CGS

Democracy by Initiative:

SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT

Second Edition

CENTER *for* GOVERNMENTAL STUDIES

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The Center for Governmental Studies (CGS), founded in 1983, creates innovative political and media solutions to help individuals participate more effectively in their communities and governments. CGS uses research, advocacy, information technology and education to improve the fairness of governmental policies and processes, empower the underserved to participate more effectively in their communities, improve communication between voters and candidates for office, and help implement effective public policy reforms.

The CGS Board of Directors takes no position on the statements and views expressed in this report.

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Foreword to the Second Edition

Much has happened in the past 16 years since the Center for Governmental Studies (CGS) published the first edition of this report, *Democracy by Initiative: Shaping California's Fourth Branch of Government*.

The impact of California's ballot initiative process over state policy continues to grow. Initiatives still circumvent the state legislature. Voters often address major issues through the initiative rather than the legislative process. Contributions to and expenditures by ballot measure committees continue to skyrocket.

California's ballot initiative process has not changed significantly in almost 100 years. Although Californians still strongly support the initiative process, they increasingly acknowledge its need for reform. This report therefore proposes that Californian modernize its initiative process by the centenary of its creation in 2011.

This report, the result of two years of work and analysis by CGS staff and interviews with over 100 outside experts, elected officials, academics, reporters and business and civic leaders, addresses California's ballot initiative concerns. It updates the findings and recommendations in the original edition, which CGS and the California Commission on Campaign Financing published in 1992. It describes the growing importance of the initiative process in setting California's policy agenda. It identifies existing and emerging ballot initiative problems. And it presents a comprehensive package of reforms to modernize the state's system of citizen democracy.

CGS Chief Executive Officer Tracy Westen and CGS President Robert M. Stern provided the impetus for this report and oversaw all research, recommendations, editing and final preparations. Anna Meyer managed the final publication of the report. Shakari Cameron Byerly organized early versions of the report. Meyer and Byerly also researched data and events since 1992, updated several chapters and conducted expert interviews. Steve Levin, Betsy Rosenfeld and Laura Richter prepared significantly updated chapters. Jeannie Wilkinson and Todd Nelson contributed research and updates to individual chapters. Nancy Volpert contributed valuable advice. Janice Roberts and Saidah Johnson provided administrative support. CGS interns, including Kelli Brown, Adam Isen, Sheela Krothapalli, Steven Lockfield, Amanda Lopez, Jeff Lyu, Dan Mitchell, Ketav Patel, AJ Petrie, Margeaux Randolph, Maneesh Sharma, Rachael Shook, Chauncee Smith and Andrew Sternlight, contributed research assistance. Leslie Connor contributed copy editing, Linda DeMasi prepared layout design and typesetting and Yvonne Crane designed the report's cover.

CGS thanks the many individuals who, over the years, contributed advice, ideas and assistance. A list of these people appears in Appendix D to the full report. CGS also thanks the James Irvine Foundation and Carnegie Corporation of New York for the generous funding necessary to prepare this report, although they take no position on its findings or recommendations.

Foreword to the First Edition (1992)

This report is the summation of two years of study by the California Commission on Campaign Financing into the impact of the initiative process on California politics and policy. It is the fifth in a series of Commission reports on important policy problems confronting the State of California.

The Commission, formed in 1984, is a nonprofit, bipartisan, private organization. Twenty-four prominent Californians from the state's business, labor, agricultural, legal, political and academic communities, about equally divided between Democrats and Republicans, currently serve as its members.

The Commission's first report, *The New Gold Rush: Financing California's Legislative Campaigns* (1985), focused on the problems of campaign financing in the state legislature. The 353-page report, now in its second printing, served as the model for statewide Proposition 68 in the June 1988 election, as well as the campaign finance portions of Proposition 131 in the November 1990 election. The Commission's second report, an *Update* to *The New Gold Rush*, was published in 1987.

The Commission's third report, *Money & Politics in the Golden State: Financing California's Local Elections* (1989), focused on campaign financing in city and county elections. The Commission also published a fourth report, *Money and Politics in Local Elections: The Los Angeles Area* (1989), which addressed the problems of Southern California's most populous metropolitan area. These two reports were in part a catalyst for the landmark June 1990 Los Angeles City campaign finance ordinance, the most innovative in the nation.

The Commission wishes to express particular gratitude to its Executive Director Tracy Westen and Co-Director Robert M. Stern, who together oversaw the Commission's study and were responsible for the preparation of this report. Matthew Stodder created the Commission's computerized data base. Craig Holman was the Commission's principal researcher. Janice Lark, office administrator, designed and coordinated the report's production. Susie Newman, Peter Vestal and Jerry Greenberg contributed early research to the project. Attorney Catherine Rich helped edit the final product. Virginia Currano, Julie Epps, Julie Hansen, Davina Perry and Sherry Yamamoto assisted in the Commission's Data Analysis Project. Robert Herstek designed the report's cover.

The Commission also wishes to acknowledge the special dedication of its Co-Chairman Francis M. Wheat, whose extra efforts in helping the Commission prepare its recommendations made a significant contribution to this report.

The Commission extends its warm appreciation to hundreds of public officials, reporters, political experts, academicians, political consultants and concerned citizens for their generous assistance. A list of these people appears in Appendix H to the full report.

The Commission's study of California's initiative process was funded by the William and Flora Hewlett Foundation, the James Irvine Foundation, the Ralph M. Parsons Foundation and the Weingart Foundation. In addition, the John Randolph Haynes and Dora Haynes Foundation contributed special funding toward the Commission's study of the initiative process in the Los Angeles metropolitan area, the results of which will be published separately in the near future.

Executive Summary

DEMOCRACY BY INITIATIVE IN CALIFORNIA

California's ballot initiative process has become a major catalyst of reform in the state and the leading example of direct democracy in the nation. Ballot initiatives bypass the normal institutions of representative government and place legislative power directly in the hands of the people. Although the idea of direct democracy by vote of the people is ancient, predating even the Greek city states, nowhere has it been applied as rigorously and with such sweeping results as in California.

During the past three decades, Californians have used ballot initiatives to write, circulate, debate and adopt many of the state's most important laws. Insurance, education, income tax indexing, rail transportation, the environment, toxic chemicals, term limits, lottery, property tax relief, handguns, reapportionment, rent control, crime prevention, cigarette taxes, wildlife protection, tribal gaming, children's hospitals, mental health services, felony sentencing, stem cell research and campaign financing—all have been addressed by the electorate through the initiative process. On many of these pressing issues, the elected state legislature and governor failed to act or respond in a manner that would satisfy interested parties.

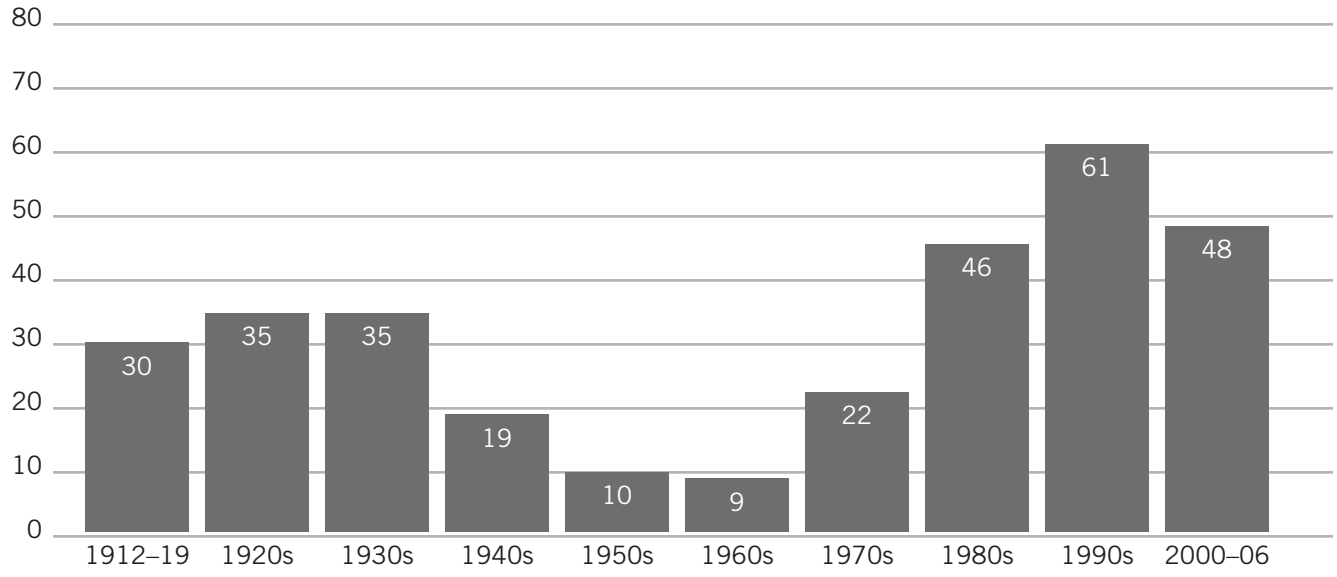
The number of initiatives circulated, qualified and adopted in this state has reached record proportions in recent decades—jumping more than sixfold since the 1960s (see Table 1). Adjusted for inflation, spending on initiative campaigns has also risen by 750% in the past 30 years—peaking in the 2006 general election, which saw $154 million spent for and against a single measure (Proposition 87, alternative energy) and $330 million spent on all the measures in the election. As the state confronts a growing list of problems and as public confidence in state government continues to wane, more and more individuals, business groups, special interests and even officeholders are choosing to advance policy proposals through the initiative process instead of the legislative process.

An emerging culture of democracy by initiative is transforming the electorate into a fourth and new branch of state government.

When early 20th-century Progressives designed California's ballot initiative process, they envisioned that it would act as a safety valve, enabling citizens to supplement the work of the legislature when it failed or refused to act. Today's initiative process, however, has outstripped this vision. An emerging culture of democracy by initiative is transforming the electorate into a fourth and new branch of state government. Voters now exercise many of the powers traditionally reserved for the legislative branch of government.

Some critics have expressed concern that ballot initiatives undermine party responsibility and the traditional forms of representative government in this state, discarding

TABLE 1 Number of Statewide Initiatives Qualified for the California Ballot* (1912 to 2006)



* Does not include indirect initiatives that qualified for legislative consideration but the legislature did not place on the ballot—an option available up until 1966.

Note: Two of the 46 initiatives in the 1980s were ruled unconstitutional by the California Supreme Court after qualifying for the ballot. The 2000s include election years between 2000 and 2006. During this period the California Supreme Court ruled one initiative unconstitutional after qualifying for the ballot.

Source: Center for Governmental Studies data analysis.

its checks and balances and its deliberateness in favor of ill-conceived, rash and poorly drafted schemes. Initiatives, they fear, shift the policy-making burden to the voters, leaving them overwhelmed by the growing number of measures on the ballot, confused by poor drafting, deceived by misleading campaigns, bewildered by counter-initiatives and frustrated by court rulings that declare provisions unconstitutional.

At the same time, ballot initiative supporters argue that the public remains firmly committed to the process. The ballot initiative, they contend, represents a rare and precious flowering of democracy, a remedy of last resort for a public frustrated by an unresponsive government. Ballot initiatives allow the people to circumvent a legislature blockaded by special interests, to enact needed reforms ignored by the government and even to limit the basic powers of government itself.

This report concludes that effective initiative reform must begin with accurate identification of key problems. The following critical problems confront California's ballot initiative process:

- *Initiative language is too inflexible.* Proponents cannot correct errors or omissions once circulation begins; legislators often cannot make amendments, enact improvements or eliminate oversights once an initiative is adopted.
- *The legislature plays an insignificant role in the process.* The current process discourages the legislature from negotiating with proponents for compromises or improvements that might reduce the number of expensive election campaigns.

- *Initiatives are frequently too long and complex.* Many voters lack the capacity, education, reading skills or time to understand them.
- *The qualification process has become outmoded.* Initiatives are too easy to qualify with paid circulators and too difficult to qualify with volunteers in the limited time available.
- *Initiatives are too easily used to amend the state constitution.* Once enacted, constitutional amendments are extremely difficult to repeal and impair legislative flexibility.
- *Counter-initiatives that conflict with and supersede each other are used as a tactic to confuse voters.* A 1990 California Supreme Court decision has encouraged the use of such measures.
- *Media campaigns disseminate deceptive information.* Misleading television advertising is widespread.
- *Voters frequently struggle to make informed decisions.* Official voter information sources are outdated.
- *Money plays too important a role in initiative qualification and campaigns.* Heavy-spending, one-sided campaigns dominate and distort the electoral process.
- *The courts have not yet struck the proper balance in initiative review.* Court decisions have invalidated some popularly enacted initiatives but left other equally complex initiatives in place.

The initiative process should be retained but improved to transform the electorate into a more responsible branch of government.

Many proposed solutions have been advanced to remedy perceived problems with the initiative process. Initiative opponents—often those who have been initiative targets—have called for abolition of the process. Initiative defenders—often those who regularly circulate initiatives to support a cause or generate funding support—have strenuously argued for its retention.

This report concludes that the initiative process should be retained but improved to transform the electorate into a more responsible branch of government. This report sets forth an innovative, balanced, comprehensive and interrelated set of reforms that will enable the electorate, acting through the initiative process, to function as a more effective and mature partner in state governance.

This report's recommendations appear below, along with cross-references to the text of the full report. A complete checklist of recommendations appears in Appendix A, the statutory language to implement the proposed reforms appears in Appendix B and a time line of the initiative process under this report's recommendations appears in Appendix C.

THE COLORFUL HISTORY OF THE INITIATIVE PROCESS IN CALIFORNIA

In the 1800s, before direct democracy was enacted in California, only one kind of politics took place in California: "corrupt politics," according to a leading newspaper reporter of the time. The Southern Pacific Railroad, called the "Octopus," controlled almost everything in the state—the legislature, the courts, even the press.

It is somewhat ironic that initiative process backers sought to wrest control of the state's political process away from special interests, especially the Southern Pacific Railroad, in the early 1900s. The irony became apparent when Southern Pacific itself took

advantage of the initiative process. It contributed significant financing to the ballot qualification of Proposition 116, a 1990 initiative passed by the voters to provide for $2 billion in bond measure financing to support rapid rail transit. Southern Pacific, like many other special interest groups, now uses the initiative process to achieve goals it cannot meet through the legislature.

The initiative, referendum and recall were first enacted at the local level in California when Dr. John Randolph Haynes convinced Los Angeles voters to adopt his reform package in 1903. The statewide reform movement was aided by corruption and bribery trials of several prominent labor leaders and corporate executives that began in 1906. Five years later, after many futile attempts to persuade the legislature to adopt the initiative process, direct democracy became part of a package sponsored by newly elected Governor Hiram Johnson. In 1911, his first year in office, the legislature placed the three components of direct democracy—initiative, referendum and recall—on the ballot. The voters overwhelmingly approved them.

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Attempts to weaken the process began almost immediately. After 17 measures qualified for the 1914 ballot, opponents of the initiative process placed on the ballot in 1920 an initiative attempting to triple the number of signatures required to place a measure affecting taxes on the ballot. The measure failed. In 1943, the legislature enacted a law limiting the time a proponent could circulate an initiative to no more than two years (before 1943, proponents could circulate for an unlimited time). Thirty years later, the legislature cut the circulation time to 150 days.

Until 1966, proponents were required to collect signatures amounting to 8% of the votes for governor at the previous election for both constitutional amendments and statutory initiatives. If proponents used the indirect initiative process for statutory initiatives, however, they only needed to gather signatures equal to 5% of the last vote for governor. The indirect process required proponents to submit their proposal to the legislature for consideration before the measure could reach the ballot. Because the legislature only met in odd-numbered years for all matters other than the budget, the indirect process was rarely used, since it required proponents to begin circulation at least two-and-a-half years before the election. In 1966, the legislature and the voters repealed the indirect initiative. (The history of the ballot initiative in California is detailed in Chapter 1.)

HOW INITIATIVES QUALIFY FOR THE BALLOT IN CALIFORNIA TODAY

Before circulating a measure, initiative proponents must first submit their proposal to the attorney general's office. The attorney general obtains a fiscal analysis from the Department of Finance and the joint Legislative Budget Committee and then provides the proponent with a title and summary that must be placed at the top of each petition. Proponents must pay the attorney general $200, a fee that is refunded if the initiative qualifies for the ballot.

Proponents need to obtain valid signatures amounting to 5% of the vote in the last gubernatorial election to place a *statutory* initiative on the ballot and signatures amounting to 8% of the vote in the last gubernatorial election to put a *constitutional* initiative on the ballot. Despite significant population growth in the state, the number of signatures

needed today for ballot qualification is only about 40,000 signatures more than was needed in 1982 because the number of voters in the 2006 gubernatorial election was nearly the same as it was, on average, in the 1980s. Circulators generally gather signatures from nearly every county in California in proportion to their population. Only one county—San Diego—has routinely provided a disproportionately large share of petition signatures, although it yielded a more proportionate number of signatures in 2006 than it had in the past.

The secretary of state must verify that a petition has obtained the required number of signatures at least 131 days before the next statewide primary, special or general election. All initiatives that qualify for the ballot require a simple majority of those voting on the measure to be enacted. If two measures cover the same subject and provisions are in conflict, the measure that receives the most votes may prevail in its entirety, and none of the provisions of the other proposition, even though not in direct conflict, may go into effect (for more information on current initiative procedures, see Chapter 1).

THE SWEEPING IMPACT OF BALLOT INITIATIVES IN CALIFORNIA

Ballot initiatives are increasingly shaping major state policies. Since 1978, California voters have approved 62 initiatives, many enacting sweeping reforms and some drastically curtailing the powers of government itself. For decades now, ballot initiatives have been "the main way to get big things done" in California, says Sacramento political consultant David Townsend (*California Business*, February 1990).

The Number of Initiatives on the California Ballot Has Grown Enormously but Has Recently Begun to Taper Off

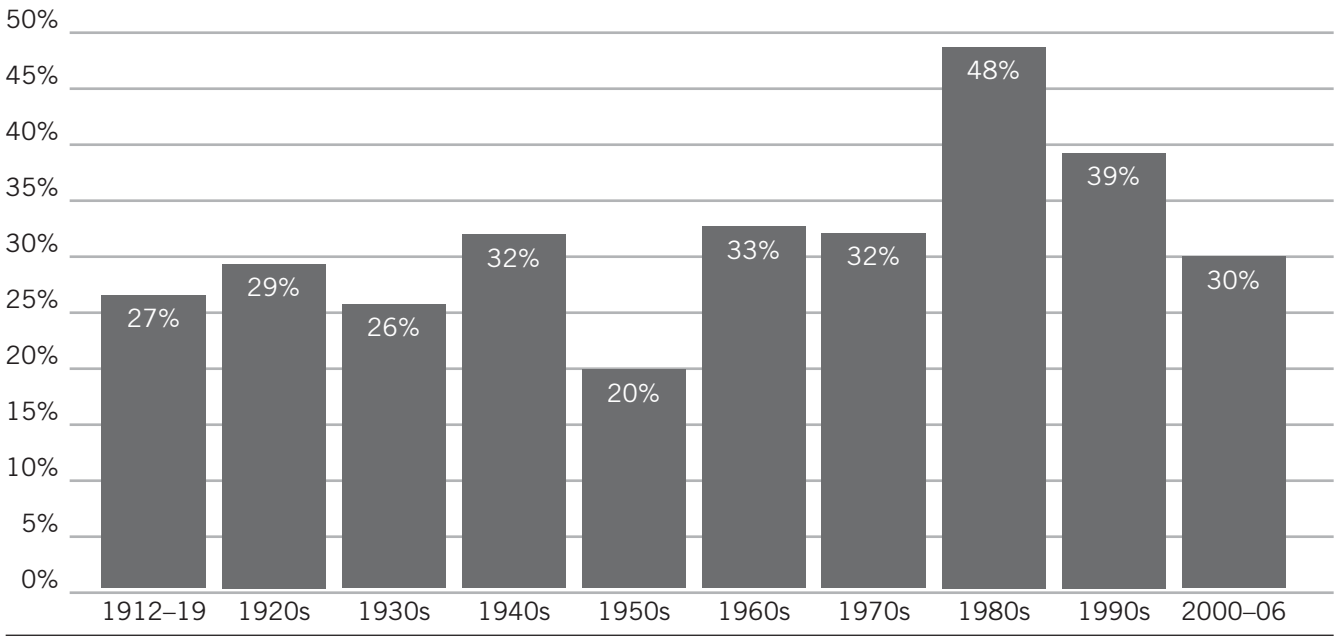
In the first three decades following adoption of the ballot initiative in California (1911 to 1939), the number of initiatives qualifying for the ballot reached a high of 35 in one decade, then began to diminish to a low of only 9 in the 1960s. From the 1960s to the 1970s, however, the number of qualified ballot initiatives on the ballot more than doubled. Ten initiatives qualified for the June and November 1972 ballots, covering such diverse subjects as property tax relief, marijuana legalization and the death penalty. A total of 22 initiatives qualified during the entire decade.

From the 1970s to the 1980s, the number of initiatives doubled again—perhaps sparked by Proposition 13 (property tax relief), overwhelmingly approved by the voters in 1978. Forty-six initiatives qualified for the ballot (2 were removed by the courts) in the 1980s—more than double the previous decade—and 18 initiatives qualified in each of the 1988 and 1990 election cycles. These numbers have remained fairly high but began to decline in the 2000s (see Table 1).

California Voters Have Recently Been Cautious About Adopting Initiatives

In the 1970s, voters adopted 32% of the 22 initiatives on the ballot (see Table 2). In the 1980s, even though 46 initiatives appeared on the ballot, the voters approved 46% of them—more than were approved in the 1940s through the 1970s combined. The initiative

TABLE 2 Percentage of Balloted Initiatives Approved* (1912 to 2006)



* Calculations include only initiatives that appeared before voters.
Note: Includes special election of 2005, in which all measures on the ballot were voted down.
Source: Center for Governmental Studies data analysis.

approval rate reached its peak in June 1990, when voters approved three of the five initiatives on the ballot for a record adoption rate of 60%.

The 2000s have seen the lowest overall initiative approval rates since the 1950s—only 30% of 48 initiatives were approved from 2000 through 2006.

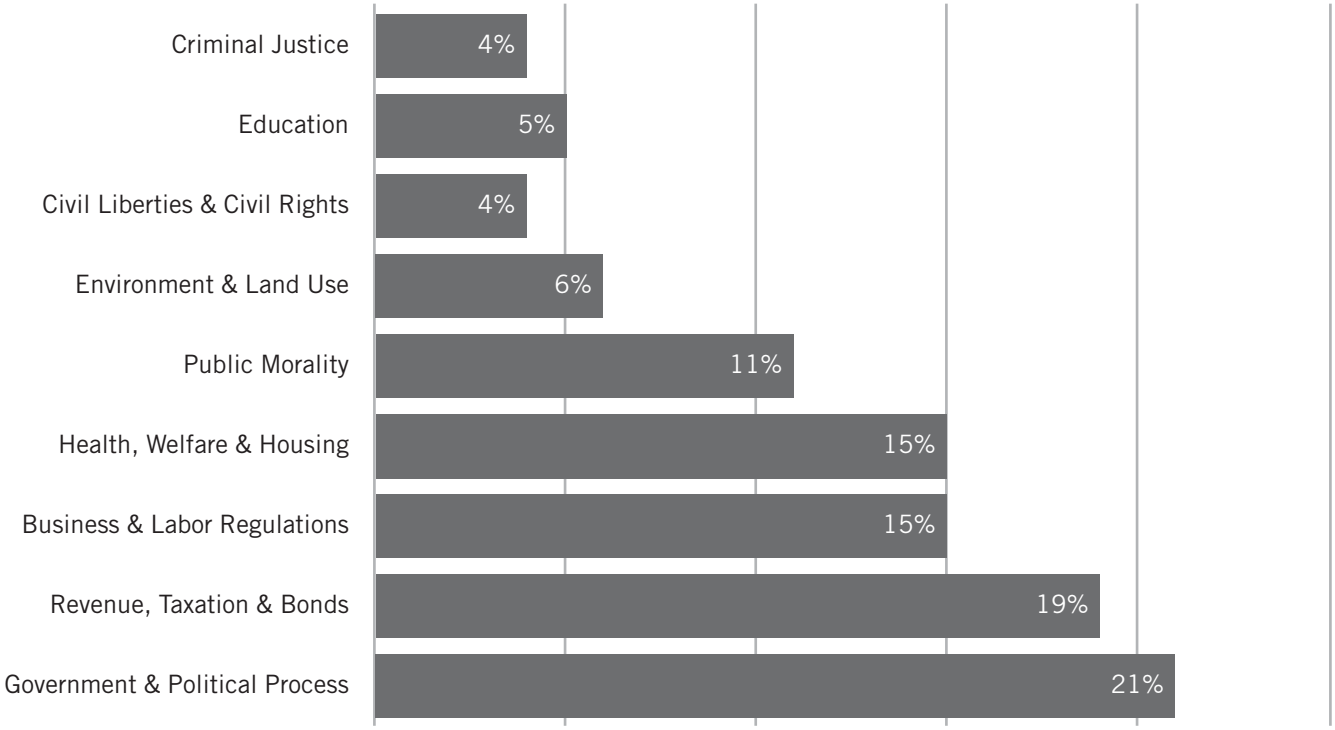
This trend has not continued. Voters in November 1990 passed only 3 (23%) of the 13 measures on the ballot. The 2000s have seen the lowest overall initiative approval rates since the 1950s—only 30% of 48 initiatives were approved from 2000 through 2006. Because all eight initiatives on the ballot in the 2005 special election failed, driving down the overall percentage, it is not clear whether initiative approval rates will remain low over the next several years.

Despite the large number of ballot decisions the electorate must often make—voters in some areas have faced as many as 100 separate decisions, including statewide candidates, judges, legislative candidates, county, special district and city candidates and state, county and city ballot measures—voters apparently are not fatigued by long ballots, and their voting does not drop off toward the end of the ballot. In some primary elections, voters have cast even more votes for ballot initiatives, such as Proposition 13 (property tax relief in 1978), than for gubernatorial candidates.

Ballot Initiatives Have a Major Impact on the Life of the State

Since its inception, Californians have used the initiative process to change almost every aspect of California life (see Table 3). Since 2000 alone, ballot initiatives have addressed sex offender sentencing (Proposition 83), water quality (Proposition 84), children's hos-

TABLE 3 Subject Matters of California Initiatives (1912 to 2006)



Source: Center for Governmental Studies data analysis.

pitals (Proposition 61), mental health services (Proposition 63), DNA sampling for certain convicts (Proposition 69), stem cell research (Proposition 71), after school programs (Proposition 49), juvenile crime (Proposition 21), the definition of marriage (Proposition 22), use of private contractors for public works projects (Proposition 35), drug treatment diversion programs (Proposition 36) and school facilities (Proposition 39).

LEGISLATIVE DEADLOCK HAS BEEN A PRINCIPAL CAUSE OF THE GROWTH IN INITIATIVES

Many initiatives can be traced to stalled legislative efforts and governmental inaction. Property tax relief, the most well-known example, languished in the legislature before Howard Jarvis and Paul Gann sought reform with Proposition 13 in 1978. The $80 million automobile insurance reform battle in 1988, when the voters approved Proposition 103, resulted from the legislature's failure to adopt its own program or forge a compromise between competing consumer, trial lawyer and insurance interests.

The number of initiatives has increased in part because of California's politically divided government—a Republican governor and a Democratic-controlled legislature from 1967 to 1975, from 1983 to 1998 and from November 2003 to the present. Democratic legislation vetoed by a Republican governor has reappeared as ballot initiatives at the polls. Legislation proposed by Republican governors but defeated in

Democratic-controlled legislatures has also qualified for the ballot. Proponents find it easier to obtain a simple majority at the polls than legislative approval, which often requires a two-thirds vote. Without a legislative forum for compromise, interest groups have increasingly battled each other via initiatives.

Officeholders Use the Initiative Process to Further Their Own Political Goals

Officeholders regularly circumvent the legislative process by sponsoring ballot initiatives themselves. In the November 2005 election, for example, Governor Schwarzenegger called a special election in November of that year to place four initiatives, which the legislature would not pass, on the ballot. Voters soundly rejected the entire package of reforms.

Easy Access to an Initiative Industry Has Stimulated the Use of Ballot Measures

The emergence of a support industry to qualify and campaign for initiatives has also increased the use of initiatives. For $1 million to $2 million, political consultants can qualify almost any initiative. For millions more, they will conduct a vigorous campaign for or against any initiative of their client's choosing. The easy availability of these powerful resources has encouraged many individuals and organizations to promote initiatives and bypass the legislative process altogether.

CRITICAL ISSUES IN THE BALLOT INITIATIVE PROCESS

Ballot initiatives in California suffer from a number of critical problems that distort law and policy in the state. Without reforms, most of these problems will continue to grow.

Poorly Drafted Initiatives Reap Confusion Among Voters and Courts

Initiatives are too often poorly-drafted, ambiguous, vague, overreaching, underinclusive, contradictory and even unconstitutional. These defects cause unexpected interpretations, unforeseen consequences, misleading electoral campaigns, litigation, legislative inaction, judicial invalidation and voter confusion and resentment.

Proposition 13, for example, the 1978 property tax measure, was drafted so poorly that UCLA law professor Donald Hagman charged its authors should be arrested for "drunken drafting" *(Los Angeles Times,* August 11, 1982). The measure contained over 40 ambiguities (according to the governor's office), spawned dozens of court cases and stimulated 16 clarifying ballot measures. Proposition 8, the 1982 "Victims' Bill of Rights," lacked such care in drafting and was so loosely worded as to "defy clear interpretation" (Assembly Committee on Criminal Justice, *Analysis of the Victims' Bill of Rights,* 1982).

Initiatives also contain serious omissions and oversights. Two unsuccessful AIDS initiatives in 1986 and 1988 were so poorly drafted that, had they been enacted, they would not have changed public policy. Two initiatives that passed, one in 1984 and one in 1986,

declared English the state's official language but failed to specify the consequences of that declaration. Their impact has been nominal.

In some cases, complicated initiative wording has confused voters and caused them to vote no instead of yes, defeating measures that otherwise could have won. Poor drafting has also led to invalidation by the courts on statutory or constitutional grounds.

Initiative Texts Are Too Long and Too Complex

Before 1988, California voters rarely faced excessively long initiatives. Most initiatives in the 1980s contained between 1,000 and 3,000 words. Only two initiatives from 1980 to 1987 exceeded 5,000 words—Proposition 15 (gun control) in 1982, and Proposition 37 (lottery) in 1984.

In the 1988 and 1990 elections, however, voters had to wade through 13 initiatives, each exceeding 5,000 words. Several were longer than 10,000 words, and one (Proposition 131, ethics, campaign finance reform and term limits) was so long at 15,633 words that the attorney general's summary could not include all its provisions. Since 1990, lengthy initiatives have been common. Between 2000 and 2006, 15 of the 46 initiatives on the ballot were over 5,000 words long, and 8 of those exceeded 10,000 words in length.

Ballot measures in recent years have often been inflated because proponents fear legislative tampering and try to close every loophole. Some initiatives add provisions (protecting specific park lands, for example) in exchange for pledges of financial support. Not only do extremely long initiatives have a greater chance of rejection at the polls, but they also undermine voter understanding, damage voter confidence in the initiative process and jeopardize the underlying integrity of the system itself (see generally Chapter 3).

The Initiative Process Is Inflexible and Prevents Proponents from Correcting Errors Once Circulation Begins

Unlike many other states, California requires no formal review of the wording, substance, legality or constitutionality of ballot initiatives before signature circulation begins. Proponents can draft an initiative, circulate it, place it on the ballot and campaign for its successful enactment—all without any mandatory or meaningful public hearing. Moreover, proponents cannot correct their own mistakes or oversights once circulation begins. For tactical reasons, therefore, proponents are forced to deny knowledge of errors or omissions they have discovered after circulation begins (see generally Chapter 3).

The Legislature Is Discouraged from Participating in the Initiative Process

The California Constitution designates the legislature as the state's principal policy body. The legislature has access to expert staff, outside consultants, extensive research capabilities, testimony from interested parties and its own accumulated expertise to support its decision making. None of this expertise is applied to ballot initiatives.

Although the legislature must hold public hearings on initiatives that qualify for the ballot, the hearings typically have no useful effect. Neither the legislature nor proponents can amend the text of an initiative following the hearing, even if significant flaws are identified. If the legislature enacts legislation that is comparable or even identical to that

of the initiative, the measure cannot be removed from the ballot. And if the initiative passes, it cannot be amended without another vote of the people.

Many initiative proponents view the legislature as irrelevant or hostile and ignore it altogether. Proponents do not seek legislative advice, and legislators see themselves as powerless to affect initiatives. California law thus virtually eliminates any incentive for legislative involvement in the initiative process (see Chapter 3).

Even After Enactment, California Law Blocks Legislative Amendments

California is the only state that prohibits the legislature from amending initiatives without the proponent's permission. Unless an initiative specifically allows for legislative amendments, only another ballot measure placed on the ballot and approved by the voters can correct errors or address new concerns—a time-consuming and costly procedure.

A 1922 initiative allowing chiropractors to practice in California, for example, did not allow legislative amendments. Technical changes to the law have required voters to consider eight different chiropractic ballot measures since the first amendment appeared on the ballot in 1948. By contrast, all other states allow their legislatures to amend initiatives after enactment. Some require supermajority votes (up to three-fourths) of their legislatures; some allow simple majority votes after a multiyear waiting period; and some place no limit on legislative amendments at all.

Unless an initiative specifically allows for legislative amendments, only another ballot measure placed on the ballot and approved by the voters can correct errors or address new concerns—a time-consuming and costly procedure.

In recent years, most statutory initiative proponents in California have voluntarily included language allowing the legislature to make amendments, provided that at least two-thirds of the legislature approves them and the amendments further the purposes and intent of the measure. Of the 42 statutory measures between 1990 and 2006 that qualified for the ballot, 33 (or 79%) had language authorizing amendments. Many proponents permit legislative amendments because they know that all initiatives sooner or later will need modification, no matter how well-drafted they are.

The California Legislature has generally been respectful of initiatives, not amending them without the tacit approval of proponents. The 1974 Political Reform Act (Proposition 9), for example, permitted legislative amendments, and the legislature has since amended it over 200 times without significant public objection. However, legislative amendments to some other initiatives have been challenged by proponents who claimed that the legislature's changes did not further the purposes and intent of the initiative in question (see Chapter 3).

Qualification by Signature Petition Is Too Easy with Money and Too Difficult Without

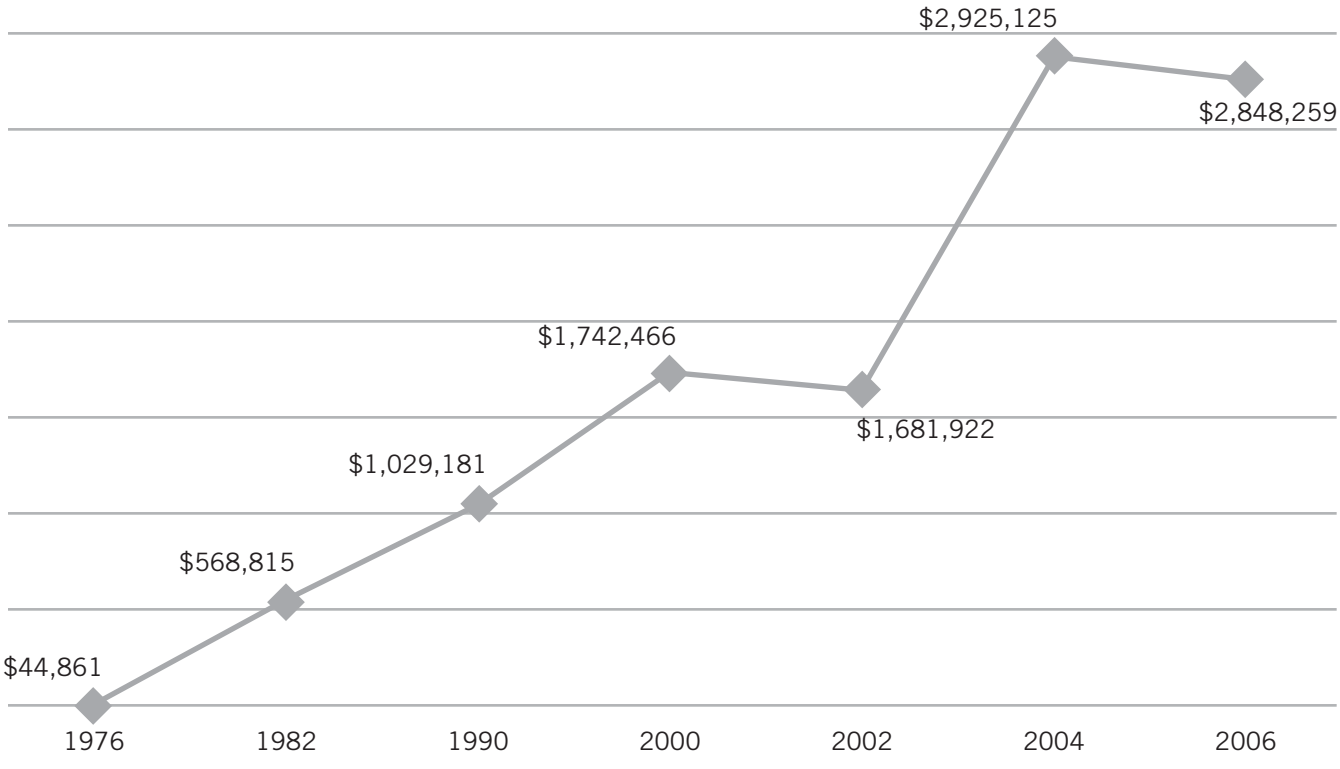
Every initiative state requires proponents to gather enough signatures to demonstrate the measure's popular support. In California, proponents must obtain valid petition signatures from 433,971 registered voters to place a statutory change on the ballot and signatures from 694,354 registered voters to put a constitutional amendment on the ballot (as of 2008). Although California qualifies more initiatives for the ballot than any other

state, it only allows 150 days in which to collect the necessary signatures, the third-shortest circulation period of any state. Only Oklahoma (90 days) and Massachusetts (90 days plus 30 days after legislative consideration) impose shorter time periods, and these states require far fewer signatures for qualification than does California.

The architects of the initiative process assumed that volunteers and grassroots organizations would circulate petitions, explain measures to potential signatories and obtain signatures backed by thoughtful consent. Today, however, petition circulation has become so professionalized and dependent on financial resources that it is difficult to defend it as a true test of popular support. Now that virtually any initiative can be qualified if the backer has enough money to hire paid circulators, signature collection has become an antiquated measure of broad public support. Although a few states have tried to prohibit the use of paid signature gatherers, the U.S. Supreme Court has deemed these efforts unconstitutional.

In 1976, the median initiative qualification cost was about $45,000. By 1990, the median cost had exploded to more than $1 million and in 2004 and 2006, the median cost tripled to nearly $3 million (see Table 4). Money, rather than breadth or intensity of popular support, has become the primary threshold for determining ballot qualification in most instances.

TABLE 4 Rising Initiative Qualification Costs Median Petition Circulation Expenditures for California Initiatives (by Select Election Year, 1976 to 2006)



Source: Center for Governmental Studies data analysis.

California's 150-day circulation period is sufficient for those who have money—one initiative qualified in 28 days at a cost of several million dollars—but it is far too short for volunteer circulation drives. A successful all-volunteer petition drive has not been waged in California since 1982 (see Chapter 4 for further discussion of petition circulation).

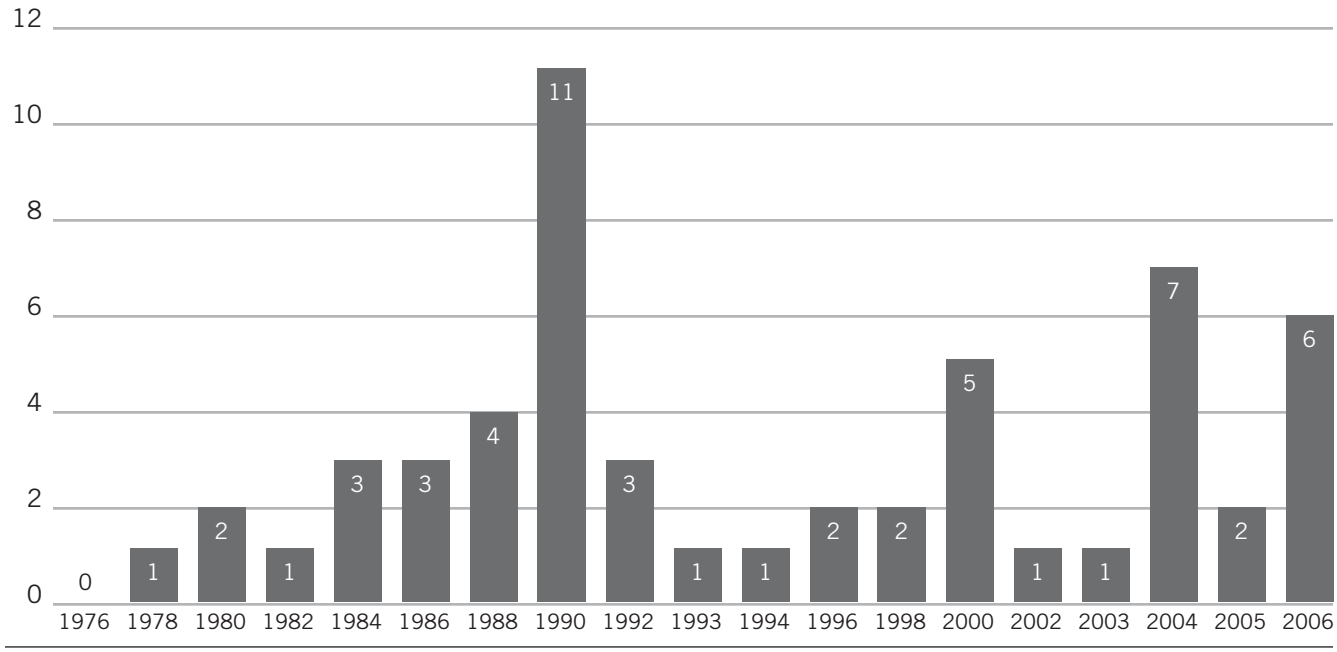
INITIATIVES AMEND THE STATE CONSTITUTION TOO OFTEN

California allows citizen initiatives to amend both state statutes and the state constitution. Each requires a simple majority vote for approval, although initiative constitutional amendments require more signatures to qualify for the ballot.

Constitutional initiatives have historically been far fewer in number and harder to pass, but elections in the past 25 years have seen a sharp reversal in this trend. In 1990, for the first time in California history, initiative constitutional amendments outnumbered initiative statutory amendments on the ballot, 11 to 7. Although 1990 proved to be an aberration, constitutional initiatives have remained frequent since then (see Table 5). Most recently, they accounted for six of the nine measures on the primary and general ballots in 2006.

The heavy use of constitutional initiatives is troubling. Because constitutional amendments are more costly to place on the ballot than statutory amendments and cannot be changed without further constitutional initiatives, the resulting constitutional amendments are more permanent—in some instances enshrining ill-considered policies into state law and filling the constitution with language that requires another vote by the people for even the smallest amendment (see Chapter 5 for further discussion of constitutional amendments and revisions).

TABLE 5 Number of Constitutional Initiatives on the California Ballot (1978–2006)



Source: Center for Governmental Studies data analysis.

Ballot Pamphlets and the Secretary of State's Website Are Important Sources of Voter Information but Do Not Communicate That Information Effectively

California law requires the secretary of state to mail a detailed ballot pamphlet to the home of every registered voter over a month before each election. For each measure, the ballot pamphlet contains a title and summary prepared by the attorney general, an analysis of fiscal impact prepared by the legislative analyst, pro and con arguments submitted by the proponents and opponents, rebuttals to those arguments and the text of the measure. It does not list key endorsers or opponents, positions of legislators or groupings of legislators by political party affiliation. It is not available in video on demand formats.

In a November 2006 Public Policy Institute of California (PPIC) survey, 42% of respondents found the official voter information guide as the most helpful source of information available. Improving the ballot pamphlet further would allow the state to reach even more voters with accurate and understandable information (see Chapter 6 for further discussion of voter information).

One-Sided and Deceptive Media Campaigns Distort Election Outcomes

Voters have fewer sources of objective information available to them in initiative campaigns than in candidate campaigns. Initiatives lack the voting cues associated with political candidates—such as party affiliations, personality traits, incumbents' records and candidates' personal histories. Initiatives are thus often more difficult to comprehend than candidates.

Initiative voters depend heavily on television advertising. The tendency of campaigns to use misleading advertising is exacerbated by unbalanced campaign spending. Many campaigns use deceptive advertising simply because they can get away with it—the other side is unable to finance adequate rebuttals. This may be why, in 40% of cases the PPIC studied in California from 1996 to 2006, public opinion reversed from yes before election day to no on election day. Long ballots, counter-initiatives and voter skepticism also contribute to initiative defeats.

Initiative voters depend heavily on television advertising, but many ad campaigns use deceptive advertising.

Slate mailers are another potent source of voter information. But instead of allowing like-minded groups to inform voters of initiatives that align with their own political philosophy, slate mailers sell endorsements to the highest bidder or give free endorsements to popular candidates with or without their knowledge in order to reap a benefit from their association. One "Democratic Voter Guide," for example, endorsed Republican candidates running in nonpartisan races who were prepared to pay more for their inclusion than their Democratic opponents. Many mailers mislead voters by deliberately appearing to represent official party endorsements when they do not.

Endorsements by political and community leaders have a considerable impact on election outcomes—particularly when initiatives are difficult to understand, objective information is inadequate or choices are complicated by unbalanced campaign advertising. Newspaper editorial endorsements, in contrast, appear to have less effect. They are persuasive when the voters have few other sources of information but ineffective on controversial measures in which the voters are keenly interested and have already formed strong opinions.

The broadcast news media are a minor source of voter information. Broadcasters believe that a thorough, substantive discussion of most measures is not saleable to a public thought to be more interested in lighter stories, and ballot measures are not given high priority as newsworthy stories. The practice of using truth boxes to analyze the accuracy of television campaign advertisements could begin to check misleading advertisements if it becomes more widespread.

The Internet is creating new sources of voter information in addition to more traditional media. Blogs, podcasts, viral videos (such as those on YouTube.com) and online communities have changed the world of voter information. These technologies have created new spaces where analyses and opinions about ballot measures and other political issues can be published without first being mediated or filtered by editors or campaign managers (see Chapter 7 for further discussion of news coverage and paid advertising).

LARGE CONTRIBUTIONS AND HIGH SPENDING DOMINATE ELECTIONS

In 1911, frustrated by the spectacle of wealthy special interests using money to bribe legislators and influence legislation, California citizens enacted the initiative process to bypass altogether the legislature and its moneyed contributors. Today, 97 years later, money often dominates the initiative process even more than it does the legislative process. In some election cycles, proponents and opponents now spend more to influence the electorate to vote on initiatives than lobbyists spend to influence legislators to vote on bills. California's initiative process has become a costly battleground, besieged by sophisticated and expensive media weaponry. Provided in sufficient quantities, money can qualify, and frequently defeat, any ballot measure.

Large contributions to initiative campaigns are growing. In 1990, two-thirds of all contributions came in amounts of $100,000 or more, and one-third came in amounts of $1 million or more. By 2006, two-thirds of all contributions came in amounts of *$1 million or more*. One individual contributor, Steven Bing, gave over $48 million to support one initiative.

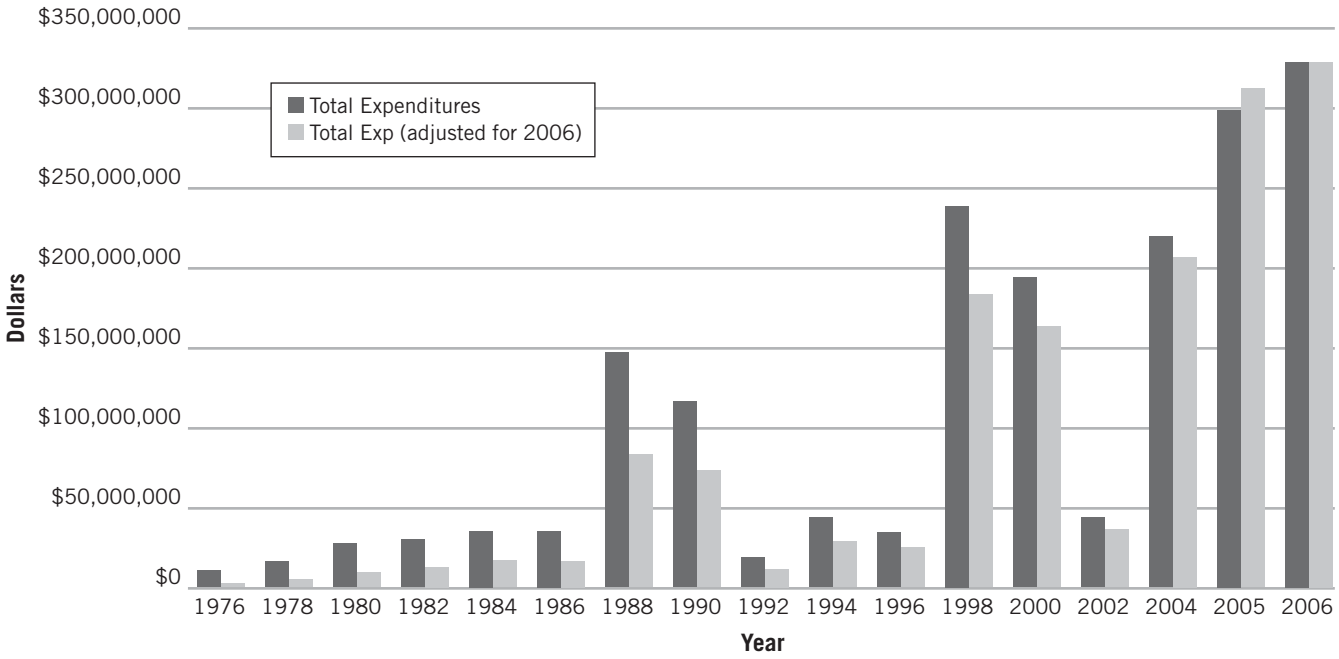
Effective campaigns for or against ballot measures can easily cost tens of millions of dollars, and some have reached $100 million on one side alone. Since 1956, the 14 most expensive campaigns for and against initiatives in California have spent a combined total of $955 million. The most expensive ballot measure campaign in U.S. history occurred when Hollywood producer Steven Bing financed Proposition 87, an unsuccessful alternative energy initiative on the November 2006 ballot. Oil companies squared off against Bing, environmental and consumer groups in a $154 million battle (see Table 6).

Ballot access today is less a drive for broad-based citizen support than an exercise in fund-raising strength.

Ballot access today is less a drive for broad-based citizen support than an exercise in fund-raising strength. Volunteer signature gatherers have largely given way to legions of expensive paid circulators. Professional signature-gathering firms regularly and single-handedly qualify initiatives (see Chapter 4 and Chapter 8 for further discussion of circulation and campaign spending).

Campaigns were once waged in precincts using volunteers and low-cost media; today they rely almost exclusively on paid consultants, media buyers and expensive broadcast advertising. The explosive growth in campaign expenditures has distorted the information

TABLE 6 Total Spending in California Ballot Initiative Campaigns (1976–2006)



Source: A complete description of the methodology for compiling this data are available on file with the Center for Governmental Studies.

available to the voters. Opponents have far outspent underfunded initiative proponents in many campaigns by approximately 20 to 1, and one ballot measure contest witnessed broadcast advertising differentials of 400 to 1. The Federal Communications Commission has unwisely repealed the fairness doctrine for ballot measures, leaving the underfunded side with no ability to balance distorted messages from the opposing side (for a full discussion of the impact of money on initiative campaigns, see Chapter 8).

COURT DECISIONS INVALIDATE POPULARLY ENACTED INITIATIVES

Opponents of a successful measure often ask the courts to invalidate initiatives on constitutional or statutory grounds. Although the courts have shown considerable deference to the initiative process, from 1964 to 2007 they completely overturned 9 of 65 initiatives approved by California voters and partially overturned another 11 (see Chapter 9, Table 9.1 for a list of ballot initiatives that the courts have partially invalidated). Of the initiatives approved by the electorate since 1964, 68% have either survived court challenges altogether or not been challenged at all.

Some rulings in the early 1990s suggested a greater willingness by the courts to invalidate popularly enacted initiatives, but to this day, the courts have maintained their traditional respect for voter-approved initiatives. Nevertheless, the California Supreme Court has ruled that, in cases when two competing initiatives conflict significantly with each other, only one initiative may be enacted, while the other must be invalidated in its entirety. Under the court's ruling, an initiative can receive a majority vote and still be overturned if a

conflicting initiative receives more votes—even though voters may have wanted provisions of both to go into effect, may not have been aware of the conflict in provisions and may not have understood that a conflict between provisions would invalidate one of the measures in its entirety (see Chapter 9 for a detailed discussion of the role of the courts).

THE NEED TO RETAIN AND IMPROVE THE BALLOT INITIATIVE PROCESS

Californians cherish the initiative process and trust it three times more than they trust the legislature. They now turn almost instinctively to the initiative process to address almost any problem, without first seeking a legislative solution.

Problems That Triggered the Creation of California's Initiative Process Still Exist

In a perfect or near-perfect system of representative democracy, ballot initiatives would be unnecessary. Elected officials would be closely attuned to the public's needs and desires, voters would be well informed on the issues of the day and legislators would be open to arguments on their merits. Government would respond appropriately to public needs, temper rashness with deliberation and accommodate legitimate desires for change without the necessity of direct popular votes through ballot initiatives.

But today such a legislative system does not exist in California or in any other state—if it ever did. The financial demands of elected office force candidates and officeholders to raise ever-increasing sums of money from special interests, leaving them susceptible to pressure and influence. The desire of incumbents for reelection has made them reluctant to develop controversial new policy initiatives. The complexity of governmental issues, together with the need of many officials to shape or control the spin of media information, has left many voters without the ability to review critically the records of officeholders at election time.

The root causes of these problems have not disappeared, and some have intensified. For a detailed discussion of one such problem, see an earlier Center for Governmental Studies (CGS) report, *In the Dead of the Night: How Midnight Legislation Weakened California's Campaign Finance Laws, and How to Strengthen Them* (2006). Until such problems are resolved, the need for the initiative process will remain (see Chapter 2).

The Public Supports Retention and Improvement of the Initiative Process

Californians clearly wish to keep their right to decide public policy through the initiative process, although they acknowledge that the process needs reform. Today, 80% of the voting public holds a favorable view of the initiative process according to a June 2006 CGS-sponsored survey (conducted by Fairbanks, Maslin, Maullin & Associates and Winner & Associates). In addition, voters have rarely passed an initiative that they have lived to regret—for example, Proposition 13 would probably pass by a higher margin today than it did in 1978.

At the same time, most voters agree that the initiative process has some serious problems. The 2006 CGS survey indicates that only 12% of California voters feel very satisfied with the way the state's ballot initiative process is working, and an overwhelming majority—73%—feel that special interests, especially well-funded ones, too easily manipulate the initiative process. Moreover, 66% find the ballot wording for initiatives complicated and confusing; 58% feel that initiatives often result in vague, ambiguous or contradictory laws; and 57% think there are too many propositions on the ballot. Voters also complain about misleading television advertising and want greater disclosure of financial contributors in initiative advertising. A full 69% want contribution limits on donations to campaigns (see Chapter 2). The time is clearly ripe to consider thoughtful and responsible modifications to California's initiative process.

THE INITIATIVE PROCESS NEEDS COMPREHENSIVE IMPROVEMENTS

Some Californians argue that the initiative process should be preserved as an essential part of California's democratic tradition and a necessary check against legislative inaction. Others are concerned that the initiative process causes the state considerable harm and damages the more representative branches of government.

The initiative's check on potential abuses of governmental power should not be eliminated while the need for that safeguard remains.

This report recommends a package of reforms. It concludes that California's initiative process should be retained but significantly modernized. Although the ballot initiative system has become significantly outmoded, its elimination is neither feasible nor desirable. The public would quickly reject the elimination of a right that it views as fundamental. Moreover, the initiative's check on potential abuses of governmental power should not be eliminated while the need for that safeguard remains. Rather than being discarded, the initiative process should be integrated into California's legislative branch.

Ninety-seven years have passed since California first adopted the initiative process. During this time, Californians have seen the emergence of radio and television advertising, paid petition circulators, demographically targeted slate mailers, computers, the Internet, websites, blogs, video-on-demand, professional campaign managers, modern fund-raising techniques and a growing industry of specialists who will write, circulate, qualify and campaign for any initiative—if paid a suitably high price. Comprehensive reforms are necessary to update the initiative process and enable it to deal with the political exigencies of a more complex age.

SUMMARY OF RECOMMENDATIONS

This book is the second edition of *Democracy by Initiative*, first published in 1992 by CGS on behalf of the California Commission on Campaign Financing (see Appendix E for a list of commission members). In updating the findings and recommendations in this report, CGS staff interviewed initiative proponents, circulators, campaign consultants, business leaders, academics, legislators and many other expert observers of the initiative process. Staff carefully researched the history of California's ballot initiative over the past

97 years and analyzed the laws of the District of Columbia and the 24 states that use the initiative process. Staff compiled and analyzed extensive sets of data on initiative campaign spending from 1992 through 2006, and it researched all the available scholarly, legal and current literature analyzing the initiative process.

CGS believes that significant, long-term and sweeping improvements must be made to California's initiative process. The full package of recommendations in this report involves modifications to the processes of initiative drafting, circulation, public and legislative review, voting, dissemination of voter information, campaign financing and judicial review. Although some of the recommendations can be adopted individually, true reform will benefit from their adoption as a package.

A detailed discussion of the recommendations appears in Chapters 3 through 9; a summary of recommendations appears in Appendix A; legislative language for enacting the recommendations appears in Appendix B; and a time line of the initiative process under the recommendations in this report appears in Appendix C.

1. The Legislature Should Hold a Mandatory Public Hearing on Each Initiative After the Raw Count of Signatures Exceeds 100% of the Qualification Threshold

A 30-day public comment period should begin the day after the secretary of state determines that the raw count (before certification) of signatures submitted exceeds 100 percent of the required threshold. The legislature should be required to conduct a public hearing on each initiative during this period within 20 days after the secretary of state certifies the raw count. The hearing will take place a little less than a month after proponents submit petition signatures to the county officials, giving the legislature ample time to prepare for the hearing. Hearings can be conducted by each house separately or by a joint senate-assembly committee.

A mandatory public hearing will air issues that proponents might wish to address through legislative negotiations or subsequent amendments (see below). It will involve the legislature in the initiative process, encourage it to consider compromises and allow it to adopt original or amended initiative proposals as legislation. It will alert the public and the press that an initiative is likely to appear on the ballot, giving them the opportunity to begin early discussions of the initiative. This potential for amendability or legislative enactment will make the legislative hearing a critical component in an improved initiative process (for further discussion of this recommendation, see Chapter 3).

2. The Legislative Analyst Should Prepare an Early Impartial Analysis of Each Initiative

The legislative analyst should prepare an impartial analysis of each ballot measure and release it publicly within 20 days after counties submit petition signatures to the secretary of state for verification, unless the secretary of state notifies the legislative analyst that the ballot measure in question is certain not to qualify. The legislative analyst currently releases an analysis 30 days after a measure *qualifies* for the ballot.

The earlier release of this analysis will increase the opportunity for public discussion of initiatives on the ballot, allowing the electorate to become more responsible custodians of

the initiative process. The analysis could be used in the legislative hearing, voters would have more time to evaluate each measure for themselves, and grassroots organizations would have more time to disseminate their own assessments of how each initiative would affect their members and the public (for further discussion of this recommendation, see Chapter 3).

3, Proponents Should Be Allowed to Negotiate with the Legislature and Withdraw Their Initiative If the Legislature Adopts It or Acceptable Compromise Legislation

Proponents should be allowed to withdraw their initiative from the ballot if the legislature enacts an acceptable version of their proposal. They should also be allowed to make limited modifications to their initiative immediately after the legislative hearing if they do place their measure on the ballot.

During the public comment period, proponents will thus have the opportunity to negotiate changes with the legislature and take one of three actions: (1) withdraw the initiative from the ballot if the legislature enacts and the governor signs the original or an amended version acceptable to proponents; (2) condition withdrawal of the initiative on the provision in new law that future legislative amendments must be approved by up to a two-thirds majority, be consistent with the law's purposes and intent and be printed and circulated three days before the legislative vote; or (3) place the original or a proponent-amended (see below) version of the initiative on the ballot if the legislature does not enact an acceptable version, so long as the changes are consistent with the initiative's original purposes and intent.

This process would encourage proponents to engage the legislature in shaping initiatives, take advantage of legislative expertise and experience, improve ill-considered proposals, simplify the ballot and, most importantly, tie the legislative and initiative processes together to produce more constructive political compromises (see Chapter 3 for further discussion of this recommendation).

4. Proponents Should Be Allowed to Amend Their Initiative Before It Goes on the Ballot

If a legislative compromise is unobtainable, proponents should be able to place either their original initiative or an amended version of that initiative on the ballot after the 30-day public comment period. Any amendments to their original proposal must be submitted in writing to the attorney general within seven days after the 30-day period. The attorney general must then issue a written determination within seven days of receipt stating whether the amendments comply with the initiative's original purposes and intent. Proponents should then have seven days to modify their amendments to comply with the attorney general's ruling or seek final review in the Sacramento County Superior Court. The court should have seven days to complete any further reviews.

Proponent amendability is important to any reform effort. It will allow proponents to correct errors or omissions in the texts of their initiatives before they appear on the ballot. It will encourage the legislature to take its hearings seriously. Most importantly, it will allow proponents to remove defects from initiatives that might otherwise become enshrined into law. Proponent amendability is thus another way to help the initiative process become a more responsible branch of government.

Proponent amendability will leave proponents with complete control over their initiatives. If proponents accept substitute legislation, that legislation will still have to meet the purposes and intent of the original initiative. Proponent amendments or legislative compromises will thus remain loyal to the general intent of ballot measure signatories, who rarely read initiative texts but, in signing, endorse the general purposes of initiatives and view proponents as representing these interests. Review by the attorney general and the court will provide safeguards to ensure that amendments serve the initiative's original purposes and intent (for further discussion of this recommendation, see Chapter 3).

5. The Legislature Should Be Allowed to Amend Any Initiative After Enactment by a Two-Thirds Supermajority Vote

California is the only state that prevents its legislature from amending an initiative after enactment unless a measure specifically permits it. The legislature should be able to amend initiatives to correct errors, resolve ambiguities and address unforeseen contingencies. At the same time, the legislature should not be given carte blanche to repeal or drastically alter initiatives.

This report recommends that the legislature be allowed to amend any initiative after its enactment, so long as the change is approved by a two-thirds vote of both legislative houses and is consistent with the measure's original purposes and intent. Any proposed amendment must be in print at least ten days before final passage to permit public inspection.

This recommendation adds flexibility to the law and permits elected representatives to respond to changing conditions. The principal objection comes from proponents who worry that the legislature will gut or undermine their initiatives. The three safeguards attached to this proposal—the two-thirds supermajority, the purposes and intent requirement and the requirement that legislation be in print for ten days—will adequately prevent legislative abuse (for further discussion of this recommendation, see Chapter 3).

6. The Secretary of State's and Legislative Counsel's Offices Should Publicize the Drafting Assistance They Can Provide

The secretary of state's office should be required to publicize the drafting assistance it and the legislative counsel's offices are legally required to provide during the initiative drafting process. This information should be placed in the *Statewide Ballot Initiative Handbook* and other materials made available to initiative proponents.

A review of an initiative's language for form and clarity would improve the quality of statutory and constitutional language put in place by initiatives. More proponents would likely take advantage of this assistance if it were made known to them (for further discussion of this recommendation, see Chapter 3).

7. The Circulation Period Should Be Lengthened

The circulation period should be lengthened from 150 to 365 days. Although paid circulators find it easy to qualify measures in 150 days, proponents relying on volunteers, particularly for constitutional amendments that require additional signatures, find the 150-day period is too brief. Extending the circulation period would place citizen pro-

ponents, who must rely on volunteer circulators, on a somewhat more level playing field with well-financed proponents, who can pay for professional circulators (see Chapter 4 for further discussion of this recommendation).

8. SOME CIRCULATION AND QUALIFICATION REQUIREMENTS SHOULD BE EASED, OTHERS TIGHTENED

The principal problem plaguing the initiative circulation and qualification process is that any proponent with a million or more dollars can qualify virtually any initiative by hiring paid circulators. This allows well-financed proponents to circumvent the screening mechanisms designed by the drafters of the initiative process to ensure that initiatives reach the ballot with broad public support.

The U.S. Supreme Court has invalidated restrictions on the use of paid circulators on First Amendment grounds, but other improvements can and should be made to the circulation process:

- *Internet Petition Access.* The secretary of state's office should make all initiative petitions in circulation available online and allow voters to download and print them for signature and submission by mail.
- *Disclosures.* Signature petitions should list the secretary of state's Website address and include a prominent notice at the top and in bold type that voters can find information about the measure's major contributors on that website. Publicizing where financial disclosures can be found will increase the likelihood that voters will use this important information.
- *Additional Statements.* Within 30 days after the attorney general titles and summarizes an initiative, proponents should be required to file an additional disclosure statement listing contributions received and expenditures made up to seven days before the filing.
- *Notice of Later Amendments.* Signature petitions should disclose that the proponent may later amend the initiative so long as the amendments are consistent with the initiative's original purposes and intent.
- *Signature Verification.* Random sample signature verification procedures by the counties should be simplified. Initiatives should qualify if the random sample verification of signatures indicates that proponents have gathered at least 105% (currently 110%) of the valid signatures needed for qualification. No county should be required to verify more than 1,500 signatures. This sample size is more than adequate to provide accuracy and will ease the financial burden on counties and speed up the verification process.
- *Online Circulation and Other Alternative Methods.* Alternatives to the current signature-gathering method for qualifying initiatives should be carefully studied and debated. Methods less dependent on financial resources should be considered, particularly using the Internet to gather signatures and either supplementing or supplanting circulation with public opinion polls (for further discussion of initiative qualification techniques, see Chapter 4).

9. STATE CONSTITUTIONAL REVISION PROCEDURES SHOULD BE AUGMENTED

In California, initiatives can amend both state statutes and the state constitution. Although constitutional amendments must pass a higher signature threshold for qualification—8% for constitutional amendments as opposed to 5% for statutory amendments—the higher threshold is no longer a significant impediment to well-financed special interest groups. Moreover, constitutional amendments are being used more frequently as part of a counter-initiative strategy to undercut competing statutory initiatives. As a result, the California Constitution is increasingly cluttered with amendments that cannot be changed without further constitutional amendments.

- *Constitutional Revision by Initiative.* Rather than making the constitution more difficult to amend—for example, by raising the vote requirement for constitutional initiatives to 60%—this report recommends easing the state's constitutional revision process. Citizens should be allowed to circulate and qualify initiatives that *revise* (as well as *amend*) the state constitution. Currently, only the legislature may propose constitutional revisions. The state constitution allows constitutional initiatives to *amend* the constitution but not *revise* it. This approach will increase the number of opportunities for Californians to ensure that the constitution reflects their needs and priorities as a whole without making amendments more difficult. It will also help to streamline the constitution and eventually reduce the need to amend it in the first place.
- *Constitutional Revision Commissions and Constitutional Conventions.* Every 20 years, a constitutional revision commission should be established automatically, and the legislature should vote on whether to place its recommendations on the ballot. Every other 20 years, a constitutional convention should also be held, and its recommendations should be placed on the ballot without legislative review (see Chapter 5 for further discussion of these recommendations).

10. AD HOC SUPERMAJORITY VOTES SHOULD BE DISCOURAGED

No initiative or constitutional amendment (for example, that future taxes cannot be raised or lowered without a two-thirds vote) should be allowed to require future ad hoc supermajority votes for passage unless the measure itself receives at least the same vote as its provisions dictate for future elections, and unless it takes effect the day after the election. Simple majorities should not be permitted to disenfranchise larger future majorities (for further discussion, see Chapter 5).

11. THE SECRETARY OF STATE SHOULD IMPROVE THE DESIGN AND CONTENT OF ITS WEBSITE

The secretary of state's Website, a key source of independent voter information, should be made more user-friendly. Its navigation and search capabilities should be simplified. Proponents and opponents should be allowed to submit video statements for and against initiatives, and these should appear on the website. The Website should also offer video and audio versions of official voter information; links to organizational supporters, opponents and outside sources of information; and forums for voters to discuss and

share information about ballot initiatives (see Chapter 6 for further discussion of this recommendation).

12. The Presentation of Information in the Existing Ballot Pamphlet Should Be Improved

This report recommends a number of changes to the ballot pamphlet. Conflicting initiatives should be grouped together in the pamphlet and on the ballot to allow voters to compare them more easily, and the attorney general should place an advisory notice in ballot pamphlets and on ballots indicating that only the measure receiving the most votes may go into effect. Proponents and opponents of each measure should be given up to one-half of a page to list the individuals and organizations endorsing their cause. Proponents and opponents should be encouraged to include charts and graphs in their ballot pamphlet arguments. The cover of the official voter information guide should notify voters that the information in the pamphlet can also be found online in seven different languages. All content should adhere to a 12th-grade readability standard (see Chapter 6 for further discussion of recommendations for improving voter information).

13. Voters Should Be Able to Choose Whether to Receive the Ballot Pamphlet via E-mail Instead of Mail

The ballot pamphlet is an important source of election information for voters, but it does not arrive on time for many absentee voters and costs the state significant millions of dollars to print and distribute. Voters should be able to opt to receive their ballot pamphlets by e-mail instead of mail. An electronic version of the pamphlet is always available over a month before hard copies are printed and distributed, and the costs associated with e-mailing it would be far less than the costs of mailing it (see Chapter 6 for further discussion of this recommendation).

14. The FCC's Fairness Doctrine Should Be Reinstated for Ballot Measures

In 1992, the Federal Communications Commission repealed the fairness doctrine as it applied to ballot measure campaigns. The doctrine required broadcast stations to cover both sides of ballot measure campaigns. This repeal has resulted in one-sided ballot measure information, allowing the side with the most money to dominate the debate. The federal government should reinstate the fairness doctrine as it applies to ballot measures. This report also encourages the broadcast media to voluntarily apply the fairness doctrine to paid initiative advertising (see Chapter 7 for further discussion of this recommendation).

15. Contributions to Ballot Measure Committees Should Be Limited to $100,000 and Contributions to Candidate-Controlled Ballot Measure Committees to $10,000

Campaign financing issues are among the most difficult and troubling in the entire study of ballot initiatives. On the one hand, the effects of huge contributions and heavy one-sided

- *Providing Summaries of Data.* The secretary of state should post at least one preelection and one postelection summary of campaign finance data for each ballot measure campaign (as well as candidate campaigns), detailing how much has been contributed toward and spent on behalf of each measure.
- *Conducting Further Study.* Supreme Court rulings have made it difficult to make other concrete recommendations in this area, but this report urges further study of workable initiative campaign finance reform. The court should be presented with carefully researched data and arguments so that it can consider upholding responsible limitations on certain initiative campaign financing practices. New techniques to redress one-sided advertising campaigns should also be considered (see Chapter 8 for further discussion of these recommendations).

16. Major Campaign Contributors Should Be Disclosed in Media Advertisements

The integrity of the initiative process depends substantially on the quality and quantity of the information on which the voters base their choices. Because paid broadcast advertising is a dominant source of voter information, the disclosures in these communications should be significantly improved.

Television advertisements should display disclosure information on the bottom one-fourth of the screen in white letters against a black background for the duration of the ad. Also, late contribution reports should tally all contributions by individual contribution sources to facilitate easy identification (see Chapter 8 for further discussion of these recommendations).

17. California Courts Should Reevaluate Decisional Rules for Invalidating Conflicting Initiatives

California courts have been understandably respectful of the initiative process and reluctant to overturn successful measures that have received a popular mandate. However, California courts have invalidated initiatives on four grounds:

1. The initiative violated the state's single subject rule.
2. Federal law preempted the initiative in question.
3. The initiative violated the First Amendment.
4. A competing initiative receiving more votes superseded the initiative.

Some critics argue that the courts should tighten the current judicial definition of a "single subject" (by which an initiative is invalidated when its provisions are not reasonably germane to each other) and more aggressively strike down initiatives that appear to address too broad a range of subjects. All proposed alternative definitions, however, have unacceptable difficulties. Consequently, this report does not recommend a change in the current definition. The courts have demonstrated that they can apply the current definition in a manner that is neither too strict nor too tolerant.

spending on ballot initiative qualification and electoral campaigns destabilize and corrupt the democratic process. With enough money, any individual or organization can single-handedly place an initiative on the ballot, and with massive amounts of money anyone can purchase enough negative television advertising to virtually doom any initiative to defeat. Any system of direct democracy that places vital issues before the public for a vote and then significantly determines the outcome on the basis of money is deeply troubling.

On the other hand, potential remedies could have both positive and negative consequences. On the plus side, a high contribution limit of $100,000 per donor, for example, might prevent single individuals or corporations from buying their way onto the ballot and require them to seek smaller donations from a wider spectrum of supporters. On the negative side, large contributors might circumvent these remedies through independent expenditure groups—spending their money directly on ballot qualification and initiative campaigns without funneling it through ballot measure committees to which limitations might apply.

The U.S. Supreme Court, however, has apparently placed these rational approaches beyond reach. The Court ruled in 1976 that contributions to candidates can be limited to avoid the appearance or actuality of corruption, but expenditures cannot be limited because they are not corrupting. In 1982, the Court invalidated limits on contributions to ballot measure committees, concluding without much analysis that ballot initiatives cannot be corrupted because their texts, unlike the willpower of candidates or elected officials, cannot be pressured or altered.

The recent addition of new members to the Court makes future rulings difficult to predict. Although a majority of the Court may still be willing to allow contribution limits, but not expenditure limits, for *candidates*, it may be unwilling to uphold limits on contributions to *ballot measure committees*. It is possible, however, that some future litigant may establish that very large contributions corrupt the ballot initiative process as well by directly purchasing provisions in a measure or by flooding the electorate with one both side of an issue.

This report proposes several reforms to improve ballot initiative campaign financing practices—some of which are more likely to pass constitutional muster than others, and all of which enjoy strong popular support:

- *Limiting Contributions.* Contributions to ballot measure committees should be limited to $100,000, and contributions to candidate-controlled ballot measure committees should be limited to $10,000.
- *Considering Expenditure Limits.* Although limiting expenditures in ballot measure campaigns would probably not survive a constitutional challenge, setting expenditure ceilings at a reasonable level would be one of the strongest single measures to reduce the impact of escalating costs and leveling the playing field in the initiative process.
- *Disclosing More Information.* Ballot measure proponents should be required to disclose their names along with the committee treasurer's name on the committee's statement of organization and first campaign statement, regardless of whether the proponent controls the committee.

The California Supreme Court should return to the earlier definition of the test by which the courts invalidated competing initiatives. Although the state constitution provides that only conflicting *provisions* of competing initiatives receiving fewer votes at the same election should fail, the court has announced it will invalidate entire competing initiatives receiving fewer votes when they are offered as all-or-nothing alternatives or create comprehensive regulatory schemes. This test is at odds with the wording of the state constitution, the approaches of several other states and the undoubted intent of many voters support competing initiatives to enact as many reforms as possible. This test may also encourage greater use of counter-initiatives prepared and promoted for the sole purpose of invalidating a competing initiative should it receive a larger vote. If so, the test will generate more ballot confusion and work for the courts (see Chapter 9 for further discussion of these recommendations).

IMPLEMENTING THE PROPOSALS IN THIS REPORT

Enacting any reforms to California's ballot initiative process will not be easy. After 97 often turbulent years, the initiative process has acquired semi-sacrosanct status. Many of its defenders argue that it is inviolate and should not be touched. Even some opponents resist suggesting reforms for fear they will be branded as "enemies of the people."

Yet most observers recognize that the initiative process can and must be improved, even though they differ over the improvements they believe necessary. The voters still strongly support the initiative process, but they acknowledge at the same time that it has gotten out of control and needs significant changes.

Piecemeal reforms have been suggested, and some have been introduced in the legislature. Such reforms are politically tempting because they create the impression that a single solution can resolve a complex problem. However, the complexity and diversity of the current problems confronting the initiative process require a broader set of reforms.

Those with a vested interest in the status quo, those who feel the recommendations in this report go too far and those who feel they do not go far enough—all may resist change. To anticipate these concerns, this report has carefully devised a comprehensive package of reforms. Presented individually, this report's recommendations might be perceived as one-sided or divisive. Taken as a whole, however, they can be implemented without tilting significantly in favor of either supporters or opponents of the initiative process.

For example, proponents must submit their initiative to scrutiny at a legislative hearing before their measure is placed on the ballot, but they maintain control at all times over the final language of the initiative that appears on the ballot. Proponents will have a significantly longer period to circulate initiative petitions for signatures, but they must provide increased campaign financing disclosure, both during and after the circulation period.

The entire package of recommendations could be adopted by a single, integrated ballot measure, placed on the ballot by the legislature or by an initiative, which would combine both constitutional and statutory amendments. Most of the report's recommendations could be adopted immediately by the legislature or, after circulation of signature petitions, by a direct vote of the people on a statutory ballot initiative. Four of the rec-

ommendations—allowing the legislature by a two-thirds vote to amend initiatives after their enactment, allowing voters to revise the constitution via the initiative process, establishing constitutional revision commissions and conventions and preventing the imposition of future supermajority vote requirements without their adoption by an equal supermajority vote—would require constitutional amendments for enactment.

The comprehensiveness of the reforms addresses criticisms of the initiative process from both its opponents and supporters. Adopting them as a package will enhance the political feasibility of reform. Implementing all the reforms proposed in this report will help the initiative process become a responsible and effective part of California's governance well into the future.

CHAPTER

I

Origins and History of the Ballot Initiative in California

When all is said about the 39th session of the California legislature, just ended [which created the initiative process in California], it may be summed up in this: It freed the state from the corporate bonds which enslaved it for decades. It gave to the people the privileges of making and unmaking their laws, and of naming and removing their officials. It made hope spring again in the hearts of men and women who had long been held in the chains of political lawlessness. It thrust from power the Captains of Greed. Of all the legislatures ever in California it alone represented the real majority of the state.

—Frederick O'Brien, *Los Angeles Record* (1911)[1]

SUMMARY

California voters adopted the ballot initiative process in 1911 as part of the Progressive movement, a grassroots effort to end government corruption. State politics in the early 1900s involved frequent corruption and bribery trials, domination by political bosses and railroad industry control over the legislature, electoral procedures and the courts. Progressive leaders John Randolph Haynes and Hiram Johnson helped bring the initiative process to California, and Johnson rode into the governor's office on a wave of strong public support.

Californians immediately began to use the initiative process to address the issues of the day, from prohibition to taxation. Despite attempts to weaken the initiative process over the years, initiatives have become a permanent fixture in state policymaking—making the ballot initiative California's fourth branch of government.

Today, California's ballot initiative system has reached a crossroads. With strong public support, initiatives are here to stay. Yet the initiative process has clear problems, and pressures to modify it continue. This report examines the ballot initiative process and recommends a package of reforms that would preserve its best features to create more balanced policymaking.

[1] Frederick O'Brien, "What 1911 Legislature Did," *Los Angeles Record*, March 28, 1911.

At the beginning of the 20th century, excessive corporate influence over elected officials and the legislative process sparked a popular rebellion against government corruption that swept through much of the West. Progressive reformers rode the crest of this rebellion, seizing control of California government in 1910 by winning the governorship and occupying a majority of the seats in the state legislature. With this victory for the reform movement, California launched itself on a course of self-governance that placed significant reliance on the electorate to formulate public policy directly through the ballot box.

In 1911, with the Progressives in control, the California State Legislature put on the ballot, and the voters overwhelmingly approved, a set of three amendments to the California Constitution adopting the *initiative*, the *referendum* and the *recall*. Each fundamentally changed the way the state was governed. Each enabled the people to act without the involvement of the legislature or governor—by enacting legislation and constitutional amendments, rescinding bills passed by the legislature or recalling elected officials from their positions.

Although the legislature had always been able to submit proposed laws and constitutional amendments to a vote of the people, the *initiative* empowered citizens to draft their own proposed laws, circulate petitions to raise the required number of signatures and then place their proposed laws and constitutional amendments on the ballot.[2] Propositions placed on the ballot by the legislature are referred to as "legislative ballot measures" to distinguish them from initiatives and referenda. The *referendum* allowed voters to repeal laws enacted by the legislature by raising sufficient signatures to put those laws to a vote of the people (see Table 1.1 for more details).[3] The *recall* enabled citizens to gather enough signatures to remove an elected official from office by popular vote (see Table 1.2 for more details).[4] Although the referendum and recall were adopted at the same time as the initiative, they have been used far less frequently and are not discussed extensively in this report.[5]

TABLE 1.1 The Referendum

In addition to *initiatives*, Californians can place two other types of propositions on the ballot: *referenda* and *recalls*.

There are two distinct types of referenda. The *petition,* or *popular, referendum* allows citizens to repeal legislation. The state constitution exempts from such challenges any bills that call for elections, new taxes, most appropriations, urgency measures approved by a two-thirds vote of both chambers and certain emergency measures intended to protect public safety. Twenty-four states allow petition referenda.

A second form of referendum that should not be confused with the direct democracy technique is called the *legislative referendum*. All state legislatures can submit legislative proposals to the voters for approval. Additionally, some legislative acts, such as constitutional amendments, local charters and bond issues, *must* be approved by the voters through compulsory legislative referenda. Compulsory referenda were established in California by the 1879 state constitution, 32 years before the Progressives added the petition referendum process.[6]

continues

[2] "Initiative," Cal. Const. art. II, § 8.

[3] "Referendum," Cal. Const. art. II, § 9.

[4] "Recall," Cal. Const. art. II, § 13.

[5] For further discussion of the referendum and recall, see Thomas Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* (Cambridge, Mass.: Harvard University Press, 1989).

[6] Every state except New Jersey has some provision for compulsory referenda.

Over the years, petition referenda have been used relatively infrequently. Though there have been 720 compulsory referenda in California from 1912 through 2006, only 43 petition referenda have qualified for the ballot over the same time period. Of these, 28 petition referenda, or 65% of the total, invalidated laws previously enacted by the legislature. (A no vote means the measure as passed by the legislature does not become law.) Voters disapproved 67% of the 315 initiatives that qualified for the ballot from 1912 through 2006.

It is difficult to qualify a petition referendum for the ballot. In 1964, the California Real Estate Association unsuccessfully attempted to qualify a referendum that would have annulled the Rumford Fair Housing law. However, the association later succeeded in qualifying a ballot initiative that would have accomplished the same result. One reason why a referendum qualification is so difficult lies in the brief 90-day signature collection period that begins as soon as the governor signs the contested bill. In many cases, citizens who protest a legislative measure may find it less burdensome to pursue their own initiative rather than seek a referendum on the issue.

TABLE 1.2 The Recall

The recall allows Californians to remove state officials from office through the ballot measure process. The recall of state-level elected officials in California, including constitutional officers, court officials and members of the legislature, has been attempted 118 times.

Only eight recall petitions have qualified for the statewide ballot in California, and only five of those have recalled an official. The most recent recall attempt was in 2003 when voters replaced Governor Gray Davis with Arnold Schwarzenegger. This was the first successful statewide gubernatorial recall petition in California history. California governors have faced 31 other recall attempts, all of which failed, including one other attempt against Governor Davis, four against Governor Pete Wilson, nine against Governor Deukmejian, five against Governor Jerry Brown, three each against Governor Pat Brown and Governor Ronald Reagan, five against Governor Culbert Olson and one against Governor Frank Merriam.

Recall efforts against other state-level offices include one against a lieutenant governor, two against attorneys general, one against the entire supreme court, 26 against individual supreme court justices, 16 against state senators and 38 against members of the assembly (five of which targeted assembly Democrats who supported a ban on assault weapons). Of these, only two senators (Black in 1913 and Grant in 1914) and two assembly members (Horcher in 1994 and Allen in 1995) were recalled. Although the recall has been ineffective against state officers until recently, it has been a viable threat against local officials.

EARLY PROGRESSIVES CREATE NEW FORMS OF DIRECT DEMOCRACY

Direct democracy—the people voting directly on laws or policies instead of indirectly through elected representatives—is an ancient tradition. The Homeric epic poems of the 9th or 8th century BCE contain references to the voting rights of military and public assemblies in ancient Greece. Tacitus, the ancient historian, spoke of German military chieftains polling their soldiers for a roar of approval over battle plans or a rattling of spears in rejection. In 1309, a few Swiss cantons adopted a relatively modern form of referendum, allowing citizens to accept or reject proposed laws or policies by a popular vote. And the American colonies extensively used techniques of direct democracy, from the founding of the Plymouth colony through the New England town hall meetings in which the populace promulgated new policies and repealed ill-advised ones.[7]

[7] Laura Tallian, *Direct Democracy: An Historical Analysis of the Initiative, Referendum and Recall Process* (Los Angeles: People's Lobby, 1977), 10.

The use of direct democracy persisted in the United States in a limited form after the American Revolution.[8] Massachusetts, for example, allowed voters to decide the fate of a new state constitution in 1778. By 1831, nearly every state entering the union had adopted the procedure of submitting constitutions to a popular vote.[9] From then on, however, states increasingly abandoned techniques of direct citizen formulation of policies and deferred to more traditional forms of representative government—until the Populist and Progressive movements of the late 19th and early 20th centuries. Although these Populist and Progressive movements arose from distinctly opposite constituencies—Populists being more agrarian and concerned with economic issues, Progressives being more urban and concerned with governmental corruption—they shared a common fear of the corrupting influence of corporate monopolies and a common goal to institutionalize the initiative, referendum and recall.

The modern concept of the initiative first reached the United States in a series of British articles discussing Switzerland's system of direct democracy.[10] Shortly thereafter, in 1885, Father Robert Haire, a priest from South Dakota, and Benjamin Urner, a newspaper publisher and Greenback Party activist, became the first American reformers to propose a similar initiative process in this country. James W. Sullivan picked up the idea and traveled to Switzerland to evaluate how the Swiss system of direct democracy functioned and to judge whether it could be adapted to the United States. Sullivan's published findings laid much of the groundwork for the American direct democracy movement.[11]

In 1898, South Dakota became the first state to adopt the initiative.[12] The movement for direct democracy quickly swept into local and state governments through most western states and several eastern states.[13] During the next two decades, 21 additional states

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[8] Austin Ranney, "United States of America," in *Referendums: A Comparative Study of Practice and Theory*, eds. David Butler and Austin Ranney (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978), 68–69.

[9] Charles Lobinger, *The People's Law* (Macmillan, 1909), 338.

[10] Eugene Lee, "The Initiative and Referendum: How California Has Fared," *National Civic Review* (February 1979): 69–76.

[11] The initiative and referendum had been practiced in a few Swiss forest cantons since the early 1300s. Ironically, and as subsequently occurred in the United States, it was the corrupting influence of the railroads in Switzerland that ushered in widespread use of the initiative process in most other cantons and the Swiss central government by the mid-19th century. Demands for expansion of direct democracy followed a generous governmental subsidy given to a Swiss railroad in 1858 by the Legislature of Neuchatel.

[12] Although South Dakota first adopted the initiative process, the first statewide initiatives themselves were presented to voters in Oregon. On June 6, 1904, Oregon voters made history by voting on and approving the first two statewide initiatives ever placed on a ballot. The first initiative created a primary nomination system; the second permitted "local option" on liquor sales. David D. Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* (Philadelphia: Temple University Press, 1987), 8.

[13] Direct democracy developed as largely a western phenomenon for several reasons. First, many western states were newly entering the union and were in the midst of designing their structures of government. Second, much of the detrimental impact of corporate monopolies on state and local political and economic systems was hardest felt in the agrarian West. Third, western states were already imbued in the agrarian revolt tradition due to the relative electoral success of the Populist Party in this region.

adopted the initiative or referendum.[14] No state subsequently adopted the initiative or referendum until 1959, when Alaska joined the Union. Wyoming obtained the initiative in 1968. Illinois followed suit in 1970 for constitutional amendments only, as did Florida in 1972. Mississippi was the last state to adopt the initiative process, which it did in 1992.[15]

The initiative did not appear in California until 1903 when the California legislature approved the process for the city of Los Angeles.[16] In 1911, California became the tenth state to adopt the initiative when voters approved the process by a three-to-one majority. Inadvertently, the Southern Pacific Railroad was the driving force behind the growth of popular support for the initiative process in California.

Domination of the State by the Southern Pacific Railroad

When four businessmen formed the Central Pacific Railroad in 1861, they created a politically powerful enterprise that was to endure for nearly half a century. The primary goal of the "Big Four" (Leland Stanford, governor of California one year later, Collis Huntington, Charles Crocker and Mark Hopkins) was to link the East and West Coasts by rail. The group sought and received massive government support to accomplish its expansive undertaking. Through the Pacific Railroad Act, amended in 1864, the federal government gave the Union Pacific in the East and the Central Pacific in the West federal bond financing and land grants of up to five miles on each side of track laid. The Central Pacific, based in California and later renamed the Southern Pacific Railroad, received almost $28 million in federal financing plus 10 million acres of public land all across the West. State and local governments contributed additional amounts. Governor Stanford, for instance, helped add to the financial wealth of the Central Pacific and later the Southern Pacific by securing outright monetary subsidies and loans for the company from the state legislature while he was in office.[17]

As the Central Pacific steamrolled across the country, it acquired smaller railroad companies unable to compete successfully. When shippers between Los Angeles and San Francisco shifted their freight business from train to steamship to cut costs, the railroad company simply acquired the steamship line and eliminated the competition. By 1869,

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[14] Three states—Kentucky, Maryland and New Mexico—allowed their citizens to petition for a popular referendum but did not allow other forms of direct democracy, such as the initiative.

[15] Mississippi, the only state to have adopted an initiative process but then lost it, had an initiative process from 1914 until the state supreme court threw it out in 1922. The state legislature re-adopted the process in 1992.

[16] Throughout most of the 1800s, state governments actively meddled in and regulated local governmental affairs. Cities were clearly subservient to state law in all areas of government. In 1875, Missouri was the first state to amend its constitution to allow cities with a population in excess of 100,000 to formulate their own charters. California followed suit in 1879 but provided that charters, after adoption by the city's voters, must be submitted to the legislature for ratification or rejection as a whole. Thus, legislative approval for the initiative process in Los Angeles was required. This requirement was repealed in 1974, after which time a charter approved by a majority of its electors could become effective when filed with the secretary of state.

[17] John Culver and John C. Syer, *Power and Politics in California*, 2d ed. (New York: Wiley, 1984), 36–37.

the Central Pacific controlled 85% of the track in California, giving the company an economic stranglehold over the state.

Renamed the Southern Pacific Railroad, the railroad and its followers not only monopolized the economy of California but also heavily entrenched themselves at all levels of government. Towns and cities found themselves obligated to railway lines for survival and hence to the Southern Pacific. It was no secret that the Southern Pacific virtually owned California's state government. Fremont Older, a leading newspaper reporter in 1896, described the situation as follows:

> In those days there was only one kind of politics and that was corrupt politics. It didn't matter whether a man was a Republican or Democrat. The Southern Pacific Railroad controlled both parties, and he either had to stay out of the game altogether or play it with the railroad.[18]

The means for securing this control were many. The sheer abundance of the railroad's financial resources made the company both a powerful lobby and an influential force in candidate elections as well. With its financial clout, the Southern Pacific dominated party conventions and nominations of candidates for major offices. Many people were on the company payroll and many companies found their livelihoods dependent on the railroad, including several of the state's major newspapers. Bribery and perks were regular tactics used by the railroad to acquire power. It was common, for example, for the railroad to hand out free passes for rail travel to officeholders and others who supported the company.

It was no secret that the Southern Pacific virtually owned California's state government.

The reach of the "octopus," as author Frank Norris called the Southern Pacific in 1901, extended to the press, voting procedures and the judicial system.[19] It advertised in newspapers that supported its cause and withdrew its advertising dollars from those that did not. While newspapers such as the *Sacramento Bee, Los Angeles Express* and all but one of San Francisco's dailies strongly opposed the Southern Pacific,[20] noteworthy supporters included the *Los Angeles Times, Oakland Tribune* and *San Francisco Chronicle*. Stanford's brother Phillip openly paid voters on the streets in San Francisco to cast ballots in favor of a municipal stock subscription that would provide construction capital for the railroad company.[21] While governor of California (1862–63), Stanford named Charles Crocker's brother Edwin to the state supreme court. At the time of his appointment, Edwin was chief legal counsel for the Southern Pacific Railroad, and he did not step down from that position while on the court.

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[18] Quoted in Charles Bell and Charles Price, *California Government Today: Politics of Reform* (Homewood, Ill.: Dorsey Press, 1980), 55.

[19] In reference to the corrupting domination of the Big Four railroad monopoly over California politics, Frank Norris wrote in his book *The Octopus* (Doubleday and Company, 1901): "They own us, these taskmasters of ours; they own our homes; they own our legislatures. . . . We are told we can defeat them by the ballot box. They own the ballot box. We are told that we must look to the courts for redress; they own the courts. We know them for what they are—ruffians in politics, ruffians in finance, ruffians in law, ruffians in trade, bribers, swindlers, and tricksters." Quoted in Tallian, *supra* note 7, at 6.

[20] John McFarland, "Progressives and the Initiative: Protestant Reformers Who Thought Politics Was a Sin," *California Journal* (October 1984): 388.

[21] See Culver and Syer, *supra* note 17, at 39.

Popular historians have said that the monopolization of the economy by the railroads and related interests was one of the reasons the American economy nearly collapsed in the 1870s. The economic strain was felt most severely in the agricultural states of the West and Midwest. Farm families found their livelihoods squeezed between two interrelated interests, the railroads and the financial industry. Railroad companies not only acquired many industries necessary for farming—such as seed and fertilizer companies—but they also owned the grain storage houses that purchased agricultural products and the railroads that transported them. Meanwhile, the banking industry set mortgage loan rates that increased the indebtedness of America's farmers. The farm crisis set in motion the Populist movement that, in California, spurred the drafting of a new state constitution.

California's first constitution of 1849 had been a simple document that contained few potential state remedies for the growing economic crisis. Disgruntled farmers and a mounting army of unemployed in the cities pressed public officials and the political parties to draft laws that would control monopolistic economic enterprises. After months of debate, a new constitution was ratified on May 17, 1879. The new constitution provided for a railroad commission to monitor and regulate the activities of the Southern Pacific. In a very short time, however, the railroad's spoils system bought the loyalty of two of the three commissioners. The Southern Pacific soon came to dominate the regulatory agency in much the same way that the railroad had already dominated the rest of state government. The projected regulatory scheme collapsed, and reformers made no further headway for another 30 years.

The Progressive Challenge to the Railroad's Power

Despite the effort of the early Populists, railroad monopolies throughout the country remained a dominant economic and political force. In California, the Southern Pacific Railroad entered the 1900s with its power intact. The corporation had developed a strong affiliation with the state's ruling Republican Party.

From that same Republican Party, however, emerged a dissident group known as the Progressives. Largely a middle-class, urban group, the Progressives focused on two major concerns: railroad monopolies and government corruption. The Progressive program for ending government corruption appealed to a wide swath of the electorate, crossing party lines and socioeconomic status. A nationwide muckraking wave swept the country under the tutelage of Theodore Roosevelt.

At the same time, early Populist reformers were moving to southern California from midwestern farm states, seeking prime agricultural land. They were committed to a highly moral society devoid of such things as gambling halls and Sunday saloons.[22] California's Progressive movement eventually leapfrogged these rural Populist concerns to become a broad-based coalition targeting government corruption. Though a specific Progressive agenda was never set down, historians generally agree that it included:

- Expanding citizen participation in politics (initiative, referendum, recall, and the replacement of party nominating conventions with the direct primary)

[22] See McFarland, *supra* note 20, at 388.

- Taming unrestrained corporate influence on the political process (e.g., expanding and strengthening the railroad commission)
- Protecting the environment (expanding conservation programs)
- Improving adverse living and working conditions (such as prohibiting child labor and establishing workers' compensation)

The reform movement was not without its critics. Political bosses and representatives of the Southern Pacific Railroad were determined to discredit the reputations of reformers in order to maintain political domination over the state. They attempted to paint the reformers as "communists" and "radicals" bent on undermining the established societal order.[23] But well-respected Progressives—like John Randolph Haynes, a Los Angeles doctor and real estate developer, David Starr Jordan, president of Stanford University, and James D. Phelan, former San Francisco mayor and U.S. Senator—kept the movement alive.

John Randolph Haynes

John Randolph Haynes was instrumental in bringing direct legislation to Los Angeles. In 1903, he led California Progressives to a major victory by gaining voter approval of a new Los Angeles city charter that for the first time in California governance adopted the initiative, referendum and recall.[24]

Working with the Direct Legislation League of California, a wing of a national nonpartisan organization committed to direct democracy, Haynes continued his crusade throughout the next eight years to ensure that direct legislation was extended to the state through the California Constitution. His first attempt came in 1904 when the league gained the pledges of a majority of state legislators elected that year to support the idea of the initiative and referendum. William F. Herrin, chief counsel of the Southern Pacific Railroad and a shrewd political lobbyist, altered the game plan when the legislature convened in 1905. When Haynes and his associates traveled to Sacramento to attend the scheduled meetings of the Constitutional Amendments Committee, they found that the legislative schedule had been changed so that committee members were on vacation. Herrin used his influence to continue creating schedule conflicts effective enough to prevent a vote on the direct legislation proposal. Although frustrated, Haynes and his followers did not lose hope. They continued their struggle for the next seven years, encouraged by the fact that by 1907 many of the larger California cities had adopted some form of direct legislation.[25]

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[23] *Government Directly by the People*, from the collection of the John Randolph Haynes and Dora Haynes Foundation, Special Collections Library, University of California, Los Angeles.

[24] See McFarland, *supra* note 20, at 388.

[25] By 1907, Los Angeles, Pasadena, San Diego, San Bernardino, Fresno, Sacramento and Vallejo had codified the initiative and referendum in their local charters.

Corruption and Bribery

California's Progressive movement gained considerable momentum from the corruption and bribery trials of several prominent labor leaders and corporate executives that began in 1906. The most renowned of these trials was that of Union Labor Party chief Abraham Reuf. Reuf had established an effective political machine that took over San Francisco's city government in 1901 and later branched out to control 20 votes in the state legislature. When Reuf's legislative votes were combined with those controlled by Herrin of the Southern Pacific, the two men could control the fate of state public policy.[26] Reuf was later charged with corruption and extortion. His trial climaxed with the brazen shooting of the prosecuting attorney by a witness in the courtroom. The witness was arrested and mysteriously died in his jail cell. A relatively unknown lawyer named Hiram Johnson stepped in as prosecutor and secured a conviction. The publicity and fame that surrounded this courtroom melodrama would later launch Johnson's political career and propel him into the governorship.

Several government officials were charged with various crimes of corruption over the next five years. Although few of these cases resulted in convictions, the public exposure of bribery, theft, kidnapping and even attempted assassination proved instrumental in igniting widespread support for the Progressives.

At the 1908 state Republican convention, many anti-railroad legislators were nominated and subsequently elected to the legislature. In 1909, the Progressives held a majority in both legislative houses. The reformers, however, still did not succeed in taming the Southern Pacific. They lacked organization while the Southern Pacific machine ran like clockwork. Knowing that it controlled only a minority of the legislature, the machine's strategy was to prevent bills from passing or at least to amend them into ineffectiveness. Newspaper reporter Franklin Hichborn recounts the machine politics of 1909:

> From the hour the legislature opened until the gavels fell at the moment of adjournment the machine element labored intelligently and constantly, and as an organized working unit, to carry its ends. There were no false plays; no waste of time or energy; every move was

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[26] In a public address in 1922, John Randolph Haynes described his experience of attempting to get a bill through the legislature. He had convinced a friend in the legislature to introduce the bill on his behalf and told the audience what followed: "Turning to me, he said: 'The man who is acting as speaker pro tempore is a $2,500 man,' and he informed me of the facts connected with this man's getting a $2,500 bribe. He pointed to various other members as being $2,000, $1,500, $500, $50 men, and finally to one who purloined stationery, stamps and other senate chamber appurtenances.

"He then said: 'Doctor, when I agreed to introduce your bill, I told you I would not double cross you, and I wish to say to you now that the measure has no show whatsoever unless you get the consent of Abe Reuf and William F. Herrin, chief counsel of Southern Pacific. Reuf controls twenty votes in this legislature and Herrin enough more to give them control of both houses. Go to San Francisco, see these men, and if they promise to keep hands off, I believe I may get the measure through; but if they are opposed, go home as it is useless to come back here.'

"I went to San Francisco, saw Mr. Reuf, and stated my case. Mr. Reuf said that if he would consent to let the measure pass, he would so notify me at my hotel at ten o'clock the next morning. He failed to communicate with me and I went home. The next time I saw Mr. Reuf he was in San Quentin." Quoted in Tallian, *supra* note 7, at 34–35.

> calculated. By persistent hammering the organized machine minority was able to wear its unorganized opponents out.[27]

The reformers let opportunities for control pass, allowing, for example, a pro-railroad Speaker to govern the assembly. The reform element also permitted the election of Senator Edward I. Wolfe, an admitted leader of the machine, as president pro tempore of the senate. The lieutenant governor, also machine affiliated, appointed committee positions as did the Speaker. Political organization and strategy in both houses was under machine control. The Progressives would have to wait until 1910 to take control of the state's political agenda.

Hiram Johnson's Election as Governor

Despite repeated setbacks, the Progressives were able to create a framework for victory. As part of California's majority Republican Party, the state Progressives established the Lincoln-Roosevelt Republican League in 1907. Antireform Republicans like Grove L. Johnson, a state legislator who called the reformists "goo-goos," viciously attacked the league. (Johnson did not foresee that his own son Hiram would be elected governor three years later as the league's standard-bearer.) In 1908, the league drafted and campaigned for a constitutional amendment that would change the method of nominating candidates from party conventions controlled by party bosses to direct primaries in which voters selected their party's candidates. Approved by the state legislature the following year, the amendment severely weakened the control of the Southern Pacific over the candidate selection process.[28]

Five Republican candidates entered the Republican primary for governor in 1910 including Hiram Johnson, the lone Progressive. Johnson's "give-'em-hell" style landed him the nomination with 102,000 votes, while the four other candidates split 113,000 votes among themselves.[29] Hiram Johnson went on to defeat Theodore Bell, the liberal Democratic candidate, in the general election, lashing out against the railroad "men in broadcloth" and the "poison press."[30] Throughout the campaign, Johnson refused to ride on a Southern Pacific train. Instead, he traveled from town to town in an automobile driven by his son. The victory was all the more stunning because the Progressive ticket also carried a majority of seats in both the assembly and the senate.

Sweeping Changes in California's Government

Hiram Johnson's Progressive administration entered office relatively uncommitted to special interest groups. It ushered in a fundamental reshaping of state government during its first legislative session. The 1911 legislature approved a package of 23 constitutional amendments to be submitted to the voters in a special election the following year.

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[27] Franklin Hichborn, *Story of the California Legislature of 1909* (San Francisco: Press of the James H. Barry Company, 1909), 10.

[28] Richard B. Harvey, *The Dynamics of California Government and Politics*, 2d ed. (Monterey, Calif.: Brooks/Cole, 1985), 17.

[29] See Bell and Price, *supra* note 18, at 56.

[30] George Edwin Mowry, *The California Progressives* (Berkeley: University of California Press, 1951), 119–124.

These amendments embodied key elements of the Progressive platform: the initiative, referendum and recall (Senate Constitutional Amendment 22 and Senate Constitutional Amendment 23; senate constitutional amendments are hereafter referred to as "SCA"). The national media, however, focused its attention on the successful women's suffrage amendment (SCA 8), which made California the sixth state in the Union to give women the right to vote.[31]

Several measures addressed the regulation of railroads. One created an independent railroad commission. Another strengthened government regulation of all public utilities. Local governments were given greater authority to manage their own affairs. An employers' liability law was approved by the voters, along with a measure providing for government inspection of merchandise and food quality. The judiciary was reorganized to allow for the impeachment of judges, as well as to minimize the partisan nature of both judicial elections and the selection of court clerks. A biennial legislature was created and veterans were given a special tax break.

The voters approved 22 of the 23 ballot measures, giving the direct legislation provisions among the largest victory margins. Not surprisingly, the only defeated measure on the ballot would have allowed public officials to ride the trains with passes issued by the railroad.[32]

All this occurred despite a strong opposition drive championed by many of the state's major newspapers.[33] The *Los Angeles Times*, for example, ran a headline the morning of the

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[31] California granted women the right to vote in the 1911 special election. The proposition was carefully worded to limit its political ramifications. For instance, persons of Chinese descent, along with "idiots" and others unable to read, were expressly prohibited the right to vote. California's amendment was heavily financed and supported by suffragette organizations throughout the country, especially from New York. Women were not allowed to vote in federal elections until a U.S. constitutional amendment was ratified in 1920.

[32] The 1911 ballot measure designed to allow railroad perks for elected officials (Assembly Constitutional Amendment 50) was written to appear as a Progressive reform amendment. The bulk of the text proposed government regulation of railroad rates and prohibited rates that discriminated between short-distance and long-distance transport. One provision, however, permitted the issuing of commute tickets at "special rates"—a clause intended to preserve the practice of free railroad passes for public officials. The ability of voters to ferret out this provision for rejection is even more noteworthy, given that the official ballot pamphlet offered no arguments against it.

[33] Opposition to the Progressive reforms was not only echoed by California newspapers. The *New York Times* printed a scathing editorial against California's newly adopted initiative process, entitled "Anti-Democracy in California." Following a paragraph of criticism of the readability of the ballot pamphlet, the editorial turned its barbs directly at the initiative and referendum: "This new method of handling the basic law of the state is advocated in the name of democracy. In reality it is utterly and hopelessly undemocratic. While pretending to give greater rights to the voters, it deprives them of the opportunity effectively and intelligently to use their powers. They receive the right to vote much oftener and on a larger number of matters than before, but the number and variety of the votes they are called on to cast does away with all chance of really using sense and discretion as to all of them. The new method is proposed as a check on the machines. But the strength of the machines lies in the inattention and indifference of the voters, and the voters are sure in the long run to be more inattentive and indifferent in proportion to the number of the questions forced upon them at one time. When the machine managers get familiar with the working of the new method, they will work it for their own ends far more readily than they work the present method." Editorial, "Anti-Democracy in California," *New York Times*, October 18, 1911.

election reading, "VICIOUS FIGHT ON FREAK LEGISLATION."[34] The day following the special election, a *Times* article stated, "Initiative and referendum, the recall, appointment to the railroad commission by the Governor—all the extreme fads proposed by the last legislature—were adopted by heavy leads in practically every precinct."[35]

John Randolph Haynes expressed a new optimism in the quality of the state legislature: "Let me say to you that [this] is the only legislature since I have been a citizen of the state that has truly represented the people of California. All other legislatures during all these long weary years have been creatures of special interests, more especially of the Southern Pacific Railway Company."[36]

SCA 22 on the 1911 ballot established both *direct* and *indirect* initiative processes in addition to the referendum. Under the direct initiative, electors equal to 8% of the total vote for governor in the last general election could petition for a statute or constitutional amendment to be submitted for a popular vote in the next general election or in a special election called by the governor. Under the *indirect* initiative, electors equal to 5% of the vote cast for governor could petition for a statute to be submitted to the legislature and, failing legislative approval, then to a vote of the people. The legislature obtained the right to submit an alternative measure to the people on the same ballot. Neither initiative procedure allowed a veto by the governor. Amendment or repeal of an initiative or legislative measure was forbidden unless the measure itself allowed it. Under the referendum, electors equal to 5% of the last gubernatorial vote could petition, within 90 days after adjournment of the legislature, to require voter approval of any measures enacted by the legislature before they became effective (except measures calling elections, providing tax levies and enacting urgency statutes).

In one swift and momentous year, the Johnson administration gave citizens the techniques to check the influence of special interest groups, alter the state's political agenda and public policies, and remove unresponsive or corrupt officeholders. The initiative era had dawned in California.

In one swift and momentous year, the Johnson administration obtained the tools it felt necessary to clean up California politics. It gave citizens the techniques to check the influence of special interest groups, alter the state's political agenda and public policies and remove unresponsive or corrupt officeholders. The initiative era had dawned in California.

Early Uses of the Initiative

Even with its political clout significantly undercut, big business did not flee the state as some anti-Progressives had predicted. Business in California flourished despite the emergence of the Progressives and adoption of the initiative process.

The new Progressive legislators believed they had achieved the two primary objectives of their reform movement—cleaning up government and curtailing the influence of well-endowed special interest groups. California's first initiatives, therefore, did not address these matters. Instead, early initiatives focused on taxation, prohibition, gambling, bond

[34] Editorial, *Los Angeles Times*, October 10, 1911.
[35] Editorial, *Los Angeles Times*, October 11, 1911.
[36] Speech by John Randolph Haynes, from the collection of the John Randolph Haynes and Dora Haynes Foundation, Special Collections Library, University of California, Los Angeles.

measures and similar concerns. These first initiatives were used to remedy legislative omissions, not to reform the governmental process itself.

In November 1912, the first year the initiative process took effect, three citizen-initiated measures appeared on the ballot. One sought to allow the consolidation of city and county governments in large metropolitan areas; another proposed to outlaw bookmaking; and the third tried to establish a single tax to support local, state and federal government. The voters rejected all three propositions.

The next ballot, in November 1914, contained 17 initiatives—the largest number of initiatives ever to appear on a single California ballot.[37] As in the 1912 election, these initiatives were not concerned with government corruption or the regulation of monopolies. Instead, they addressed prohibition, an eight-hour work day, a six-day work week, prize fights and an assortment of bond measures and minor governmental matters such as procedures for absentee voting. Voters rejected all but five.

Voters did, however, choose to make immediate use of the threat of a recall. The recall had originated in Los Angeles in 1903 at the insistence of John Randolph Haynes. It was first employed in that city following a scandal involving H. E. Huntington's street railway company. The city council agreed to sell the company three miles of land along the Los Angeles River at a bargain price and under false pretenses. The mere threat of a recall encouraged the council to reverse its decision, thus avoiding an actual ballot issue. A decade later, following statewide implementation of the Progressive program, two state legislators were removed from office for the first time through the recall.

The early history of the initiative demonstrated reluctance by citizens to use this new vehicle as an alternative legislative forum. But early experiences also revealed that the mere threat of being bypassed or repudiated by popular initiative or recall could be an important force in making public officials act honestly and responsibly.

According to historian Spencer Olin, "Hiram Johnson played the game of politics to win, and win he did; and because he won, California benefited from strong, vigorous leadership during the years 1911 to 1917. The success of Hiram Johnson's administration is measured chiefly by the way it devised machinery to meet the pressing political, social, and economic problems of the day."[38]

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[37] From 1913 through 1914, 27 initiative petitions were circulated, and 17 of these received enough signatures to qualify for the ballot. Only four petitions had been circulated in the previous election cycle (three qualified). There were many reasons for this dramatic upsurge in initiative activity, among them the novelty of a new legislative process and the full two years available for circulation of petitions between 1912 and 1914 (rather than one year from October 1911 to November 1912).

It should also be noted that while the 1914 general election ballot contained the largest number of initiatives in California history, initiatives at that time could only qualify for the general election ballot. In both 1988 and 1990, 18 initiatives qualified for the ballot in a single election cycle (combining the primary and general elections)—more than ever before. No election cycle since 1990 has surpassed that number, although a few have come close. In the 1996 primary and general elections combined, Californians saw 17 initiatives on the ballot, and 12 initiatives appeared on the ballots in each of the 1998, 2000 and 2004 election cycles.

[38] Spencer C. Olin, *California's Prodigal Sons: Hiram Johnson and the Progressives, 1911–1917* (Berkeley: University of California Press, 1968), 170–171.

CALIFORNIA VOTERS HAVE ENACTED NUMEROUS AMENDMENTS TO THE INITIATIVE PROCESS SINCE ITS INCEPTION

Over the years, Californians have accepted the initiative process as a permanent part of the state's political institutions. It has been modified a number of times, but with relatively few exceptions, these modifications have not been intended to restrict the people's right to formulate policy through initiatives.[39] Instead, they have been designed to limit abuses of the system. Few have proposed abolishing the initiative altogether. Nonetheless, critics of the initiative process have attempted from time to time to weaken California's system of direct legislation.

Californians have accepted the initiative process as a permanent part of the state's political institutions.

Early Unsuccessful Attempts at Modification

Between 1911 and 1922, opponents made 35 attempts to change or weaken the initiative process. One of the most serious threats came by initiative less than 10 years after the process's inception. Initiative opponents organized a group called the Anti-Single Tax League, playing on popular fear of a single tax, and qualified two separate initiative constitutional amendments, one in 1920 and another in 1922.[40] These efforts sought to increase the signature threshold for qualifying for the ballot any

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[39] Most structural changes to the initiative process were intended to preserve the system's integrity, such as the 1966 reduction in the signature threshold for statutory initiatives. Not all structural changes, however, were designed to improve the people's right to vote on public policy. Artie Samish, a self-proclaimed California political boss, once boasted about shortening the petition circulation period in order to protect the liquor industry from the grassroots Prohibition movement. Following an unsuccessful Prohibition ballot measure in 1948, Samish schemed to change the procedure for qualifying an initiative to the ballot: "I saw to it that the law pertaining to petitions was changed. Under the old law, the Drys could start taking signatures in 1940 and if they had enough by 1950 they could get their proposal on the ballot.

"The new law made it tougher. A group could file a petition with the attorney general for $200, then get a title from the secretary of state. [Instead of the previous unlimited circulation period] the group had 150 days to get the necessary signatures, with the right to petition for an additional 90 days. To qualify for a position on the ballot, 8% of the total vote of the last state election would be required.

"That made it terribly difficult for an initiative to qualify for the ballot. The expense of acquiring so many signatures in so little time was virtually prohibitive.

"Which is why the beverage industry was never threatened by local option thereafter." Arthur Samish and Bob Thomas, *The Secret Boss of California* (New York: Crown, 1971), 69.

In actuality, Samish grossly exaggerated the impact of a restricted circulation period and boasted of his own influence way beyond the facts. As early as 1943, the legislature had already restricted the circulation period to a potential maximum of two years. All qualification efforts were required to complete their drives within a single election cycle. Cal. Elec. Code § 1407 (West 1944). This time restriction obviously failed to deter qualification of the 1948 Prohibition initiative. And it was not until 1973 that the elections code was amended to restrict the circulation period to 150 days. Cal. Elec. Code § 3507 (West 1974), current version at § 9051 (2006).

[40] Henry George, a Populist in the late 1800s, proposed revising the tax system in the United States by imposing a single tax on the rise of real estate values. George believed that social inequities came from the system of private land ownership in which landowners could enrich themselves solely through the rise in property values. Land took on value not because of anything the owner did but because people

initiative relating to the assessment or collection of taxes. The 1920 ballot measure proposed increasing the threshold from 8% to 25% of votes cast in the last gubernatorial election. Such a high threshold would have made it virtually impossible to qualify a tax initiative. Voters resoundingly rejected the measure. The second attempt proposed a 15% signature threshold. John Randolph Haynes described the reasoning behind these measures:

> What is the real reason? We do not have to go far to find it. The proponents of Number 7 desire to get sole control of taxation. They know that the 210,000 signatures that are required under the 15 percent requirement can be obtained only by great interests with enormous financial or other resources at their demand, and that it would be utterly impossible for the people as a whole to secure that number of signatures. On the other hand, inasmuch as it requires a two-thirds vote of both houses to pass any basic tax measure, and inasmuch as fourteen members of the senate are a little more than one-third of that body, all the special interests will need to block legislation is to induce fourteen members of the senate to think as they do on any tax measure; and they recognize the fact that it is easier to control fourteen members of the senate than the entire electorate of California. Again, if they can destroy the people's use of the initiative in its most important function, taxation, it will be the beginning of efforts which will lead to the destruction of the entire initiative power of the people.[41]

An overwhelming proportion of the electorate agreed with Haynes and rejected this measure by an even wider margin than in 1920.[42]

Amendments to the Initiative Process

Following the adoption of the initiative process in 1911, few significant changes were made until 1943. Since then, most reforms have entailed minor attempts to improve the system or clarify omissions or inconsistencies in the law. These changes included:

1943 Prior to 1943, the state constitution gave circulators an unlimited period of time to gather the signatures necessary to qualify an initiative for the ballot.

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lived on it. Profits from land speculation, then, were seen by George as unearned income. Instead of allowing individuals to keep this unearned income, the single-tax proposal would have awarded the wealth to the state. Enough wealth could be accumulated by this single tax that any other taxes would become unnecessary. Additionally, George argued that by ending land speculation, the root causes of social inequality would cease to exist and individual enterprise could prosper with little need for government intervention in any other aspect of the economy. This was a popular idea among agrarians during the farm crises of the late 1800s, but as the Populist movement subsided in the early 1900s, the single tax became viewed as a confiscatory socialistic scheme.

[41] Quoted in Tallian, *supra* note 7, at 41.

[42] In November 1990, California voters also rejected a measure designed to limit the voters' right to change tax policy through the initiative process. Proposition 136, touted as a confirmation of the popular tax-cutting measure Proposition 13, would have required two-thirds voter approval of any initiative calling for an increase in special taxes. Since 1976, no initiative requiring revenues for programs has ever received two-thirds voter approval. Not even the popular Proposition 13 received two-thirds voter approval. Clearly, this initiative, like those of the Anti-Single Tax League, was designed to destroy the people's use of initiative in its most important function, control of taxation.

In 1943, the legislature enacted a law that effectively limited the circulation period to no more than two years.[43] Despite this early attempt by the legislature to limit the number of initiatives appearing on the ballot, it is doubtful that it had any major impact.

1946 The state constitution was ambiguous as to whether the legislature had the authority to place on the ballot proposed amendments to previously enacted initiatives. Voters ratified a constitutional amendment in 1946, requiring the legislature to propose amendments to initiatives or constitutional amendments, effective upon approval by the voters, unless the original initiative specified that the legislature could amend initiatives without voter approval.[44]

1948 An initiative measure titled the "California Bill of Rights" proposed regulations on a variety of matters ranging from gambling to reapportionment. This confusing measure never appeared on the California ballot. The California Supreme Court ruled that it was a constitutional "revision" rather than a constitutional "amendment" and therefore not eligible for a vote by the people.[45]

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[43] From 1943 to 1973, initiative proponents were required to submit "first petitions" within 90 days of receiving an official title and summary from the attorney general. Unlimited "supplementary petitions" could be submitted anytime thereafter, so long as all petitions were turned into the respective county clerks at least 130 days before the next general election. Petitions not submitted before that deadline were deemed invalid. Initiative proponents under this system could have had up to two years for a qualification drive. Cal. Elec. Code § 1407 (West 1944).

The maximum two-year circulation period required clarification by the courts. The elections code did not specify that petitions became invalid after the next general election. Instead, the law made reference only to the fact that a successful petition drive would qualify for the next general election ballot. This ambiguity led to a situation in which proponents of a retirement life payment amendment to the constitution submitted petition signatures 15,000 shy of the qualification threshold for the November 1940 ballot. Voter turnout for the 1942 gubernatorial race, however, was abysmally low, resulting in a sharp reduction of the number of signatures needed for ballot qualification in 1944. The number of signatures submitted for the retirement life payment qualification drive exceeded the new threshold, and so proponents pressed the state for placement of their initiative on the 1944 ballot. The California Supreme Court ruled that "framers of constitution never intended that initiative measures should remain alive year after year and qualify at a distant future election." *Gage v. Jordan*, 147 P.2d 387, 388 (1944).

[44] Cal. Const. art. II, § 10(c).

[45] *McFadden v. Jordan*, 32 Cal. 2d 330 (1948). Although no clear guidelines exist to help lawmakers distinguish between the two, complete restructuring of the constitution is generally known as a "revision," while smaller changes are known as "amendments." Constitutional amendments and constitutional revisions are treated by law as distinct entities. The California Constitution provides for constitutional *amendments* through initiatives, but it allows for constitutional *revisions* only through constitutional conventions or action by the legislature. Cal. Const. art. XVIII, § 2. The courts have respected the concept that amendments are to be treated differently than revisions. There are, however, no clear-cut guidelines for initiative proponents or the courts to follow in distinguishing an amendment from a revision. This determination is made on a case-by-case basis and is a matter of degree. In determining whether a change is a revision, "each situation must be resolved upon its own facts and change is not a mere amendment whenever less than all sections of the constitution are altered." *McFadden*, 32 Cal. 2d at 331. The line of demarcation is whether the change is within the lines of the original instrument, in which case it is an amendment, or broader in scope so as to substantially alter the purpose of the constitution, in which case it is a revision. For a fuller discussion, see Chapter 9.

It did, however, stimulate a successful 1948 constitutional amendment designed to limit every initiative to a single subject. The amended constitution now reads: "An initiative measure embracing more than one subject may not be submitted to the voters or have any effect."[46]

1949 The legislature amended the Elections Code in 1949 to require the legislative counsel to prepare analyses of all measures on the ballot. These 500-word explanations appear in the ballot pamphlet preceding the arguments for and against the measures. The Political Reform Act of 1974, an initiative, designated the legislative analyst, rather than legislative counsel, to write the analyses.[47]

1950 The constitution was amended in 1950 to disallow the naming of individuals to any public office by initiative. In the comprehensive constitutional revision of 1966, which was submitted to a vote for final approval, this provision was expanded to prohibit the naming of a specific private corporation to perform any function or have any power or duty.[48]

1957 When the initiative process was adopted in 1912, the secretary of state made all decisions regarding the order of placement of initiatives and all other measures on the ballot. A 1957 statute limited the secretary of state's authority to determine the ballot order of legislative ballot measures. Ballot positions for initiatives and referenda were to be determined by the order in which they qualified. A 1976 statute removed any remaining discretion by the secretary of state over ballot order. Even legislative ballot measures (measures placed on the ballot by the legislature) now appear in order of their approval by the legislature and are placed before initiatives on the ballot.[49] (Because this is a statutory provision, the legislature can pass bills which override this provision so that particular measures are designated with specific ballot numbers—such as Proposition 1.)

1966 Prior to 1966, the signature threshold for both statutory and constitutional initiatives was 8% of the votes for governor in the previous election. While signature requirements for constitutional amendments remained the same, the threshold requirement for initiative statutes was lowered to 5%, partly in response to the enormous number of signatures required and partly to encourage the submission to popular vote of statutory rather than constitutional initiatives.[50] In the same package of constitutional and election law changes, the indirect initiative was abolished.[51] For further discussion of the pros and cons of the indirect initiative process, see Chapter 3.

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[46] Cal. Const. art. II, § 8(d).

[47] Cal. Elec. Code § 9087 (2006); Cal. Gov't Code § 88003 (2006).

[48] Cal. Const. art. II, § 12.

[49] Cal. Elec. Code § 13115 (2006).

[50] Cal. Const. art. II, § 8(b).

[51] The "indirect initiative" was created as an alternative procedure in which proponents could submit their initiatives, once they had qualified, to the legislature for possible approval prior to a popular vote. If the legislature adopted the measure, it would be withdrawn from the ballot. Proponents were given an incentive to pursue the indirect rather than direct route: a lower signature requirement (5% as opposed

1968 Although the California Constitution seems to imply that initiatives should be submitted to the voters only during general or special elections,[52] initiatives began appearing on primary election ballots following a 1968 statutory provision that led to placement of legislative bond measures on primary ballots without a consolidated special election.

1973 An almost unnoticed but dramatic restriction on the initiative process occurred in 1973 when the legislature limited the circulation period for ballot qualification to no more than 150 days.[53] This statute amended the prior time limit of up to two years that had been in effect since 1943. Prior to 1943, California had allowed an unlimited period of time for circulation of initiative petitions.

1974 The Political Reform Act of 1974 ushered in sweeping changes in the conduct of initiative campaigns, ranging from expenditure limits (later invalidated by the courts) to campaign finance reporting requirements. Although portions of this act were ruled unconstitutional,[54] many significant elements were retained, including California's campaign finance reporting requirements, which are among the most extensive in the nation. The act also required improvements in the readability of the ballot pamphlet and provided voters with expedited court review of any inaccuracies in the pamphlet. It prevented counties from requiring initiative petitions to include the precinct number for each person signing the petition. "Precincting" had been an onerous burden, especially for volunteer circulators.

1975 The Elections Code was amended in 1975 to require that the attorney general include a fiscal impact analysis of a proposed measure in the official ballot title.[55]

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to 8% of those voting in the last gubernatorial election). Despite this incentive, however, the indirect initiative process was rarely used because the filing procedures required a nearly two-year delay before action could be taken on an initiative. Between 1934 and 1966, 19 titled initiatives attempted the indirect route in California. Of these, only four qualified for a legislative hearing and just one, a 1936 fishing control measure, was approved by the legislature.

[52] No provision in the state constitution or Elections Code permits initiative measures to appear on primary election ballots. In fact, the constitution specifies that initiatives are to appear "at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election." Cal. Const. art. II, § 8(c). For further discussion of how initiatives began appearing on California's June ballot, see Chapter 5.

[53] Cal. Elec. Code § 3507 (West 1974), current version at Cal. Elec. Code § 9051 (2006).

[54] In deference to the landmark U.S. Supreme Court ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), state courts have struck down several provisions of the California Political Reform Act of 1974. The California Supreme Court voided expenditure ceilings on ballot propositions in *Citizens for Jobs and Energy v. FPPC,* 16 Cal. 3d 671 (1976). In *Hardie v. Eu,* 18 Cal. 3d 371 (1976), the court struck down provisions that limited expenditures for circulation of petitions. In later rulings, the U.S. Supreme Court in 1981 nullified a Berkeley, California municipal ordinance that established contribution limits for proponents and opponents of ballot measures. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). For further discussion of these cases, see Chapter 8.

[55] Cal. Elec. Code § 9005 (2006).

1976 When initiative petitions are submitted to the counties, the secretary of state orders the counties to determine the number of valid signatures on the petitions by comparing signatures and written addresses with county registration records.[56] Prior to 1976, every signature had to be individually verified. A random signature-sampling system was established in 1976, substantially reducing the workload. The next section of this chapter provides a more detailed explanation of California's current signature verification process.

1982 Initiative measures in different elections were often given the same proposition number, creating some confusion. This procedure was changed in 1982. Proposition numbers were not to be repeated within any 20-year period until 1998, when the legislature would revise this section of Elections Code once again.[57]

1989 In 1989, the legislature began to require that the ballot pamphlet discuss the state's current bonded indebtedness situation in order to help voters make more informed fiscal decisions when deciding on ballot measures. The ballot pamphlet must now include the current dollar amount of the state's bonded indebtedness, the approximate percentage of revenues consumed by that indebtedness, and the expected impact if voters approve the bonds on the current ballot.[58]

1990 Since 1990, initiative petitions have been required to include the text, "NOTICE TO THE PUBLIC: THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK."[59]

1991 The state attorney general typically prepares the title and summary of each proposed ballot measure. In 1991, the legislature amended Elections Code so that the legislative counsel must perform this duty when the attorney general is a proponent of a proposed measure.[60]

1992 Historically, ballot pamphlets had presented voters with long, complex descriptions and analyses of each ballot measure, thereby limiting the pamphlet's audience to voters who could set aside enough time to understand the content. Based on a 1992 recommendation from the Center for Governmental Studies (CGS) and the California Commission on Campaign Financing,[61] the secretary of state began to supplement the ballot pamphlet with simplified, concise summaries and pro and con arguments for each measure. In 1993, the legislature officially codified into law a requirement that the ballot pamphlet include summary statements of the effects of yes and no votes, written by the legislative analyst.[62]

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[56] Cal. Elec. Code § 9030-1 (2006).
[57] Formerly Cal. Elec. Code § 10219.5 (1990), current version at Cal. Elec. Code § 13117 (2006).
[58] Cal. Elec. Code § 9088 (2006).
[59] Cal. Elec. Code § 101 (2006).
[60] Cal. Elec. Code § 9003 (2006).
[61] The California Commission on Campaign Financing was a project of the Center for Responsive Government, a predecessor of the Center for Governmental Studies (CGS).
[62] Cal. Elec. Code § 9085 (2006).

1995 The legislature added the requirement that, in cases where either pro or con arguments for a ballot measure have not been prepared and filed, the secretary of state must issue a general press release at least 120 days prior to the election soliciting the voters to supply ballot arguments regarding any ballot measure.[63] The secretary of state then chooses which arguments will appear in the ballot pamphlet.[64]

1998 Beginning with the November 3, 1998 general election, the Elections Code required that all state ballot measures in all elections must be numbered in a continuous sequence starting with the number 1 and continuing in numerical sequence for a period of ten years. After each ten-year cycle, the numbering sequence recommences with the number 1.[65]

2001 Petition circulators once had to be voters registered in the same jurisdiction of the governmental entity to which the initiative or referendum measure would apply. In 1999, however, the U.S. Supreme Court decided that requiring petition circulators to be registered voters was unconstitutional, as it inhibits petition circulators' freedom of speech.[66] Accordingly, in 2001 the California State Legislature expanded the qualifications for circulators of initiative and referendum petitions to include anyone *eligible* to register to vote anywhere in the state.[67]

2002 Assembly member Kevin Shelley introduced a successful bill, Assembly Bill 2932, requiring proponents and paid circulators to file statements with the attorney general's office vowing to use petition signatures only to qualify an initiative for the ballot and not for other purposes, such as mailing or fundraising efforts. Petitions were required to state that using signatures for other purposes was a misdemeanor and that suspected misuse should be reported to the secretary of state.[68]

Current Elements of the Initiative Process

Most ballot measures are placed on the ballot by the legislature rather than by citizen petitions. The California State Legislature frequently uses its authority to put measures on the ballot in the form of legislative referenda, bond measures and constitutional amendments. The initiative process, on the other hand, requires citizen-initiated ballot measures.

Proponents of an initiative must first submit the text of any proposed measure to the office of the attorney general and pay a filing fee of $200 prior to the petition circulation process. The filing fee is intended to finance part of the state costs associated with the submission of initiatives and to discourage frivolous proposals. It is refunded to proponents upon successful qualification. The filing fee was set in 1942 and has not increased since that

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[63] Cal. Elec. Code § 9060-1 (2006).
[64] Cal. Elec. Code § 9067 (2006).
[65] Cal. Elec. Code § 13117 (2006).
[66] *Buckley v. American Constitutional Law Foundation, Inc.*, 486 U.S. 414 (1988).
[67] Cal. Elec. Code § 9021 (2006).
[68] Cal. Elec. Code § 9607-10 (2006).

date, even though the California Attorney General's office estimates that it now costs an average $2,042 to prepare the title and summary for an initiative.

The attorney general prepares a title and brief (100-word) summary of each initiative. If the proposal has any fiscal impact on state or local government, the Department of Finance and the Joint Legislative Budget Committee prepare a fiscal impact statement and include it in the official summary. The title and summary must be printed on each petition. The secretary of state maintains a calendar of petition filing dates that mark the 150-day deadline for petition circulators to collect the required number of signatures for ballot qualification. Constitutional amendments require a number of signatures equivalent to 8% of the total votes cast in the last gubernatorial election; statutory initiatives and referenda require 5%. Initiatives are placed on the ballot at the next statewide election held at least 131 days (31 days for referenda) between the time of qualification and the election date when voting on the measure will take place.[69]

Most ballot measures are placed on the ballot by the legislature rather than by citizen petitions.

Each petition for an initiative or referendum must contain signatures from registered voters in only one county. Once collected, these petitions are submitted to the appropriate county clerks for verification. The counties forward their count of raw signatures to the secretary of state, who then determines if the total number of raw signatures amounts to at least 100% of the required qualification threshold. If so, the counties conduct a random sample check for valid signatures with voter registration records. Approximately 5% of the raw signatures are checked. If the percentage of valid signatures in the sample indicate a high likelihood that proponents have gathered 110% of the required signature threshold, the measure is automatically placed on the ballot. If the sampling indicates that proponents have less than 95% of the threshold, the measure fails to qualify. If the sample indicates a figure somewhere between 95% and 110%, then each signature must be individually verified.[70]

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[69] Procedures for petitioning for a recall are different from those for initiatives. At the state level, a recall petition must gather 12% of the total vote cast for that same office in the last general election within a period of 180 days. If the petition drive is successful, a special election is held with a two-part ballot. At the top of the ballot, voters are asked whether the official should be recalled. At the bottom is a list of various candidates wishing to replace the official. Each candidate must have gathered signatures of 1% of the vote cast in the last election in order to qualify as a nominee. The officeholder, of course, cannot be listed as a candidate. A simple majority vote determines whether the official is recalled. If the official is recalled, the candidate who collects the most votes is elected to serve out the remainder of the term. The signature threshold has discouraged most attempts to recall statewide officials. With the successful recall of Gray Davis, however, attempts to recall statewide officials may become more frequent.

[70] Proposition 68, the campaign finance reform measure approved by voters on the June 1988 ballot, barely survived the signature verification process. Petitions for the measure were submitted to county clerks in 1986. The random check showed less than the 110% validity threshold needed for automatic qualification. Verification of each signature by the counties resulted in a determination that an insufficient number of valid signatures had been collected and thus the measure failed to qualify. Proponents spent roughly $50,000 of their own money to recheck the petitions and found several thousand valid signatures that had not been counted. The initiative petition was deemed sufficient by the secretary of state and the proposition was then placed on the next statewide election ballot and approved by a 53% vote. Proposition 68 was derived from a model law proposed by the California Commission on Campaign Financing, a project of CGS.

By law, the signatures on petitions must be kept confidential.[71] Names and addresses cannot be used for mailing or fund-raising objectives. Direct mail signature-gathering services have been able to get around this law by designing a petition with a tear-away coupon for fund-raising or including a separate fund-raising envelope. In this manner, direct mail services not only gather signatures to qualify an initiative but also raise funds to defray the high costs of this signature-gathering method. Recently, initiative proponents have also begun distributing initiative petitions via e-mail to expedite and minimize the costs of signature gathering; e-mail recipients simply download the petition, sign it and mail it back to the proponents at their own cost.

All initiatives that qualify for the ballot can pass by a simple majority of those voting on the measure.

All initiatives that qualify for the ballot can pass by a simple majority of those voting on the measure, including measures (such as constitutional amendments) that would otherwise require a two-thirds vote in the state legislature. Initiatives are required to address only one subject. If an initiative receives more yes than no votes, it becomes law. If major provisions of two or more propositions approved at the same election are in conflict, the measure receiving the most yes votes prevails in its entirety (see Chapter 9).

The legislature is prohibited from amending laws established by initiative unless the initiative itself allows legislative amendments. Since 1990, about 79% of all voter-approved initiatives have permitted legislative amendments under stipulations spelled out in the initiative. Frequently, initiatives will specify that legislative amendments can only be made if they further the purposes and intent of the measure. More often, initiatives require a supermajority vote of the legislature for amendment (see Chapter 3).

Constitutional amendment initiatives may be changed only through voter approval of another constitutional amendment. The legislature is always free to submit changes to any voter-approved measure—statutory or constitutional—to the electorate for approval (although a constitutional amendment requires a two-thirds vote by the legislature to be placed on the ballot).

Initiatives are also subject to constitutional review by the courts. Since 1911, several initiatives and individual initiative provisions have been ruled unconstitutional and void. Occasionally the courts have conducted their review prior to the election and removed the initiative from the ballot; more frequently, they have conducted their review after a measure's passage (see Chapter 9 for a more detailed discussion).

Ongoing Efforts to Modify the Initiative Process

The initiative process described here has remained largely intact. Nevertheless, efforts to amend the process have persisted.

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[71] Cal. Elec. Code § 18650 (2006). The statute providing for the confidentiality of petitions arose from concerns expressed by proponents of the 1972 marijuana decriminalization initiative (Proposition 19). Many voters expressed reluctance to sign the initiative petition out of fear that their names would be transmitted to police enforcement agencies or the media; interview with Deborah Seiler, consultant, Senate Elections Committee, in Sacramento, California, August 8, 1990. A constitutional challenge to the confidentiality statute was rejected by an appellate court. *Bilofsky v. Deukmejian*, 124 Cal. App. 3d 825 (1981).

During the last 15 years, various public leaders, policy groups and commissions have recommended improvements to the initiative process, and legislators have introduced numerous amendments—most of which failed. Although there had been previous attempts to review the initiative process, the most comprehensive analysis to date was the first edition of this book, written by CGS and the nonprofit California Commission on Campaign Financing in 1992. The commission recommended 30 ways to improve the ballot initiative process, addressing all aspects of the process from drafting and signature gathering to voter information and campaign financing.

Since 1992, other groups have also examined the initiative process and proposed changes, including former state Assemblyman Jim Costa's Citizen's Commission on Ballot Initiatives in 1994. Reform proposals also emanated from former state Senator Lucy Killea's (D-San Diego) California Constitution Revision Commission in 1996 and the League of Women Voters in 1999.[72]

In the most recent major attempt to identify and address current problems with the initiative process, former California Assembly Speaker Bob Hertzberg (D-Van Nuys) gathered a 30-member nonpartisan commission to assess and improve the initiative process in 2000. Speaker Hertzberg summarized the commission's concerns with the process:

> Those who gave California's voters this powerful tool for reform would have a hard time recognizing the initiative process we know today, where powerful interests clutter the ballot with contradictory proposals incapable of passing constitutional muster. I want to find ways to restore public confidence in the process.[73]

Hertzberg's commission published its final report in January 2002. It included several recommendations for how to improve the initiative process and make it more responsive to voters.[74] The chief recommendation was to establish an indirect initiative process in California. The other nine suggestions ranged from requiring that campaign finance information about the initiative's proponents be disclosed during the circulation period to strengthening the single subject rule. None of these recommendations was implemented.

In addition to initiative commissions, legislators have introduced several bills since 1992 in an attempt to amend the initiative process, most of which died or failed at some point in the legislative process. In the 2005–06 legislative session alone, former Secretary of State Bruce McPherson, a bipartisan group of lawmakers and the League of Women Voters proposed a package of such bills. Assembly Bill 2460 would have required all initiative petitions to use exactly the same language as the language in the summary approved by the attorney general. Senate Bill 1715 would have more than doubled the initiative circulation period, extending it from 150 to 365 days. And Assembly Constitutional Amendment 18 would have reestablished the indirect initiative process in California. None of the bills passed.

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[72] For a summary of recommendations from each of these commissions, see Fred J. Silva, "The California Initiative Process: Background and Perspective" (resource material for the Speaker's Commission on the California Initiative Process, November 2000).

[73] Speaker's Commission on the California Initiative Process, "About the Commission," www.cainitiative.org/about.html (accessed December 6, 2006).

[74] Speaker's Commission on the California Initiative Process, *Final Report*, January 2002.

CONCLUSION: THE INITIATIVE SYSTEM IS AT A CROSSROADS

The initiative, referendum and recall in California were designed to give citizens tools to maintain a degree of control over public policy and the state's political agenda. The Progressives sought to provide a means for citizens to overrule the influence of special interest groups and keep the government in check. The initiative process was not meant to replace representative democracy but to supplement it.

California voters have approved ballot initiatives with caution. Prior to the 1980s, voters approved only about one-third of all initiatives placed on the ballot. A somewhat different pattern prevailed throughout the 1980s, and in the 1990 primary election, when voters approved close to half of all qualified initiatives. That election proved to be an aberration, however. In the November 1990 election, voters again demonstrated caution, approving only three of 13 initiatives and only 39% of all ballot initiatives throughout the entire decade. The average approval rate between 2000 and 2006 has dipped even further to 30%.[75]

Elimination of California's initiative process has never been seriously considered. But pressures to modify the system of direct democracy continue as more and more significant state policies emerge from the initiative process and problems with the process grow. For example, qualification costs have soared beyond the means of all but well-funded groups or wealthy individuals. Special interests are increasingly willing to spend large sums of money to place their issues before the voters, thus contributing to an increasingly long and complex ballot and flooding the system with dollars, consultants and campaign professionals.

The growing reliance on ballot initiatives to formulate public policy in California has provoked legislators and other critics to mount a serious effort to curtail, or at least modify, the use of initiatives. Additionally, voters have mixed feelings about initiatives. Nearly half, or 47%, of likely voters express "not too much confidence or none at all in their fellow voters' ability to make policy at the ballot box" according to 2006 poll results from the Public Policy Institute of California.[76] And the 2006 CGS-sponsored poll indicates that 67% of voters believe that the initiative process should be reformed.[77]

Nevertheless, initiatives are here to stay. The recent PPIC poll also shows that seven in ten likely voters are either "somewhat" or "very" satisfied with the initiative process.[78] Similarly, the CGS poll indicates that 80% of voters think the process is either "probably" or "definitely" a good idea.[79] If popular support for direct democracy is to be preserved, however, Californians need to reexamine their continuing need for the initiative and modify it in ways that will preserve its best features for the future.

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[75] This percentage includes the results from Governor Arnold Schwarzenegger's 2005 special election, in which voters rejected all eight measures on the ballot. Excluding the special election, the average approval rate for ballot initiatives from 2000 to 2006 was 36%.

[76] Mark Baldassare, *Californians and the Future*, statewide survey conducted by the Public Policy Institute of California, November 2006, 12.

[77] Center for Governmental Studies (CGS), *Random Digit Dial Survey and ARS Study*, conducted by Fairbank, Maslin, Maullin & Associates and Winner & Associates, June 2006, 12.

[78] *Id.*, 26–27.

[79] CGS, *supra* note 77.

CHAPTER

2

The Growing Impact of Ballot Initiatives

The initiative, created by the California Progressives in the first decade of the 20th Century . . . [has] become not an alternative, but the very essence of major policy-making in California.

—Peter Schrag, Political Commentator[1]

SUMMARY

Initiatives have touched nearly all aspects of California life, from political reform to taxation to environmental protection. Use of the initiative process began in 1911 but began to accelerate in the 1970s and reached a peak in the 1990s, with 381 initiatives in circulation and 61 initiatives on the ballot during that decade.

Causes of the growth in initiative activity include government inaction, conflicts between business and other special interests, use of the initiative process by candidates, officeholders and wealthy elites, and easy access to a booming initiative industry.

Despite its widespread use and popularity, the initiative process faces many criticisms: that it undermines legislative power and procedures, generates poorly-drafted or ill-considered proposals, encourages high-spending and deceptive campaigns, permits excessive special interest influence, has become too professionalized, encourages single-issue politics, generates voter confusion and overload, discourages compromise and invites corruption and manipulation.

Supporters of the initiative process defend it, arguing that it allows the public to circumvent the governor and legislature when necessary, neutralizes the power of special interests, overcomes resistance to government and political reforms, stimulates public involvement in state issues and exerts pressure on the legislature to act responsibly.

This report concludes that the initiative process should be retained because the pressures that gave rise to the initiative in the first place still exist today. However, the initiative process needs significant improvements, which are discussed throughout the remainder of the report.

[1] Peter Schrag, "What If Jarvis Had Never Been Born?" *California Journal* 34 (June 2003):16.

When early 20th-century Progressives designed the ballot initiative process for California, they envisioned a clear policy-making relationship between direct democracy and the state's representative branches of government. State government would retain its role as chief policy generator; the initiative process would act as a safety valve, enabling citizens "to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact."[2]

The initiative process has become a major if not the principal generator of state policy.

In the last three decades, however, these respective roles have been reversed significantly. The initiative process has become a major if not the principal generator of important state policy, while state government often sits as an understudy responding to initiatives in a supplemental and reactive fashion. Columnist Dan Walters observes, "The legislature, at best, has become a political janitor, cleaning up the leavings of ballot measures."[3]

Over the past few decades, the governor, legislators and interest groups have begun to use the ballot initiative to further their own purposes. Once initiatives appear on the ballot, elected officials often use them as cover to look the other way on controversial issues. Alternatively, elected officials sometimes avoid working with other elected officials on policy issues by taking them to the ballot.

Qualified initiatives are also increasingly used as bargaining chips by well-heeled interests seeking to lobby the legislature, interests akin to those the process was originally designed to circumvent. As Walters further describes, "Whether we like it, or whether we were even aware we were doing it, we have institutionalized government-by-initiative, with major policy enacted either directly by the voters, or by the legislature under threat of initiative, a form of genteel political extortion."[4]

This shift in power within California has turned the electorate into a new and fourth branch of government. Unlike traditional models of state government, in which legislation is enacted by the legislature, signed by the governor and reviewed by the courts, the initiative process places legislative power directly in the hands of the people. It allows the voters to adopt legislation directly themselves, circumventing the legislature and governor altogether. Even the courts have assumed a deferential attitude toward ballot initiatives, expressing reluctance to interfere with the will of the people by overturning initiatives.[5]

As a consequence, many of the most important state public policy questions of the past thirty years—involving property taxes, insurance, education, income tax equity, transportation, the environment, water, crime prevention, cigarette taxes, government reform, the minimum wage, Indian gaming, stem cell research, affirmative action and other policy issues—have been enacted directly by the people and not by their elected representatives. Ballot initiatives have increasingly shouldered aside the legislative and executive branches of government, leaving them to play the role of disgruntled observers, vocal in their com-

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[2] California Special Election Ballot Pamphlet, "Arguments in Favor of SCA 22," October 11, 1911.

[3] Dan Walters, "Yeasty Ballot Being Brewed," *Sacramento Bee*, February 1, 1989.

[4] Dan Walters, "State's Case of Initiative Fever Rages on, With No Cure in Sight," *Sacramento Bee*, November 27, 2005.

[5] Although reluctant, the courts have overturned a select number of initiatives found to be unconstitutional. For a thorough discussion of initiatives and the process of judicial review, see Chapter 9.

plaints but powerless or unwilling to intervene. The electorate's position at center stage in the policy-making process has solidified California's position as a bellwether state, allowing voters to initiate trends in state policy that ripple across the nation.

Observers, however, have raised important questions about potentially negative impacts of policy making by initiative. Declining voter turnout, increasing dissimilarities between the demographics of the electorate and the larger population and the growing influence of money in the ballot initiative process all call into question the democratic character of democracy by initiative. Critics contend that ballot initiatives undermine normal state governmental processes. Supporters argue that they correct the excesses and shortcomings of the legislative process. All agree that the impact and influence of initiatives over statewide policy is substantial.

BALLOT INITIATIVES PLAY A PROMINENT ROLE IN SHAPING CALIFORNIA PUBLIC POLICY

Whether you love it or hate it, the initiative process is part of life in California.

—Kim Alexander, President/Founder California Voter Foundation[6]

The modern era of the initiative process began in 1978, a watershed year characterized by a dramatic upsurge in initiative activity and the historic passage of Proposition 13, the well-known anti–property tax measure that spurred a national tax reform movement. Proposition 13 "reinforced the notion that the initiative, not the Capitol, was the portal to power."[7] Since that time, 156 measures have qualified for the ballot, a number nearly matching all qualified initiatives over the prior 60 years. Of those 156 initiatives, California voters approved 62, tackling issues across virtually every area of statewide public policy and setting trends that have in some instances spread across the nation.

The Numbers of Initiatives Qualifying for the Ballot Has Grown Enormously but Has Recently Begun to Taper Off

Ballot initiative activity in the last 40 years has become even more intense than in the first decades following the enactment of the initiative process (see Table 2.1). From 1912 to 1919, 30 initiatives qualified for the ballot; from 1920 to 1929, the number increased to 35; and from 1930 to 1939, the number of qualified initiatives steadied at 36. During the war-dominated decade of the 1940s, ballot measure activity declined substantially (just 19 initiatives reached the ballot). The number shrank to 12 in the 1950s. The 1960s witnessed the lowest number of initiative measures to reach the ballot in a single decade (only nine).

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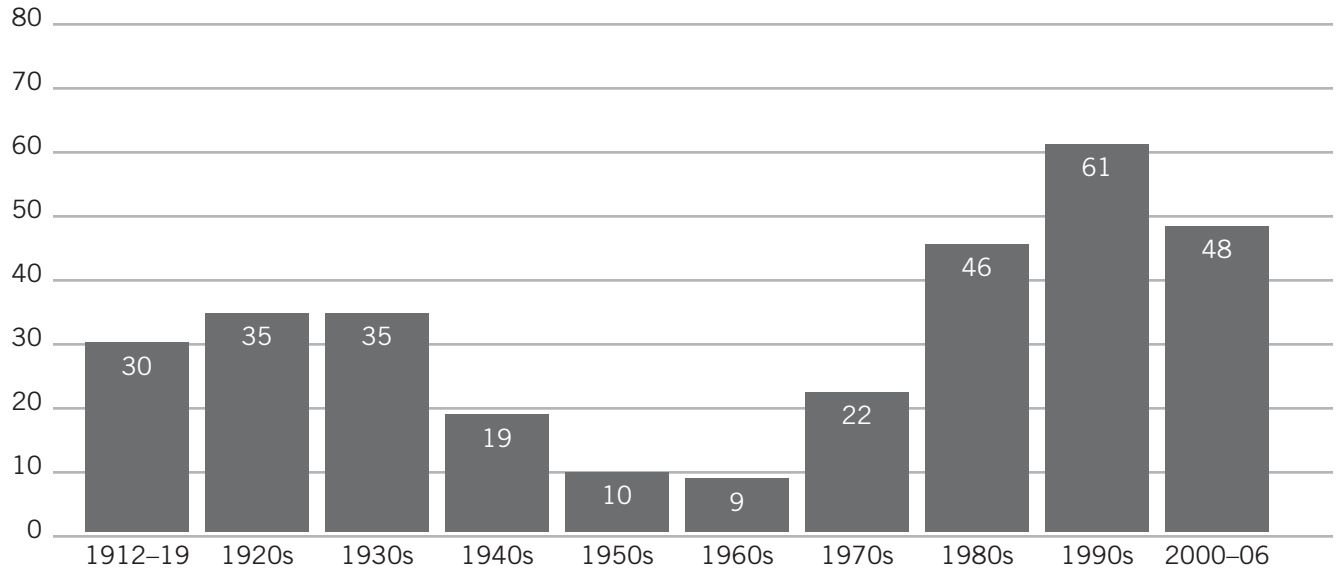
[6] Quoted in Bobby Caina Calvan, "Sun, Quakes—and Ballot Initiatives: California Democracy Tackles Any Issue," *The Boston Globe*. September 12, 2003.

[7] Stuart Leavenworth, "Initiative Kingpins, Hollywood Hustlers Have Kidnapped Hiram Johnson's Ballot Brainchild," *Sacramento Bee*, February 20, 2005.

TABLE 2.1 Number of Statewide Initiatives Qualified for the California Ballot* (1912 to 2006)



* Does not include indirect initiatives that qualified for legislative consideration but the legislature did not place on the ballot—an option available up until 1966.

Note: Two of the 46 initiatives in the 1980s were ruled unconstitutional by the California Supreme Court after qualifying for the ballot. The 2000s include election years between 2000 and 2006. During this period the California Supreme Court ruled one initiative unconstitutional after qualifying for the ballot.

Source: Center for Governmental Studies data analysis.

Beginning in the 1970s and persisting into the 21st century, a new culture of government-by-initiative has emerged. After 30 years of moderate-to-low initiative activity, 22 initiatives qualified for the ballot in the 1970s. In the 1980s, the number of qualifying initiatives rose to 46.[8] During the 1990s, 61 initiatives appeared on the ballot. Though the number of initiatives qualifying for the ballot during the 2000s is unlikely to match the high of the 1990s, 48 initiatives appeared on the ballot between 2000 and 2006, a pace in keeping with the overall trend of the last 40 years.[9] The final 2008 election cycle (with elections in February, June and November) is likely to bring this number up at least to the low to mid-50s.

One of the more dramatic changes in the history of direct legislation is the recent increase in the number of initiative proposals circulated for the ballot. The number of initiatives circulated in the 1970s broke all previous records by nearly threefold. That record in turn was broken in the 1980s as petitioners circulated 261 titled initiatives. The 1990s broke the record again with 381 circulated initiatives. The trend will likely continue. From 2000 to 2006 alone, petitioners circulated 355 initiatives.

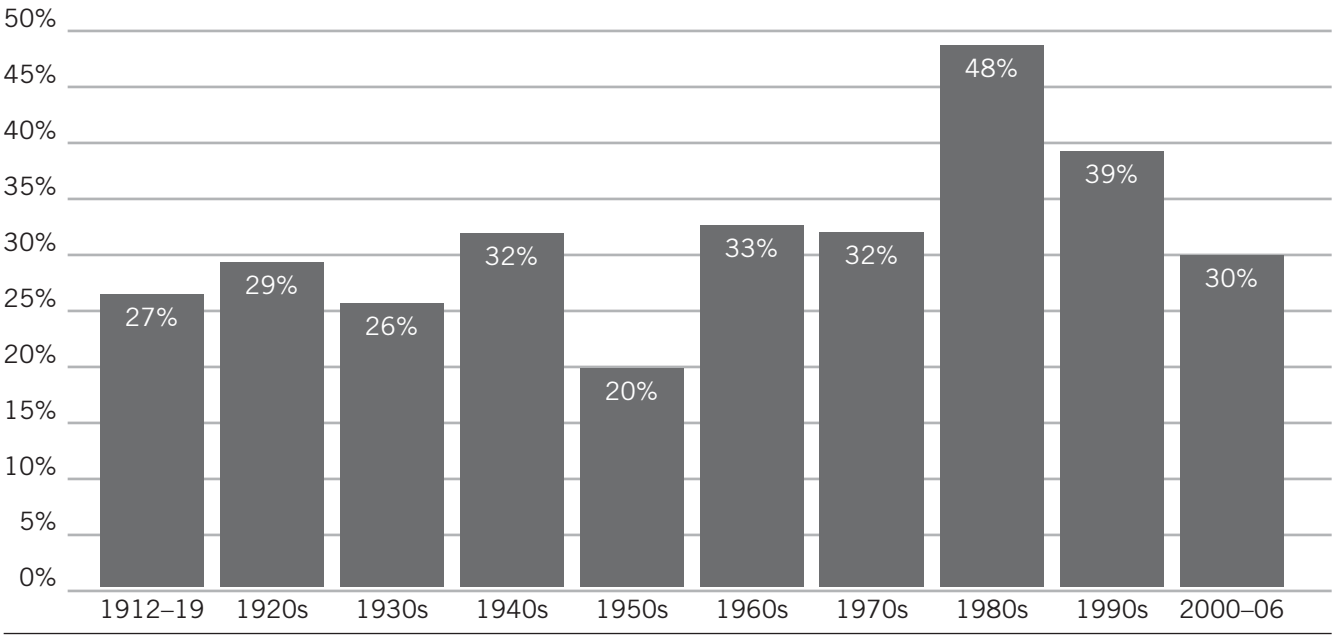
[8] Two of the 46 initiatives in the 1980s were ruled unconstitutional by the California Supreme Court after qualifying for the ballot. Forty-four initiatives actually appeared on the ballot during the decade.

[9] One of the 48 initiatives in the 2000s was ruled unconstitutional by the California Supreme Court after qualifying for the ballot. Forty-seven initiatives actually appeared on the ballot during this decade.

Declining Numbers of Initiatives Adopted in Recent Years

Over the 97-year history of the California ballot initiative process, the voters have approved 104 (or 33%) of a total of 312 balloted initiatives.[10] Before the 1980s, this approval rate did not vary substantially. In the 1980s, however, it began to rise, and voters approved nearly half (48%) of all initiatives they considered (see Table 2.2.). The rate of approval declined in the 1990s, although at 39% it remained substantially above 1970s levels. In the current decade, between 2000 and 2006, voter approval has dropped to 30% of initiatives on the ballot, below the average of 33% for nearly the last 40 years.

TABLE 2.2 Percentage of Balloted Initiatives Approved* (1912 to 2006)



* Calculations include only initiatives that appeared before voters.
Note: Includes special election of 2005, in which all measures on the ballot were voted down.
Source: Center for Governmental Studies data analysis.

[10] This figure (312 initiatives) does not include three initiatives that were ruled unconstitutional by the California Supreme Court after their qualification, but before they appeared on the ballot. One was the Sebastiani reapportionment plan originally slated for a 1983 special election. In *Legislature of the State of California v. Deukmejian,* 34 Cal. 3d 658 (1983), the court ruled that a state constitutional provision specifying that reapportionment may occur only once within a ten-year period following the federal census precluded a further change in district boundaries through the statutory initiative. In *AFL-CIO v. Eu,* 36 Cal. 3d 711 (1984), the "Balance the Federal Budget" initiative was removed from the November 1984 ballot, leaving four blank pages, even after it had already been assigned a proposition number and allotted space in the ballot pamphlet. The court reasoned that the initiative process was not a legitimate procedure for proposing amendments to the U.S. Constitution. In the landmark 1999 decision of *Senate of the State of California v. Jones,* 21 Cal. 4th 1142 (1999), the court ordered Proposition 24 removed from the ballot prior to the election, ruling that the initiative violated the "single subject rule," the first ruling of its kind in the state. The proposal, entitled the "Let the Voters Decide Act of 2000," dealt both with redistricting and reapportionment and with legislative compensation and reimbursements.

The approval rate from 2000 to 2006 appears to be significantly below the standard set in the prior two decades, dipping to its lowest level since the 1950s. This decline, however, results partly from the rejection of all eight initiatives on the November 2005 special election ballot. Observers closely link the poor performance of those initiatives with the governor's low approval ratings and a general rejection of his effort to circumvent the legislature, call a special election and place what turned out to be an unpopular reform agenda before voters. As reported by the Public Policy Institute of California (PPIC) shortly following the November election, 56% of special election voters disapproved of Governor Arnold Schwarzenegger's "overall performance," 58% disapproved of "his handling of government reform issues" and 60% disapproved of the "way he [was] using the initiative process to make public policy."[11] When the 2005 special election is excluded from calculations, the approval rate of the period rises to 36%, a percentage more closely in synch with the trend toward moderately higher rates over the past three decades.

Despite a dramatic rise in the prior two decades, the absolute numbers of initiatives approved appear to be in decline. Before the 1980s, the highest number of initiatives approved in any decade was 10 (in the 1920s). But during the 1980s and 1990s, voters approved initiatives in record numbers, 21 and 24 initiatives respectively (see Table 2.3). More initiatives were adopted in each of these decades than were adopted in the 1940s, 1950s, 1960s and 1970s combined. The current decade appears to represent a reversal of this trend. Between 2000 and 2006, only 14 initiatives were approved. This, however, may be due to the fact that voters have been confronted with an election in every year from 2002 to 2006, including the unpopular 2005 special election. Interestingly, no initiative has been approved in the primary since 2000, a period covering three election cycles.

Wide-Ranging Impacts Across Statewide Policy Issues

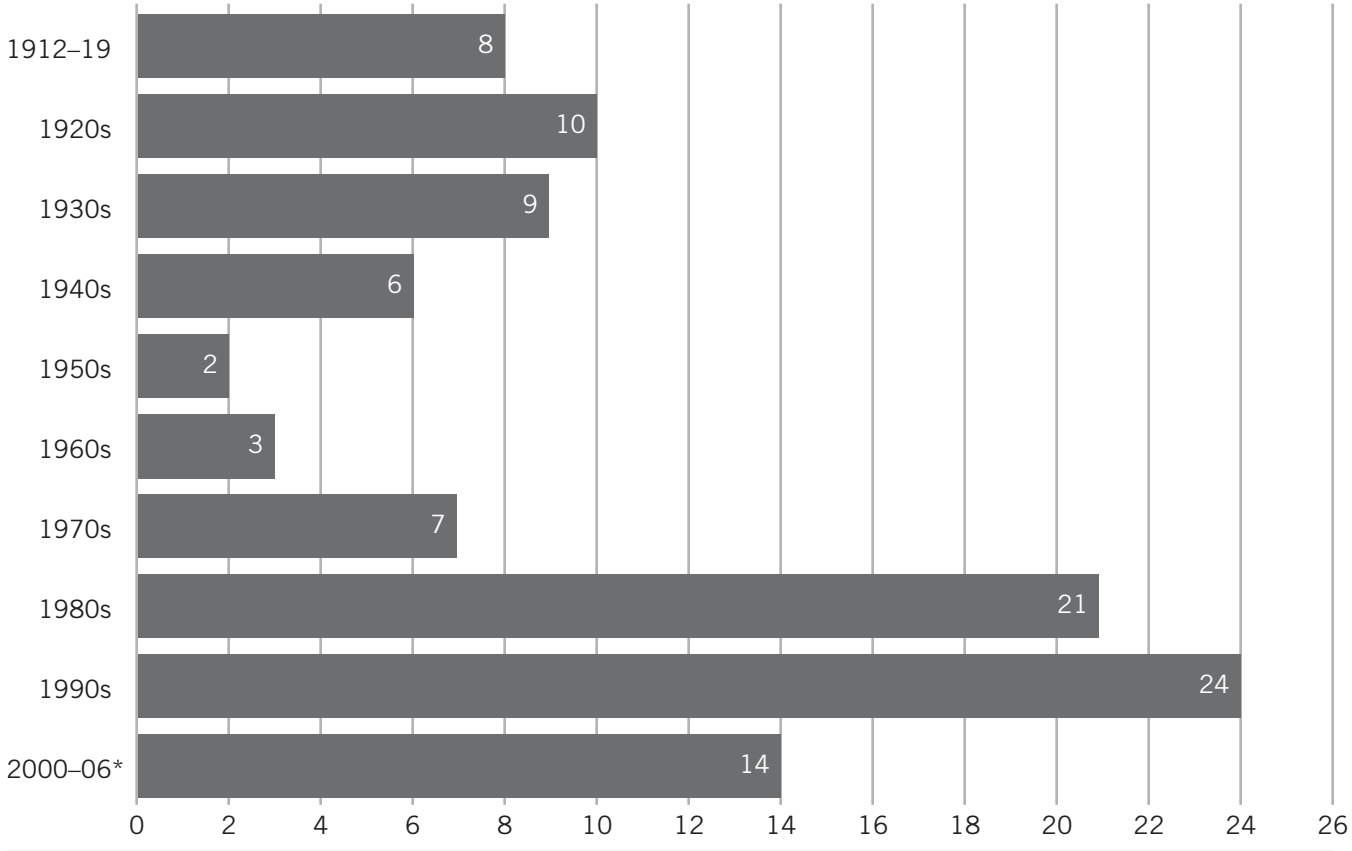
Since 1978, when Proposition 13 (property tax relief) triggered the surge toward greater reliance on ballot initiatives, Californians have used the initiative process to decide a host of important policy questions (see Table 2.4). One of the most far-reaching impacts of increased reliance on direct democracy, however, has been on the governmental process. Initiatives have addressed almost every aspect of governance—from taxes and the formulation of the state budget to term limits for state officeholders. The impact of ballot initiatives has rippled across other policy areas as well, often in flux with the most pressing concerns of the day.

Initiatives has addressed almost every aspect of governance—from taxes and the formulation of the state budget to term limits on state officeholders.

Fiscal policy making represents one of the most prominent aspects of state governance. Legislative control over state fiscal matters has been substantially diminished by three initiatives. Proposition 13 in 1978 curtailed property taxes and imposed strict requirements for future property tax increases. Proposition 4 in 1979 restricted the growth of the state budget, greatly reducing the legislature's ability to fund new state programs. Proposition 98 in 1988 mandated that at least 41% of the state's total budget be spent on education.

[11] Mark Baldassare, *Californians and the Initiative Process*, survey conducted by the Public Policy Institute of California, November 2005.

TABLE 2.3 Number of Initiatives Approved (1912 to 2006)



* 2000s include election years from 2000 through 2006.
Source: Center for Governmental Studies data analysis.

"Proposition 13 ushered in an era of fiscal policy making by initiative which has reduced the Governor and the legislature to bystander roles in shaping California's fiscal policy."[12]

On the other hand, voters have been willing to support specific tax increases to fund programs they like. As observed by Peter Schrag, author of *Paradise Lost: California's Experience, America's Future,* "Because the local property tax has, in effect, become a state tax, local jurisdictions fight each other in pursuit of [revenue streams] that they hope will keep their cops on the street and their firehouses open."[13] Voter response to this struggle has been to lash out repeatedly against higher taxes and fees, instead opting to approve pet-project spending often tied to specified revenue sources that further limit state and local government's ability to cope with fiscal crisis. According to Schrag, "Voters are much more likely to support tax increases targeted to spending that they support than revenues that are left to the discretion of a legislature they don't trust."[14]

[12] Sherry Bebitch Jeffe, "California's Budget Lotto: Sacramento Now Forced to Spend by the Numbers," *Los Angeles Times*, July 2, 1989.
[13] Schrag, *supra* note 1.
[14] Peter Schrag, "Two Initiatives Tackle Urgent Issues," *Torrance Daily Breeze*, February 2, 2006.

TABLE 2.4 Voter-Approved Initiatives (1992 to 2006)

Proposition	Subject	Election
162	Administration of Public Employees' Retirement System	1992 General
163	Tax Exemption for Specified Food Products	1992 General
164	Congressional Term Limits*	1992 General
184	Three Strikes for Convicted Felons	1994 General
187	Denial of Public Benefits for Undocumented Immigrants*	1994 General
198	Open Primary*	1996 Primary
208	Campaign Contribution and Spending Limits, Disclosure**	1996 General
209	Dismantling Affirmative Action	1996 General
210	Minimum Wage Increase	1996 General
213	Damage Recovery Limitations for Felons, Uninsured Motorists and Drunk Drivers	1996 General
215	Medical Use of Marijuana***	1996 General
218	Limitations on Local Government Taxation and Fee Assessments	1996 General
225	Congressional Term Limits*	1998 Primary
227	Restrictions on Bilingual Education	1998 Primary
4	Ban on Wildlife Traps and Specified Animal Poisons	1998 General
5	Indian Gaming*	1998 General
6	Ban on Slaughter and Sale of Horsemeat	1998 General
10	Tobacco Tax for Early Childhood Education Programs	1998 General
21	Juvenile Crime	2000 Primary
22	Definition of Marriage	2000 Primary
35	Use of Private Contractors for Public Works Projects	2000 General
36	Drug Treatment Diversion Program	2000 General
39	School Facilities Bonds	2000 General
49	State Grants for After-School Programs	2002 General
50	Water Projects and Wetlands Protection Bonds	2002 General
61	Children's Hospital Bonds	2004 General
63	Personal Income Tax on Millionaires for Expansion of Mental Health Services	2004 General
64	Enforcement Limits on Unfair Business Competition Laws	2004 General
69	DNA Sample Collection	2004 General
71	Stem Cell Research Funding	2004 General
83	Residence Restrictions and Monitoring of Sex Offenders	2006 General
84	Water, Flood Control, Natural Resource Protection and Park Improvement Bonds	2006 General

* Declared invalid after passage.
** Superseded by Proposition 34.
*** In *Gonzales v. Raich*, USSC: No. 03-1454 (2005), the Supreme Court ruled that state medical marijuana laws provide no protection against prosecution of medical marijuana users.
Source: Center for Governmental Studies data analysis.

There are several examples. In 1996, voters responded to local government's post–Proposition 13 scramble for alternative revenue sources with Proposition 218, which further limited their authority over revenue generation and increased local government dependence on state resources. Yet on its heels, voters approved a special tax on smokers to support early childhood education programs (Proposition 10).[15] This trend continued

[15] Proposition 10 also included funding for a smoking-prevention program; however, the initiative was widely marketed as an education proposal.

in 2002 when then-actor Arnold Schwarzenegger won approval for Proposition 49, which provided state grants for after-school programs. In 2004, the voters approved Proposition 63, an initiative that expanded mental health services, funded by a special tax on high-income earners. Propositions 39 (2000), 50 (2002), 61 (2004), 71 (2004) and 84 (2006) all authorized bonds for specified projects, funding improved school facilities, water quality and coastal wetland protection, children's hospital projects, stem cell research, water quality and park protection, respectively. Each of these initiatives, whether by preempting the government's power over fiscal matters or by directly authorizing expenditures from designated funds, limited legislative control over state fiscal matters. The length of this list highlights the continued era of fiscal policy making by initiative that began in 1978 with Proposition 13.

Throughout the history of ballot initiatives in California, reform topics have shifted in accordance with the needs of the times. As shown in Table 2.5, government and the political process was a primary target of initiatives from 1912 through 1939. Interest dropped from 1940 through 1979, but matters of government have enjoyed considerable attention ever since the 1980s. Issues of government and taxation have followed a similar pattern, drawing considerable attention from initiatives in the first two decades of direct legislation and renewed interest during the last 30 years.

These trends reflect periods of heightened voter dissatisfaction with government. In earlier decades, Californians were preoccupied with corruption in government. In the 1980s, government inefficiency and unresponsiveness became central themes that continue to resonate with voters. According to a 2006 survey, 47% of likely voters rate the legislature poorly in assessing its capability to deal with state problems.[16] Similarly, tracking of legislative approval ratings between 1983 and 2006 by the Field Poll reveals that voter confidence in legislature has remained low for quite some time. From 1983 to 2002, approval hovered around 40% and fell below 40% for the period from April 2003 through September 2006.[17]

Another revealing trend is the shift from initiatives concerning public morality to an emphasis on civil liberties and environmental protection. Civil rights, for example, were all but ignored in the first half century of the initiative, but interest began to build in the 1960s. Though few initiatives qualified for the ballot during that period, one-third of the measures that did appear pertained to civil rights, and this pattern has persisted in the ensuing decades. Interest in civil rights issues has continued through the 2000s, albeit at relatively lower levels when compared with other interest areas.

Environmental measures also represent an area of modern public concern. During the first 60 years of the initiative, only one measure could be categorized as an environmental protection proposal. Between 1970 and 2006, however, 17 such proposals appeared on the ballot, with heightened interest in the 1990s.

Regulation of business and labor was fairly prevalent during the first four decades of the initiative process and then dropped off during the 1950s through the 1970s. Though

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[16] Center for Governmental Studies (CGS), *Random Digit Dial Survey and ARS Study*, conducted by Fairbank, Maslin, Maullin & Associates and Winner & Associates, June 2006.

[17] Mark DiCamillo and Mervin Field, "Schwarzenegger Viewed More Favorably," Field poll release #22227, April 6, 2007.

TABLE 2.5 Subject Matters of California Initiatives (1912 to 2006)

Subject	1912–19	1920s	1930s	1940s	1950s	1960s	1970s	1980s	1990s	2000–06	*Total*	% of Total
Government & Political Process[1]	7	7	9	1	1	2	3	12	11	14	**67**	21%
Revenue, Taxation & Bonds	6	10	4	2	3	1	5	9	10	10	**60**	19%
Business & Labor Regulations[2]	6	2	6	6	2	2	2	7	10	3	**46**	15%
Health, Welfare & Housing[3]	2	7	6	5	2	0	1	7	10	6	**46**	15%
Public Morality[4]	9	6	7	3	1	1	3	2	1	2	**35**	11%
Environment & Land Use[5]	0	1	0	0	0	0	4	4	8	1	**18**	6%
Civil Liberties & Civil Rights[6]	0	1	0	1	0	3	1	3	3	2	**14**	4%
Education	0	1	1	1	1	0	1	1	5	5	**16**	5%
Criminal Justice[7]	0	0	2	0	0	0	2	1	3	5	**13**	4%
Total	**30**	**35**	**35**	**19**	**10**	**9**	**22**	**46**	**61**	**48**	**315**	—
% of Total	10%	11%	11%	6%	3%	3%	7%	15%	19%	15%	—	100%

[1] Includes voting, government regulation and administration, compensation for public officials and civil service, political reform and local government.
[2] Includes insurance industry regulation, tort reform, regulation of attorney's fees and minimum wage.
[3] Includes veterans' benefits, rent control, smoking regulations and parental notification.
[4] Includes liquor, gaming, the lottery, obscenity, marijuana legalization, gun control and nuclear weapons freeze.
[5] Includes nuclear power.
[6] Includes definition of marriage, affirmative action, immigrant rights.
[7] Includes sentence enhancements, sex offender residency restrictions, restrictions on damage awards to felons.
Source: Center for Governmental Studies data analysis.

business regulation initiatives increased over the course of the 1980s and 1990s, this trend appears to have slowed in the current decade.

A VARIETY OF POLITICAL DEVELOPMENTS HAVE SPURRED GROWTH IN THE USE OF INITIATIVES

[I]ncreasingly, in recent years, our political structures have generated something less than compromise, or perhaps, the ultimate in compromise—no action at all. . . . The result has been government by stalemate, failure to deal with critical issues and, ultimately, public frustration.

—Walter Zelman, Former Executive Director
California Common Cause[18]

Many trace the increase of initiatives to state government's inability or reluctance to address the major issues of the day. Interest groups and citizens are increasingly abandoning their attempts to enact legislation through the state legislature in favor of the initiative process. Even officeholders are choosing the initiative process as an arena to launch their proposals. And business groups, which have traditionally sought to advance their interests in the legislature, have now transferred substantial resources to the initiative process, funding multimillion dollar campaigns to back affirmative and counter initiatives.

This movement toward ballot initiatives parallels a steady decline of public confidence in the legislature's ability to govern. According to Mark Baldassare, president of the PPIC, "Voters' impressions of the dysfunctional relationship between the governor and the legislature, and the lack of state government attention to major issues influence their generally positive attitude about the initiative process."[19] PPIC statewide surveys conducted in 2006 found that "6 in 10 residents (59%) believe decisions made by voters through the initiative process are probably better than those made by the governor and the state legislators.[20] In fact, a separate PPIC survey revealed that many voters believe initiatives (39%) should have more influence over state policy as compared to the 32% and 18% who believe the same, respectively, about the legislature and governor.[21]

Governmental Inaction

Governmental inaction stands as a prime cause of increased initiative activity. Many initiatives can be traced directly to stalled legislative efforts. Property tax relief, for example, languished in the legislature before Howard Jarvis and Paul Gann sought reform with Proposition 13 in 1978. The $80 million automobile insurance reform battle in 1988 resulted from the legislature's inability to forge a compromise between competing consumer,

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[18] Walter Zelman, "California's Stalemated Government," *Sacramento Bee*, August 5, 1990.

[19] Baldassare, *supra* note 11.

[20] Mark Baldassare, *Californians and the Initiative Process*, statewide survey conducted by the Public Policy Institute of California, August 2006.

[21] Mark Baldassare, *Californians and the Initiative Process*, statewide survey conducted by the Public Policy Institute of California, September 2005.

trial lawyer and insurance interests. And the legislature deadlocked over addressing the issue of bilingual education for ten years before voters approved Proposition 227 in 1998.[22] Commenting on the increased use of the initiative process, California historian Kevin Starr remarks, "[Hiram Johnson] would be astonished at the breakdown of dialogue between the two major branches of government. . . . Basically, the legislature is putting itself in the position of becoming an irrelevant institution."[23]

A number of structural and political reasons exist for the deepening gridlock in the state capitol. California has been ruled by a divided government—a Republican governor and a Democratic-controlled legislature—for two-thirds of the past 40 years: from 1967 to 1975, from 1983 to 1999 (except for 1995–96 in the assembly), and from 2003 to the present (see Table 2.6). Beginning with Governor George Deukmejian's administration, the number of ballot initiatives surged during each period of divided rule. The increasing recalcitrance of each branch and each political party to work together has defeated compromise on many important issues. Disappointed supporters of those interests have sought recourse at the ballot box. Supporters of initiatives know the legislature needs a two-thirds vote to override a gubernatorial veto. Obtaining a simple majority vote at the polls is easier.

Procedural restraints also thwart legislative solutions. California, for example, is one of only a few states whose constitution requires the legislature to adopt fiscal measures by a two-thirds vote, and the constitution requires the vote to be of the total legislative membership, not just those members voting. This archaic procedural obstacle has allowed minority factions in either house to block legislative measures desired by clear majorities.

TABLE 2.6 Unified versus Divided Rule (1959–2007)

Period	Governor(s)	Type of Government	Number of Initiatives	Average Per Year
1959–1966	Pat Brown	Unified	8	1
1967–1974	Ronald Reagan	Divided*	15	2
1975–1982	Jerry Brown	Unified	21	3
1983–1998	George Deukmejian Pete Wilson	Divided*	92	6
1999–2003	Gray Davis	Unified	18	4
2004–Present	Arnold Schwarzenegger	Divided	29	10

Total Years of Divided Government	27 years	136 Initiatives
Total Years of Unified Government	20 years	47 Initiatives

* From 1969–70 and 1995–96, Republican Governors Reagan and Wilson worked alongside a Republican assembly.
Source: Center for Governmental Studies data analysis.

[22] Ron Unz, "Why Initiatives Are Necessary: Some Tales from California," in *Democracy: How Direct? Views from the Founding Era and the Polling Era* (Lanham, Md.: Rowman & Littlefield, 2002).

[23] Quoted in John Marelius, "On a Historical Scale, This Batch Carries Weight," *San Diego Tribune,* October 3, 2005.

In frustration, proponents of such measures have turned to the initiative process, in which only a simple majority vote is required.

In addition, changes to some laws require constitutional amendments. The legislature can only place such amendments on the ballot by a two-thirds vote. Some proponents may conclude that a two-thirds legislative vote might be more difficult to obtain than circulating and qualifying a constitutional amendment themselves, which only requires a majority vote for passage.

Entrenched special interest influence over state government has also contributed to government inaction. Incumbents seeking to discourage challengers now raise massive campaign war chests in nonelection years, largely from contributors interested in affecting specific pieces of legislation. This ultimately results in reluctance on the part of legislators to take a stand on issues that may jeopardize their ability to raise campaign contributions or seek higher office.

The practice known as "taking a walk," or "staying off" a legislative bill by abstaining from the recorded vote, has become increasing common. According to John Diaz of the *San Francisco Chronicle*, "Today, when a populist measure encounters strong resistance from a well-heeled special interest, 'walks' are commonplace. Not voting is a convenient way for a politician to serve the wishes of big contributors, by helping kill legislation, without having to answer for a 'no' vote."[24]

Likewise, incumbents who are raising money from groups on both sides of pending legislative controversies are often reluctant to resolve those controversies for fear that campaign contributions will dry up. Ironically, while some legislative leaders decry the emergence of the initiative process as a major force in statewide policy making, their unwillingness to support serious campaign finance reform has indirectly contributed to larger numbers of initiatives as proponents increasingly go directly to the voters for an honest up or down vote.

In recent years, the backdrop to these structural problems has been a sharp increase in battles between special interests. Starting in the early 1980s, President Ronald Reagan's "New Federalism" shifted a number of key governmental programs to the states. "In some cases," commented Fred Silva, then chief fiscal advisor to state Senate President David Roberti, "the federal government dumped whole programs (such as health care) on state governments."[25] Competing interests took their legislative battles from the nation's Capitol to the state capitols. In California, lobbying expenditures jumped from $30 million in 1980 to over $100 million in 1990. These expenditures have only escalated over the years. In 2005, expenditures hit a record high of $227.9 million.[26]

These competing interest groups—using campaign contributions and armies of lobbyists—have grown in strength to a point where they can exert a *de facto* "veto power" over many pieces of legislation. Important bills stall in committee and never reach the

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[24] John Diaz, "Lost Legislators: Beyond the Budget, They're AWOL on Many Major Issues," *San Francisco Chronicle*, July 21, 2003.

[25] Telephone interview with Fred Silva, chief fiscal advisor to state Senator David Roberti, October 7, 1991.

[26] Office of Secretary of State Bruce McPherson, *Lobbying in California State Government* (Sacramento, June 2006).

assembly or senate floor for a vote. "I think you have to lay it at what I'd call 'lobbylock'—the balance of contending forces that keeps the legislature from dealing with major controversies," says former Assemblyman and State Republican Party Chair Robert Naylor. "Pretty soon you have a deadlock that is solved at the ballot box—maybe not solved, just dealt with."[27] On insurance, transportation, taxation, environment and government reform, competing groups found themselves in legislative standoffs. "Each [group] seems to have enough power to thwart the designs of others, but not enough to enact designs of its own," notes former California Common Cause executive director Walter Zelman.[28]

Conflicting Business and Special Interest Agendas

Conflicts between businesses and special interest organizations have also fanned the initiative fires. Stifled by legislative inaction, many lesser-funded groups have taken their issues to the ballot, only to be confronted with business-backed counter initiatives. The 2005 special election showdown between Proposition 78 and Proposition 79, both of which offered alternative discount prescription drug proposals, represents a classic example. When consumer groups that ultimately sponsored Proposition 79 hinted at circulating a more far-reaching measure than the governor proposed to the legislature, the issue became part of a complex web of special interest power plays. While consumer groups held back submission of their signatures in hopes of a legislative solution, drug companies, sensing a threat, submitted signatures first for an initiative version of the governor's proposal (Proposition 78), they poured money into several other initiatives aimed at other special interest adversaries—including unions and trial lawyers who were also thought to be supportive of the consumer groups' proposal.

Republican political consultant Dan Schnur described the actions that led up to the Proposition 78 and 79 fight as a typical example of the "'Untouchables' school of initiative politics, referring to the movie version of the law enforcement attempts to bring down Al Capone. They pull out a knife, you pull a gun. They send one of your guys to the hospital, you send two of theirs to the morgue."[29] In the end, voters rejected both measures. The pharmaceutical industry spent nearly $80 million on the campaign both to defeat Proposition 79 and advance its own Proposition 78. These resources dwarfed spending by the Proposition 79 campaign, which only registered around $2 million in expenditures.

Candidate and Officeholder Campaign Strategies

As far back as 1934, when then-Alameda County District Attorney Earl Warren sponsored a package of criminal justice reform initiatives, officeholders have used the initiative process to advance reforms—and their own careers. In more recent history, officeholders have sponsored initiatives almost as a standard practice, perhaps further demonstrating

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[27] Quoted in James Sweeney, "Ballot-Box Democracy Restyled State Politics During Decade," *Los Angeles Daily News*, December 29, 1989.

[28] Zelman, *supra* note 18.

[29] Quoted in Kate Folmar, "Big Money Put Behind Drug-Cost Campaign; Pharmaceutical Industry Wants to Seize Initiative," *San Jose Mercury News*, March 12, 2005.

the growing importance of ballot initiatives and the diminishing relevance of the legislative process.

Officeholders sponsor initiatives for three principal reasons. First, they hope to derive public support by visibly affiliating themselves with a popular issue. Second, they hope to tap additional sources of money, asking their contributors to give extra contributions to their initiative campaigns, which are not subject to contribution limitations. And third, they hope to motivate voters to go to the polls. As Joe Tayag of the Greenlining Institute observes, "it's getting harder to overlook how public officials and special interests are taking advantage of the initiative process. . . ."[30]

Governors and candidates for that office have demonstrated a distinct tendency toward the sponsorship of initiatives. In 1974, current Attorney General and then-Secretary of State Jerry Brown sponsored Proposition 9 and launched a successful campaign for governor. Sitting governors Ronald Reagan and Pete Wilson both used the process to promote their policy preferences. One commentator noted that when Governor Wilson was elected in 1990, he either sponsored an initiative or adopted one as the centerpiece of his platform every two years thereafter.[31]

Even before Arnold Schwarzenegger became the state's 38th governor, he was part of this trend. He successfully won funding for after-school programs (Proposition 49) in 2002 and ran for governor in the recall election the following year. In 2005, however, Governor Schwarzenegger became perhaps best-known for the practice when he called a special election to advance his personal "reform agenda," which consisted of a package of four initiatives. Prior to Schwarzenegger, "no governor had ever put what amount[ed] to a governing agenda on the ballot."[32] According to Jim Shultz, author of the *Initiative Cookbook*, "Schwarzenegger [took] the trend of governors using the initiative process and pumped it up with steroids."[33]

Other elected officials have employed the initiative process, although not always for campaign purposes (see Table 2.7). In 1992, for example, Assemblyman Richard Floyd served as a lead sponsor of Proposition 163, which eliminated the sales tax on candy and snacks. A trio of elected officials, including U.S. Representative Michael Huffington and Assembly members Bill Jones and Jim Costa, led the call for Proposition 184, California's "three strikes" initiative. More recently, state legislators Pete Knight (Proposition 22 in 2000), Darrell Steinberg (Proposition 63 in 2004) and George and Sharon Runner (Proposition 83 in 2006) have taken policy proposals to the voters when their proposals either stalled in the legislature or passed as unsatisfactory compromise legislation.

Agenda of Wealthy Elites and Well-Known Individuals

As the number of wealthy individuals and groups have grown, so too has their use of the initiative process as a means to influence public policy. Many wealthy individuals have

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[30] Joe Tayag, "Reforming the Reformer's Tool" (issue brief for the Greenlining Institute, August 2005).

[31] Vlae Kershner, "Democracy Gone Awry: Explosion of Initiatives Lets Voters, Not Elected Leaders, Steer State," *San Francisco Chronicle*, May 18, 1998.

[32] Marelius, *supra* note 23.

[33] *Id.*

TABLE 2.7 Officeholder-Sponsored Initiatives (1992 to 2006)

Sponsor	Proposition	Subject	Year
Assemblyman Richard Floyd & Assemblywoman Jackie Spier	Proposition 163	Elimination of Tax on Candy and Snacks	1992 General
Governor Pete Wilson	Proposition 165	Reduction in Welfare Payments	1992 General
U.S. Representative Mike Huffington Assemblymen Bill Jones & Jim Costa	Proposition 184	Three Strikes for Convicted Felons	1994 General
Assemblyman Richard Mountjoy	Proposition 187	Denial of Public Benefits for Illegal Immigrants	1994 General
U.S. Representative Tom Campbell	Proposition 198	Open Primary	1996 Primary
Governor Pete Wilson	Proposition 209	Dismantling Affirmative Action	1996 General
Insurance Commissioner Chuck Quackenbush	Proposition 213	Uninsured Motorist and Drunk Drivers	1996 General
Los Angeles Mayor Richard Riordan	Proposition 223	Spending Limits on Administration in Public Schools	1998 Primary
Governor Pete Wilson	Proposition 226	Regulation of Union Dues for Political Activities	1998 Primary
Governor Pete Wilson	Proposition 8	Class Size Reduction	1998 General
Governor Pete Wilson	Proposition 21	Trial of Juveniles as Adults	2000 Primary
State Senator Pete Knight	Proposition 22	Definition of Marriage	2000 Primary
Assemblyman Darrell Steinberg	Proposition 63	Tax on Millionaires to Fund Mental Health Services	2004 General
Governor Arnold Schwarzenegger	Proposition 74	Teacher Tenure	2005 Special
Governor Arnold Schwarzenegger	Proposition 75	Regulation of Union Dues for Political Activities	2005 Special
Governor Arnold Schwarzenegger	Proposition 76	Government Spending Limits and School Funding	2005 Special
Governor Arnold Schwarzenegger	Proposition 77	Redistricting	2005 Special
State Senator George Runner & Assemblywoman Sharon Runner	Proposition 83	Sex Offender Residence Restrictions and Monitoring	2006 General

Source: Center for Governmental Studies data analysis.

become major players in the politics of the initiative process, financing proposals that may not have made it on the ballot without their personal support. As explained by millionaire Hal Arbit, who financed the qualification of the "Forests Forever" initiative (Proposition 130) in 1990, "[As a wealthy individual,] I have the choice of buying a $2 million painting and looking at it on the wall, or I could spend $2 million and have a chance of saving the last 5% of California redwood forests."[34]

[34] Quoted in Jim Schultz, "Atlas Goes Into Politics," Democracy Center On-Line, Volume 13, May 20, 1998, http://www.democracyctr.org/newsletter/vol13.htm (accessed November 20, 2007).

Well-known individuals in Hollywood and wealthy Silicon Valley elites top the list of prominent players in California's initiative process, particularly when it comes to issues in education. In 1998, high-tech entrepreneur Ron Unz sponsored Proposition 227, successfully dismantling bilingual education. In the same year, actor and director Rob Reiner sponsored voter-approved Proposition 10 (tobacco tax funding for early childhood education programs) and moved on to sponsor Proposition 86 (universal preschool), which voters rejected in 2006. Venture capitalist Tim Draper sponsored Proposition 38 (school vouchers), which failed to pass in 2000. In the same year, software tycoon and Netflix CEO Reed Hastings sponsored both Proposition 26 (lower vote requirement for school construction bonds), which voters rejected in the primary, and Proposition 39 (a second attempt to lower vote requirements for school bonds), which voters approved in the general election. Hastings sponsored Proposition 39 with venture capitalist John Doerr, and made use of the process again in 2006 by financing the effort that placed the ultimately unsuccessful Proposition 88 (property tax funding for education) on the ballot.[35]

Wealthy elites have also sponsored initiatives outside of the field of education. In 2004, Silicon Valley developer Robert Klein II spearheaded the successful Proposition 71 campaign (stem cell research). Hollywood producer Stephen Bing made the largest contribution given to an initiative campaign by a single individual when he poured nearly $50 million of his own money into the unsuccessful Proposition 87 (oil tax funding for research into alternative fuels) in 2006. Stuart Leavenworth observes, "[these] men are what I call Initiative Kingpins . . . operat[ing] in a world of big bucks, big causes and grand salesmanship. Their electoral success ensures we will see more of them in the future."[36]

The availability of an initiative industry, offering everything from pollsters to paid circulators, has encouraged many groups to bypass the legislature entirely.

Easy Access to Initiative Industry

The growth of an entire support industry oriented toward making initiative qualification significantly easier than in earlier years has also contributed to an increase in the number of initiatives that appear before voters. Confronted by a legislative process plagued with political wrangling and procedural roadblocks, many initiative proponents now find it easier to take their proposals through the initiative process instead. The availability of an initiative industry—which stands ready to offer pollsters, paid circulators, advertising agencies, media buyers, slate mailers, campaign managers and the promise that for $1.5 million they can virtually guarantee to qualify any measure for the statewide ballot—has encouraged many groups to bypass the legislative process entirely.

The growing success rate of initiatives in the late 1980s may have encouraged a growing number of individuals and organizations to circulate additional measures in subsequent years. The passage of toxics regulation (Proposition 65 in 1986) and a wildlife bond act (Proposition 70 in 1988), for example, encouraged environmental activists to again use the initiative process for further wildlife bonds (Proposition 117) and the sweeping

[35] Hastings decided to cut his funding of Proposition 88 near the end of the campaign after much publicized opposition from all sides of the political spectrum.

[36] Leavenworth, *supra* note 7.

environmental plan (Proposition 128, "Big Green") in 1990. Since then, environmental activists unsuccessfully attempted to pass more wildlife bonds with Proposition 180 in 1994 and successfully passed bonds to pay for coastal wetland protection (Proposition 50 in 2002) and better water quality (Proposition 84 in 2006).

Industry taxation initiatives have also followed this trend. Strong voter approval of the tobacco tax (Proposition 99 in 1988), despite a tobacco industry–funded $22 million opposition campaign, inspired proponents of an alcohol tax to go to the ballot in November 1990 with Proposition 134. Since then, a number of initiatives have taken this approach. Proposition 185 (1994) attempted to implement a gasoline sales tax; Proposition 188 (also 1994) attempted to regulate smoking and tobacco products statewide; Proposition 10 (1998) established a tobacco surtax to pay for state and county early childhood development programs; Proposition 67 (2004) sought to increase telephone surcharges to fund emergency room services; and Proposition 87 (2006) would have implemented a gasoline tax to fund research on alternative fuels. In a slight twist on this trend, Proposition 63 (also 2004), which enhanced funding for mental health services through a tax on millionaires, may have inspired Proposition 82 (2006), which would have funded universal preschool to all four-year-olds through a tax on upper-income households.

OPPONENTS ADVANCE A NUMBER OF ARGUMENTS AGAINST THE INITIATIVE PROCESS

One can only imagine what [Hiram] Johnson would say about a hijacked initiative process that creates unelected power brokers, unaccountable to anyone and disdainful of representative government. "This is not direct democracy!" Johnson might have said. "This is direct oligarchy!"

—Stuart Leavenworth, *Sacramento Bee*[37]

Critics have attacked California's initiative process from its inception. That criticism continues today. Some charge that the ballot initiative fundamentally undermines California's representative form of governance by circumventing the more responsible legislative process with ill-conceived or poorly drafted schemes. Columnist Dan Walters comments, "Deciding so many matters via the ballot is a terrible way to make policy. Initiatives are written in private, without public input, and often contain language that benefits narrow economic interests to the detriment of the larger public."[38] Peter Schrag observes, "With every crisis—property tax spikes, recession, inadequate school funding, political scandal, headline crimes—we adopt another initiative that makes government still less responsive and impenetrable."[39]

Other critics argue that the growing number of initiatives has shifted the enormous burden of complex policy making to the voter, generating confusion and overload. Vlae Kershner of the *San Francisco Chronicle* says, "Overused, overfinanced and oversimpli-

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[37] *Id.*

[38] Dan Walters, "Ballot Will Be Crowded Again," *Sacramento Bee,* January 22, 1990.

[39] Peter Schrag, "So Who's to Blame, Us or Them—and Who's Them?" *Sacramento Bee*, June 4, 2003.

fied, California's ballot initiatives are exploding into a political force that is simply overwhelming."[40] *Los Angeles Times* columnist Michael Hiltzik comments, "Many [initiatives] propose crude or self-interested nostrums for complicated problems, raising the specter of a California governed by laws and constitutional amendments written by bozos and billionaires."[41]

Undermines Legislative Power and Procedures

Some argue that ballot initiatives themselves, not the gridlock of competing special interests, have triggered the stalemate and legislative impotence that has descended over the state capital. They point specifically to propositions that have circumscribed legislative authority over the state budget and fiscal issues. Proposition 98 represents one of the most notable examples, mandating the minimum expenditure of 41% of the state budget for education.

Some argue that ballot initiatives themselves, not the gridlock of competing special interests, have triggered the stalemate and legislative impotence that has descended over the state capital.

David Abel, chair of the 1999 Speaker's Commission on State and Local Government Finance, says the pattern of initiatives like Proposition 98 has altered the state's ability to tax and spend and "has become a profound attack on representative government," with destabilizing effects.[42] James Sterngold of the *San Francisco Chronicle* adds, "By mandating spending, the initiatives have tied up well over one-third of the state's general fund and leave politicians with the unpopular job of figuring out what has to be cut to make way for the required programs."[43]

Alternatively, John Matsusaka of the Initiative and Referendum Institute disputes the claim that ballot initiatives have paralyzed the state budget. Matsusaka argues that while initiatives have placed some "serious constraints" on state appropriations and revenues, "only 32% of state appropriates [as evaluated against the 2003–2004 budget] has been locked in by initiatives." Furthermore, Matsusaka asserts that all virtually all of the spending "would have been appropriated by the legislature even without an initiative mandate," and that initiatives "have not placed any significant constraints on the three most important revenue sources for state governments: income taxes, sales taxes and corporate taxes."[44]

Peter Schrag observes that while voters use the initiative process as a means "to tie down politicians, bureaucrats and judges, or to compel them to act in narrowly prescribed ways—term limits; spending limits; spending mandates; three-strikes laws . . . unfortunately, many of those reforms [have] made representative government still more irrelevant, unresponsive and incomprehensible."[45]

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[40] Kershner, *supra* note 31.

[41] Michael Hiltzik, "Ways to Reform the Initiative Process," *Los Angeles Times*, July 28, 2005.

[42] James Sterngold, "Hard Times Fuel Debate on the Initiative Process," *San Francisco Chronicle*, August 17, 2003.

[43] *Id.*

[44] John Matsusaka, "Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?" *State Politics and Policy Quarterly* 5 (Fall 2005): 248–266.

[45] Schrag, *supra* note 1.

According to Schrag, the increasing use of the initiative process to set major public policy reaffirms the public perception of government as an "increasingly ineffective self-serving collection of politicians and civil servants" who are incapable or unwilling to deal with the state's problems. Dan Walters editorializes, "This is one of those chicken-and-egg questions: Did the explosion in ballot propositions result from politicians' failure to address pressing issues, or do the decrees from voters truss them in Gordian knots that make it impossible to address those issues, and thereby increase pressure for even more ballot measures? The answer, probably, is both. Had we set out to deliberately create an unworkable governmental process, we could have scarcely done a better job than what we created inadvertently—and there are absolutely no indications that initiative fever will subside."[46]

Generates Poorly Drafted or Ill-Conceived Proposals

The frequent involvement of the courts in reviewing initiative proposals has drawn considerable attention to deficiencies in drafting. As observed by columnist Josh Benson, "The problem is, crafting big ideas without legislative input can have unintended consequences, not the least of which is losing out on the vetting that might help ensure a measure is constitutional."[47] Michael Hiltzik points out, "The stem cell program, for example, is tied up in court because Proposition 71 (stem cell research) was ineptly written. Even the sainted Proposition 13 has been accused of being poorly drafted.[48] Of the 63 voter-approved initiatives since 1974, the courts have completely invalidated 8[49] and partially invalidated 9.[50]

Some initiative proponents simply overlook incongruities, while others deliberately add popular (and constitutionally questionable) provisions and terminology to increase

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[46] Walters, *supra* note 4.

[47] Josh Benson, "Governors Take the Initiative; Isn't Lawmaking for Legislators?" *Washington Post*, May 23, 2004.

[48] Hiltzik, *supra* note 41.

[49] The eight initiatives completely invalidated by the courts were Proposition 6 (a repeal of the state's inheritance tax), approved in 1982; Proposition 68 (campaign finance reform), approved in 1988; Proposition 105 (disclosure of advertisers), also approved in 1988; Proposition 164 (congressional term limits), approved in 1992; Proposition 187 (restricting illegal immigrants from public services), approved in 1994; Proposition 198 (open primary), approved in 1996; Proposition 225 (congressional term limits), approved in 1998; and Proposition 5 (Indian gaming), also approved in 1998 (for a more thorough discussion of court actions regarding these initiatives, see Chapter 9). Two of the eight, Propositions 6 and 68, were invalidated because another initiative on the same ballot got more votes.

[50] The nine initiatives partially invalidated by the courts were: Proposition 9, approved in 1974 (campaign finance/campaign disclosure); Proposition 7, approved in 1978 (the death penalty); Proposition 24, approved in 1984 (reform of legislative procedures); Proposition 62, approved in 1986 (local tax regulations); Proposition 73, approved in 1988 (campaign finance); Proposition 103, approved in 1988 (auto insurance reform); Proposition 115, approved in 1990 (criminal justice reform); Proposition 140, approved in 1990 (pensions of state officials); and Proposition 208, approved in 1996 (campaign contribution spending limits and disclosure). (For a more thorough discussion of court actions regarding these initiatives, see Chapter 9).

the likelihood of passage. For example, Proposition 212, the 1996 campaign finance reform initiative that claimed to be the "only measure on the ballot that tames special interests," would have also repealed, to the "chagrin of most reformers" an existing ban on gifts and honoraria passed by voters in 1990.[51] Although proponents claimed otherwise, this was more likely than not an inadvertent drafting error.

Proponents of Proposition 187, the 1994 voter-approved restriction on public benefits to illegal immigrants overturned by the courts, moved forward in an effort to advance an antiimmigrant campaign strategy, despite broad awareness that the measure would not likely stand constitutional muster. Xandra Kayden, former president of the League of Women Voters of Los Angeles, contends that, "When [initiatives] are overturned by the courts, that again increases the sense that government isn't working. It adds to the sense that society is falling apart," an unhealthy trend for democracy overall.[52]

Several critics have called for a process of drafting review to stave off potential court involvement. Joe Tayag of the Greenlining Institute explains, "Unlike many other states, California requires no formal review of the wording, substance, legality or constitutionality of ballot initiatives before signature circulation begins. Proponents cannot even make corrections to mistakes or oversights gathered from feedback from the public or the legislature. Even after enactment, California law blocks legislative amendments."[53] Tayag goes on to suggest that the lack of flexibility in the initiative process creates a series of problems, including costly initiative battles between special interests. (For a thorough discussion of initiative drafting, see Chapter 3.)

Encourages High-Spending, Deceptive Campaigns

Some critics contend that the many competing interests converging on California's initiative process have ignited massive campaign spending and deceptive campaign techniques. As the stakes have risen in initiative battles, sometimes involving what certain industries see as near life-and-death consequences (tobacco, insurance and timber, for example), spending on sophisticated television advertising and direct mail has also grown. Between 1976 and 1988, total initiative spending climbed from $9 million to $127 million. By 1996, initiative spending climbed to $140 million, and the average amount spent per initiative rose from $3 million in 1988 to $8 million in 1996.[54]

In 2004, with two Indian gaming initiatives raising more contributions than any other initiative battle up to that time, initiative spending reached a record-breaking $280 million. Initiative campaigns set another record in 2006, when spending exceeded $330 million. Spending in the campaign for Proposition 87 (oil tax funding for alternative fuel research) alone topped $150 million. Proposition 87 spokesman Scott Macdonald comments, "The money spent is obnoxious. It is bad. No one says $150 million

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[51] Dirk Olin, "State Ballot Measures," *SF Weekly*, October 30, 1996.

[52] Ed Ritchie, "Mob Rules?" *LA Alternative Press*, December 10, 2005.

[53] Tayag, *supra* note 30.

[54] Elisabeth Gerber, *Interest Group Influence in the California Initiative Process*, report for the Public Policy Institute of California, November 1998.

spent on a proposition is money well spent. But our people spent the money because they were under attack."[55]

Critics say the emphasis on 30-second television spots and direct mail has encouraged simplified and sometimes deceptive campaigns. According to Jamie Court, president of the Foundation for Taxpayer and Consumer Rights, "The sheer volume of political advertising is drowning out all real political debate and corrupting the initiative process."[56] Campaign consultant Larry Sheingold, president of Sheingold Associates explains, "The yes side must defend each written work and convince voters to accept every point. The no side needs only to find a word, sentence, or concept within the proposal and use it to prove that the entire proposal is unacceptable."[57] According to Jim Schultz, executive director of the Democracy Center, a public affairs group, "The main problem is that what we vote on is the rhetoric at the tip of the iceberg, and what we get stuck with is what's below the surface. Everyone, left and right, is pandering to public emotion and simplicity, because that's how the game is played."[58]

In some elections, high-spending opposition campaigns have employed multimillion-dollar "counter-initiative" strategies, many of which also rely on deceptive advertisements or slate mailers. The counter-initiative battle over discount prescription drug policies in the 2005 special election (Propositions 78 and 79) provides a case in point. In 2005, slate mailers for Proposition 78, the pharmaceutical industry–backed initiative, featured photographs of prominent elected officials, many of whom were on record in opposition, and urged a yes vote on the measure. Although the mailer did not identify explicitly those pictured as supporters, voters could easily assume the link. Outraged at the inclusion of her photograph in the mailer, Representative Barbara Lee (D–Oakland) described the tactic as "dirty politics at its worst."[59] Stymied by fewer resources, the consumer group initiative, Proposition 79, failed to mount an effective counter-campaign to combat such tactics. (For a further discussion of one-sided opposition spending, see Chapter 8; and for a further discussion of slate mailers, see Chapter 7.)

Some critics charge that the initiative process has become the special interests' *alternative to* the legislature rather than the people's safeguard.

Permits Excessive Special Interest Influence

Some critics charge that the initiative process has become the special interests' *alternative* to the legislature rather than the people's safeguard. Reformers designed the initiative process in 1911 to give citizens a more direct voice in government. Critics argue that "[n]early a century later, what began as a progressive, grassroots movement has morphed into a multi-million dollar indus-

[55] Quoted in Dan Morain, "Deep Pockets Carry the Day," *Los Angeles Times*, November 9, 2006.

[56] Jaime Court, "Less Corporate Money, More Voters," *Los Angeles Times*, October 10, 2006.

[57] Larry Sheingold, "California's Crying Game: Beating Prop. 165—California Governor Pete Wilson's Proposition 165," *Campaigns and Elections Magazine*, April/May 1993.

[58] Schultz, *supra* note 34.

[59] Brendan Coyne, "Drug Lobby Lies to California Voters About Political Backing," *New Standard News*, November 8, 2005. CGS and the California HealthCare Foundation created a Website, www.HealthVote.org, which presented truth boxes for each of the ads in this campaign.

try. The interest groups have changed and rather than simply lobbying government officials for support, they shell out millions hoping to lure voters to their various causes."[60] Former Senate President Pro Tem John Burton opines, "What's gone wrong is that the initiative is supposed to be something for the people, [and] now it's something for politicians and interest groups."[61]

The fight over Indian gaming in California illustrates how the initiative process has been used as a vehicle for special interests. Prior to the passage of Proposition 5 in 1998, negotiations over Indian gaming compacts hung in limbo for close to 10 years. Obstacles included both a recalcitrant governor (Pete Wilson) and a legislature more favorable to the interests of card room and racetrack owners, who held a long-standing monopoly on gambling in the state. Although later declared unconstitutional, Proposition 5 built its successful campaign message around the issue of Indian sovereignty and self-reliance, a "little guy" appeal to public sympathy. However, well-heeled interests on both sides of the campaign—Indian gaming tribes, Nevada gaming interests and California card clubs—fought toe-to-toe, ultimately setting a national spending record.

In an ironic twist of fate following court invalidation of Proposition 5, the legislature, with the approval of Governor Gray Davis—who as a candidate had received significant campaign contributions from Indian gaming interests—placed a legislative referendum (Proposition 1A) on the ballot to resolve the constitutional questions within Proposition 5. In total, tribes spent close to $100 million in their effort to pass both Proposition 5 and Proposition 1A.[62]

Today, tribal gambling interests have become a big-money political player in both candidate and initiative campaigns. According to Bill Whalen, research fellow at the Stanford University Hoover Institute, when card clubs filed Proposition 68 in 2004, on the heels of their failed court challenge to voter approved Proposition 1A, gaming tribes "promised to easily spend $100 million—or whatever it [took]—to defeat [it]."[63] Gaming tribes filed a counter-initiative of their own, Proposition 70, and went so far as to circulate mailers vilifying the sponsor of the opposing measure, card room owner Larry Flynt, before signatures were even submitted for qualification.

Amid strong opposition from the governor, poor showings in public opinion polls and heavy opposition spending by a coalition of major gaming tribes, the backers of Proposition 68 decided midstream to drop the campaign for the measure. Voters ultimately rejected both Proposition 68 and Proposition 70, but the initiative fight over both propositions illustrated that the balance of power had clearly shifted in the gaming industry. As observed by John Hubbell of the *San Francisco Chronicle*, "In a state where racetrack owners once loomed large, tribal casinos have become a multibillion-dollar industry with enough political power to be key players at the highest levels of government. Proposition

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[60] Heather Tuggle and Zachary Stauffer, "California Initiative Process Remains Confounding and Controversial," University of California Berkeley School of Journalism, California and National Elections, Special Projects: Propositions, October 31, 2006.

[61] Kershner, *supra* note 31.

[62] Bill Whalen, "The New Special Interest: Native American–Run Gambling as a Big Money Political Player," *Campaigns and Elections Magazine*, July 2004.

[63] *Id.*

68 . . . looked to offer deliverance for the waning businesses, whose leaders now find themselves on the margins of a pastime they helped popularize."[64]

The high-stakes politics over Indian gaming is just one example among many. Peter Schrag comments that the process has become "an open invitation to almost anyone who, for reasons of ideology or economic self-interest or political advantage or simple vanity, wants to become an instant player."[65] Voters may tend to agree. According to PPIC polling, the control special interests exert over the initiative process is one the major complaints of likely voters. In the organization's 2005 statewide survey, more than 65% of respondents agreed that "special interests have a lot of control over initiatives."[66]

Increases Professionalization of the Process

In decrying the subversion of the initiative process by special interests, critics have blamed professionalization. Some argue that initiative campaigns are fought and won not on the strength of ideas, but on the savvy of paid consultants who can turn the tide of public opinion with pithy media sound bites. Jonathan Kirsch notes, "In its pristine form, the initiative process appears to be an expression of pure democratic will. The reality, however, is that the initiative has become an expensive blend of art and science, psychology and old-fashioned politics, all practiced by experts on behalf of their paying clients."[67] As quoted in *Newsweek,* Peter Schrag opines, "When [politicians] run for office they face [contribution] limits. But initiatives do not, which of course makes them a lucrative source of income for consultants who dream them up."[68]

Some argue that initiative campaigns are fought and won, not on the strength of ideas, but on the savvy of paid consultants who can turn the tide of public opinion with pithy media sound-bites.

Indeed, since 1978, large-scale grassroots initiative efforts have given way to paid circulators, professional consultants, marketing advisors and media buyers. Today, anyone with enough money can hire organizations that conduct public opinion polling to determine popular receptivity to an initiative, draft the initiative, circulate it for signatures and conduct a full-blown campaign on its behalf. University of Southern California law professor Elizabeth Garret comments, "I think [the early proponents of initiatives would] be very disturbed at the role that money plays. Once you can use paid signature gatherers, you can pretty much qualify anything for the ballot."[69] According to Kelly Kimball, a recognized name in the paid signature-gathering business, "Thirty years ago people who wanted to put forward an initiative had an idea and maybe a little bit of money. Now con-

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[64] John Hubbell, "Campaign 2004: Backers Surrender on Gaming Measure; Proposition 68 Would Have Ended Tribes' Casino Monopoly," *San Francisco Chronicle,* October 7, 2004.

[65] Peter Schrag, "The Fourth Branch of Government? You Bet" (Institute for Governmental Studies, Working Paper 2001-3).

[66] Baldassare, *supra* note 11.

[67] Jonathan Kirsch, "Initiatives Cutting Up the Constitution?" *California Lawyer,* November 1984.

[68] Howard Fineman and Karen Breslau, "State of Siege," *Newsweek,* July 28, 2003.

[69] Quoted in Bob Keefe, "Recall Effort a Step Too Far, Critics Say; In California, Small Minority Could Select New Governor," *The Atlanta Journal-Constitution,* August 3, 2003.

sultants looking for fresh meat on the market drive the process."[70] (For further discussions of the professionalization of the initiative process, see Chapters 4 and 8.)

Encourages Single-Issue Politics and Stifles Cohesive Policy Making

Some observers of the initiative process complain that proponents are not worried about the impact of the initiative on state policy as a whole, but rather are concerned only with implementation of their own interests. Likewise, voters presented with single-issue choices may be unaware of how their votes will impact the overall future of California. As explained by the National Conference of State Legislatures, "Initiatives ask voters to make simple yes-no decisions about complex issues without subjecting the issue to detailed expert analysis and without asking voters to balance competing needs with limited resources."[71]

Jean Ross, executive director of the California Budget Project, has described initiatives as a case of eating "dessert without having to eat your vegetables. You can put $3 billion worth of stem cell research bonds on the ballot [Proposition 71] without the voters having to tell you where the $300 million a year to pay those bonds is going to come from, and without asking voters to make the kinds of priorities and choices that the executive branch and legislative branch have to. The voters didn't have a choice, 'do you want to cover all children with health insurance in California for 10 years, or do you want stem cell bonds? Those are the kinds of choices that come from the legislature."[72]

This can often lead to a patchwork of public policies that point to conflicting priorities. As columnist Todd Purdum of the *Milwaukee Journal-Sentinel* explains, Californians "want it all, all the time: lower taxes and smaller classrooms; tighter pollution controls and bigger SUVs; cheap labor and fresh produce but tighter limits on immigration and provision of social services."[73]

Single-issue politics may also undermine the advancement of cohesive policy by other political actors, namely political parties. Political parties traditionally stake out platform positions on key issues and push legislation to advance those interests. Today, as more and more issues are directed through ballot initiatives rather than legislation, voters are more easily swayed by single-issue politics that do not necessarily fit neatly within either party's governing agenda.

Although parties have begun to adapt by supporting or opposing propositions and contributing to initiative campaigns, voters often approve a mix of liberal and conservative measures in a single election. In the 1996 general election, for example, voters

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[70] Quoted in Peter Schrag, "Governing by Initiatives Has Made the Legislature an Irrelevant Sideshow," *Contra Costa Times*, July 6, 1997.

[71] National Council of State Legislatures, *Initiative and Referendum in the 21st Century,* final report and recommendations of the NCLS Initiative and Referendum Task Force, July 2002.

[72] Quoted in *San Francisco Chronicle* editorial board meeting on the state initiative process, abridged transcript, April 20, 2005.

[73] Todd S. Purdum, "What Makes California 'Crazy' May Spread to Other States," *Milwaukee Journal Sentinel*, September 28, 2003.

approved both an end to affirmative action (Proposition 209)—with the Republican Party contributing over $2.8 million in support of the measure—and an increase in the minimum wage (Proposition 210), a policy associated with the interests of the Democratic Party.[74] This frustrates the efforts of the majority party to advance a comprehensive governing agenda.

Though elected officials of the majority party are given a mandate to rule, the minority party can go to the ballot instead of adhering to the traditional rules of engagement, thus undermining the objectives of the majority that was elected to govern. According to Loyola Law School professor Rick Hasen, Republicans outspent Democrats in the 1990s by more than two to one on initiative politics as a strategy to overcome their minority status and drive voter turnout. As observed by Hasen, "In California, if not the nation, the initiative process has become another partisan tool."[75]

Furthermore, as the initiative process siphons significant issues away from the legislature, it increasingly disconnects the political parties not only from the average citizen but also from the politicians in the legislature who are such integral parts of party apparatuses. While initiative proponents sit at the main policy-making table, politicians in the legislature are left to squabble over the crumbs of policy making. This contributes to the public's perception that while initiatives tackle major policy issues, legislative politicians are preoccupied with petty partisan wrangling instead of focusing on agendas that will move the state in the right direction.

Perhaps as a consequence, voters directly attempted to undermine the party apparatus as a filter for candidates when they approved Proposition 198 (open primary) in 1996. Although the courts overturned the measure when the California Democratic Party challenged its constitutionality, it would have provided an opportunity for voters to select candidates independent of their registered party affiliation.

Weakens Political Process

Some critics argue that the initiative process has created an "escape valve" for state government to avoid its traditional responsibilities. Patrick McGuigan, executive editor of the *Daily Oklahoman*, posits, "[I]t becomes a way for legislators to avoid doing what we elect them to do."[76] Governor Schwarzenegger seems to have learned this lesson after the voters defeated his slate of initiatives in 2005. According the governor, "The people sent a message loud and clear. And that message was, 'Don't come to us for every little thing. Go to the legislators. You guys work it out.'"[77] Michael Hiltzik comments, "Once

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[74] Rick Hasen, "Parties Take The Initiative (and Vice Versa)," *Columbia Law Review* 100, no. 3 (2000): 740. Notably, the California Democratic Party spent a nominal $53,000 in support of the increase in the minimum wage and the majority of its spending over the course of the 1990s was in opposition to measures. For example, the Democratic Party spent almost $1 million in opposition to Proposition 165 (welfare reform) in 1992 and voters ultimately rejected the measure.

[75] *Id.*, at 731–750.

[76] Quoted in Mike Feinsilber, "The Right of Initiative, Referendum Is Mixed Blessing," *Sacramento Daily Recorder*, July 13, 1990.

[77] Patt Morrison, "Aren't 13 Propositions Too Many?" *Los Angeles Times*, October 19, 2006.

a ballot measure looks like it's going to qualify for the next election, the legislature bails out on the topic. That's a shame because for all its shortcomings, the legislature has the ability to air all sides of an issue and all ramifications of a measure by holding public hearings . . . which is important because sloppy drafting is a chronic disease in the initiative world."[78]

Some observers of the process also conclude that the initiative process undermines the system of checks and balances fundamental to the tenets of American democracy. Matthew McCubbins, professor of political science at the University of California San Diego, explains, "We have an avenue of power being exercised, and since it is the sovereign right of the people, it's an avenue of absolute power—and we know that absolute power corrupts absolutely whether or not it's exercised by the people, a dictator or anybody else . . . except for some small chance of judicial check, it's largely unchecked."[79]

Generates Voter Confusion and Overload

Critics of the initiative process also question the wisdom of adopting public policies through the initiative process because voters have neither the time nor the interest to understand fully the wide range of complicated issues that are often involved, and certainly not when compared to full-time legislators who ideally spend their working lives analyzing and debating political questions. James Keene, executive director of the California State Association of Counties, worries about the public's ability to collectively assess the benefits and losses of each initiative, especially when it comes to constitutional amendments on increasingly crowed ballots. According to Keene, "[The initiative] is like fast food. We get it and eat it and run. What matters is speed, and ease, and packaging and marketing. It is convenient, sometimes appealing, tasty, not always nutritious, and can have lasting unforeseen consequences. We are in a hurry. We dissociate from the details. Sometimes, maybe, we'd just rather not know."[80]

Others charge that the increasing numbers of issue choices reaching the ballot are overwhelming the average voter. Columnist Vlae Kershner puts it this way, "Campaigners say the only way to pass or defeat an initiative is to drill a one-sentence slogan into voters' heads. But ballot-box battles, most notoriously the five warring 1988 auto insurance initiatives, can produce incomprehensible ballot pamphlets with well over 100 pages of legalese."[81] UCLA history professor John Allswang continues, "The average American doesn't read that much serious non-fiction in a year."[82] Kim Alexander of the California Voter Foundation affirms this. "Confusion about issues on the ballot is a considerable barrier for voters in the state. My fear is people who are burned out may choose to sit home."[83]

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[78] Hiltzik, *supra* note 41.

[79] San Francisco Editorial Board Meeting, *supra* note 72.

[80] James Keene, "Who Does the Initiative Belong To?" *California Counties* 22 (September/October 2006): 19.

[81] Kershner, *supra* note 31.

[82] *Id.*

[83] Michael Blood, "California's Never-Ending Election Cycle Takes Toll on Voters," *The Associated Press State and Local News Wire*, July 9, 2005.

Discourages Compromise

Unlike the legislative process, in which competing interests can negotiate and compromise, critics maintain that the initiative process discourages compromise. *New York Times* columnist Tom Wicker writes, "[Interest groups] find it easier and surer to round up the necessary signatures, and pay for an emotional television campaign, than to slog through lengthy legislative procedures. . . . But committee deliberations, floor debate, procedural rules, give-and-take bargaining—dismaying though they are—can separate the useful sheep from the political goats."[84] Weblogger Mitch Ratcliff comments, "From a psychological perspective [ballot initiatives] promote black and white thinking, the view that there are two possible solutions to a problem, and nothing in between. . . . [I]t does nothing to promote people working together for the good of the community."[85]

Unlike the legislative process, in which competing interests can negotiate and compromise, critics maintain that the initiative process discourages compromise.

Commentator Jim Schultz agrees. Citing Proposition 227 (restrictions on bilingual education) and its sponsor Ron Unz, Schultz argues, "Legislative lawmaking nudges the parties toward compromise. Initiatives, in the end, are about 'my way and my way only.'" As explained by Schultz, Unz "told lawmakers, in essence, my initiative is the reform I want, it is the only reform I want, and nothing the Legislature might approve would dissuade me from continuing my campaign. Going further, Unz actively advocated against a bipartisan bilingual compromise as it moved through the Legislature and succeeded in getting Governor Wilson to veto it."[86]

Other observers suggest that the inflexibility of the process makes compromise challenging. Proposition 65 (2004), a measure aimed at protecting local government revenue streams from state government reductions, for example, could have been avoided entirely if the initiative process included room for compromise and negotiation with the legislature. Proponents of the measure, including the League of California Cities and the California Association of Counties, through continued negotiations, ultimately agreed to shift their support to a compromise measure placed on the ballot by the legislature, Proposition 1A. However Proposition 65, having qualified, could not be withdrawn.

Inflexibility in the initiative process left the original proponents of Proposition 65 in the awkward position of opposing a measure they spent nearly $3 million to qualify. Even in the absence of significant opposition to 1A, the compromise measure, local government leaders and other supporters felt compelled to raise close to $9 million to mount a campaign in support of it. As explained by League of California Cities Executive Director Chris McKenzie, "You can't take [success at the ballot box] for granted. You have to be prepared for a fight . . . even with no fight, with 16 measures on the ballot and voters being overwhelmed, you have to distinguish the measure."[87]

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[84] Tom Wicker, "Voters Were Legislators for a Day," *Los Angeles Daily Journal*, June 11, 1990.

[85] Mitch Ratcliffe, "Ballot Initiatives in a Post-Broadcast World," Greater Democracy.org, December 29, 2003.

[86] Schultz, *supra* note 34.

[87] Alexa H. Bluth, "Organizers Raise Millions for Uncontested Initiative," *Sacramento Bee*, October 30, 2004.

Even when the legislature appears to respond to the threat of an initiative, proponents do not always find the compromise acceptable. In 2006, for example, state Senator George Runner and his wife, Assemblywoman Sharon Runner, moved forward with the campaign for Proposition 83 (residence restrictions for sex offenders) even after the legislature rushed to pass a package of bills that contained a majority of the initiative's provisions. The key difference between the newly enacted laws and Proposition 83, however, represented a substantive policy issue. While the Runners firmly believed that sex offenders should not be allowed to live in close proximity to a school, the legislature opted to impose trespassing restrictions instead of residence restrictions. In this instance, an initiative process that allowed room for compromise and negotiation with the legislature would not have obviated the Runners' urge to go before the voters.

Prone to Corruption and Manipulation

Critics cite the practice of initiative "logrolling" to support claims of corruption and special influence dominance. Dating back to 1988, proponents of several initiatives dealing with bonds and taxes have added provisions to their initiative in exchange for campaign contributions.[88] (For a more detailed discussion of "logrolling," see Chapter 8.) Jean Ross of the California Budget Project observes, "We have an ability, through the initiative process, to have very explicit quid pro quos. Donate a million dollars to get my measure passed and I'll put your freeway interchange in my bond measure. If [legislators] engaged in that kind of trading . . . [they] would be behind bars today."[89] In 1991, the legislature passed and the governor signed a bill to prohibit such practices, but the courts later declared it invalid.

SUPPORTERS CITE A NUMBER OF ARGUMENTS IN DEFENSE OF THE INITIATIVE PROCESS

The initiative allows for new ideas to be placed on the political agenda. Through the initiative, the people can play a direct role in making policy, joining legislators, judges and the media in defining public debate.

—Bill Owens, Governor of Colorado[90]

To its staunch defenders, the initiative process is the "true sense of democracy."[91] For them, the initiative process stands as the people's last resort, a way to work around an unresponsive and gridlocked state government. The initiative also brings ordinary citizens

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[88] Proponents of park bond Proposition 70 in June 1988, the proponents of tobacco tax Proposition 99 in November 1988, rail transportation bond Proposition 116 in June 1990, alcohol tax Proposition 134 in November 1990 and transportation Proposition 51 in 2002 also included provisions in their initiatives in exchange for campaign donations. Dan Walters, "Cafeteria-Style Initiatives," *Sacramento Bee*, August 4, 1989.

[89] *San Francisco Chronicle*, *supra* note 72.

[90] Bill Owens, "Is the Initiative Process a Good Idea: Counterpoint," *State Government News*, July 1991.

[91] Planning and Conservation League General Counsel Corey Brown, quoted in Barbara Reynolds, "Initiatives Are the True Sense of Democracy," *USA Today*, April 16, 1991.

into the political process. Republican consultant Rick Claussen, comments, "When Sacramento is out of control, I really want to have this as a court of last resort . . . if things get out of hand, I am going to take matters into my own hands."[92] Harvey Rosenfeld, founder of the Foundation for Taxpayer and Consumer Rights, explains it this way, "If you look at the people as the pre-eminent authority in our democracy, then I think that you have to look at the initiative process as a very elegant way for the people to maintain their ultimate authority over the [political] process."[93]

Allows the Public to Circumvent a Recalcitrant Governor and Legislature

Hiram Johnson and the Progressives created the initiative process to serve as a "safety valve" for outraged citizens to circumvent a gridlocked and stubborn state government, and initiative supporters believe it is still needed to fulfill this vital function. Property tax reduction (Proposition 13 in 1978), establishment of the Coastal Commission (Proposition 20 in 1972) and officeholder term limitations (Proposition 140 in 1990), for example, would never have been adopted had it not been for the initiative process. "The initiative allows for political choices that are stymied in the normal legislative process. In fact, the problem is not the initiative process but the lack of political leadership," says former Governor and current Attorney General Jerry Brown.[94] Supporters argue that the legislature now takes its cue from the initiative process. David McCuan, assistant professor of political science at Sonoma State University, observes, "Legislators have allowed themselves to be made impotent by ballot initiatives. They are unwilling to be bold, they are unwilling to be innovative, they are unwilling to lead."[95]

David Lesher, former editor of the *California Journal*, echoes these sentiments. Commenting on the troubling state of health care, education, persistent budget deficits and the lack of infrastructure investment, Lesher says, "[W]hile the policy challenges [facing California] are significant, the greatest threat to California is the disconnection between its innovative electorate and its outdated political leadership. The legislature makes closed-door policy decisions based on powerful interests. Its long-term vision is two years. Its top-down authority is a throwback to a long gone generation and an anachronism in a state that is prepared to lead on a bold new path."[96] Political commentator Joe Scott asserts, "[M]uch too often the legislature ignores issues that are brought to their attention. . . . That's why the initiative process lives."[97]

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[92] Quoted in Daniel Weintraub, "To Kill a Ballot Measure in California," *Oakland Tribune*, November 16, 2006.

[93] *San Francisco Chronicle*, *supra* note72.

[94] Quoted in Jerry Roberts and Susan Yoachum, "Some Say Initiative Process Is a Mess," *San Francisco Chronicle*, August 10, 1990.

[95] Quoted in Tuggle and Stauffer, *supra* note 60.

[96] David Lesher, "California's Great Disconnect: The Governed and the Government," *California Journal* 36, no. 1 (2005): 8–12.

[97] Joe Scott, "Initiative Allows Voters to Bypass Legislative Impasse," *Santa Monica Outlook*, April 25, 1991.

Neutralizes Power of Special Interests

Supporters argue that the initiative process adds a critical counterweight to a state government that frequently is driven by special interests. Proponents of Proposition 64 (2004), the initiative approved by voters to halt "shakedown" lawsuits claiming frivolous violations of unfair business practice and false advertising laws, provide an example. Trent Norris, partner with San Francisco–based law firm Bingham McCuthen states, "Despite cries for reform from business, plaintiffs lawyers and interest groups had essentially taken the Legislature captive, prompting businesses to take their concerns to the voters."[98] Indeed, according to contribution and expenditure reporting by the Civil Justice Association of California, trial lawyers poured more than $7.4 million into campaigns for statewide office holders and legislative incumbents and candidates in the reporting period that ran from January 2003 through December 2004.[99] Voters approved Proposition 64 by 59%.

Supporters argue that the initiative process adds a critical counterweight to a state government that frequently is driven by special interests.

As measured by campaign contributions, special interests continue to assert influence over the legislature. The Commonwealth Club's Voices of Reform Project observes, "The record-breaking sums of political contributions made to state legislators in the final days of the 2005–2006 legislative session (more than $3.5 million in August alone) once again raised serious questions of legislative independence in an environment awash in special interest money, just two months before statewide elections that are largely financed by these same special interests."[100]

Empirical data collected by John Matsusaka, president of the Initiative and Referendum Institute, supports the notion that the initiative process provides a way for the majority to regain control of public policy when state legislators may be more inclined to bend toward special interests. "The facts . . . do not support the view that the initiative process allows special interests to distort policies away from what the public wants."[101] He adds that the evidence shows that even if wealthy interests are prominent players in initiative politics, their efforts ultimately redound to the benefit of the majority. "Without the initiative, voters are forced to accept the policy choices of the legislature. With the initiative, voters are given choices."[102]

Overcomes Resistance to Institutional Reforms

Many believe the initiative process is necessary to reform government itself. They believe that major government and political reforms would simply not occur if left to the legislature and the governor. Their inherent interest in self-preservation would make effective reforms virtually impossible.

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[98] Quoted in Susan Davis, "Tort Reform: New and Pending State Legislation Aims to Rein in Consumer-Protection Lawsuits" (Bingham McCutchen partner advisory, Winter 2006).

[99] Civil Justice Association of California, *Report of Total Trial Lawyer Contributions and Expenditures* (reporting period January 1, 2003 through December 31, 2004).

[100] The Commonwealth Club's Voices of Reform Project, "Announcement of Election Issues Forum: A Discussion of Proposition 89," October 24, 2006.

[101] John Matsusaka, *For the Many or the Few: The Initiative, Public Policy, and American Democracy* (Chicago: University of Chicago Press, 2004), 3.

[102] *Id.*, 71.

The history of the California ballot measure process shows that citizens have sought recourse through ballot initiatives most frequently for governmental reforms. The number of initiatives affecting the government and the political process outnumbers initiatives in all other categories. Proposition 140 (term limits), arguably one of the most sweeping government reforms in California history, was passed by the voters in November 1990. In California, where the median length of service was 8 years for an assembly incumbent and 10 years for a state senator, most believe that the legislature would never have seriously considered a term limits measure. Indeed, legislative leaders put up the principal opposition to, and most of the money against, Proposition 140. The initiative process was the only possible avenue to advance this proposal.

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Supporters say the persistent call for redistricting reform illustrates the need for the initiative process. Although rejected by the voters on several occasions, opinion polling consistently illustrates that the voters want sensible redistricting reforms and have probably rejected past proposals as partisan power plays that failed to offer authentic resolution to the conflict of interest inherent in legislative control over the process. Heeding the call of the voters for a bipartisan plan for reform, legislative leaders vowed in 2005 to address the issue if Proposition 77 (a proposal calling for redistricting by a panel of retired judges) lost at the ballot box. When voters gave the legislature the opportunity by rejecting the initiative, legislative leaders failed in the final hours of the 2006 legislative session to make good on their commitment. Having successfully passed in the senate chamber, the redistricting bill did not reach the lower chamber in time for a vote.

Daniel Weintraub observes, "[Legislative leaders] acknowledge that it's wrong for legislators to draw their own districts, in effect choosing their voters, rather than the other way around. But so far they have just not been able to get themselves to do anything about it. They creep up to the precipice of reform and then pull back, teasing us, and maybe even themselves, with the idea that one day they might do the right thing."[103] Commenting on the legislature's renewed efforts to address redistricting reform, Ned Wigglesworth of California Common Cause, commented, "If they don't take meaningful action in the coming months, then we're likely to start seriously considering the initiative."[104]

Stimulates Public Involvement in State Issues

Initiative process supporters say that ballot measures are also instrumental in raising greater public awareness of, and interest in, important state issues. Initiatives draw voters to the polls, and they inspire interest in statewide issues. According to Jeffrey Makin of the Initiative and Referendum Institute, "A large body of research generally agrees that ballot propositions increase political information and overall turnout."[105] Daniel Smith

[103] Daniel Weintraub, "With Power on the Line, Politicians Like to Tease," *Sacramento Bee*, February 4, 2007.

[104] Quoted in Peter Nicholas, "Schwarzenegger Proposes Creating Citizen Panel to Draw Voting Districts," *Los Angeles Times,* December 6, 2006.

[105] Jeffrey Matkin, "Are Ballot Propositions Spilling Over onto Candidate Elections?" University of Southern California Initiative and Referendum Institute, October 2006.

and Caroline Tolbert assert that citizens "are more knowledgeable, interested, and pay more attention to politics when there are propositions on the ballot."[106] These trends may be due to the fact that voters may have difficulty determining what electoral candidates stand for, but they often find it easier to determine what ballot initiatives stand for.

Some have likened the initiative process to a statewide "town hall" meeting in which all members of the community are given an opportunity to participate. "In this age of electronic advertising and impersonal politics, the initiative process is as close as we can get to an old-fashioned town meeting," write Joel Fox and Harvey Rosenfield. "The people gather in their voting halls after a period of debate and express their feelings about what their fellow citizens have proposed. The tradition is a long and trusted one. And it works."[107] Indeed, voters have rarely passed an initiative that they have lived to regret.

Exerts Pressure on the Legislature to Act Responsibly

Supporters of the initiative process maintain that the threat of a ballot measure is often necessary to pressure the legislature and governor to respond to particular public needs in a meaningful way. Research by John Matsusaka of the Initiative and Referendum Institute provides support for this assertion. Masusaka's research indicates that legislative decision making in initiative states aligns with popular will at a rate that is 17%–19% higher than the rate for states without an initiative process.[108] "A properly structured initiative process results in increased responsiveness by government to the will of the people, greater citizen participation and a better-informed electorate, says Colorado Governor Bill Owens. "Legislatures recognize this by passing legislation under the threat of an initiative.[109]

Fear of being bypassed by an initiative has forced the legislature to act in a number of areas. Workers' compensation reform (2004), the California "Lemon Law" (2006), charter school reform (1998), consumer privacy legislation (2003) and limits on state authority over local government revenues (2004) were all passed under the threat of an initiative. In reference to charter school reform, Jim Shultz observes, "[Reed] Hastings said to state lawmakers . . . 'I have the signatures I need to get on the ballot. . . . If we can agree to a solid compromise and enact it into law I'll drop my initiative.' A few weeks [later] lawmakers approved a compromise and Hastings, in an unprecedented move, never filed his signatures."[110]

The fight for consumer privacy protections illustrates the leverage often created by the threat of an initiative. Disgruntled after three unsuccessful attempts to advocate for reform through the legislative process, proponents of consumer privacy began petition

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[106] *Id.*

[107] Joel Fox and Harvey Rosenfield, "The People's Initiatives Are Under Heavy Assault," *Los Angeles Times*, August 8, 1991.

[108] John Matsusaka, "Institutions and Popular Control of Public Policy," University of Southern California Initiative and Referendum Institute, November 2006. Matsusaka restricts his study to issues that have only two possible outcomes, policies, for example, like capital punishment that can either be prohibited or allowed. He then collects survey information on whether citizens favor or oppose the policy, and compares the position of the median voter to actual legislative outcomes.

[109] Owens, *supra* note 90.

[110] Schultz, *supra* note 34.

circulation in 2003 with the expectation of bringing their proposal before the voters in March of 2004 if the legislature failed, yet again, to pass legislation. State Senator Jackie Speir, sponsor of the consumer privacy legislation, successfully moved the bill forward; however during legislative negotiations she acknowledged that "the power of special interests may force those of us who care about privacy to go directly to the people."[111] As detailed by California Chamber of Commerce Senior Vice President Fred Main, banks and insurance companies that formerly lobbied the legislature to block the Speir proposal considered the initiative such a "serious threat" that they supported the privacy bill as a vehicle for compromise.[112] The Speir bill, known as SB 1, went on to become the strongest consumer financial privacy law in the country.[113]

DESPITE ITS FLAWS CALIFORNIA'S BALLOT INITIATIVE PROCESS SHOULD BE RETAINED—BUT WITH SIGNIFICANT IMPROVEMENTS

Conceived in 1911 as an innovation in modern government, allowing the people to enact laws directly whenever their elected representatives lost sight of the public will, the ballot initiative is no longer solely a measure of last resort. Californians now turn to the initiative almost routinely—to launch statewide debates over new issues and to trigger shifts in policy—sometimes even before the legislature has had a chance to address those issues. Today, initiatives are frequently used as offensive weapons—to bypass the legislature altogether, to immunize laws against future amendments and to crystallize public opinion into defined state policy in compressed periods of time.

While the public values the initiative process as its voice in state government, it also has significant concerns. According to polling by the PPIC, "Two in three adults and likely voters say the initiative process needs either major (37%) or minor (31%) change."[114] Most would agree that the process should be improved and modernized—transformed from an increasingly impractical system of direct democracy conceived at the beginning of the 20th century into one capable of sustaining efficient and effective government into the 21st century.

The Need for Retention

In a perfect or even near-perfect system of representative democracy, ballot initiatives might be unnecessary. Elected officials would be closely attuned to the public's needs and

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[111] Quoted in Robert Salladay, "Voters Expect Legislature to Bow to Banks, Insurers, and Kill Bill," *San Francisco Chronicle*, March 13, 2003.

[112] *Id.*

[113] The legislative success of consumer privacy advocates, ultimately, however, represented only a partial victory. The financial services industry, having acquiesced in the legislative battle, challenged the statute in federal court. Although the court upheld restrictions on the sharing of consumer information with third parties without consumer consent, the court invalidated portions of the legislation that restricted information sharing between company affiliates, ruling that federal law superseded state authority in that area.

[114] Public Policy Institute of California, "Just the Facts: Californians and the Initiative Process," December 2006.

desires; voters would be well-informed on the problems and issues of the day; and legislative bodies would be open to arguments on their merits—freed from the need to raise campaign contributions to ensure reelection. Such a legislative system would quickly respond to public desires and at the same time inform and temper the public's opinions through the deliberations and advice of elected representatives. Such a system could accommodate legitimate desires for change without the need for direct popular votes through ballot initiatives.

In a perfect or even near-perfect system of representative democracy, ballot initiatives might be unnecessary, but the system is not perfect.

But such a legislative system does not exist—if it ever did—in California today or in any other state. Elected officials, everywhere and increasingly, are subjected to a diversity of pressures that make it difficult for them quickly to respond to problems as they arise. The financial demands of elected office and the need of candidates and officeholders to raise ever-increasing sums of money frequently make them more responsive to the demands of special interest and major contributors than to average voters. The control of incumbents over redistricting has often made it difficult for voters to oust officeholders and initiate legislative change. Incumbent officeholders' desire for reelection often makes them reluctant to take the lead on bold policy initiatives. And the complexity of governmental issues, together with the need of many officials to shape or "control the spin" of information available to the public, has left many voters without the knowledge they need to review the records of officeholders at election time. The result is a legislative process that is often incapable of resolving critical problems, resistant to new candidates and ideas, and discouragingly lacking in public esteem.

The ballot initiative was conceived as an antidote to such a state of affairs, and the need for this remedy has not dissipated since its inception. As in the early part of this century, California state government is still subject to special interest influence; important statewide policies are not addressed; needed legislation is derailed or blocked; and the legislative and executive branches are frequently locked in unproductive battles. The fact that Californians have gone to the polls to vote on citizen initiatives every year in the current decade—with the exceptions of 2001 and 2007—is alone a significant indication that the legislative process is not yet responsive to public needs. Until this structural situation significantly changes, Californians will need to retain the initiative power as a safeguard against legislative inaction and an implement for legitimate change. Twenty-four states and the District of Columbia have enacted some form of the initiative process; not one has repealed it.

The ballot initiative process is also important for making changes to the *structure of government itself*—changes that legislatures themselves find inherently difficult to make. Campaign finance, redistricting, ethics and limits on terms of office, for example, are all reforms that legislatures typically resist. In California, as in other states, the initiative process is still necessary to trigger reforms in these areas.

PUBLIC SUPPORT FOR INITIATIVE RETENTION AND IMPROVEMENT

Californians also clearly wish to keep their right to decide public policy through the initiative process. Surveys conducted in California since 1979 have consistently demonstrated a strong positive view of the initiative process among the voting public. Yet while

vast majorities believe that direct legislation is generally a good thing, gradual erosion in the strength of that support clearly has occurred. The height of popularity for initiatives immediately followed Proposition 13, the 1978 tax-cutting initiative. In 1979, an overwhelming 83% of Californians expressed a positive overall opinion of the system of initiatives. Although support has lessened, the percentage of respondents expressing positive attitudes toward the initiative process is still very strong. Today 74% of the voting public views the initiative process in a favorable light.[115]

Though a solid majority of Californians still support the initiative process, they also see a need for reform. PPIC polling indicates "strong majority support" for reforms that would, for example, create a "period of time in which the initiative sponsor and the legislature could meet to see if there is a compromise solution before initiatives go to the ballot (75%), and having a system of review and revision of proposed initiatives to try to avoid legal issues and drafting errors (73% of likely voters).[116]

Recent polling asked voters what negative aspects they saw in the initiative process. Survey respondents pointed to the dominance of money and the lack of voter information. An overwhelming majority feel that the process is too easily manipulated by special interests and dominated by big money interests (73%). Many also find that the ballot wording for initiatives complicated and confusing (66%), believe that initiative campaigns are often deceptive (63%), feel that initiatives often result in unintended problems or consequences (60%) and think there are too many propositions on the ballot (57%).[117] This research affirms that the time is now ripe to consider reasonable modifications to the initiative process.

The Need for Significant Improvement

The initiative process in California suffers from a number of major defects:

- Initiative texts are inflexible; once drafted and circulated they cannot be amended either before or after adoption.
- The initiative process discourages the legislature from entering into negotiations to strike compromises over initiatives' content.
- Initiatives are too easy to qualify with paid circulators and too difficult to qualify with unpaid volunteers.
- Voters are too easily misled with incorrect or deceptive information in media advertisements and slate mailers.
- Official voter information sources, including the ballot pamphlet and other state-sponsored resources, fail to offer voters clear, concise, easily accessible information that will effectively equip them to make informed decisions about initiatives, which are often lengthy and complex.

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[115] Public Policy Institute of California, *id.*

[116] *Id.*

[117] CGS, *supra* note 16.

- High-spending, one-sided campaigns often dominate and distort the electoral process.
- The courts, while appropriately exercising judicial restraint, have invalidated all substantive provisions of successful initiatives because some of these provisions purportedly conflict with some provisions in other initiatives dealing generally with the same subject matter.

The remainder of this report addresses these problems. Each chapter addresses a major problem area and discusses proposed solutions. The reforms proposed are designed to make the initiative process work more easily, fairly and flexibly. They assume that the initiative will continue to be a part of California's political landscape well into the distant future. They are therefore designed to retain the initiative process while adjusting it to the exigencies of modern political life.

CHAPTER

3

Initiative Drafting and the Need for Amendability

Donald Hagman, the late UCLA law professor, observed in 1978 that the authors [of Proposition 13] might reasonably be arrested for 'drunken drafting.'"

—Edward Hamilton, *Los Angeles Times*[1]

SUMMARY

One of the biggest problems California's initiative process faces is its rigidity, both during an initiative's circulation and after its adoption. Once an initiative begins circulation, not one word can be changed, and once an initiative is adopted, the legislature cannot make amendments—no matter how flawed or outdated the initiative might be—unless the initiative itself permits such amendments, or another measure is placed on the ballot and approved by the voters.

Although the initiative process provides a valuable means for citizens to influence public policy, the problems caused by poorly-drafted initiatives often undermine the popular vote. In addition, initiative proponents and the legislature currently have no incentive to work together to negotiate to an agreement. This creates missed opportunities for proponents to take advantage of the legislature's experience and expertise, as well as for the legislature to pass initiative proposals and spare voters a long ballot and proponents a costly initiative campaign.

Once an initiative qualifies for the ballot, its proponents should be allowed to negotiate with the legislature and withdraw the initiative from the ballot if the legislature enacts either the original or a compromise version of the initiative. Proponents should also be allowed to amend their initiative before placing it on the ballot to correct unforeseen errors, provided the amendments meet the initiative's original purposes and intent. After an initiative is adopted, the legislature should be able to amend it by a 60 percent supermajority vote, so long as the amendments are consistent with the initiative's original purposes and intent.

[1] Edward Hamilton, "California's Sloppy Ballot Measures," *Los Angeles Times*, August 11, 1982.

This package of reforms would improve the drafting quality of initiatives, foster consensus building between initiative proponents and the legislature and simplify the ballot.

Ballot initiatives are rarely enacted without flaws. Like laws passed by legislatures, initiatives can be ambiguous, vague, overreaching, under-inclusive or even contradictory. They can overlook entire problem areas, become outdated and violate both the state and the federal constitutions.

Yet under California law, not one word of an initiative's text can be changed after the attorney general gives it a caption and returns it to the proponent to begin signature collection—at least not without the proponent withdrawing that initiative, redrafting it and starting over again. Any errors, omissions or oversights it might contain must go uncorrected, even if the proponents discover them and wish to make changes. Despite flaws or unintended consequences that might surface during the course of the qualification drive and campaign, the proponents have no choice but to push doggedly on, denying that problems exist and allowing the enactment of mistakes into law, or to give up and withdraw the initiative altogether.

Even worse, after an initiative has been enacted into law, no one, not even a unanimous legislature and governor acting together, can amend that law to correct a single word, no matter how erroneous, flawed or outdated that initiative may be, unless the text of the initiative itself permits such legislative amendments.

Initiatives, in other words, must remain eternally fixed in the law as they are drafted—unless they are amended by other ballot measures or themselves allow subsequent legislative amendments. The initiative process prohibits change and thus discourages scrutiny during circulation and after enactment.[2]

In vivid contrast, the legislative process in its ideal form is almost infinitely flexible, encouraging scrutiny, criticism and change before and after legislative proposals become law. It is expressly designed to catch and correct errors in legislative bills before, during and even after their enactment. When a legislator introduces a bill, it is sent to one or more committees, where legislative staff analyze it for problems. The bill's author may then redraft and resubmit it to the committee. Public hearings are then usually scheduled, allowing experts and the general public to comment. If the bill is reported out of committee, it continues through the gamut of legislative scrutiny in a series of additional committee and floor debates. At any point up to final legislative action, the bill can be amended by the author to accommodate criticisms or suggestions. If the bill is enacted into law and errors are later discovered, the legislature may amend and correct the law at any time.

California's initiative process must be reformed to incorporate greater flexibility in drafting and amendments.

As in other states, California's initiative process must be reformed to incorporate greater flexibility in drafting and amendments. The initiative process should also result in better-written laws than it currently does, encourage citizens to work on policy issues

[2] California law allows initiative proponents to submit draft proposals to the legislative counsel and secretary of state for assistance in drafting and comments on clarity and layout, but proponents rarely ask for such assistance.

with the legislature instead of placing so many initiatives on the ballot and encourage the legislature to solve problems that initiatives have addressed in the past. Under suitable safeguards, proponents should be allowed to make limited changes to the text of their initiatives before placing them on the ballot. Proponents and legislators should also be permitted, if they mutually desire it, to negotiate with each other over possible compromise solutions to problems addressed by an initiative proposal. The legislature should be vested with suitably limited authority to amend initiatives after their enactment.

POORLY DRAFTED INITIATIVES CAUSE CONFUSION AMONG VOTERS AND THE COURTS

Many of the problems in the life of an initiative stem from its initial drafting.[3] A poorly drafted initiative can undermine a proposed reform in any number of ways.

Ambiguities or omissions in language can produce unintended consequences. Administrative agencies and the courts may find a different intent in the measure than anticipated by its proponents. Excessively complicated or confusing terminology can be

[3] Critics of initiatives often point to "bad" citizen-initiated measures as evidence that the voters are prone to produce dangerous and antidemocratic policies. Voter approval of California's 1920 Alien Land law, restricting property ownership based on citizenship, the 1964 voter repeal of the Rumford Fair Housing law, prohibiting discrimination in housing based on race, and voter approval of Proposition 187, restricting social service benefits for immigrants until the courts ultimately declared it unconstitutional, are frequently cited in support of this argument.

Defenders of the initiative process respond that similar problems affect legislation by representative bodies. The Alien Land law was preceded by various state statutes enacted by the California legislature that had similar discriminatory objectives. Indeed, one of the most reprehensible abuses of civil liberties was the internment of Japanese Americans during World War II, an action supported by representative bodies. "State Experience with the Initiative Process and Senate Joint Resolution 67," testimony of Larry Berg before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, U.S. Senate, December 13, 1977.

Although this chapter focuses on the problems involved in drafting an initiative—and these problems are substantial—bills drafted by the legislature are plagued by similar shortcomings. Examples abound. For instance, the legislature passed a law requiring all Californians to have automobile insurance but overlooked restraints on insurance rates to make policies affordable. Partly due to this omission, demands for tort reform mounted, resulting in a compromise package between the insurance industry, trial lawyers, doctors and business that was hastily drafted on a napkin at Frank Fat's restaurant in Sacramento. Consumer interests were entirely neglected by this compromise, prompting Ralph Nader to seek redress through the initiative process. The insurance industry, trial lawyers and other interested groups followed suit by placing five insurance initiatives on the November 1988 ballot at a combined campaign cost in excess of $83 million. Oversights, omissions and hastily drafted laws by the legislature contributed to this crisis in the insurance industry. Tom Dresslar, "Legislature Held at Fault for Crisis in Auto Insurance," *Los Angeles Daily Journal*, October 17, 1988.

Many critics also point to energy deregulation legislation (AB 1890 in 1996) as a poorly drafted legislative measure that received only perfunctory debate in a limited number of public hearings. Critics argue that this energy deregulation legislation served as a primary contributing factor to California's 2001 energy debacle. While the unanimously approved legislation promised lower utility rates and other benefits associated with market-driven competition, deregulation ultimately contributed to rolling energy blackouts throughout the state, the largest utility rate increases in California history (in excess of 40% over the course of a single year), the bankruptcy of two major energy corporations and one

exploited by opponents to foster voter reluctance to accept the measure. And constitutional weaknesses or other legal deficiencies may render an initiative void in whole or in part upon review by the courts.

Poorly drafted initiatives not only frustrate proponents but confuse voters as well. Voters may feel justifiably betrayed by initiatives that, because of ambiguous or unconstitutional provisions, are unable to deliver on ballot box promises. Improperly drafted initiatives also subject the courts to political pressures, forcing judicial involvement in questions of constitutionality, scope of subject matter, procedure, administrative interpretation and conflict with other initiative measures. The legislature is often forced to enact additional legislation to raise funding for measures enacted but not financed by the voters. And the state must pay many of the costs of the resulting legal disputes.[4]

Problems that arise from poorly drafted initiatives can be grouped into five specific categories. Ambiguous or imprecise terminology can make the implementation of initiatives problematic as administrative agencies and the courts wrestle with problems of interpretation. Omissions and oversights can result in unintended consequences and faulty legislation. Excessive length can overwhelm voters with too many issues or subjects. Complicated wording in the text and titles of initiatives can promote voter confusion. And constitutional deficiencies can frustrate voters and force proponents to start the enactment process all over again.

AMBIGUOUS OR IMPRECISE TERMINOLOGY

Poorly drafted initiatives can shape public policy in undesirable or unanticipated ways. A glaring example is Proposition 13, the popular limit on some property owners' taxes, which became part of the California Constitution after its passage in 1978. It has generated intense confusion and debate ever since. At the time of its passage, an analysis by the governor's office stated that the measure contained at least 40 ambiguities in its language.[5] Court adjudications have confirmed this judgment.

In the first legal challenge to Proposition 13, *Amador Valley Joint Union High School District v. State Board of Equalization*,[6] the California Supreme Court called its language "imprecise and ambiguous" but nonetheless held that the initiative met the single-subject requirement (for further discussion of the single-subject rule, see Chapter 9) and that proper procedures had been followed for an amendment to the state constitution. However, several of the justices predicted that future problems would inevitably arise as administrative agencies and the courts attempted to define the measure's imprecise terminology.

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state-sponsored corporate bailout, the sum of which cost taxpayers in excess of $10 billion; Foundation for Taxpayer and Consumer Rights, "Hoax: How Deregulation Let the Power Industry Steal $71 Billion From California," January 17, 2002. At least two ballot initiatives, Proposition 9 in 1998 and Proposition 80 in 2006, have sought unsuccessfully to modify aspects of the 1996 deregulation. Of course, the fact that drafting procedures in the state legislature are also flawed does not preclude the need to improve drafting procedures in the initiative process.

[4] The state government is required to administer and defend in court, if necessary, any initiative approved by the voters.

[5] See League of Women Voters, *Initiative and Referendum in California: A Legacy Lost?* (Sacramento, 1984), 40.

[6] *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208 (1978).

As predicted, several lawsuits challenged the provisions of Proposition 13.[7] The Howard Jarvis Taxpayers Association, which drafted Proposition 13, felt that these court rulings contradicted the original intent of the measure and hence it felt forced to sponsor four subsequent initiatives to reverse their decisions. Proposition 36 on the November 1984 ballot sought to reverse the court's decision as to when the annual increase in property assessments should begin under Proposition 13.[8] Proposition 62 on the November 1986 ballot attempted to reverse another court decision and redefine "special taxes" to require two-thirds voter approval. Proposition 136 on the November 1990 ballot tried to reverse other court interpretations. Proposition 218 on the November 1996 ballot restricted the authority of local governments to impose taxes, property-related assessments and fees without voter approval. The voters rejected two of these Jarvis Association–sponsored initiative constitutional amendments (Propositions 36 and 136) and approved two others (Propositions 62 and 218).

Poorly drafted initiatives can shape public policy in undesirable or unanticipated ways, and vague or ambiguous initiative language creates huge liabilities during a campaign.

Proposition 13 not only forced the court system to decipher the intent of the measure, but it also sparked a wave of "friendly" ballot measures, primarily put on the ballot by the legislature, to clarify its ambiguous terminology. Between 1978 and 2006, at least 18 ballot measures were proposed to clarify or amend Proposition 13. Some of these measures sought to preserve certain exemptions that the authors of Proposition 13 said they never intended to eliminate; others tried to adjust the tax-cutting initiative to changing social needs.[9]

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[7] In *County of Fresno v. Malmstrom*, 94 Cal. App. 3d 974 (1979), an appellate court ruled that "special assessments" were not to be construed as "taxes" under the provisions of Proposition 13 and therefore were not subject to the two-thirds voter approval requirement for levies by a local government. One year later, in *Board of Supervisors of San Diego v. Lonergan*, 27 Cal. 3d 855 (1980), the California Supreme Court had to clarify another provision in Proposition 13 by holding that the initiative's 1% tax rate was not intended to apply to unsecured property for tax year 1978–79. In *Los Angeles County Transportation Comm'n v. Richmond*, 31 Cal. 3d 197 (1982), the court ruled that "taxes" as defined by Proposition 13 did not encompass sales and use taxes, and for this reason a use tax did not require two-thirds voter approval. The court commented that the language of Proposition 13 was " 'imprecise and ambiguous' in a number of particulars." *Id.* at 201. In *Carman v. Alvord*, 31 Cal. 3d 318 (1982), the court ruled that the tax ceilings in Proposition 13 were not intended to apply to current taxes resulting from public employee retirement plans approved prior to the initiative's passage. In *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47 (1982), the court concluded that Proposition 13's two-thirds vote requirement did not apply to tax revenues utilized for general governmental purposes. And in *Armstrong v. County of San Mateo*, 146 Cal. App. 3d 597 (1983), an appellate court spent considerable time debating when the initial application of the measure's 2% annual inflation cap was to occur.

[8] Howard Jarvis argued that the 2% annual inflationary increase in property assessments was to begin upon enactment of Proposition 13 in 1978. However, noting that the initiative rolled back property values to 1975 levels, the court ruled that the 2% inflationary increase could be applied retroactively to 1975.

[9] The ballot measures that addressed aspects of Proposition 13 were Proposition 8 (approved November 1978; excluded reconstructed property after a natural disaster from value reassessment), Proposition 7 (approved November 1980; excluded solar energy systems from value reassessment), Proposition 3 (approved June 1982 excluded eminent domain actions from "change of ownership" provisions), Proposition 23 (approved June 1984; excluded seismic safety improvements from value reassessment), Proposition 31 (approved November 1984; excluded fire protection systems from value reassessment),

Proposition 13 is not unique. Numerous other measures have fallen short of their goals or have clogged the courts and burdened administrative agencies with omissions and ambiguities in textual language. After the passage of California's controversial 1996 medical use of marijuana law (Proposition 215), which directly conflicted with the federal Controlled Substances Act, doctors, patients, law enforcement officials and local, state and federal prosecutors clashed over the measure's parameters. According to the office of former Attorney General Bill Lockyer, ambiguities and significant omissions in the language of initiative contributed to erratic application and enforcement. "Proposition 215 was a poorly drafted initiative that raised more questions than it answered," commented Lockyer.[10] Even after a state task force recommended implementation guidelines, state legislators deadlocked over clarifying legislation for six years before passing a bill.[11] Now, 11 years after the measure's passage, with guidelines in place, outstanding legal issues related to the measure's language remain.[12]

Proposition 33 (approved November 1984; allowed property tax postponement for senior citizens), Proposition 34 (failed November 1984; excluded historic structures from value reassessment), Proposition 36 (failed November 1984; clarified provisions of property assessments), Proposition 46 (approved June 1986; allowed higher tax ceiling when approved by voters), Proposition 50 (approved June 1986; allowed transfer of value assessment to comparable property in the event of a disaster), Proposition 58 (approved November 1986; covered family transfers of property), Proposition 60 (approved November 1986; excluded replacement residences for the disabled from value reassessment), Proposition 62 (approved November 1986; defined special taxes), Proposition 90 (approved November 1988; excluded replacement residences for persons over 55 years of age in other counties from value reassessment), Proposition 110 (approved June 1990; property tax exemption for the severely disabled), Proposition 136 (failed November 1990; a Jarvis organization initiative to define various concepts in Proposition 13); Proposition 218 (approved November 1996; a Jarvis organization initiative that restricted authority of local governments to impose taxes, property-related assessments and fees without voter approval), and Proposition 37 (failed November 2000; redefined certain fees as taxes subject to the two-thirds vote requirement). Five of these measures, Propositions 36, 62, 136, 218 and 37, were initiative constitutional amendments.

[10] Press Office of Attorney General Bill Lockyer, "Attorney General Bill Lockyer, Senator John Vasconcellos, Santa Clara District Attorney George Kennedy and Others Release Medical Marijuana Task Force Recommendations," Release No. 99-056, July 12, 1999.

[11] SB 420 (Chapter 875, Statutes of 2003) clarified the scope of Proposition 215 and provided guidelines for implementation, including the establishment of a voluntary patient identification program, guidelines for law enforcement compliance and the assertion of medical marijuana use as a matter of states' rights.

[12] Several court cases have clarified the protections offered under Proposition 215, notably: *People v. Mower*, 28 Cal. 4th 457 (2002), which clarified that Proposition 215 provides limited immunity from prosecution, but does not grant absolute immunity from arrest, and *Gonzales v. Raich*, 545 U.S. I (2005), which affirmed the federal government's power to enforce federal marijuana laws under the commerce clause of the U.S. Constitution, even in states that approve its use for medicinal purposes. The *Gonzales* decision has not impacted the enforcement of state laws that remove criminal penalties from medical marijuana use, but it does affirm that Proposition 215 provides no protection from arrest and prosecution at the federal level. In February 2007 the California Supreme Court agreed to take up a case on appeal, *People v. Mentch*, 143 Cal.App.4th 1461(2006), that may clarify whether primary caregivers should be protected from criminal charges under Proposition 215.

Poorly drafted initiatives with vague and ambiguous language also create huge liabilities during a campaign. Ward Connerly's 2003 Racial Privacy initiative, for example, sought to promote a "color-blind society" through a state-agency ban on the collection of racial and ethnic data. Although Proposition 54 contained exemptions for medical research, federal census operations and certain law enforcement activities, many feared that the measure would have far-reaching consequences that would hinder efforts to fight disparities in health, law enforcement and education.

The potential impact on public health and disease prevention became a linchpin for the opposition campaign. Broad consensus emerged in the medical and public health communities that Proposition 54's exemptions were too vague and narrow. As detailed by Vanessa Baird, a chief administrator in the state's Department of Health Services, "It is difficult to determine the [initiative's impact] because the language in the initiative in some areas is a bit vague. . . . There will be some impact that will not be known unless the proposition passes, and some decisions will have to be made through the court system."[13] Connerly publicly admitted that "he meant for all medical data to be exempted, and that, in hindsight, he could have worded the measure better to make that clear. Even so, he said he hoped legislators and courts would recognize his intentions."[14] As voter support steadily declined and concerns mounted beyond the impact on public health, Connerly appeared to shift gears entirely. He argued that he designed the measure to be largely symbolic, with little to no impact on any major area of policy.[15] Voters rejected the measure 36% to 64%.

Omissions and Oversights

Some initiatives are drafted with no clear concept of the measure's consequences as a piece of legislation. The unsuccessful AIDS initiatives sponsored by Lyndon LaRouche (Proposition 64, November 1986, and Proposition 69, November 1988), for example, were drafted so poorly that even if they had been approved by the voters, they would probably not have changed public policy. The clear intent of the LaRouche initiatives was to declare AIDS a socially contagious disease and institute a reporting program that would lead to the quarantine of those carrying the HIV virus. Both proposals called for placing the names of AIDS carriers on the list of reportable diseases maintained by the California Department of Health Services (DHS) for appropriate action. The authors apparently assumed that qualification for such listing would then warrant quarantine. In fact, AIDS is currently subject to the laws and regulations governing communicable diseases,

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[13] Quoted in Bernice Young, "Connerly's Con: Ward Connerly Says His New Anti-Racism Initiative Won't Have Any Real Impact on California; Critics Beg to Differ," *SF Weekly*, September 10, 2003. Concern within the public health and medical community arose over how the exemption for "medical research subjects" would be interpreted. Proponents argued that the exemption would cover any medical data, while critics claimed that the term as commonly defined in the health-science field, would only apply to someone "tied directly to a research project, such as a volunteer using an experimental drug." "Prop. 54 Debate Rages Over Just One Word," *Sacramento Bee*, October 2, 2003.

[14] Martha Mendoza, "Researchers Untangle Proposition 54; Backer Expresses Pessimism," Associated Press, October 4, 2003.

[15] Bernice Young, *supra* note 13.

including reporting the names of persons who meet the AIDS surveillance criteria to the DHS. Since there is no evidence that AIDS can be transmitted through casual contact, no health official in the state has ever recommended the option of pursuing quarantine actions. In all probability this policy would not have changed even with passage of the LaRouche measures. The text of the initiatives indicated that the authors did not understand existing public policy.

In a similar vein, proponents seeking to make English California's official language (Proposition 63, November 1986) easily won an initiative election. Judging from an earlier initiative (Proposition 38, November 1984) by the same group calling for printing election ballots only in English, the objective of this measure was to discourage the accommodation of other languages in the public sector, especially in schools and government services. But the initiative's actual impact has been negligible at best. Declaring English an official language is in itself an ambiguous gesture, and the measure neglected to require that regulations be adopted to implement any specific objective. Although citizens have been given the right to sue the state for noncompliance, it is unclear what would constitute "compliance," and no lawsuits have been filed. Hence, this proposition has generated no noticeable change in public policy.

Drafting oversights and errors can tarnish the credibility of otherwise meritorious measures.

Drafting oversights and errors can also tarnish the credibility of otherwise meritorious measures. In 1996, two campaign finance reform measures appeared on the ballot: Proposition 208, sponsored by California Common Cause and the California League of Women Voters, and Proposition 212, sponsored by California Public Interest Research Group (CalPIRG).[16] While Proposition 208 proponents marketed their measure as "more realistic," Proposition 212 advocates branded their measure as the one with "sharper teeth."[17] Several provisions in Proposition 212 conflicted with that assertion, but one provision repealed the ban on honoraria and gifts to public officials. Proposition 212 backers insisted during the campaign that repealing the ban was a deliberate tactic to force the legislature to impose an even stricter limitation in the future, whereas opponents charged that the repeal was a mistake that Proposition 212 advocates refused to admit.[18] Broad consensus formed around the latter conclusion. This error contributed to the measure's ultimate failure.[19]

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[16] The Center for Governmental Studies was the principal author of Proposition 208.

[17] Bleys W. Rose, "Props 208, 212 Do Battle Both Take Aims at Campaign Funds," *Santa Rosa Press Democrat*, October 23, 1996.

[18] *Id.*

[19] In another example of a drafting oversight, U.S. Senator Pete Wilson placed a "Speedy Trial/Crime Victims" initiative (Proposition 115, June 1990) on the ballot to coincide with his election campaign for governor. Although the measure was intended to enhance Wilson's standing among voters, one of its provisions generated considerable controversy by deleting California's right to privacy clause from the state constitution. Wilson's rival candidate for governor, John Van de Kamp, argued that the right to privacy clause protected existing abortion rights and therefore the measure posed a threat to the pro-choice movement—which Wilson had said he supported. Ironically, this apparently inadvertent omission in the drafting process might have caused more harm than good to Wilson's candidacy.

Excessive Length

A problem often encountered in California is excessively long ballot propositions. Before 1988, California initiatives were sometimes as brief as 77 words of new language to be added to the statute books.[20] Initiatives in the early half of the 1980s typically contained between 1,000 and 3,000 words. Before 1988, only two initiatives in the 1980s exceeded 5,000 words—a gun control measure on the November 1982 ballot (Proposition 15, 5,556 words) and the state lottery measure on the November 1984 ballot (Proposition 37, 7,282 words).

The 1988 and 1990 elections, however, were watershed years, characterized by upsurges in the word length of initiatives. In those elections, voters had to wade through 13 separate initiatives that each surpassed 5,000 words in length. Several of these measures exceeded 10,000 words, with Proposition 131, the 1990 ethics and campaign finance reform measure, logging in at 15,633 words.[21] The median word length between 1990 and 1999 was 2,146, while the mean was just under 5,000 words. As shown in Table 3.1, the average word length of initiatives has remained similarly high in the past eight years as well, with a median of 2,710 and, again, a mean of just under 5,000.

California ballot propositions are often tediously long and complex.

Several major factors tend to make ballot propositions tediously long and complex. First, some initiative proponents apparently mistrust the legislature so profoundly that they draft their initiative to address every conceivable contingency and close every potential loophole. Instead of presenting the public with a general set of easily understood principles, leaving the legislature to fill in the details, these

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On the other side, Van de Kamp sponsored three separate initiatives on the November 1990 ballot in the expectation of boosting his gubernatorial election chances (Proposition 128, a far-reaching environmental measure labeled "Big Green"; Proposition 129, Van de Kamp's answer to Pete Wilson's speedy trial initiative; and Proposition 131, an ethics, campaign finance reform and term limits package that cost him the support of many Democratic Party officials). In an effort to accentuate the right to privacy omission in Pete Wilson's speedy trial initiative, Van de Kamp placed his own criminal procedures measure on the ballot (Proposition 129). Unfortunately for Van de Kamp, the initiative also called for an expensive drug abuse prevention program to be financed by closing specific corporate tax loopholes. Upon learning that additional revenues could be obtained by closing these loopholes, the legislature beat Van de Kamp to the punch by quickly closing them and allocating the funds to other state programs. It was too late for Van de Kamp to amend his initiative in light of the sudden absence of the anticipated revenue source, and the measure was rejected by voters on election day. Had the measure been approved by the voters, the state would suddenly have had to raise $1.2 billion in new revenues.

Another example took place in Bade County, Florida, where lack of drafting review procedures resulted in an embarrassing omission for proponents of a tax-cutting initiative in the mid-1980s. A group petitioned for an initiative to cut property taxes by 50%. The initiative's sponsors wanted to reduce property taxes from 8 mills per $1,000 of property value to 4 mills per $1,000 of property value. In drafting the petition, however, the proponents inadvertently omitted the words "per $1,000," resulting in a proposed property tax reduction of 99.95%. The mistake was not discovered until the measure qualified for the ballot. A court ruled that the initiative could not be changed and that it must be submitted to the voters as written. No one campaigned for the measure, and it lost.

[20] Proposition 9 (taxation and income) on the June 1980 ballot was 77 words in length.

[21] Legislative ballot measures usually do not exceed 5,000 words, presumably because they concern less controversial and less sweeping issues. From 1976 through 1990, for example, only 7 of 161 legislative ballot measures exceeded 5,000 words.

TABLE 3.1 Estimated Word Length of All Initiatives on the California Ballot (2000–2006)

Proposition	Subject	Year	Status	Word Count*
21	Juvenile Crime	2000 Primary	Approved	8,342
22	Definition of Marriage	2000 Primary	Approved	93
23	"None of the Above" Ballot Option	2000 Primary	Rejected	1,913
25	Contributions and Spending Limits	2000 Primary	Rejected	9,484
26	Bonds for School Facilities	2000 Primary	Rejected	1,797
27	Term Limits Declaration for Congressional Candidates	2000 Primary	Rejected	1,272
28	Repeal of Proposition 10 Tobacco Surtax	2000 Primary	Rejected	603
35	Public Works	2000 General	Approved	1,145
36	Drug Treatment	2000 General	Approved	4,575
37	Taxation	2000 General	Rejected	876
38	School Vouchers	2000 General	Rejected	3,359
39	School Facilities	2000 General	Approved	1,791
45	Legislative Term Limits	2002 Primary	Rejected	625
49	After-School Programs	2002 General	Approved	2,633
50	Water and Wetlands	2002 General	Approved	5,078
51	Transportation	2002 General	Rejected	19,645
52	Voter Registration	2002 General	Rejected	2,368
54	Affirmative Action Repeal	2003 Special	Rejected	627
56	Voting Requirements for State Budget and Taxes	2004 Primary	Rejected	2,096
61	Children's Hospitals	2004 General	Approved	2,823
62	Elections	2004 General	Rejected	11,184
63	Mental Health Services	2004 General	Approved	8,716
64	Business Competition	2004 General	Approved	987
65	Local Government Funds	2004 General	Rejected	2,213
66	"Three Strikes" Limits	2004 General	Rejected	1,818
67	Emergency Medical Services	2004 General	Rejected	11,710

proponents seek to minimize or eliminate altogether the legislature's ability to fill in later statutory details.

Proposition 71 (2004), a voter-approved constitutional amendment that funds stem cell research through state-issued bonds, serves as a classic example. The proposition consisted of over 10,000 words and spanned roughly eight pages in the official voter information pamphlet. According to *San Francisco Chronicle* staff writer Bernadette Tansey, the initiative's authors designed it to be "something of a juggernaut, invulnerable to the competing state priorities" and any political and financial obstacles that might hinder the scientific aim of the initiative.[22] The trade-off, however, is that many voters, not having the time or wherewithal to read the entire initiative, may have been surprised to learn of provisions within the measure that could be construed as contrary to its stated purpose and intent: funding stem cell research. In addition to this core aim, for example,

[22] Bernadette Tansey, "Prop. 71's Fine Print Contains Surprises: Tightly Written Law Leaves Little Room for Oversight or Changes," *San Francisco Chronicle*, December 8, 2004.

Proposition	Subject	Year	Status	Word Count*
68	Nontribal Gambling	2004 General	Rejected	6,885
69	DNA Samples	2004 General	Approved	7,707
70	Tribal Gaming	2004 General	Rejected	2,179
71	Stem Cell Research	2004 General	Approved	10,841
73	Parental Notification	2005 Special	Rejected	2,600
74	Teacher Tenure	2005 Special	Rejected	778
75	Union Dues for Political Purposes	2005 Special	Rejected	1,255
76	Spending Limits and School Funding	2005 Special	Rejected	3,219
77	Redistricting	2005 Special	Rejected	2,710
78	Prescription Drug Discounts	2005 Special	Rejected	3,277
79	Prescription Drug Discounts	2005 Special	Rejected	4,517
80	Electric Service Providers	2005 Special	Rejected	2,065
82	Universal Preschool	2006 Primary	Rejected	11,000
83	Sex Offenders	2006 General	Approved	3,698
84	Water Resources	2006 General	Approved	8,253
85	Parental Notification	2006 General	Rejected	2,917
86	Tobacco Tax	2006 General	Rejected	17,849
87	Oil Tax	2006 General	Rejected	11,025
88	Education Funding	2006 General	Rejected	2,495
89	Public Financing of Campaigns	2006 General	Rejected	17,303
90	Eminent Domain	2006 General	Rejected	1,617
			Median	**2,710**
			Mean	**4,935**

* Words counted are all italicized proposed additions to statutory or constitutional law and any enacting language pertinent to the initiative, such as all severability clauses. Existing statutory or constitutional law repeated in the text of an initiative, and all strike-out language, are not included in the tabulation. Preambles are included in the content.
Source: Center for Governmental Studies data analysis.

Proposition 71 provided funding for "other scientific and medical research technologies" that could be entirely unrelated to regenerative medicine. The measure also set up a sizeable governing committee made up of organizations that could profit from the grants under their purview, a provision that raised concerns about conflicts of interest and accountability.[23]

[23] In another example, the November 1990 ballot, which included Proposition 131, was fattened by pro- and antienvironmental protection measures of exorbitant length. "Big Green" (Proposition 128) encompassed everything from timber harvesting to protection of the ozone layer in a 13,655-word treatise. It was accompanied by a timber industry–sponsored measure (Proposition 138) that proposed little more than preserving the status quo in a meandering 9,735-word document. Altogether the ballot pamphlet totaled 222 pages of analysis, arguments and texts.

Long ballot initiatives might be justified if they were necessary to deal with urgent issues of the day—even though voters would be hard-pressed to understand them. But the lengthy measures referred to here dealt with matters arguably no more critical than the Victims' Bill of Rights in June 1982 (Proposition 8; 2,890 words), the Beverage Recycling Act in November 1982 (Proposition 11;1,309

There are other reasons for excessively long initiatives. Some authors apparently feel that if they are going to go to the effort to push an initiative through the entire costly and time-consuming process, then they had better include everything possibly relevant to their cause out of fear that they might have to return to this burdensome process. An otherwise admirable desire for comprehensiveness, however, can overwhelm the public's ability to absorb the meaning of the proposal. Instead of writing a thorough and precise campaign finance reform initiative in 1990, for example, Attorney General Van de Kamp drafted one of the longest initiatives in recent history (Proposition 131), encompassing comprehensive campaign finance reform, a detailed ethics package for public officials and a term limits proposal. Even the official summary in the state ballot pamphlet could not address all the aspects of this initiative.

Some measures are overly long because they seek to incorporate a wide array of pet projects in trade for money and volunteer support from special interest groups. Two of the lengthiest measures in the past 15 years both involved funding for a conglomerate of special interest projects and were sponsored by the same proponent, the Planning and Conservation League. In crafting Proposition 180, a $2 billion parks and conservation bond measure on the June 1994 ballot, the league appeared to have included "something for everyone," as one commentator noted.[24] Weighing in at 32,343 words, the measure set a record as the longest initiative in California history. Proposition 180 spanned 19 pages in the California ballot pamphlet and enumerated close to 400 specific projects, some of which could be directly linked to the interests of campaign contributors.[25] Amid charges of pork-barrel politics during the campaign, voters rejected the measure.[26]

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words), the Gann limit on legislative spending in June 1984 (Proposition 24; 4,322 words), the Ralph Nader–endorsed insurance reform measure in November 1988 (Proposition 103; 2,563 words), the term limits measure of November 1990 (Proposition 140; 604 words) or any of the other propositions written more concisely. Indeed, some observers have speculated that a principal reason why the November 1988 insurance reform measure (Proposition 103) was drafted in a readable 2,563 words, while the insurance industry measure (Proposition 104) contained 12,336 words, was partly a reflection of opposing election strategies. Consumer groups wanted voters to understand the basic elements of insurance reform, while the insurance industry wanted voters to give up on all insurance reforms as an issue too complex to be decided at the ballot box.

[24] Editorial, "Boondoggle Bonds: Proposition 180 Seems to Have Something for Everybody," *Los Angeles Daily News*, May 18, 1994. The electioneering strategy of "buying" support for an initiative by drafting pet projects into it is not exclusively limited to excessively wordy initiatives. Proposition 99 (1,700 words), the tobacco tax initiative on the November 1988 ballot, earmarked some of the expected tax proceeds for fire prevention, fish and waterfowl protection and other state and local park maintenance and protection programs in return for $50,000 and a pledge by environmental groups to help gather signatures. The legislature in 1991 enacted a law (SB 424-Kopp) that prohibited initiative proponents from including an appropriation in an initiative in exchange for a campaign contribution, but the court declared this provision invalid. *Planning and Conservation League, Inc. v. Lungren*, 38 Cal. App. 4th 497 (1995).

[25] The Irvine Company, for example, contributed close to $100,000 to the Proposition 180 campaign. The proposition outlined nearly $36 million of the bond funding toward the purchase of Irvine Company lands. Ricky Young, "Irvine Company Gives Additional $40,000 to Proposition 180 Push for Conservation Bonds," *Orange County Registrar*, June 7, 1994.

[26] In 1986, a similar situation took place. Proponents of Proposition 70 (12,655 words), a $776 million park bonds measure on the June ballot that year, promised local environmental groups that their pet projects would be included in the initiative if they pledged to support the qualification drive.

Proposition 51 (28,265 words), the Planning and Conservation League's other measure and the lengthiest initiative to appear before voters between 2000 and 2006, garnered a similar reaction. The initiative would have set aside 30% of motor vehicle sales taxes for transportation programs and other specified projects. Mark Martin of the *San Francisco Chronicle* noted that the league "made no secret of the fact that some projects were selected in the hopes of earning contributions from benefactors."[27] Those who raised money or gathered signatures were rewarded by having their favorite park acquisition projects added to the bond measure, regardless of where those projects fell in a ranking of priorities. The trade-off, however, was that the long length of such pay-to-play measures led to less scrutiny of the fine details buried within the text. As one league board member noted when she discovered funding that would benefit an antienvironmentalist large-scale developer, "I personally was disappointed that I didn't pick up on it, and that there wasn't a process to more carefully vet some of the projects included in [the measure]."[28] Like its forerunner, Proposition 51 failed to pass.

The fates of Propositions 180 and 51 are not unique: Voters are less likely to approve longer, more complex initiatives. From 1990 to 2006, initiatives under 10,000 words in length registered an approval rate of 38%. Initiatives under 5,000 words in length had about the same approval rate. By contrast, initiatives over 10,000 words registered an approval rate of merely 14%. Longer initiatives tend to be more complex and, by extension, may be more difficult to understand.

Possibly the greatest damage inflicted by excessively wordy initiatives, however, is to voter confidence in the initiative process. Many persons have expressed frustration with the growing number of lengthy propositions that are overreaching in scope, conceal attempts to create confusion or appear akin to pork-barrel legislation.

Complicated Wording

Complicated wording may help to overcome ambiguities in the text of an initiative and thus rarely contributes to "bad" legislation, but it often generates voter confusion. According to public opinion research conducted by the Public Policy Institute of California, "a solid majority of voters (63%) agree strongly (33%) or somewhat (30%) that the wording of propositions on the November [2006] ballot was too complicated and confusing."[29] This finding is consistent with, though slightly higher than, voter concern in the 2005 special election, when 55% of voters agreed with the statement.[30]

The attorney general's desire to provide an ideologically "neutral" title and summary for an initiative proposal has also contributed to voter confusion. For example, Proposition 10, the anti–rent control initiative on the 1980 primary ballot, was not well understood by voters because of its title. A coalition of landlords circulated a petition intended to restrict rent control at the state and local levels. The attorney general simply labeled the initiative "Rent Control." Although the title was changed to "Rent" when the measure

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[27] Mark Martin, "Ballot Measure Packed with Pork," *San Francisco Chronicle*, September 26, 2006.

[28] Howard Blume, "A Deal-Maker's Demise," *LA Weekly*, November 15, 2002.

[29] Mark Baldassare, *Californians and the Future,* statewide survey conducted by the Public Policy Institute of California, November 2006.

[30] *Id.*, at 27.

finally qualified for the ballot, the new title was equally confusing to voters. One study estimated that three-fourths of the voters did not match their opinion on rent control with their vote on the measure; 23% wanted to protect rent control but voted yes, and 54% were opposed to rent control but voted no. If this study is correct, the landlords' initiative would have won if it had been accurately labeled.[31]

Ballot measures written in complicated and confusing terminology tend to fare poorly at the polls. The cause of this pattern is not as evident as first appears. It is indeed true that, as Herbert Baus and William Ross contend, "The confused voter votes 'no.' "[32] But voters are not only reluctant to pass judgment on something they do not understand; they also tend to vote against complicated and confusing measures because opposition campaigns against such initiatives are especially effective.

The true cost of a poorly drafted measure, however, burdens more than the proponents. All affected parties waste financial resources on expensive campaigns and subsequent court challenges. State resources used to prepare the ballot measure and conduct the statewide election are undermined. And voter disenchantment increases toward a policy-making system that nurtures confusion and doubt.

Unconstitutional Provisions

Like legislation, all initiatives are subject to potential review by the courts for compliance with constitutional and procedural requirements. The courts will consider invalidating initiatives on one of three general grounds: (1) whether the substance of the measure conflicts with a federal or state constitutional provision or a federal statute; (2) whether the subject of the measure goes beyond the defined boundaries of what the constitution says an initiative can address; or (3) whether procedural requirements for ballot measure qualification have been violated.[33] Depending on circumstances, the courts can remove a measure from the ballot prior to an election or rule against the propriety of the voter-approved legislation or constitutional amendment after the election.

Throughout the history of the initiative process, most federal and state courts have expressed reluctance to interfere with the initiative power of the people. In 1912, the U.S. Supreme Court set the tone of judicial deference toward initiatives in *Pacific States Telephone and Telegraph Co. v. State of Oregon*, declaring that the laws passed in a sovereign state as the result of proper initiative and referendum clauses in a state's constitution did not violate the U.S. Constitution's guarantee of a republican form of government.[34]

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[31] David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (Baltimore: Johns Hopkins University Press, 1984), at 144.

[32] H. M. Baus and W. B. Ross, *Politics Battle Plan* (New York: Macmillan, 1968), 61.

[33] James Gordon and David Magleby, "Pre-Election Judicial Review of Initiatives and Referendums" (paper presented at the annual meeting of the American Political Science Association, Washington, D.C., 1988).

[34] *Pacific States Telephone and Telegraph Co. v. State of Oregon*, 223 U.S. 118,151 (1912). The court has often deferred to the states on "political questions." See, e.g., *Luther v. Borden*, 48 U.S. 1 (1849). For the argument that the courts should modify the political question doctrine and rule the initiative process unconstitutional, see Cynthia Fountaine, "Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative," *Southern California Law Review* 61 (1988): 735–776.

Judicial deference toward initiatives in California appears to be as strong as ever today, although legal challenges are now a staple in the arsenal of opposition groups in their attempts to defeat measures.

Through most of the ballot initiative's history in California, state courts have followed this lead of minimal intervention in the initiative process. Paralleling court decisions in several other states, the California Supreme Court ruled that the state constitution's initiative and referendum provisions should be liberally construed to preserve maximum legislative power for the people.[35] Indeed, the court later announced it was the court's solemn duty to guard the sovereign people's initiative power.[36]

Judicial deference toward initiatives in California appears to be as strong as ever today, although legal challenges are now a staple in the arsenal of opposition groups in their attempts to defeat measures. Since 1964, the courts have struck down, either in whole or in part, 21 of 65 voter-approved initiatives and kept 3 off the ballot altogether.[37] (For a complete discussion of judicial involvement in the initiative process, see Chapter 9.)

Tellingly, opposition groups are no longer inclined to wait for passage of a measure before pursuing legal recourse. The courts today seem more willing to review measures prior to the election. Proponents drafting an initiative must be particularly careful to anticipate legal challenges that are likely to ensue. The more clearly and carefully an initiative is drafted, the more likely its proponents will see the policy results they want.

CALIFORNIA LACKS EFFECTIVE PROCEDURES TO DETECT AND CORRECT INITIATIVE ERRORS EITHER BEFORE CIRCULATION OR AFTER ADOPTION

California requires no formal review of the wording, substance, legality or constitutionality of ballot initiatives. Proponents can draft, circulate and qualify an initiative without ever receiving an independent analysis of the measure—save a perfunctory legislative hearing just before the election.[38]

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[35] See *Blotter v. Farrell*, 42 Cal. 2d 804 (1954); *Hunt v. Mayor & Council of Riverside*, 31 Cal. 2d 608 (1948).

[36] *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208 (1978); *Brosnahan v. Brown*, 32 Cal. 3d 236 (1982).

[37] In one case in which an initiative was removed from the ballot, the peremptory challenge came so late that the measure was numbered and the galleys of the ballot pamphlet sent to the printer. The California Supreme Court then struck the measure from the election. The secretary of state ordered the state printer to remove the description of Proposition 35 from the pamphlet, leaving four blank pages in the middle of the November 1984 booklet with the inscription: "There is no Proposition 35 at this election. Go to page 42."

[38] After an initiative is titled but before it qualifies for the ballot, the attorney general forwards copies of the text and summary to the senate and assembly. The appropriate committees of each house may hold hearings on the measure at any time. California Elections Code § 3506 permits optional legislative hearings on any titled initiative prior to ballot qualification. The Elections Code requires legislative hearings for all initiatives certified by the secretary of state as qualifying for the ballot (§ 3523.1). As a result, the legislature generally does not hold hearings until after an initiative proposal actually qualifies for the ballot. No changes or amendments to the proposal may be made by either the legislature or the proponents after titling, and the initiative will appear on the ballot as written regardless of any action taken by the legislature. Consequently, these legislative hearings have little meaning. Proponents sometimes do not bother attending them and they generate very little, if any, press attention.

Before Circulation: Unused Drafting Assistance

By far the greatest proportion of initiative proposals in California have been drafted privately by their sponsors with no outside review or assistance. Yet California provides two avenues for optional drafting assistance to initiative proponents on request. One is through the legislative counsel, who can assist in writing the measure before it receives an initiative title. A second, little-known avenue is through the secretary of state, who on request must provide a review of a measure's form and clarity prior to circulation.[39]

Legislative Counsel

A request for legislative counsel assistance must be signed by 25 or more electors. The legislative counsel must assist at no charge in drafting the proposal if the counsel determines that there is a reasonable probability the measure will be submitted to the voters.[40] The legislative counsel has rarely refused.

Although the attorney general receives an average of about 60 proposals for titling each year, the legislative counsel only receives between 6 and 10 requests annually for drafting assistance. Usually this assistance is requested by nonprofessional citizens with limited organizational resources. Such initiative proposals often fare poorly at the polls. By contrast, the major organizations that stand the best chance of placing a measure on the ballot can afford to pay for private drafting assistance and are the least inclined to request it from the legislative counsel.[41]

Secretary of State

A little-known provision in the state's government code establishes an optional review process for initiative measures by the secretary of state's office.[42] After an initiative measure is prepared and before its circulation, proponents may ask the secretary of state to review the initiative and recommend ways to improve its form and language. This review has been requested only a few times in the history of the initiative process, in part because so few proponents realized that such an option exists. The review procedures in the handbook prepared by the secretary of state's office and other materials made available to initiative proponents make no mention of this service. The statutory provision itself is not contained in the body of laws addressing initiative procedures. Instead, it is hidden under "Duties of the Secretary of State" in the California Government Code.

As discussed in Chapter 4, prior to circulation of an initiative the proponent must submit the language to the attorney general for a title, summary and fiscal analysis. The attorney general's analysis is a brief synopsis of the measure and is not meant to assist proponents in writing a better law or pinpoint flaws in the proposal.

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[39] Cal. Gov't Code § 12172 (2007).
[40] Cal. Gov't Code § 10243 (2007).
[41] Telephone interview with Thomas Kerbs, deputy, California Legislative Counsel's office, May 8, 2007.
[42] Cal. Gov't Code § 12172 (West 1980).

After Qualification: Inability of the Legislature and Proponent to Negotiate a Compromise

Once the secretary of state certifies that an initiative has qualified for the ballot, the proponent and the legislature are powerless to amend, improve or withdraw it—or even to eliminate errors. By law, a qualified initiative must be placed on the ballot exactly as written. The legislature cannot enact a *substitute law* and withdraw the initiative from the ballot—even if the proponents agree that such a substitute is desirable. In fact, even if the legislature enacts a law that is *identical* to the initiative, the initiative as drafted must still appear on the ballot. At most, the legislature can place its own proposal on the ballot *in addition to* the initiative—thus confronting the voters with *two* measures and increasing the risk of confusion.

If the legislature enacts a law that is *identical* to an initiative on an upcoming ballot, the initiative as drafted must still appear on the ballot.

As a result of these legal barriers to amendability, initiative proponents and legislators have little incentive to negotiate with each other to improve an initiative, eliminate some of its unrealistic aspects or otherwise reach a compromise. While the legislature can draw on its experience, staff and resources to improve complex pieces of legislation, these resources and skills are inaccessible as a matter of law to the participants in the initiative process.

In recent years, a few proponents have used a new tactic. They have circulated petitions and obtained or gotten close to obtaining sufficient signatures to qualify a measure, but they have not turned those signatures in to the secretary of state for formal counting and qualification. Instead, they have negotiated with the legislature, encouraging it to adopt comparable legislation in exchange for the proponents' willingness not to submit their signatures for qualification. This allows the legislature to contribute ideas and helps proponents avoid an expensive campaign that they might lose.

Governor Arnold Schwarzenegger used this tactic to get workers' compensation legislation passed in 2004. As he met with legislators to develop a workers' compensation reform package, a business-friendly initiative petition on the subject was in circulation and enjoyed strong support from the California Chamber of Commerce and other business groups. The governor planned to campaign for the initiative in circulation if the legislature did not come to an acceptable agreement, giving him significant clout in negotiations. The legislature passed SB 899 (Poochigian, R-Fresno), in which the governor and business interests won two major victories: The bill did not regulate insurance rates, and it required injured workers to pick their physicians from an employer- and insurer-approved pool.[43]

In another example, the legislature passed a charter school bill, AB 554 (Lempert, D-San Carlos), in 1998. The bill increased the number of charter schools that can be built each year in California, and it eased the process for initiating a charter school. Proponents, who had already collected 1.1 million petition signatures for a charter school ballot initiative, made a deal with the California Teacher's Association. The CTA agreed to endorse a bill with the same language if it also required charter teachers to have a state

[43] "Workers' Compensation in California," Institute for Governmental Studies, April 2005.

credential and included provisions for oversight of spending and curriculum. AB 554 passed, and proponents did not submit their signatures.[44]

Occasionally, proponents may draft more extreme provisions into their initiatives to create a greater incentive for the legislature to act. For example, in 2004 Proposition 65 proponents used the measure as a bargaining tool with the legislature in their negotiations to better protect local government revenue from state-level appropriations. The successful compromise measure, Proposition 1A, placed on the ballot by the legislature, contained more flexible terms that allowed the state to shift local government revenue with two-thirds approval of the legislature and a gubernatorial declaration of fiscal necessity. The initiative proponents and the legislature both agreed to campaign for Proposition 1A and against Proposition 65. In addition to the risk of voter confusion over the two measures being on the same ballot, proponents of the compromise also risked creating a $2.6 billion hole in the state budget if Proposition 65, the more restrictive measure, passed.[45] To the relief of Proposition 65's original proponents and all those involved in the compromise effort, Proposition 65 failed and Proposition 1A passed.

Other initiative proponents have also ended up campaigning against their own initiatives in what has often amounted to a costly game of chicken with the legislature. In 2005, an alliance of transportation interests spent $2.5 million to qualify an initiative that would protect Proposition 42 (2002) gas-tax revenue set aside for transportation spending from being used to fill state budget gaps in tough times. The coalition largely used the initiative to pressure the legislature into action and began collecting and filing a sizeable number of signatures. When proponents reached a compromise with the legislature, they attempted to prevent their own measure from qualifying by holding back 300,000 signatures. To their surprise however, the previously submitted signatures included over 7,000 more valid ones than necessary, and the measure qualified. The legislature's compromise measure, Proposition 1A, went on the 2006 ballot and passed. Although voters seemingly resolved the issue by passing Proposition 1A, the proponents are powerless to withdraw their transportation initiative now set to appear on the ballot in 2008, two years after the compromise measure passed.

Between 1911 and 1966, California did have a two-track system of initiatives in which proponents could choose to pursue one of two courses. Proponents could place their measures directly on the ballot by gathering signatures amounting to 8% of the last gubernatorial vote for both statutory initiatives and constitutional amendments. Alternatively, proponents could file an "indirect initiative" proposal and gather signatures amounting to 5% of the last gubernatorial vote for ballot qualification. Before being placed on the ballot, however, the initiative would be presented to the legislature for consideration. If the legislature did not approve the measure, the original measure would then be placed on the ballot.

California's alternative indirect initiative system was ended in 1966 for lack of use. In the entire history of the state's direct democracy, only 19 titled initiatives had attempted

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[44] Marshall Wilson, "Charter Schools Expected to Double Under New Law," *San Francisco Chronicle*, May 8, 1998.

[45] The Proposition 1A compromise deal included an agreement that local governments would give up $2.6 billion in the current fiscal year in order to help the state out of debt. Jennifer Fitzenberger, "Dumped by Local Agencies, Proposition 65, Gets Florez's Help," *Fresno Bee*, October 21, 2004.

the indirect route, and only 4 of these gathered enough signatures to qualify for the ballot and a legislative hearing. Only one was actually approved by the legislature; the other three failed at the polls.[46]

One reason the indirect initiative was used so seldom in California was that it took at least two and one-half years to complete the process, and few proponents were willing to wait that long. Before 1966, the California legislature only met in odd-numbered years to consider such general matters as indirect initiative proposals.[47] Proponents wishing to use the indirect initiative had to gather enough signatures to qualify their measure for the ballot and have them counted and ready for presentation to the legislature by January 1st of an odd-numbered year. That required the proponents to begin circulating their initiative at least six and a half months before the January 1st odd-year deadline—if they were to take the needed time for circulation and give the secretary of state an additional 45 days to count and verify the signatures.[48] The legislature then had to consider the measure during its odd-year session, and the initiative could not be presented to the voters until the ensuing even-numbered year.

A second reason for the disuse of the indirect initiative was its "take-it-or-leave-it" aspect. If an initiative qualified for the ballot through the indirect procedure, the legislature's only option was to adopt it in its entirety or reject it altogether. The legislature was unable to change a single word, and the proponent was similarly prohibited from accepting even minor corrections. As a result, the proponent and the legislature lacked an incentive to negotiate with each other over the substance of the initiative. Compromises were impossible. It is little wonder that California's indirect initiative procedure was little used and ultimately repealed.[49]

Some have urged California to reinstate the indirect initiative and make it more attractive by offering a lower signature threshold.[50] Experience in other states suggests,

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[46] In 1937, a Fishing Control indirect initiative was approved by the legislature and therefore not placed on the ballot. The three indirect initiatives that were passed on to the voters by the legislature were Reorganization of Building and Loan Associations (1942); Old Age Assistance (1952); and Prohibition of Cross-Filing in Elections (1952). All three were rejected by the voters. Seven years after the failed initiative, however, the legislature passed legislation abolishing cross-filing in elections.

[47] The legislature also met in even-numbered years but only to consider the state budget. Other matters, such as initiative proposals, could not be addressed.

[48] Thus, a proponent might have to begin circulating an initiative by June 15,1952, for example, to obtain enough signatures by the end of December 1952; the legislature would then have to consider it in 1953; and the initiative could then only appear on the ballot in November of 1954—since, at that time, initiatives could only appear on general and not primary election ballots.

[49] The indirect initiative procedure was repealed in 1966 as part of a general revision of the California Constitution. The signatures required for statutory initiatives were reduced from 8% to 5% of the vote in the last gubernatorial election. Signatures required for constitutional initiatives were left at 8%.

[50] In the 1991 legislative session, AB 1450 and ACA 16 by Assemblymember Sher (D-Palo Alto) proposed to restore the indirect initiative and require proponents to submit their certified signatures and initiative to the legislature by February of odd-numbered years (for the June ballot in even-numbered years) or March of even-numbered years (for the November ballot of even-numbered years). Under these bills, proponents would have had between 14.5 to 27.5 months between circulation and the ballot—compared to about 12.5 months for the current direct initiative process. Sher's bills were not adopted.

however, that even these inducements might not be successful. In every state that allows proponents to choose between the direct initiative route or an indirect route, the direct initiative is overwhelmingly preferred, despite a significantly higher signature threshold.[51]

After Adoption: Limited Power of the Legislature to Amend

California law forbids legislative amendments to initiatives after their adoption unless the text of the initiative itself expressly permits amendments.[52] Any initiative that does not expressly allow the legislature to make amendments can only be changed by voter approval of another ballot proposition. Moreover, the legislature can only amend previously adopted initiatives by placing a measure on the ballot for a statewide vote, no matter how trivial the amendment is. No other state in the nation carries the concept of initiatives as "written in stone" to such lengths as to forbid their legislatures from updating or amending initiative legislation.

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Ban on Amendments Without Prior Proponent Consent

In 1974, the Political Reform Act (Proposition 9) broke new ground by expressly permitting the legislature to amend its provisions on three conditions: (1) the amendment had to "further the purposes" of the act; (2) the amendment had to be in final form 40 days (now 12 days) before the final vote of each house; and (3) two-thirds of the members of each house had to approve the amendment.[53]

Since 1974, a growing percentage of statutory initiatives have followed the example of Proposition 9 and voluntarily permitted the legislature to amend their provisions, although none has allowed the legislature to repeal the measure. Of the 107 statutory measures between 1976 and 2006 that qualified for the ballot, 78 (73%) had language

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[51] In interview after interview across the nation, initiative proponents were hostile to the notion of presenting their proposals before their legislatures. Sallie Debolt, an assistant elections counsel in Ohio, who was once involved in an initiative statute drive, summarized this hostility: "The system of appealing to the legislature is really perfunctory, since it is legislative inaction on the issue that caused the problem in the first place. . . . We go before the legislature and grow furious in the course of the hearing. . . . The inconvenience is having to put up with the legislature." Telephone interview with Sallie Debolt, January 15, 1991. Other interviews support this feeling. In all states that offer the option of either indirect or direct initiatives, the direct route is overwhelmingly preferred.

[52] Art. II, § 10(c) of the California Constitution states: "The legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."

[53] Cal. Gov't Code § 82013 (West Supp. 1990). In California, all vote requirements refer to a vote of all the members in the body, not just the members voting on the issue. Thus, a two-thirds vote requirement means two-thirds of the 80-member assembly, or 54 votes, and two-thirds of the 40-member senate, or 27 votes. In Congress, on the other hand, vote requirements refer to the number voting on the particular issue, provided a quorum is in attendance.

authorizing amendments. Between 2000 and 2006, 15 of the 18 statutory initiatives on the ballot (83%) allowed legislative amendments.[54]

Proponents are increasingly allowing the legislature to amend their initiatives for a number of reasons. First, they are becoming more sophisticated in drafting their measures and are hiring experienced lawyers for this purpose. These lawyers know that no complex law can be drafted perfectly, and few laws can be left in place for years without needing fine-tuning or additions.

Second, initiatives are becoming more complex as they seek to adopt detailed solutions to perceived problems. Initiatives are not general policy statements asking the legislature to solve a problem. They contain specific, legal language that must be kept flexible for continued viability.

Finally, the legislature, despite a few exceptions, has generally been respectful of initiatives and has not sought to amend them without at least the tacit approval of the proponents. The legislature has amended the Political Reform Act over 200 times. In virtually every instance, the Fair Political Practices Commission, the watchdog agency created by the act and charged with its administration, has not objected.

Initiatives Prohibiting Amendments Altogether

Some measures, however, have not permitted legislative amendments. One of these, authorizing chiropractors to practice in California, illustrates the problems of lack of amendability. Enacted in 1922 by the people, the legislature has been forced to place eight measures on the ballot to amend the chiropractic law—in 1948, 1960, 1970, 1972, 1976, 1978, 1990 and 2002. Nearly all these amendments have involved minor technical changes, but they have still been costly to submit to the voters and often generate voter disenchantment.

In November 1976, for example, the legislature put an amendment on the ballot to increase the membership of the Board of Chiropractic Examiners from 5 to 7 and to require that neither of the new members be licensed chiropractors. It also changed the eligibility requirements of colleges and the length of the license application period. Two years later in 1978, the legislature put another measure on the ballot to clean up the 1976 measure, which apparently was interpreted by a superior court in a manner unintended by the Board of Chiropractic Examiners.

A group called Mad as Hell Association wrote the ballot pamphlet argument against the measure. It consisted of a bit of doggerel, quoted in part below:

Why do we have to vote on trivia like this
When pollution, crime and high prices have caused our state to go amiss?
So let's tell the establishment we don't want more schemes
To fill the files with paper reams

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[54] Initiatives that amend the constitution can only be changed by a vote of the people and thus are not included in these statistics.

Of needless statutes and codes
When pollution is choking us on the roads.
In the book of life is writ
That the legislature should know when to quit.
In 76 the chiropractic initiative was passed;
Why wasn't this law the last?[55]

Unaware that the legislature had no choice in the matter, the opponents urged voters: "Tell the legislature that unimportant issues should not be brought to the public to waste their time and money."[56] The measure was approved by a 76% vote, despite the unique and memorable argument against it.

Another example, Proposition 7 in 1978, was sponsored by Senator John Briggs of Orange County and restored the death penalty to California. It also increased the penalty for second-degree murder. Because Proposition 7 did not contain language allowing the legislature to amend its provisions, the legislature in 1988 was forced to put another measure on the ballot to increase the penalties for second-degree murder of a police officer to 25 years to life. In addition, the measure prevented good behavior from being taken into account when serving time for such an offense. The bill to place the correcting measure on the ballot was passed 66 to 1 in the assembly and 24 to 0 in the senate. The voters approved it by an overwhelming 82% to 18% margin, the largest yes vote on any proposition on the June 1988 ballot.

Amendments such as these waste time and money and undercut the public's confidence in both the initiative system and the electoral process.

Proponent-Sanctioned Supermajority Vote of the Legislature for Amendments

Since 1976, only seven initiatives have authorized the legislature to amend all or certain parts of them by less than a two-thirds supermajority. Three of these initiatives have allowed legislative amendments with simple majority approval and the governor's signature. Two were sponsored by the same group: GASP, the nonsmoking predecessor to Americans for Nonsmokers' Rights. These two smoking regulation initiatives, Propositions 5 (1978) and 10 (1980), allowed the legislature to make amendments by a majority of each house, provided the amendments were consistent with the intent of the measure. The voters rejected both initiatives. The other such initiative was Proposition 7 (1998), which would have authorized the state to award tax credits to encourage emissions reductions.

Four additional measures authorized the legislature to amend certain, but not all, of their provisions by a simple majority vote. Two such initiatives were Proposition 8, the 1982 Victims' Bill of Rights, and Proposition 83, which stiffened the penalties for sex offenses in California. These initiatives, both of which voters approved, authorized the legislature to *increase* penalties by a majority vote. The other two measures, which both failed at the polls, were Proposition 217 (1996), a measure that attempted to reinstate top income tax brackets, and Proposition 86 (2006), a tobacco tax initiative. All four of

[55] California Ballot Pamphlet, November 1978, 22.
[56] Id.

these initiatives required the legislature to meet a higher vote threshold—either two-thirds or four-fifths of each house—to amend selected sections of the initiative.

Since 1976, 10 initiatives have required *more* than a two-thirds vote of each house for amendments to all or certain parts of them. These initiatives include Proposition 99 (enacted, 1988), a tobacco tax; Proposition 117 (enacted, 1990), a mountain lion protection measure; Proposition 134 (failed, 1990), an alcohol tax measure; Proposition 166 (failed, 1992), a measure requiring employers to provide basic health care coverage for certain workers; Proposition 180 (failed, 1994), a park and wildlife conservation measure; Proposition 185 (failed, 1994), a gasoline tax initiative; Proposition 8 (failed, 1998), an education reform measure; Proposition 67 (failed, 2004), a telephone surcharge for emergency medical services initiative; Proposition 71 (enacted, 2004), a stem cell research funding measure; and Proposition 86 (failed, 2006), a tobacco tax initiative. These measures mandated 70%, 75% or 80% approval by the members of each house. All other measures requiring supermajority votes to enact legislative amendments have called for a two-thirds vote.

Other Proponent-Sanctioned Restrictions on Amendments to Initiatives

Fifteen of the 65 initiatives between 1976 and 2006 that authorized amendments by the legislature have required the legislature to have the amendments in print a certain number of days (between 12 and 20) before final passage. The Political Reform Act of 1974 (Proposition 9) was the first initiative to insert such a provision. It was added out of concern that the legislature would attempt to weaken the act in the last minutes of a session. The drafters of the Political Reform Act were quite familiar with legislative proceedings. They had seen bills on the last day of the session completely gutted and passed by large majorities with no notice being given to outsiders (and some legislators) of the proposed changes. Political Reform Act proponents wanted to permit technical amendments to the act but were fearful that amendments weakening the act would be passed without public scrutiny. They thus mandated that the Fair Political Practices Commission be provided with the language of any amendments a certain number of days before a floor vote of the legislature. One court has upheld this requirement.[57]

The legislature has amended the Political Reform Act over 200 times. Most of the amendments have been sponsored or supported by the Fair Political Practices Commission, the agency created by Proposition 9 that is charged with administering and enforcing its provisions. Legislative amendments have increased the disclosure threshold, clarified filing requirements, created a revolving door restriction, established a disqualification

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[57] In 1977, the legislature enacted its annual budget bill but added language to the appropriation of the Franchise Tax Board's Political Reform Audit Division that limited the number of audits the board could conduct. The language was vetoed by Governor Brown, but the legislature insisted that its language should prevail despite the veto. Although the bill's language did not formally amend the Political Reform Act, the court ruled that the control language was an amendment to the Political Reform Act since it changed the number of audits required by the act. As an amendment to the Political Reform Act, it was invalid since the budget bill had not been in print 20 days prior to the final passage of the bill. *Franchise Tax Board v. Cory*, 80 Cal. App. 3d 772 (1987).

provision for receipt of certain campaign contributions, restricted personal use of campaign funds and expanded enforcement.

The vast majority of initiatives since 1976 (53 out of 65) that authorized legislative amendments required that such amendments "further the purposes" of the measure. No other state has similar constraints on legislative amendments.[58] In November 1988, for example, voters approved Proposition 103, an insurance reform initiative that established (among other things) regulation of rates for "property-casualty" insurance. The text of Proposition 103 further specified that the initiative could be amended by the legislature if the amendment "furthers its purpose" and is ratified by a two-thirds vote of each house.

In the following session, the legislature unanimously approved AB 3798, an amendment to Proposition 103 that excluded surety insurance from two provisions of the insurance regulation scheme: the automatic 20% rate rollback and prior administrative approval for future rate increases.[59] Under the amendment, the insurance commissioner would retain the authority to file legal actions to roll back unfair surety rate increases. Although surety coverage generally had not been considered to be in the same category of insurance as property-casualty, the focus of Proposition 103's regulatory scheme,[60] Proposition 103 nevertheless listed a number of types of insurance coverage exempted from the rate rollback and did not mention surety insurance. The legislature exercised its amending authority, claiming that no compelling state interest was served by regulating surety insurance.[61] The preamble of AB 3798 declared that the exemption "furthers the purpose of Proposition 103 by clarifying the applicability of the proposition to surety insurance."

Voter Revolt and the state insurance commissioner challenged the legislative amendment as undermining rather than furthering the purposes of Proposition 103 and thereby constituting illegitimate legislative action. Proposition 103 proponents argued that the courts must "narrowly construe" the "limited authority" of the legislature to

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[58] A 1995 state supreme court decision addressed this issue in California, limiting the scope of amendments the legislature can make to initiative statutes that include such amendment language. See *Amwest Surety Insurance Co. v. Wilson*, 11 Cal. 4th 1234 (1995).

[59] Voting for AB 3798 was then-state Senator John Garamendi, who later, as insurance commissioner in 1991, joined proponents of Proposition 103 in attempting to strike down AB 3798 as inconsistent with the purposes of the initiative. The brief filed by Amwest Surety Insurance Company in favor of the surety exemption made extensive use of Garamendi's contradictory position by beginning many of its sections with a quote from the state senator pointing out the flaws of Proposition 103 and criticizing the initiative process as a poor method for creating public policy.

[60] Casualty insurance covers accidental injury to both persons and property. Surety insurance "promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefore." Cal. Civil Code § 2787 (West 1974). See *Somers v. United States Fidelity and Guarantee Co.*, 191 Cal. 542 (1923).

[61] The Senate Insurance, Claims and Corporations Committee legislative analysis of AB 3798 argued: (1) there was no opposition to the bill; (2) differences exist between surety and casualty-property insurance; (3) Proposition 103 did not originally intend to apply to surety insurance; (4) surety rates have been relatively stable and competitive, making rate regulation unnecessary; and (5) the insurance commissioner would retain oversight over unfair surety insurance rates.

amend the initiative and accept only "technical amendments" as "furthering the purposes" of an initiative. Exempting a line of insurance from the regulatory scheme impermissibly repealed substantive portions of the initiative.

In rebuttal, an insurance company litigant argued that the legislature's authority to amend the initiative extended beyond mere technical changes. Substantive changes should be permissible if they addressed "unwanted or unintended consequences." Neither initiative proponents nor the voters intended that Proposition 103 apply to surety insurance, but the general language used in the measure included some sureties. Correcting these drafting oversights, the insurer claimed, is why legislative amendability was included in the initiative. "This grant of power to the legislature must not be so narrowly construed as to render it meaningless."[62]

The superior court's ruling went far beyond the contentions of either the plaintiffs or defendants, holding that if an initiative grants the legislature the authority to amend it, that authority cannot be constrained by such limiting standards as "furthering the purposes."[63] The legislature must be given either complete power to amend or none at all. It is not the role of the judicial system, argued the court, to second-guess the legislature whenever it determines that a certain amendment is appropriate.

This decision was overturned four years later, when the state supreme court ruled that the legislative amendment did not further the purposes and intent of Proposition 103 and therefore violated the constitution.[64] Had the lower court's decision been upheld, it would have undermined the will of the electorate as expressed through the initiative process and had profound consequences for future initiatives. Proponents may no longer have allowed the legislature to effect *any* amendments to their initiatives, fearing that the legislature would exercise carte blanche to amend, add or even repeal major portions of the initiative.

OTHER STATES HAVE PROCEDURES TO DETECT AND CORRECT DEFICIENCIES IN BALLOT INITIATIVES, BUT MANY OF THESE WOULD PRESENT PROBLEMS IN CALIFORNIA

Procedures for drafting assistance and review of initiative proposals vary across the states. They generally fall into three categories ranging from little or no review of proposals in states such as Arizona and Illinois, to optional drafting assistance available in Oregon, and diverse forms of mandatory review, for which Nebraska and Utah provide two very different examples. In states that provide little to no drafting assistance or review, the office of the lieutenant governor, attorney general or secretary of state serves as the filing agency for initiative proposals, an administrative step prior to circulation. In states that do provide some form of review, the approach varies. Some states require that a state constitutional officer or administrative agency offer nonbinding advice on the technical aspects of a proposal to ensure conformity with the format, style and drafting conventions

[62] Plaintiffs Memorandum of Points and Authorities at 3, *Amwest Surety Insurance Co. v. Wilson*, 11 Cal. 4th 1234 (1995).

[63] *Amwest Surety Insurance Co. v. Wilson*, 11 Cal. 4th 1234 (1995).

[64] *Id.*

TABLE 3.2 State Provisions for Initiative Drafting Assistance

Alaska	Lieutenant governor reviews for proper form and legal restrictions on content.
Arizona	None. Secretary of state serves as filing agency only and does not review or approve language.
Arkansas	None. However, any qualified elector may call for secretary of state to review for legal sufficiency after measure has been filed. Attorney general reviews proposed ballot title and may modify or instruct petitioners to do so if title misrepresents content of initiative proposal.
California	Optional drafting assistance from legislative counsel and optional review for technical errors related to drafting conventions by secretary of state. Secretary of state does not review substance of proposal for legal sufficiency, constitutionality or single subject compliance.
Colorado	Office of legislative council staff performs mandatory content review and offers advisory recommendations to sponsors.
Florida	Division of elections reviews for proper form. Supreme court reviews for constitutionality and compliance to single subject after sponsors gather 10% of the required signatures.
Idaho	Attorney general performs mandatory content review and offers advisory feedback to sponsors. Any elector may then bring an action in supreme court to determine constitutionality at this time.
Illinois	None.
Maine	Secretary of state reviews initiative language for proper form and may modify proposal to conform to state drafting conventions upon consent of sponsor. Alternatively sponsors may revise and resubmit proposal in proper form.
Massachusetts	Attorney general reviews for legal restrictions on content.
Michigan	None. Although department of state's bureau of elections offers assistance with formatting of petitions and state board of canvassers holds public hearing on language of title and summary, the board does not review language of proposed initiative.
Mississippi	Reviser of Mississippi statutes performs mandatory review for form of proposal and offers advisory recommendations. If sponsors are amenable, reviser may also make advisory recommendations of a substantive nature.
Missouri	None. Secretary of state and attorney general each review petition for proper form but do not review proposed initiative language.

of existing law (also described as a review for "proper form"). A number of states go beyond this to require an evaluation of content, including constitutional or legal sufficiency, single subject rule compliance or specified restrictions on the substance or subject matter of proposals (see Table 3.2).

Mandatory review, which can take many forms, is an essential component of many good drafting assistance programs. Some states require a review of all initiative proposals by an administrative officer prior to circulation; others strengthen the review process by conducting it through a full-time professional staff or, better yet, through a public hearing managed by a full-time staff. Two states have, with rather limited success, used the indirect initiative process in an effort to enhance the drafting quality of initiatives *after* petition circulation.

Montana	Legislative services division performs mandatory review for clarity and consistency. Sponsor must respond in writing rejecting, accepting or modifying each recommended change. Secretary of state then reviews full petition for proper form. Attorney general reviews for legal sufficiency.
Nebraska	Under direction of Secretary of state, the reviser of statues reviews for proper form and makes advisory recommendations based on drafting conventions. Sponsor may accept or reject recommendations.
Nevada	None. Secretary of state reviews petition for proper form but does not review proposed initiative language.
North Dakota	None. Secretary of state reviews petition for proper form, but does not review proposed initiative language.
Ohio	Attorney general reviews content of title and summary. General assembly of legislature has four months to enact original proposal or pass an amended version. If rejected or passed in amended form, sponsors have option to submit the original or amended version to voters.
Oklahoma	None. Secretary of state reviews petition for proper form but does not review proposed initiative language.
Oregon	Optional drafting assistance from legislative counsel. Secretary of state conducts 15-day public comment period and, in consultation with attorney general, makes final determination of compliance with procedural constitutional requirements, including single subject provision.
South Dakota	Legislative research council performs mandatory review for proper form and consistency with drafting conventions. Council makes advisory recommendations before measure is filed with secretary of state and circulated.
Utah	Lieutenant governor, in consultation with attorney general, reviews measure for constitutionality, and will reject the measure if it is patently unconstitutional, nonsensical or proposed law could not become law if passed.
Washington	Code reviser performs mandatory review for technical errors, style and potential conflicts between the proposals and existing statues. The sponsor may amend proposal or reject recommendations before filing final draft with secretary of state.
Wyoming	Secretary of state reviews language for format and content. Sponsors may amend proposal or reject recommendations. Secretary of state may deny circulation of proposal if it fails to meet constitutional and statutory requirements, including single subject rule and other restrictions on content.

Source: Center for Governmental Studies data analysis.

Mandatory Review and Drafting Assistance by State Officials Before Circulation

The state of Oregon requires review of all initiative proposals prior to circulation for compliance with the single subject rule. Proponents are given a chance to amend their proposal to accommodate the single subject rule early in the course of mandatory review procedures. Proponents may also request drafting assistance from the legislative counsel, the official drafting arm of the legislature. Once a proposal is drafted, the "prospective petition" is sent to the secretary of state's office. The secretary of state seeks professional and public comments on whether the proposed law or amendment embraces one-subject-only as required by the Oregon constitution. At the same time, the secretary of state publishes a statewide notice seeking comments from the legislative assembly and any

concerned persons about the draft ballot title as written by the attorney general. Initiative proponents are free to make limited changes in the proposal as long as the amendment is completed prior to the deadline for submitting written comments and is deemed within the spirit of the original proposal by the attorney general.

Advice and Comment on Policy Implications

Several states have established mandatory review of initiative drafts that goes beyond compliance with a single subject rule. Idaho, Montana and Washington all require initiative proponents to submit their proposals for review and recommendations concerning both form and substance. The recommendations are advisory only and need not be accepted by the proponents. If the proponents agree with the advice, they may elect to modify the original draft of the initiative.

Idaho and Montana involve state constitutional officers in the review process. In Idaho, the attorney general has 20 working days from receipt of an initiative proposal to review it for form and substance and to transmit the findings and recommendations in writing to both the proponents and the secretary of state's office for public disclosure. Montana requires initiative proponents to submit their measures to the legislative services division, an arm of legislative counsel, for review and advice in drafting. Staff members analyze each measure for clarity, consistency and any other matters of concern. The counsel has 14 days to complete its review and put its recommendations in writing for both the proponents and the public.

Montana has a second layer of review beyond what Idaho offers. Following the legislative services review process, proponents must submit the complete final text of the measure to the secretary of state, including the sample petition. The secretary of state transmits a copy to the attorney general, who must review the petition and text for legal sufficiency within 21 days of receipt. Review of legal sufficiency includes a textual review of the proposed measure for compliance with constitutional requirements governing the submission of ballot initiatives to the electorate.[65] In Montana, the secretary of state may reject the proposal on grounds of legal deficiency as determined by the attorney general.

Mandatory review procedures have been fairly well received in the states where they are required. In Idaho, proponents have been receptive to assistance and strive to stay within the confines of constitutional and legal standards. By extension, the courts have invalidated very few approved initiatives in Idaho.[66] Likewise, in Montana, mandatory review of both substance and form of an initiative proposal has helped proponents delineate their intentions and understand constitutional restraints.[67]

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[65] Montana Ann. Code 2005, § 13-27-202

[66] Telephone interview with William von Tagen, deputy attorney general, Idaho Attorney General's office, June 5, 2007. It should be noted, however, that not many initiatives qualify for the ballot in Idaho. For example, two citizen-initiated measures appeared on Idaho's November 2006 ballot, none appeared on the November 2004 ballot, two appeared on the November 2002 ballot and none appeared on the November 2000 ballot.

[67] Telephone interview with Greg Petesch, director of legal services, Montana Legislative Services Division, June 6, 2007.

There are limits, however, to the usefulness of many mandatory review programs. In Idaho, the attorney general's office provides advice ranging from technical corrections in language to matters of constitutionality. While the majority of proponents are receptive to technical recommendations, there are those who ignore potential legal issues or questions of constitutionality. The legislative services division in Montana has also encountered less receptivity to more substantive recommendations. In these cases, initiative proponents often view state officers as adversaries, which may cloud proponents' judgments and minimize the advice they are willing to accept.

Use of an Official Drafting Arm

The state of Washington provides extensive mandatory review and drafting assistance through the office of the code reviser, the official bill drafting arm of the legislature. Once proponents file the complete text of an initiative with the secretary of state, the office of the code reviser must, within seven working days, review the draft for technical errors, style and any potential conflicts between the proposal and existing statutes. Proponents often submit language that represents an idea of what they wish to accomplish rather than the text of a proposed law. If the proponent's intent is clear, the code reviser will also fully draft the language of the measure. If the proponent's intent cannot be discerned, the code reviser will issue a certificate of review and include a copy of the state's bill drafting guide along with a letter of explanation. The attorney general, in at least one instance, has refused to issue a ballot title because the language and intent of the measure was virtually incomprehensible.[68] In such instances, proponents rarely move forward with their proposals, although they retain the option to do so.

Following the mandatory review, the Washington petitioner has 15 days to file the final draft of the measure with secretary of state's office, accompanied by the code reviser's certificate of review. Proponents are not restricted to the recommendations of the code reviser and may amend the original proposal as they deem appropriate. Although only one review per proposal is required, proponents occasionally file subsequent drafts with the secretary of state as separate proposals in order to more thoroughly refine the initiative language and take full advantage of the assistance provided by the code reviser. Once proponents file the final draft, the secretary of state and attorney general prepare the initiative measure for petition circulation.

Mandatory Public Hearing Before Petition Circulation

Colorado has taken drafting assistance one step further—it conducts the review process in a public hearing. Through this hearing process, initiative proponents receive criticisms and advice from sources outside state government as well as from state officers. Suggestions for improving an initiative from nongovernmental persons and entities sometimes carry greater credibility with proponents than advice from government representatives.

In Colorado, the office of legislative council staff, which provides research support to committees within the legislature, and the office of legislative legal services, the legislative

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[68] Telephone interview with Lou Lewis, deputy staff attorney, Office of the Code Reviser, June 5, 2007.

drafting office, review every initiative proposal before it is submitted to the secretary of state for titling and circulation. Proponents must file draft language with the legislative council staff, who in turn must schedule a public hearing two weeks from the filing date. The purpose of the hearing is to "review the language of the initiative to ensure that the measure accomplishes the proponents' intent and to give public notice that a proposal is under consideration."[69] The council does not draft or revise initiatives; instead, it raises questions and offers advice to proponents in a public forum, after which they may opt to change any facet of their initiative. If proponents make substantial changes, however, they must resubmit their proposal for review.

The drafting quality of initial proposals in Colorado varies widely, as does receptivity to the recommendations presented at public hearings. Some proponents hire professional counsel to draft their measure and respond to comments at the public hearing, whereas others have little more than an idea that still needs to be drafted into statutory language.[70]

The "Indirect Initiative": Advisory Legislative Hearings After Ballot Qualification

Several states have integrated the legislature into the initiative process. This approach is commonly known as the "indirect initiative," in which an initiative proposal is submitted to the legislature for action prior to a vote of the people. If the legislature enacts the initiative into law exactly as drafted, the initiative is automatically withdrawn from the ballot.[71] If the legislature refuses to act, the original initiative is then placed on the ballot.[72] In some states, such as Maine, Michigan, Nevada and Washington, if the legislature adopts a law that differs from the initiative in any respect, then both the initiative and the law are placed on the ballot. In two states, Massachusetts and Ohio, the legislature

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[69] Colorado Department of State, *Initiative and Referendum Procedures and Guidelines* (2007–08), 4.

[70] Telephone interview with Robin Jones, office administrator, Colorado Office of Legislative Council Staff, June 20, 2007.

[71] The law adopted by the legislature, however, is subject to a referendum vote of the people if enough petition signatures are raised.

[72] States employing one form or another of the indirect initiative process are Alaska, Maine, Massachusetts, Michigan, Nevada, Ohio, Utah, Washington and Wyoming. South Dakota ended the indirect initiative option in 1988, and California ended it in 1966.

South Dakota was the first state to adopt the initiative process in 1898. The state established a form of *indirect* initiative for statutory initiatives; the constitution could not be amended via initiative prior to 1972. Oregon was the first state to adopt the *direct* initiative process in 1902.

South Dakota's indirect initiative procedures had been so inflexible that there was really very little difference between Oregon's direct route and South Dakota's indirect system. The only distinguishing feature was that South Dakota required the legislature to officially put the measure on the ballot. However, the legislature could not vote the measure into law as is and remove it from the ballot, and it was questionable whether the legislature could go on record voting against the measure. The legislature could not even propose that an alternative measure be placed on the same ballot. South Dakota's indirect system simply consisted of an initiative passing through the legislature for a perfunctory yes vote to place the measure on the next general election ballot. The practice was finally ended in 1988 as unnecessary and replaced with the direct initiative process for both constitutional amendments and statutes.

may suggest amendments; if the proponent accepts them, the initiative must be circulated for additional signatures before it can be placed on the ballot.

Alaska and Wyoming have established a variant of the indirect initiative process. Instead of requiring that a qualified initiative proposal be submitted to the legislatures for action, these two states require only that a qualified initiative cannot be placed on the ballot until after a legislative session has convened and adjourned. If the legislature enacts legislation that is "substantially the same" as the initiative proposal, the initiative is removed from the ballot.[73]

The indirect initiative process has the potential to provide useful guidance in drafting initiatives. In almost every state that uses the indirect initiative process, however, the system provides little, if any, drafting assistance to proponents. The principal shortcoming of existing indirect initiative systems is their lack of amendability. Except in the cases of Massachusetts and Ohio, by the time an initiative proposal reaches the legislative hearing, it cannot be changed by proponents. Even in Alaska and Wyoming, where an initiative proposal may be amended by the legislature and removed from the ballot, proponents are given neither the authority nor an incentive to negotiate improvements in the proposal with the legislature.

The intent behind the indirect process is fourfold. First, it allows a legislature to enact the original initiative or, in the case of Alaska and Wyoming, a substantially similar measure as a law and remove the initiative from the ballot—thereby eliminating a costly election and avoiding an initiative statute that is difficult to amend. Second, it allows the legislatures in some states to enact their own version of an initiative and place both measures on the ballot. Third, it subjects initiative proposals to the public scrutiny of a legislative hearing. And fourth, by involving the legislature in the initiative process, it increases the legislature's accountability to public needs.

Legislative Negotiations

Legislatures in any direct or indirect initiative state may propose substitute measures. The indirect process in most instances brings the legislature and initiative proponents together for a hearing, thereby creating a potential environment for legislative negotiations. Unfortunately, states that employ the indirect process have generally failed to make constructive use of this potential for improving initiative legislation through negotiations between proponents and the legislature. The legislature in indirect initiative states may suggest that an initiative be replaced by a substitute measure, but given the often adversarial relationship between initiative sponsors and the government, legislative substitute measures are usually seen as unacceptable by proponents and voters alike. Most indirect initiative states further diminish the possibility of legislative negotiations by requiring that all qualified initiatives be placed on the ballot unless the legislature approves them in the original form. States that use the direct initiative process, such as California, require that all

[73] In Alaska, the lieutenant governor, with formal concurrence of the attorney general, determines whether a legislative act is substantially the same as an initiative proposal. Alaska Stat. § 15.45.210 (1988). In Wyoming, this determination is made by the attorney general. Wyo. Stat. § 22-24-119 (2007).

qualified initiatives be submitted to the voters *even if* enacted into law by the legislature. If proponents cannot voluntarily remove a proposition from the ballot no matter what the legislature does, they have little incentive to negotiate changes with the legislature.

The key element to meaningful drafting assistance is proponent amendability—allowing proponents to voluntarily revise their proposal in light of additional information that may surface during the review process. Only two indirect initiative states, Massachusetts and Ohio, allow for a degree of proponent change to the form and content of initiatives. These states do not assist proponents in the initial draft of their proposals. Instead, once proponents gather a certain threshold of signatures, the proposal is submitted to legislative hearings for review.

Review procedures differ between the two states. Massachusetts tends to be quite restrictive toward citizen-initiated legislation. After gathering signatures amounting to 3% of the number of voters who participated in the last election, an initiative proposal (either statutory or constitutional amendment) is sent to the attorney general for certification. If the measure is certified by the attorney general, it goes before the legislature for review and a vote. At any time during the review, a majority of the listed proponents may make limited adjustments in the wording of the measure as long as the revisions are accepted by the attorney general as "perfecting in nature." A proposal eventually becomes law if passed by the legislature and signed by the governor. If the measure is rejected or amended to the dissatisfaction of proponents, collection of an additional 0.5% of voters' signatures will place the original (or "perfected") initiative on the ballot.[74]

The system of indirect initiatives in Ohio could provide proponents with considerable drafting assistance. After collecting signatures of 3% of the number of votes cast in the last gubernatorial election, a statutory initiative is given a hearing before the state legislature.[75] The legislature may amend initiative proposals by majority vote with the consent of proponents. Proponents cannot offer their own changes to the initiative proposal, but they can accept any amendments offered by either branch of the legislature. Consequently, the indirect initiative system of Ohio allows for substantive changes in content and form following expert and public scrutiny of any flaws or disadvantages in a measure. However, proponents must then gather signatures of another 3% of the voters on a supplementary petition that expresses the original or modified version of the proposal. Only then is the measure placed on the ballot.

The Two-Track Initiative Option

A few states have established a two-track system of initiatives in which proponents may choose to pursue either an indirect or a direct initiative. Michigan, Nevada and Ohio, for example, have established an indirect system for initiative statutes and a direct system

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[74] Initiative constitutional amendments in Massachusetts must be approved by at least a quarter of the members of the legislature in two successive sessions to be placed on the ballot. If the measure fails to get the 25% approval from the legislature, it is not presented to the voters. Statutory initiatives are not subject to this special requirement of receiving minimal approval from the legislature.

[75] Initiative constitutional amendments in Ohio require signatures amounting to 10% of the last gubernatorial vote before the measure is submitted directly to the voters.

for initiative constitutional amendments. The two-track systems in all three states were designed to encourage proponents to press for initiative statutes rather than constitutional amendments. Proponents, however, have continued to prefer drafting constitutional initiatives.

These states all have different qualification requirements. Michigan requires a lower signature threshold for indirect statutory initiatives than do Nevada and Ohio (8% of the last gubernatorial vote for indirect statutory initiatives and 10% for direct constitutional initiatives). In Nevada, the penalty for choosing the direct route is more severe. Constitutional amendments (direct) must be approved by voters at two consecutive statewide elections, while initiative statutes (indirect) are immediately ratified by a simple majority vote. Ohio offers a substantial incentive for proponents to pursue indirect initiative statutes rather than direct initiative constitutional amendments: Proponents need to gather 40% fewer signatures to qualify an indirect initiative statute than a direct initiative constitutional amendment.

Two other states have variations on the two-track system. Washington provides a two-track system only for initiative statutes. Proponents may circulate a direct initiative petition for six months in an effort to gather signatures amounting to 8% of the last gubernatorial vote, or circulate an indirect initiative petition for ten months in an effort to raise the same number of signatures. Utah also provides a two-track system for initiative statutes but fails to offer any incentive to choose the indirect route. Proponents must gather signatures amounting to 10% of the last gubernatorial vote for a direct initiative or, for the indirect initiative, 5% of the gubernatorial vote for a legislative hearing and another 5% for ballot qualification.

Vetoes and Amendments

In addition to or instead of state-sponsored programs designed to assist proponents in drafting a better initiative, many jurisdictions impose official review procedures in which poorly drafted or unconstitutional initiatives may be removed from the ballot, voided by the courts or amended by the legislature after enactment.

Administrative Veto of Improper Provisions

In every state, the courts have final jurisdiction to determine whether the substance of an initiative violates subject limitations or other constitutional norms. A handful of states, however, empower administrative officers to scrutinize the substance of initiative proposals and to refuse certification of initiative petitions if the subject is not appropriate for direct legislation. An "administrative veto" is a convenient and efficient means for state authorities to regulate certain aspects of drafting initiative legislation, but the potential for arbitrary abuse is great.

Six initiative states and the District of Columbia specifically permit administrative veto of initiative proposals on grounds of subject matter. (Most states, of course, allow administrative scrutiny of petition format.) The most common basis for refusing to certify an initiative proposal is that it treads on subject matters prohibited for direct legislation by the state constitution. The constitutions or state statutes of Alaska, Illinois, Massachusetts, Nebraska and Wyoming forbid initiatives from dealing with a variety of

subject matters, such as the dedication of state revenues or reorganization of the courts, and they vest a designated state officer with authority to terminate any initiative proposal that violates such subject restrictions.[76] The District of Columbia additionally allows its board of elections to refuse certification of any initiative petition that authorizes discrimination prohibited under the Human Rights Act of 1977.[77] In Oregon, the county clerks need not approve for circulation a proposed initiative measure that is deemed in violation of the single subject rule.[78]

State officers are usually reluctant to invoke their administrative powers to veto initiatives due to the seemingly arbitrary nature of this authority. Several states have no specific constitutional or statutory provisions forbidding an administrative veto of allegedly unconstitutional initiative proposals, leaving the issue to be clarified by state courts. In California, Colorado and South Dakota, state supreme courts have ruled that elections officers have only ministerial duties in the initiative process and thus lack authority to assess the substantive merits of initiatives.[79] In California, for instance, the attorney general may not refuse to title a ballot initiative even if he or she believes the proposed measure violates the state constitution. California's attorney general once refused to prepare a title for an initiative measure that would have prevented teachers from striking, prohibited teachers' organizations from making campaign contributions and required that tax revenues could not be used to provide transportation to balance schools racially. The attorney general's staff argued that the measure violated the single subject requirement. However, the California Supreme Court overruled the attorney general on the ground that his office has no such discretionary authority.[80]

Judicial Review Before Qualification

Virtually all initiative states permit preelection judicial review of initiatives for compliance with proper qualification procedures, such as certification disputes. Most states also allow for preelection review of initiatives by the courts for proper subject matter.

Only Florida, however, requires automatic court review of initiatives after the circulation of petitions has begun but before the measure actually qualifies for the ballot.[81] Following a series of last-minute court challenges to a number of initiatives from 1982 through 1984, Florida voters ratified a 1986 constitutional amendment requiring state supreme court review of all initiatives that collected 10% of the requisite signatures.[82]

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[76] Alaska Const. art. XI, §7 (2007); Ill. Const. art. XI, § 3 (2007); Mass. Const. art. XLVIII, § 2 (2007); Neb. Const. art. III, § CIII-2 (2007); Wyo. Const. § 97-3-052 (2007).

[77] D.C. Stat. Chap. 10, § 1001.3(d) (2007).

[78] Ore. Stat. § 250.168 (2007).

[79] California—*Schmitz v. Younger*, 21 Cal. 3d 90 (1978); Colorado—*City of Rocky Ford v. Brown*, 293 P.2d 974 (1956); South Dakota—*Coon v. Morrison*, 61 S.D. 339 (1933).

[80] *Schmitz v. Younger*, 21 Cal. 3d 90 (1978). The initiative proposal was eventually titled "Pupil Transportation to Alter Racial Ratios: Use of State and Local Revenue," but the petition drive failed to gather the requisite signatures for ballot qualification.

[81] Fla. Stat. Title IV, Chap. 16 § 16.061 (2007).

[82] The purpose of Florida's court review in the early stage of the initiative process is not so much to reduce lawsuits as to ensure that legal challenges will be heard in a timely fashion. Prior to 1986, several

The 10% threshold is designed to avoid burdening the court with frivolous initiative proposals. The state supreme court analyzes the initiative proposals for compliance with the single subject rule and other statutory criteria. The court then issues an advisory opinion on the measure's validity.

Although proponents have four years to circulate petitions and gather the requisite signatures for ballot qualification in Florida, signature gathering stops at the 10% threshold, pending supreme court certification. After the court issues its advisory opinion on the initiative's compliance with the single subject rule, proponents may modify the proposal to accommodate the advisory opinion and start all over again to raise signatures, or refuse to alter the proposal and risk a final judicial reversal. The court's advisory opinion is thus not binding, but it is to be viewed as "extremely persuasive" in a later court challenge.[83]

Legislative Amendments After Enactment

California is the only state that prohibits the legislature from amending the text of an initiative statute after its enactment by the voters—unless the text of the initiative itself permits such amendments. States that allow legislative amendments after enactment either specify the vote requirements needed by the legislature to amend a measure or provide a time delay before amendments are permitted. None of these states, with the exception of Arizona, restricts the extent of amendments, such as requiring that legislative amendments "further the purposes" of the measure, and none requires that a bill be in print a certain number of days before a final vote on any amendment.

After California, Michigan and Arizona have the toughest amendment requirements: In both states, it takes a three-quarters vote of both houses of the legislature to amend an initiative (although in Michigan, the initiative may specify lesser requirements). In addition, Arizona law only allows for legislative amendments if they "further the purposes" of the original measure.[84] Arkansas mandates a two-thirds vote of the legislature for any amendments to an initiative. North Dakota specifies that two-thirds of the legislature must approve any amendments within seven years of passage of the initiative. Washington also requires a two-thirds vote but only in the first two years after the passage of the measure. Both states allow simple majority votes after the time period expires.

Several states permit legislative amendments with no supermajority: Massachusetts, Alaska (but no repeal in the first two years after enactment of the measure), Nevada (but only after three years have elapsed since passage of the initiative), Utah (may amend but not repeal initiative legislation) and Wyoming (but no repeal in the first two years after enactment of the measure).

Florida initiatives faced preelection lawsuits challenging their compliance with the single subject rule. The slow process of lower court hearings and eventual appeals to the state supreme court left some of the cases unresolved just weeks before the election. One measure was even printed on the ballot and in the ballot pamphlet and later stricken from the election.

[83] Staff Analysis of House Joint Resolution 71, Florida House of Representatives, Committee on Judiciary, February 18, 1986.

[84] Ariz. Const. art. IV, § 1(6) (C).

A number of states have no provisions specifying whether or how the legislature may amend or repeal an initiative. Court rulings in all of these states have permitted legislatures to amend the measures.[85]

RECOMMENDATIONS: AMENDABILITY AND OTHER PROCEDURES MUST BE ADDED TO IMPROVE THE DRAFTING QUALITY OF CALIFORNIA INITIATIVES

Improving the amendability of ballot initiatives is an essential component of any reform. The quality of public policy contained in an initiative depends significantly on its drafting. Ambiguously worded measures or proposals are subject to varying interpretations by enforcement agencies and the courts, often resulting in policies not intended by the proponents or voters. An initiative's authors can sometimes overlook and omit important aspects of their proposed reforms. Inadequate consideration of legal parameters in drafting an initiative can tread on constitutional rights and requirements. Poorly drafted initiatives often confuse the voters and randomize electoral outcomes.

When a poorly drafted initiative causes voter confusion, everyone loses.

When a poorly drafted initiative causes voter confusion, unintended consequences, constitutional violations or unintended omissions, everyone loses. Initiative proponents find their objectives thwarted, voters feel betrayed by unintended policies or court rulings that limit or reverse the popular will, and the state and the courts feel burdened by the costs of defining and implementing a badly drafted measure.

All these problems plague California's initiative process. Although Californians confront a large number of initiatives every year—initiatives that fundamentally shape the objectives and policies of the state—California provides the least flexibility of any state in drafting, amending or negotiating their content. Of all the problem areas of the initiative process that must be addressed, drafting of initiative legislation is among the most important.

A constructive program to improve the quality of drafted initiatives must attempt to meet six general objectives:

1. Provide some limit to the complexity and number of potentially confusing issues contained in initiatives
2. Provide a thorough review of both the form and substance of initiative proposals in an atmosphere that is taken seriously by the public and press and that does not unduly intimidate initiative proponents

[85] Colorado, Idaho, Maine, Missouri, Montana, Ohio, Oklahoma, Oregon and South Dakota have no constitutional provisions addressing legislative amendments, but court rulings or "common practice" have established the right of their legislatures to amend and/or repeal initiative legislation. This means that legislatures have simply assumed the authority of amending initiative legislation without such authority clearly vested by state law or court determination. Montana is one state in which the legislature has amended initiative legislation without any specific statutory or judicial authorization. An initiative failed to qualify to Montana's 1990 ballot that would have prohibited legislative amendments to initiative legislation. Telephone interview with Nancy Hart, chief, Montana Elections Bureau, January 8, 1991.

3. Encourage the state's legislative body to work with proponents to draft and negotiate the content of initiatives
4. Offer advisory recommendations to initiative proponents for improving their proposals and adapting them to established statutory and constitutional constraints
5. Allow proponents to amend their proposals before they appear on the ballot
6. Permit some flexibility in amending initiative legislation after enactment to address unforeseen problems and changing social conditions and needs

California's initiative process lacks all of these elements. A model law designed to enact a balanced and mature initiative process can be developed by combining certain innovations with modifications from other states. The following recommendations provide a strong foundation to help the state's initiative process meet these objectives. (See Appendix C for a timetable of the ballot initiative process under the recommendations in this report as they would apply to the November 2008 election.)

Publicize Drafting Assistance Available Through the Legislative Counsel and Secretary of State's Offices

As discussed earlier, state law requires the legislative counsel and secretary of state's offices to provide drafting assistance to any initiative proponent who requests it, but proponents do not use this resource, which represents a missed opportunity to improve the integrity of the initiative process. The secretary of state should be required to publicize the availability of assistance by placing notices in the *Statewide Ballot Initiative Handbook* and other materials made available to initiative proponents.

Even if only a small number of proponents took advantage of this assistance, it would be an improvement over the current circumstances. Reviewing the language of initiatives for form and clarity and drafting assistance from the legislative counsel would improve the quality of statutory and constitutional language put in place by initiatives. And as has been shown in Idaho, where it is often used, drafting assistance can reduce the number of future court challenges initiatives face.

Early Analysis by the Legislative Analyst

The legislative analyst currently releases an impartial analysis 30 days after a measure *qualifies* for the ballot. This analysis is a valuable informational tool to help voters assess each measure, but it comes too late for optimal benefit. This report recommends that the legislative analyst's office publicly release its analysis of each ballot measure within 20 days after counties submit petition signatures to the secretary of state for verification. This recommendation would not apply to measures for which the secretary of state finds that an insufficient number of signatures have been collected.

Although this recommendation would require the legislative analyst's office to prepare more initiative analyses than it currently does, releasing this impartial, credible analysis as early as practically possible would extend the amount of time available for public discussion of initiatives on the ballot. It would also make the analysis available for reference during the mandatory legislative hearing recommended below. In conjunction with

allowing proponents an opportunity to amend their measures based on the information in this analysis the earlier release of the legislative analyst's analysis could also improve the quality of initiatives placed on the ballot. Voters would also have more time to evaluate each measure for themselves, and grassroots organizations would have more time to disseminate their own assessments of how each initiative would affect its members.

Mandatory Legislative Committee Hearing After Secretary of State Determines That the Raw Count of Signatures Reaches 100% of Qualification Threshold

After the secretary of state totals the raw signature counts from each county and determines that an initiative meets the minimum signature requirement to qualify for the ballot, the legislature should be required to hold a public hearing on the initiative within 20 days, either by a committee of each house or by a joint senate-assembly committee. The legislature should publicize upcoming hearings with three-days' advance written notice. Twenty days would provide sufficient time for the legislature to schedule and conduct hearings on qualified initiatives. The counties' submission of signatures to the secretary of state's office will warn the legislature at least 30 days in advance that it will likely need to hold a hearing on an initiative.

A legislative hearing will alert the press and the public to the emergence of a new initiative and stimulate public discussion. The hearing will also explore potential flaws in the initiative, encourage negotiations with the legislature and allow proponents to achieve a legislative compromise and either withdraw the initiative from the ballot or place it on the ballot with amendments (see below).

Proponent-Sanctioned Substitute Legislation and Withdrawal of the Initiative from the Ballot During a 30-Day Public Comment Period

In addition to the mandatory legislative hearing, a 30-day public comment period should begin one working day after the secretary of state totals the raw signature counts from the counties. During this time, proponents would maintain complete control over what happens to their initiatives.

Immediately following the public comment period, proponents should be allowed to take any of three possible actions:

1. Withdraw the initiative from the ballot if the legislature enacts it as drafted and the governor signs it.
2. Withdraw the initiative from the ballot if the legislature enacts and the governor signs an acceptable alternative that is consistent with the initiative's original purposes and intent. The proponent, in these circumstances, should be able to condition the initiative's removal from the ballot on the provision that future legislative amendments must be approved by a two-thirds majority, be consistent with the law's purposes and intent, and be printed and circulated three days before the final vote.[86]

[86] This condition would be unnecessary if this approach were also enacted into law, allowing the legislature to amend all initiatives by a two-thirds majority.

3. Place the original initiative, or a proponent-amended version of the initiative that is consistent with the original proposal's purposes and intent, on the ballot if the legislature does not enact it, enacts an unacceptable version of it or places an unacceptable version of it on the ballot.

This report recommends a 30-day public comment period for several reasons. It will increase the likelihood that the legislature might adopt an initiative proposal as legislation, thus reducing the number of initiatives on the ballot. As discussed earlier in the examples of workers' compensation and charter school legislation, California's experience indicates that some proponents are already willing to work with the legislature instead of placing their measures on the ballot—a practice that might be used more frequently if the initiative process officially promoted it. A public comment period would also allow the affected parties to analyze the measure and provide testimony to proponents and the legislature, thereby improving the chances for all interested parties to voice constructive ideas, complaints or suggestions. It will give proponents and the legislature more time to think about the pros and cons of an initiative proposal. It will also give the public and press more time to understand the implications of an initiative. In addition, data from a June 2006 survey sponsored by the Center for Governmental Studies (CGS) indicate that the proposed reform enjoys support among California voters: 56% of respondents favor giving proponents this 30-day period to work with the legislature, assuming that proponents maintain control over the content of their initiatives.[87] Most importantly, if amendments were allowed after qualification, it would enable proponents to consider changes and negotiate them with the legislature.[88]

If initiative amendments were allowed after qualification, it would enable proponents to consider changes and negotiate them with the legislature.

AMENDMENTS BY PROPONENTS AFTER THE PUBLIC COMMENT PERIOD

The proponent—and *only* the proponent—should have the authority for seven days after the public comment period to make changes to the text of the initiative and place it on the ballot, so long as such changes are "consistent with the purposes and intent" of the original proposal. At the end of the seven-day period, initiative proponents should be allowed to decide either to not revise the original proposal or to deliver an amended version of the measure in writing to the attorney general's office, which should have seven days to issue an opinion on whether the amendments are consistent with the "purposes and intent" of the original proposal. Proponents should then have seven days to either renegotiate their amendments with the legislature if the attorney general issues an adverse opinion or seek final review of that opinion in the Sacramento County Superior Court. The court should have seven days to complete its review.

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[87] Center for Governmental Studies (CGS), *Random Digit Dial Survey and ARS Study*, conducted by Fairbank, Maslin, Maullin & Associates and Winner & Associates, June 2006.

[88] If the initiative qualifies during the legislature's fall recess (initiatives rarely qualify in the fall), the legislature will not have to be called back into special session. It can consider the initiative within 27 days after it reconvenes.

Alternatively, proponents could negotiate with the legislature and agree on a substitute measure encompassing changes in the proposal. Amendments under this scenario would also be subject to review for consistency with the proposal's original "purposes and intent" by the state attorney general and, if the attorney general's opinion is challenged, the Sacramento County Superior Court. If, after such negotiations, the legislature enacts a modified version of the initiative that is acceptable to the proponents and found to be consistent with the original purposes and intent, the proponents must withdraw the original initiative from the ballot within two days; otherwise the initiative would still go on the ballot. Or, with the proponent's consent, the legislature could place on the ballot an amended version of the original initiative. If the legislature fails to enact comparable legislation, or enacts a version of the initiative that is unsatisfactory to proponents, the proponents can place the initiative in its original or proponent-amended form on the next statewide ballot.

Possible Legislative Actions

Through this system of legislative review, the proponents and legislature may take the following possible actions:

- The legislature may enact the proposal *as originally drafted*, and the proponents will withdraw it from the ballot.
- The legislature may enact the proposal *as amended by proponents* in a manner consistent with its "purposes and intent," and proponents will withdraw it from the ballot.
- The legislature may propose amendments consistent with the initiative's original "purposes and intent" and place this amended version on the ballot to let the voters decide; the proponents may then withdraw their initiative.
- The legislature may reject the proposal or offer an amended version that is unacceptable to the proponents, and the proponents can then place the original or proponent-amended (consistent with "purposes and intent") version of the measure on the ballot.
- The proponents may make amendments to the measure consistent with its "purposes and intent" and place the measure on the ballot if the amended version is not adopted by the legislature.
- Both the proponents' original or proponent-amended measure and a competing legislative measure can be placed on the ballot. Whenever the attorney general concludes that only one of the measures can become law, he must then alert the voters by placing a notice to that effect in the voters' pamphlet and on the ballot.

At each step in the negotiations with the legislature, the proponents have the final say on what does and does not happen to their initiative proposal.

Objections to this concept of initiative amendability generally come from some initiative proponents, those who distrust the legislature and persons surveyed about the question. Only 23% of likely voters in California trust the legislature to do "what is

right" either always or most of the time, although this number fluctuates somewhat over time depending on current events.[89] Additionally, 48% of voters in the state worry that giving the legislature 30 days to review each initiative proposal and work with proponents toward possible amendments could lead to undue legislative influence over the initiative's contents.[90]

Those who distrust initiative proponents also argue that signing an initiative petition is like signing a contract between the signatory and the petitioner in support of the precise proposal printed on the petition, and that petitioners should not be able to amend it. Forty-seven percent of California voters feel that the 30-day period could dilute initiatives or violate an implied agreement with petition signers.[91] Hence, it may be seen as a violation of this contract to place a different proposal on the ballot, regardless how minor the changes may be.

It seems a gross exaggeration to view a signature on an initiative petition in terms of a binding contract supporting the exact text of the original proposal.

It seems a gross exaggeration, however, to view a signature on an initiative petition in terms of a binding contract supporting the exact text of the original proposal. Very few people actually read the text of an initiative when signing a petition, and their signature does not bind them to vote for the measure. Many sign initiative petitions simply to see them appear on the ballot, at which point they can decide, in the context of an actual election, whether to vote for it. To put the matter somewhat differently, a person signs an initiative petition in support of the *essence* of the proposal, often giving his or her signature on the basis of an assessment of the circulator's credibility and the importance of the general subject. Registered voters may, for instance, sign a petition on behalf of "campaign finance disclosure" or "the prohibition of gillnet fishing," but in doing so they typically do not specifically intend that campaign reporting forms be filed by candidates for any contribution of $100 or more (as opposed to $50 or $250) or that the permit fees on commercial fishermen be raised to $150. In most instances, signatories neither know nor care that the initiative affects the specific reporting threshold or raises fishing permit fees. The details are assumed to be adequately researched and planned by the proponents. To the extent that a "contract" is implied, it is with proponents to pursue the essential "purposes and intent" of the initiative.

The proponent's ability to amend initiatives under this proposal is limited to "furthering the purposes and intent" of the original initiative. Of CGS survey respondents, 58% favor allowing proponents to fix minor wording problems before their initiative appears on the ballot, requiring the attorney general to confirm that the amendments are consistent with the initiative's original intent and providing for expedited court review in the event that the attorney general's rulings are challenged. In addition, 61% of respondents would favor these changes to the initiative process if they reduced the number of initiatives on the ballot and the number of mistakes in the initiatives that do appear on the ballot.[92]

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[89] PPIC Statewide Survey, August 2006; see also Mark Baldassare and Cheryl Katz, *The Coming Age of Direct Democracy: California's Recall and Beyond* (New York: Rowman & Littlefield, 2008).

[90] CGS, *supra* note 88.

[91] *Id.*

[92] CGS, *supra* note 88.

Modifications to the text of an initiative that remain true to the concrete policy objective should not be seen as undermining the will of signatories but as furthering it in a manner that would be supported by signatories.

Legislative Flexibility

A legislative hearing is one component of this report's package of recommendations for enhancing the drafting quality of initiatives. It will come at a time when the legislature is likely to give an initiative serious consideration and at a time when proponents can make amendments to the measure. Feedback from the hearing will allow proponents to make changes on their own or negotiate with the legislature in an attempt to reach a compromise that will avoid placing the initiative on the ballot. Both the proponents and the legislature have the flexibility to consider alternative legislation in lieu of a ballot measure. The legislature is encouraged to consider a compromise to avoid an initiative that may seem extreme or that ties the legislature's hands. The proponents have a strong incentive to compromise to avoid a costly election battle they may lose.

This proposal will, in effect, merge the legislative and initiative processes for a brief period to allow a give-and-take that can enhance the drafting and quality of initiative legislation. The legislature will be less likely to ignore initiatives but instead will have a meaningful opportunity to address the merits of the issues raised. Proponents will be more likely to participate in the legislative process and use the information and views received to improve the drafting of their measure.

Important Differences Between This Proposal and the "Indirect Initiative"

At least two major differences exist between this proposal and the standard indirect initiative used in several other states. First, this proposal emphasizes negotiations and legislative flexibility. Indirect initiative processes throughout the nation woefully miss the opportunity to use the legislature's involvement as a sophisticated form of drafting assistance. None of the indirect systems currently in existence allow proponents to make substantive improvements to their initiatives, and proponents are rarely allowed to correct obvious drafting errors. Proponents are thus not encouraged to negotiate with the legislature. If the legislature in most indirect initiative states enacts a modified version of the initiative acceptable to proponents, the original measure frequently must go on the ballot anyway.

Second, this proposal permits the proponent to retain full control over drafting the initiative. Most indirect systems in other states implicitly cast the legislature in the role of a caretaker overseeing and, in some cases, even checking the people's right to make policy through initiatives. Alaska and Wyoming go so far as to empower state authorities to remove an initiative from the ballot without the proponent's consent if they enact legislation that is "substantially the same" as the original proposal.

Policy making through a deliberative body like the legislature has considerable merit. This report's proposal incorporates the deliberative legislative process as part of the initiative process, but it gives the initiative proponent the final word in legislative negotiations. The proponent decides which, if any, amendments are appropriate and can make the changes in the text of an initiative with or without approval of the legislature. All final

decisions must be made with the proponent's consent. Ballot access is guaranteed unless the proponent wishes otherwise.

Legislative Amendments After Enactment of Initiatives

As noted earlier in this chapter, California is the only state that flatly prevents its legislature from amending an initiative after enactment unless the measure itself specifically permits the legislature to do so. This report recommends that this be changed. The legislature should be allowed to amend the language of either statutes or initiatives enacted by the people as circumstances change and if a serious need arises. At the same time, the legislature should not be given carte blanche to repeal or drastically alter an initiative adopted by the electorate. Appropriate conditions should restrict the ability of the legislature to amend initiatives, but such conditions should not be so prohibitive as to make legislative changes virtually impossible.

The legislature should be allowed to amend any statutory initiative after its enactment, so long as the legislation amending an initiative "furthers the purposes and intent of the law," is in final form and published for at least ten days, and is approved by a two-thirds vote of both houses. The text of an initiative could allow the legislature to make amendments by a lower (but not a higher) percentage, down to a simple majority. Courts must have the jurisdiction to review whether the legislative amendments further the purposes and intent of the initiative in question.

With a purposes and intent standard and a supermajority vote requirement, the legislature will be unable to repeal or gut an initiative, but it would be permitted to perfect a measure by adding provisions, clarifying language and making both substantive and technical changes, so long as these changes do not violate the purposes of the law. The need for legislative flexibility is amply demonstrated by the experience of California's Political Reform Act—which the legislature has amended more than 200 times.

Opposition to the concept of permitting legislative amendments stems from those who fear the legislature will radically change or gut controversial initiatives, especially measures that restrict or curtail the legislative process. Because of this fear, this report's recommendation imposes tough purposes and intent requirements on the legislature for amending initiative legislation and specifically allows the courts to determine if the amendments meet this standard. No other initiative state imposes such strict criteria for legislative amendments. To ensure that the legislature complies with the purposes and intent standard, this report further recommends that any proposed amendment to initiative legislation be in print at least 10 days prior to final passage by the legislature to allow public comment.

The requirement that any legislative amendments to initiatives be in print at least three days prior to passage is somewhat similar to the in-print requirement of the Political Reform Act, which has been in effect for 33 years. It stops the legislature from passing last-minute amendments that no one has had a chance to examine. In rare cases, this rule may hinder useful amendments proposed in the last frantic days of the legislative session, but the advantages of slowing down the process to allow more careful consideration of amendments clearly outweigh the disadvantages of good last-minute amendments not being adopted.

This recommendation could be strengthened and expanded to include additional features. For example, proponents could receive attorney's fees or treble damages if they successfully argue in court that the legislature's amendments to an initiative are not consistent with the initiative's purposes and intent. Such cases could be heard on an expedited time line to minimize costs to proponents. Further study might be given to the idea of allowing proponents and their designated spokespersons to veto any legislative amendments that they deem contrary to the initiative's purposes and intent.

OTHER REFORMS HAVE BEEN SUGGESTED THAT ARE UNNECESSARY OR UNDESIRABLE

This report has considered many other solutions to the drafting problem that have been proposed or used in other states but are not used in California. After careful analysis of other states' experiences and of California's unique political circumstances, there are some potential reforms, both tried and untried, that this report does *not* recommend for California or any state with a similar initiative process.

A Ballot Measure Word Limit

The first edition of this report recommended that a reasonable limit be imposed on the length of all ballot propositions—both legislative ballot measures and initiatives—of no more than 5,000 words of new language. Strikeout language and existing law repeated in the text of the initiative would be excluded from such a word limit.

A 5,000-word limit would have some benefits. It would encourage proponents to delineate their cause and to write it in concise language, allowing the electors to understand better the issues on which they are asked to vote. A 5,000-word limit would be sufficient to permit proponents to address squarely most public issues. Such a word limit might also generate more public confidence in the ballot initiative process—72% of respondents to the CGS-sponsored survey favor the idea.[93] Word limits have been used successfully in other areas, yet the substance of the ideas communicated has not been affected. The state and federal appellate courts, for example, place page limits on all legal briefs and pleadings submitted to them, despite the complexity of the issues addressed.[94] The federal rules of judicial procedure limit interrogatories in civil cases to no more than 100 questions.[95]

A word limit could also help to prevent initiative proponents from misusing the initiative process. Measures placed on the ballot by the legislature rarely exceed 5,000 words

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[93] CGS, *supra* note 88.

[94] See, e.g., Fed. R. App. P., 9th Circuit Court of Appeals, Rule 28(g) (limits briefs to 50 pages of typographic printing or 70 pages of any other form of printing or typing). In Minnesota, a 40-page word limit on briefs was vigorously enforced by U.S. District Judge David Doty, who penalized both the plaintiffs and defendant's law firms in a class-action age-discrimination case with a $50,000 fine each for exceeding the word limit. Both law firms had submitted briefs longer than 600 pages. Margaret Zach, Two Law Firms Each Fined $50,000 for Wordy Briefs, *Minneapolis Star and Tribune*, June 26, 1991.

[95] Federal Practice and Procedure, Civil, Rule 33(a).

in length. Excessively long ballot measures almost exclusively involve initiatives, especially in recent years. There appear to be three reasons for such wordy propositions. First, some initiative proponents seek to cover too much ground in a single proposition. Second, initiative opponents draft long and complicated counter-initiatives to make the entire subject matter appear too complex for ballot-box legislation. Third, some initiative proponents attempt to gain volunteer and financial support by logrolling related pet projects into a single measure. Whatever the reasons for wordy propositions, voter confusion is often the result.

Initiative proponents are not better drafters when they keep their proposals under 5,000 words, although they may be more straightforward in describing their policy objectives. As discussed above, California voters have slashed property taxes (Proposition 13), regulated the insurance industry (Proposition 103), regulated toxic discharges in the waters (Proposition 65), imposed campaign contribution limitations (Proposition 73), established after school programs (Proposition 49) and authorized bonds to fund children's hospitals (Proposition 61), all with initiatives written in less than 5,000 words.

As initiatives and the legislature add more and more laws to the books, it is increasingly unfair to ask initiative proponents to draft their measures under a certain word limit.

Although the first edition of this report recommended a 5,000-word limit, further reflection has suggested a contrary recommendation. As initiatives and the legislature add more and more laws to the books, it is increasingly unfair to ask initiative proponents to draft their measures under a certain word limit. A word limit would bias the initiative process against proponent wanting to change issues already dealt with at length in California law, forcing them to place their changes into two or more initiatives or write their initiatives to allow significant legislative discretion in implementing the measure. A word limit might also cause proponents to omit necessary details, thus requiring supplemental legislation or administrative regulation to fill the gaps—and this, in turn, could stimulate expensive and time-consuming litigation. In addition, some of the most ambiguously worded initiatives have been brief. Proposition 13, for example, comprised only 350 words, and yet its terminology was long debated in the courts and on the ballot. A longer initiative might be clearer.

Voter confusion is a critical problem, but it apparently does not stem only from the length of the ballot measures themselves. Voters rarely, if ever, read measures in their entirety, and the drop in voter approval as measures reach over 10,000 words may be due to variables other than length. Voter confusion may be ameliorated in ways other than imposing a word limit on initiative proponents. This report offers various suggestions in other chapters, including improving voter information (Chapter 6) and requiring clearer disclosure in paid advertisements for or against initiatives (Chapter 7).

Optional Drafting Assistance

Although several states strongly encourage initiative proponents to seek state assistance in drafting their proposals, and California provides it on request to the secretary of state and legislative counsel, exclusive reliance on optional drafting assistance programs is inadequate. This report therefore does not recommend initiating additional drafting assistance programs.

Many initiative proponents view official review and criticism of their proposals as a major inconvenience and one that can sometimes be usurped for political purposes. They typically refuse to participate in optional review programs. Outside review of an initiative proposal, especially if that review is conducted by legislative staff and open to the public, could, they fear, serve as a forum for attacks on the measure by its opponents. Even supporters of an optional drafting assistance program concede that review procedures may be open to political opportunism.

At the same time, public policies that affect all persons in a state should not be drafted by any single individual or organization without the scrutiny and advice of experts in the field, affected interest groups and the general public. Invariably, authors of legislation overlook some of its ramifications, omit important contingencies in the law or write the policy in language that may seem ambiguous to others. Moreover, it is difficult to prod the authors of legislation into seeking the opinions of others if they are not required to do so.

The experience in California and in other states is clear: optional drafting assistance programs are too often ignored by initiative proponents to be useful as a remedy for inadequate drafting. However, California's current system of optional drafting assistance by the legislative counsel or secretary of state prior to titling could prove useful if publicized more aggressively and coupled with this report's proposed mandatory legislative hearing and amendability procedures used later in the qualification stages.

Compulsory Recommendations and Administrative Veto

It has been argued that the attorney general's role in the initiative process in California should be more than administrative. California courts have rejected this argument in the absence of constitutional provisions mandating it, but Utah has empowered its attorney general with the authority to refuse to certify an initiative petition for circulation if it is deemed unconstitutional. Oregon similarly empowers its secretary of state to refuse certification of any initiative proposal believed to be in violation of the single subject rule.

If such substantive issues as constitutionality and compliance with the single subject rule were as easy to determine as proper petition format, giving an administrative officer the power to veto an initiative petition based on substance could be justifiable. That, however, is not the case. A concrete formula to determine what is constitutional and what addresses a single subject has never been established. The ultimate authority to rule on these substantive issues rests with the courts, and that is where it should stay.

Initiatives represent the right of citizens to challenge and change the public policies that the government has established. To allow government representatives to alter or veto an initiative proposal—either through compulsory recommendations made by a reviewing agency or through the certification powers of a designated state officer—would conflict with the purpose of the initiative process.

Mandatory Review: An Administrative Hearing at the 25% Mark

The first edition of this report recommended that all initiative proposals be subject to a public hearing conducted by the Fair Political Practices Commission (FPPC) once peti-

tioners have gathered an unverified 25% of the gross signatures needed for ballot qualification. Under that proposal, signature gathering could continue unabated throughout the hearing and the signatures collected before the hearing would count toward the final qualification threshold.

The 25% hearing threshold was selected to separate serious initiative proposals from frivolous efforts. Data collected for signature collection drives from 1982 through 1990 showed that most initiatives that gathered at least 25% of the requisite signatures qualified for the ballot at the end of their signature drives. Professional signature-gathering firms confirmed that this conclusion agreed with their experience. Lower thresholds to trigger the administrative hearing were also possible, but lower thresholds are too easily attainable by initiative drives that in the end would fail to qualify for the ballot.

An early administrative hearing would have several benefits. It would give experts in the subject matter of the initiative an incentive to analyze the initiative carefully on its merits and present their views to the public. It would as allow the FPPC to commission in-depth analyses of initiatives by outside experts. Making this analysis publicly available would allow earlier public scrutiny of initiatives than is currently possible, and it would give proponents a chance to ponder the measure's potential weaknesses or oversights. The hearing would also alert the legislature to the existence of a potential initiative. The legislature may then decide to enact legislation on its own or negotiate a legislative solution with the proponent, thus resolving an important problem and preventing a costly ballot campaign.

Since publication of this report's first edition, however, it has become clear that an FPPC hearing at 25% of the necessary signatures is probably unnecessary. The legislative hearings recommended above would provide enough of a review process to render the FPPC hearings somewhat redundant. The principal purpose of the 25% FPPC hearing was to give proponents an opportunity to amend an initiative before it appeared on the ballot. This report's recommendation to allow proponent amendments after a legislative hearing and public comment should amply satisfy this purpose. Moreover, the FPPC lacks two key advantages that the legislature has: it is not a body of elected representatives, and it has narrow expertise rather than the legislature's broad experience. Finally, a hearing at the 25% mark may disrupt the initiative process because proponents would have to focus on both signature gathering and the hearing at the same time.

MANDATORY REVIEW WITHOUT A PUBLIC HEARING

Several states require all proposals to undergo a review by a state officer or board of experts that can then offer suggestions for improving the form and substance of the measure. Such procedures can be helpful, but they cannot substitute for opening the review process to public comment. Mandatory review by the attorney general, for example, may highlight legal or constitutional problems with an initiative proposal to allocate school revenues, but it may overlook such policy ramifications as its impact on the quality of education, the school administration or the profession of teaching. A comprehensive review that included a public hearing would require not only a legal analysis by the attorney general but also scrutiny by the superintendent of schools, education administrators, teachers, parents and students.

A public hearing both diversifies the perspectives given to initiative proponents and enhances the information dispersed to voters. If all else fails and initiative proponents and lawmakers refuse to learn from each other in the course of these hearings, the public and press will still be listening.

Mandatory Review Prior to Petition Circulation

Some states with limited initiative activity can properly manage procedures for conducting public hearings on the form and content of initiative proposals prior to petition circulation. A public hearing prior to the official titling of an initiative has the added benefit of allowing proponents to make wholesale changes in the substance of the initiative before submitting it for an official title and petition format. Colorado has perhaps the most extensive and useful public review process prior to the titling of an initiative. The state's legislative council is presented with 10 to 20 initiative proposals per year on which to conduct hearings and analyses. Although this caseload is beginning to tax the resources of the council, Colorado can still provide a comprehensive analysis for each measure.

The Colorado system is not practicable in California. Two to three times as many proposals are submitted for titling in California than in Colorado for each election cycle. Many are frivolous with no chance or expectation of actually qualifying for the ballot. In every election period, the secretary of state's office is inundated with initiatives ranging in substance from a proposed six-week vacation for all private workers, to the invalidation of all laws enacted by the legislature since 1926, to a requirement that the legislature urge Congress to fund breakfast for everyone on Earth for a day. The expense of conducting a comprehensive analysis and public hearing for every initiative proposal prior to titling would be burdensome and unnecessary.

Not only would it be costly for California to emulate Colorado's review system for all submitted initiative proposals, but it also might be counterproductive. Public hearings, should they have to deal with a large number of frivolous initiative proposals, would come to lack a sense of gravity. The quality of the analyses would suffer, little public dialogue would result, the press in most instances would ignore the hearings and initiative proponents would receive little constructive criticism.

Interrupted Petition Circulation

Massachusetts and Ohio both employ a two-step petition circulation process. In Massachusetts, proponents can submit their initiatives to the state general court for review after they have collected signatures equaling 3% of total votes cast in the last gubernatorial election. If the general court does not approve the original initiative, proponents can amend it and place it on the ballot after collecting additional signatures amounting to 0.5% of total votes cast in the last gubernatorial election. In Ohio, proponents may amend an original initiative following the collection of signatures amounting to 3% of the last gubernatorial vote and a subsequent legislative hearing. After the hearing, they must then circulate a new petition for signatures comprising an additional 3% of the gubernatorial vote.

This report considered recommending a system in which initiative proponents could make wholesale changes to their original proposal following the administrative hearing, print new petitions to reflect those changes and then resume circulation for the remaining 75% of signatures required for ballot qualification. A two-step circulation process that allows wholesale changes in the text of an initiative could be justified on the grounds that substantial popular support for the amended version of an initiative is amply demonstrated by collection of the remainder of the required signatures.[96]

This proposal, however, raises several objections. Many grassroots organizations and initiative proponents express concern over the difficulty of stopping and restarting a petition drive at the 25% mark. Organizations that rely heavily on volunteer circulators worry that the loss of momentum caused by halting the petition drive for two weeks to a month for an administrative hearing and reprinting petitions might be fatal to their effort.

The cost of a two-step petition process is also a concern. Initiative proponents would have to shoulder the expense of printing two sets of petitions. More importantly, grassroots organizations and professional petition circulation companies would have to maintain the cost of staff salaries and organizational facilities during the interim period. For these reasons, this report does not recommend a two-step circulation process.

Two-Track Indirect Initiative Process

Some thoughtful students of the initiative process have on several occasions proposed that California return to a two-track system of initiatives in which proponents would have the option of pursuing either direct or indirect initiative procedures. Arguably, a new two-track system could avoid the pitfalls of California's earlier indirect initiative option by making the indirect route more timely (ballot qualification took over two and a half years in California's earlier indirect system) and by offering other incentives for proponents to pursue indirect initiatives, such as a lower signature threshold.

The intent behind a two-track system is to give proponents the choice of integrating the legislature into the initiative process without alarming those defenders of direct democracy who ardently distrust the legislature. Proponents wishing to follow the existing procedures for direct initiatives would retain the ability to do so. Proponents wishing to benefit from reduced signature requirements or other incentives could choose the indirect initiative method.

Under indirect initiative procedures, the legislature would be required to hold hearings on initiatives that qualified for the ballot and to vote on each measure. The system of public review through legislative hearings would highlight any potential problems and afford initiative proponents an opportunity to negotiate amendments to the initiative

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[96] Signature gathering may be the only test of popular support currently used in every state to determine ballot access, but it is not the only test available. Other options exist that were not available at the time the Progressives designed America's system of direct democracy. One such test, which is much more indicative of popular support for an initiative but probably far too new an idea to be seriously entertained, is the use of public opinion polls. See Chapter 4.

before it becomes law. Proponents of indirect initiatives would enjoy a lower signature threshold for qualification. Conversely, initiative proponents who did not want the legislature involved in any way would still be able to follow California's existing initiative qualification procedures and place their measure directly on the ballot. By making indirect initiatives an alternative option rather than a replacement of the existing system, a two-track initiative process could ease the qualification burden for indirect initiative drives while preserving the existing system for those wary of legislative involvement.

Although this proposal may sound like the best of both worlds, it would probably not work. Experience in other states shows that where initiative proponents are given a choice, they overwhelmingly choose the direct initiative system—even though they must collect more signatures, have less time to do so or may need to seek voter approval of the measure in two consecutive elections. Defenders of a two-track system underestimate the hostility initiative proponents harbor toward their legislatures in every state.

An "impossible to refuse incentive" would have to be offered to encourage substantial numbers of initiative proponents to choose the indirect initiative route over the direct route. If Ohio is indicative, requiring even a signature qualification threshold for indirect initiatives *half* the size of the threshold for direct initiatives may not be adequate to make the indirect system a meaningful component of the initiative process. This report is not prepared to recommend lowering the signature threshold this far. Instead, it recommends that a legislative hearing should be held on *all* qualified initiatives and that proponents be empowered to negotiate with the legislature and either obtain a legislative substitute or place an original or amended initiative on the ballot.

Compulsory Judicial Review for Single Subject Violations

Compulsory early review by the state supreme court for single subject violations of all initiatives, triggered perhaps by 10% of the signatures needed for ballot qualification, is an intriguing concept. (See a more in-depth discussion of the single subject rule in Chapter 9.) Florida has adopted this procedure—although only a relatively small number of initiatives are circulated in that state. The Florida provision seems to encourage court involvement—which, because the Florida courts appear to be very anti-initiative, has resulted in many initiatives being thrown out for fairly trivial reasons. The court has, for example, invalidated a redistricting measure on single subject grounds because it called for a commission to do congressional *and* state redistricting. Early judicial review has saved the state and initiative proponents alike from costly ballot campaigns for initiatives that might later be voided by the courts.

Florida's system of review, however, would not be practicable in California or any high-use initiative state. In 2007 alone, early judicial review in California would have necessitated full supreme court review of a burdensome number of initiative proposals. Three initiatives (Propositions 91, 92 and 93) had qualified for one of the three 2008 ballots by November 2007, and an additional 50 proposals were in circulation at the time of publication, some of which would likely have gathered at least 10% of the signatures necessary to qualify for the ballot. A requirement to review each of these measures would subject the judicial system to an unjustifiable burden.

CONCLUSION

Californians cherish the initiative process. It provides a valuable means for citizens to influence public policy. But the problems generated by poorly drafted initiatives can undermine any popular mandate. Drafting initiative legislation is perhaps the most critical step in the process of formulating public policy via the initiative. Yet few states, most notably California, provide proponents with any significant scrutiny or assistance.

Procedural techniques to improve the quality of initiative language, without violating the voluntary nature of initiatives, are proven in practice and readily available. An ideal drafting assistance program should emphasize public scrutiny, flexibility and amendability. A mandatory legislative hearing, followed by an opportunity for the proponent to revise the original proposal in negotiations with the legislature, should be allowed. Legislative amendments of voter-approved initiative proposals should also be allowed with a two-thirds vote in both houses.

CHAPTER

4

Petition Circulation and Ballot Qualification

Why try to educate the world when you're [just] trying to get signatures?

—Ed Koupal, Signature Gatherer[1]

SUMMARY

California has one of the shortest circulation periods and highest signature requirements of any state. California initiative proponents have 150 days to collect 433,971 valid signatures to qualify statutory initiatives for the ballot and 694,354 to qualify constitutional initiatives. Requiring proponents to collect a certain number of signatures was originally intended to be a test of public support that would keep frivolous initiative proposals from cluttering the ballot.

Today, however, successful signature collection more often indicates organizational and financial resources than an initiative's popular support. Despite its high signature threshold and relatively short petition circulation period, California sees more initiatives on the ballot than many other states. Additionally, as the number of signatures required for qualification has risen by the hundreds of thousands, volunteer circulation has become a thing of the past. Paid circulators now gather the vast majority of petition signatures. Rising qualification costs associated with these trends have not affected well-financed initiative campaigns dramatically, but ballot access has become more and more difficult for lesser-funded campaigns.

California's signature gathering period should be extended from 150 days to a year. This would better allow for grassroots, volunteer petition circulation efforts. Campaign finance disclosures should be strengthened during the circulation period to identify each initiative's backers. Signature verification procedures should be streamlined to ease the burden on counties. The filing fee to submit an initiative proposal to the state attorney

[1] Carla Lazzareschi Duscha, "Interview with Ed Koupal," *California Journal*, March 1975.

general should be raised from an outdated $200 to $500 plus annual cost-of-living adjustments to help deter frivolous proposals and offset costs to the attorney general's office.

These recommendations strike a balance between increasing ballot access for serious but lesser-funded grassroots groups and preventing frivolous initiative proposals—without significantly impeding the initiative process.

Ballot initiatives allow citizens to shape the state's political agenda by placing issues on the ballot and deciding them by popular vote. But procedures must be established to discern which issues are of sufficient importance to warrant submission to the electorate. Only one selection process has thus far been developed: signature collection through the circulation of petitions.

Collecting enough signatures in support of an initiative proposal was intended to demonstrate sufficient popular concern about the issue to justify submitting the measure to a vote of the people. California's experience suggests that successful signature collection may often be more an indication of organizational and financial resources than of an initiative's popular support. This chapter examines how well the practice of gathering signatures has lived up to its original purpose and offers recommendations for improving the process.

BALLOT QUALIFICATION IN CALIFORNIA REQUIRES HUNDREDS OF THOUSANDS OF SIGNATURES

In California, as in all initiative states except Missouri, proponents must submit the text of a measure to the state attorney general's office before circulating the petition for signatures. Proponents in California pay a $200 filing fee before they begin circulating petitions for signatures. This $200 fee was originally set in 1943 to cover the administrative costs of analyzing and verifying petitions and to discourage frivolous proposals. The filing fee is refunded to proponents if the measure qualifies for the ballot. According to the California Attorney General's office, however, it now costs an average $2,042 just to prepare the title and summary for an initiative. The most spent on titling a proposal for the years 2004 and 2005 was $23,388 for an initiative titled "Voters' Right to Protect Marriage."[2]

As discussed in greater detail in Chapter 3, the attorney general in California prepares a title and brief summary of the initiative proposal in less than 100 words. If the proposal has any fiscal impact, the Department of Finance and the Joint Legislative Budget Committee prepare a fiscal assessment that is added to the official summary. The title and summary must be printed on each petition. Proponents have to gather the requisite number of signatures within 150 days after the attorney general prepares the official title and summary. The text of the proposal cannot be changed after the official summary date.

[2] Office of the California Attorney General, *Report on Circulating Initiative/Referenda* (Sacramento, November 6, 2005).

Signature Thresholds

Every state with an initiative process requires petitioners to collect a certain number of signatures to qualify an issue for the ballot. Signature collection has two related purposes: to demonstrate both the *breadth* and the *intensity* of popular support for the initiative. A wide spectrum of the community must find the proposal acceptable, and a significant number of citizens must find the proposal so pressing as to warrant their efforts to collect the signatures. The signature threshold as a test of significance was developed at a time when other means of evaluating public sentiment, such as advanced public opinion polling, were not available.

Signature Collection in California

California has two signature thresholds: one for constitutional initiatives and one for statutory initiatives. To qualify a constitutional initiative, signatures of registered voters equaling 8% of the number of votes for governor at the last general election must be certified.[3] (See Chapter 5 for a discussion of the unique role in governance played by initiative constitutional amendments.) In the 2006 gubernatorial election, 8,679,420 votes were cast for six gubernatorial candidates including write-ins; 8% of that total is 694,354. In contrast to the 8% total necessary to amend the state constitution, initiative statutory amendments require *valid* signatures amounting to 5% of the last gubernatorial vote—currently 433,971 valid signatures.

The number of valid signatures needed to qualify an initiative has remained fairly steady over the past several years. Although the number of Californians registered to vote, and thus eligible to sign petitions, increased by 1.1 million since 1994, not many more people voted for governor in 2006 than in 1994.[4]

It is important to emphasize that these signature thresholds are the numbers of *valid* signatures needed. Depending on the issue, the method of petition circulation and the integrity of signature gatherers, a significant percentage of all signatures collected are deemed invalid in every petition drive. Although petition drives vary in their degree of signature invalidation, California initiative proponents lose up to 40% of gross signatures they have collected in the verification check. For this reason, signature gatherers must collect well over 750,000 gross signatures for initiative statutes and more than a million gross signatures for initiative constitutional amendments in order to be reasonably assured of qualification.

Signature Verification Procedures

Petitions to place an initiative on the state ballot are circulated on a county-by-county basis.[5] Only registered voters of any given county may sign petitions that are to be validated in that county, although petition circulators can reside anywhere in the state, or

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[3] Cal. Const. art. II, § 8(b).

[4] Additionally, the number of Californians *eligible* to register to vote has increased by 3.7 million; about 6.8 million of those currently eligible to register to vote have not done so. Center for Governmental Studies (CGS) data analysis, June 2007.

[5] A typical signature petition includes a large caption and a 100-word summary at the top, both prepared by the attorney general, followed by a number of lines for signatures. The full text of the initiative must be readily accessible to signatories who wish to read it.

even outside the state.[6] Signatories must affix their signatures, printed names, residence addresses and names of their incorporated cities or unincorporated communities.[7] Each signature must be witnessed by the petition circulator, who later signs an affidavit to that effect at the bottom of the petition.

Completed petitions are filed with the county clerk or registrar of voters in the appropriate county. Within eight days, the clerk or registrar must notify the secretary of state of the total number of raw signatures. If the total number from all counties is less than 100% of the required signatures, the petition is deemed insufficient. If the number equals or exceeds 100% of the threshold, then the counties are directed to conduct a random sampling of at least 3% of the signatures.[8] The county officers have 30 days in which to verify the signatures and send a certificate to the secretary of state indicating the results of the examination. An initiative fails to qualify for the ballot if random sampling indicates that the number of valid signatures falls short of 95% of the qualification threshold. An initiative achieving a sampling verification rate in excess of 110% of the threshold qualifies for the ballot without further verification. If the statistical sampling shows that the number of valid signatures falls within the 95% and 110% range, the county clerks must then count and verify each and every signature.[9] Any initiative measure that succeeds in qualifying for the ballot is submitted to the voters at the next statewide election following a 131-day period.[10]

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[6] Cal. Elec. Code § 9021 (2007). Prior to 1976, petition circulators had to be from the same county as the signatories on the petition, but the court has since ruled that California cannot enforce that provision.

[7] Cal. Elec. Code §§ 105, 9020 (2007). If the address listed on the petition differs from the registered address, the county clerk must strike the signature from the petition. *Schaaf v. Beattie*, 265 Cal. App. 2d 904 (1968). In a related case, members of the assembly filed suit against the California Republican Party in an attempt to prevent an initiative referendum on reapportionment from being placed on the ballot. Assembly Democrats argued that the petition process used by the Republican Party violated Section 3516 of the Elections Code requiring that signatories affix their residence address to a petition rather than their registered address. The cover letter of the direct mail petition sent to registered Republican voters bore the following instructions: "ATTENTION! . . . WHEN SIGNING YOUR PETITION, PLEASE USE THE NAME AND ADDRESS INFORMATION EXACTLY AS IT IS LISTED HERE (EVEN IF INCORRECT) TO INSURE YOUR PETITIONS QUALIFY. . . ." The California Supreme Court ruled that this instruction was indeed a violation of state law, but the violation had previously been common practice and therefore was not substantial enough to render the petitions invalid. However, any future infractions of this sort will be sufficient grounds to render initiative petitions invalid. *Assembly of State of California v. Deukmejian*, 30 Cal. 3d 638 (1982). Because of this tactic, this petition had the highest validity rate (85%) of all petitions circulated between 1982 and 1990.

[8] The size of the random sample for counties to verify petition signatures was reduced from 5% of raw signatures submitted to 3% in 1991.

[9] Cal. Elec. Code § 9030 (2007). In 1982, the legislature passed an urgency measure lowering the ceiling of the random sample verification test from 110% to 105% for petitions submitted on or before January 28 of that year. This legislative action was a temporary amendment designed exclusively to allow ballot qualification for the Victims' Bill of Rights initiative proposal, which had garnered 108.76% of the necessary valid signatures; the ceiling has been 110% for all other initiatives.

[10] Cal. Const. art. II, § 8(c). The governor may call a special election so that the measure can be submitted to the voters before the date of the next regularly scheduled statewide election. Special elections are rarely called for this purpose; the last one was held in 2005 at an estimated cost of $48 million. Before 2005, the most recent special elections to decide on ballot measures took place in 1993 and 1979.

INITIATIVE QUALIFICATION PROCEDURES HAVE BECOME MORE DIFFICULT AT THE LOCAL LEVEL, ALTHOUGH LOCAL INITIATIVES ARE STILL ABLE TO QUALIFY

While the state constitution sets the number of signatures needed to qualify a state constitutional amendment or statutory measure, the California legislature has established the number of signatures required to qualify a local measure.[11] In addition, local measures—other than charter amendments—are subject to an indirect initiative process in which the local governing body must consider the initiative before the measure appears on the ballot. If the local governing body approves the measure, it automatically becomes law without a vote of the people. (For a discussion of problems with the indirect initiative process at the state level, see Chapter 3.)

Charter Amendments

Proponents of an amendment to a county charter must gather signatures totaling 10% of the votes in the county for all candidates for governor at the last election to place the measure on the local ballot.[12] In Los Angeles County, for example, a charter amendment proposal must presently be backed by 197,104 signatures. Sacramento County requires 36,207 valid signatures.

In 1990 the legislature substantially increased the number of signatures needed to qualify a city charter amendment, apparently without realizing it. The law requires signatures of 15% of all *registered* voters in any charter city, except for the City and County of San Francisco where signatures of 10% of registered voters are required.[13] The law was previously based on the number of votes cast for governor in the prior election. Since voter turnout in many cities has been less than 60%, the legislative amendment nearly doubled the number of signatures needed to qualify a measure. The legislature appears to have enacted this drastic change inadvertently. The analysis by the Assembly Elections, Reapportionment and Constitutional Amendments Committee reported that the bill was merely a technical restructuring of code sections.[14]

Ordinances by Initiative

Initiative measures amending or enacting local ordinances are all subject to an indirect initiative procedure, in which citizen-initiated proposals are first presented to the local

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[11] The authority of the legislature to set the number of signatures required for local initiatives was confirmed in *District Election of Supervisors Committee for 5% v. O'Conner*, 78 Cal. App. 3d 261 (1978).

[12] Only 14 counties (of 58) in California have their own charters. The charter counties are Alameda, Butte, El Dorado, Fresno, Los Angeles, Orange, Placer, Sacramento, San Bernardino, San Diego, San Francisco, San Mateo, Santa Clara and Tehama.

[13] Cal. Elec. Code § 9214 (2007).

[14] The legislature later declined to correct the error. State Senator Quentin Kopp (I-San Francisco) introduced a bill (SB 27) in the 1991–92 legislative session which would have returned the signature threshold to 10% of the voters in the last gubernatorial election. Perhaps due to the legislature's hostility toward initiatives, the bill was killed in the assembly.

legislative body for action. At the county level, if the petition contains signatures equivalent to at least 20% of the votes in the county for governor at the last election, the board of supervisors has three choices: (1) adopt the ordinance without change, (2) call a special election to submit the unamended measure to a vote of the people, or (3) order a study of the initiative's impact to be completed within 30 days and then either adopt the measure or place it on the ballot.[15] At no point can the board of supervisors negotiate modifications in the initiative, nor can initiative proponents withdraw the proposal from consideration after qualification; the measure must either be adopted or placed on the ballot without alterations.

If the proponents of a measure submit signatures amounting to 10% or more of the votes in the county for all candidates for governor at the last election, the board of supervisors has three options: (1) approve the measure without change, (2) place the measure on the next statewide election ballot scheduled at least 88 days after the order of election, or (3) order a study of the initiative to be completed within 30 days and then either adopt the measure or place it on the ballot.[16]

Few countywide initiatives qualify for the ballot. The average California county had 2.7 initiatives in the 1990s, but Napa and Tuolumne counties each experienced nine countywide initiatives throughout the decade—more than any other counties in the state.[17]

City initiative ordinances are also subject to indirect initiative procedures, but the percentage of signatures needed to qualify a measure depends on the number of registered voters in the city. In a city of over 1,000 registered voters, at least 15% of the city's electorate must sign the petition. In cities of 1,000 or fewer persons, 25% of the electorate or 100 voters, whichever is less, must sign the petition. After a successful petition drive, the city council has three choices: (1) adopt the ordinance without change, (2) call a special election to submit the unamended measure to a vote of the people, or (3) order a study of the initiative to be completed within 30 days and then either adopt the measure or place it on the ballot.[18]

While the legislature requires more signatures to qualify city and county measures than statewide measures, it also gives proponents more days to circulate. Proponents of local initiatives in most municipalities have 180 days, as opposed to 150 days at the state level, to garner signatures.[19]

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[15] Cal. Elec. Code § 9116 (2007).

[16] Cal. Elec. Code § 9118 (2007).

[17] Tracy M. Gordon, *The Local Initiative in California*, report for the Public Policy Institute of California (2004).

[18] Cal. Elec. Code § 9214 (2007).

[19] Cal. Elec. Code §§ 9110, 9208 and 9265 (2007). The Los Angeles City Charter has specific provisions concerning the amount of time petitioners have for circulation which differ from state guidelines. Rather than 200 days in which to circulate a charter amendment or 180 days for an ordinance, Los Angeles gives proponents only 120 days to circulate a measure. Los Angeles Elec. Code ch. VII, art. B, § 708.

CIRCULATION PROCEDURES VARY IN OTHER STATES

States vary widely in the time allotted by law to circulate petitions. As shown in Table 4.1, Oklahoma allows the shortest amount of time to circulate direct initiatives (90 days), and Massachusetts gives circulators 90 days to gather signatures for indirect initiative drives. In Massachusetts, if the legislature does not pass an initiative proposal that has qualified, circulators then have 30 more days to gather the remaining signatures needed for ballot qualification. Although the circulation periods are similar, the signature requirements are much stiffer in Oklahoma (8% of the total vote in the previous election) than in Massachusetts (3.5% of the last gubernatorial vote).

California has the third shortest circulation time period (150 days) of any state—only Massachusetts and Oklahoma have shorter circulation periods—followed by Colorado (6 months), Michigan (180 days) and Washington (6 months for direct initiatives). California and Colorado have similar signature requirements to qualify statutory initiatives (5% of the previous gubernatorial and secretary of state's election, respectively), whereas Michigan and Washington require 8% of the previous gubernatorial election vote to qualify an initiative. Seven states provide less than one year to circulate petitions, and ten states have circulation times of one year or more. Three states (Arkansas, Ohio and Utah) allow an unlimited circulation time period.[20]

Circulation Period and Qualification

Longer circulation periods do not necessarily mean that more initiatives qualify for the ballot. For example, Wyoming has one of the longest circulation periods, but only eight initiatives have qualified since the state's initiative process began in 1970. California, on the other hand, has a comparatively short circulation period and, along with Colorado and Oregon, qualifies the largest number of initiatives for the state ballot.

The degree of difficulty in qualifying an initiative for the ballot in each state is largely a product of the interplay of several procedural factors. The length of the circulation period is one such factor, but other factors include the percentage of registered voters and the absolute number of signatures needed for qualification, geographic distribution requirements for the signatures, whether the particular state utilizes a direct or indirect initiative process, and any other procedural restrictions a state may choose to impose. For example, though Wyoming has a long circulation period, it also requires initiative proponents to gather signatures equivalent to 15% of the total votes cast in the last general election (the highest percentage of any state), distributed proportionately throughout at least two-thirds of the state's counties.[21]

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[20] California also permitted an unlimited time period for circulation of initiative petitions until 1943, when Artie Samish allegedly convinced the legislature to shorten the circulation period to protect the liquor industry from a flurry of prohibition initiatives (see footnote 38, Chapter I).

[21] Wyoming imposes such strict qualification procedures, especially an extremely high signature threshold, that it would appear the state is not serious about providing direct democracy. In the brief history of Wyoming's initiative process, only 30 initiative proposals have been filed with the secretary of state. Of these, only nine initiatives have gathered the requisite signatures for ballot qualification. One of the nine never appeared on the ballot because legislation passed that year was determined to be essentially the same.

TABLE 4.1 Initiative Qualification Requirements by State

	Signature Requirement					
State	Initiative Statutes		Initiative Constitutional Amendments		Circulation Period	Geographic Distribution
Alaska	10%	LTV			1 year	Yes
Arizona	10%	LGV	15%	LGV	2 years	No
Arkansas	8%	TV-LGE	10%	LGV	Unlimited	Yes
California	5%	LGV	8%	LGV	150 days	No
Colorado	5%	SV	5%	SV	6 months	No
Florida			8%	LPV	4 years	Yes
Idaho	6%	RV			18 months	Yes
Illinois	8%	LGV	8%	LGV	2 years	Yes
Maine	10%	LGV			1 year	No
Mass.	3%	LGV + 1/2% LGV	3%	LGV	90 days + 30 days	Yes
Michigan	8%	LGV	10%	LGV	180 days	No
Mississippi			12%	LGV	1 year	Yes
Missouri	5%	LGV	8%	LGV	18 months	Yes
Montana	5%	LGV	10%	LGV	1 year	Yes
Nebraska	7%	LGV	10%	LGV	1 year	Yes
Nevada	10%	LTV	10%	LTV	10 mos. (Statutory), 11 mos. (Const.)	No
N. Dakota	2%	TV	4%	TV	1 year	No
Ohio	3%	LGV + 3% LGV	10%	LGV	Unlimited	Yes
Oklahoma	8%	TV	15%	TV	90 days	No
Oregon	6%	LGV	8%	LGV	About 2 years*	No
S. Dakota	5%	LGV	10%	LGV	1 year	No
Utah	5% 10%	LGV + 5% LGV(I)** LGV + 10% LGV(D)**			Unlimited	Yes
Washington	8%	LGV			6 mos.(D), 10 mos.(I)	No
Wyoming	15%	LTV			18 months	Yes

Key:
- LTV — Percentage of total votes cast in last general election
- LGV — Percentage of votes cast in last gubernatorial election
- TV-LGE — Percentage of total vote in the last election with gubernatorial candidates
- SV — Percentage of votes cast for Secretary of State in last election
- LPV — Percentage of votes cast for President in the previous presidential election
- RV — Percentage of registered voters
- D — Direct initiative process
- I — Indirect initiative process

* In Oregon, the secretary of state does not approve initiative petitions until four months before the *previous* election. This practice limits the state's circulation period to slightly more or less than 24 months, depending on exactly when the general elections occur.

** In Utah, the first round of signatures collected does not involve a distribution requirement, but the second round must come from 10% of the total vote cast in at least 20 of the 29 counties in the state.

Source: Initiative and Referendum Institute and Center for Governmental Studies data analysis.

Time Considerations

Depending on the method of petition circulation chosen and the resources available to run a qualification drive, the amount of time necessary to gather enough signatures for ballot qualification can vary widely. A volunteer effort is the most time-consuming means of petition circulation. The lack of rigid businesslike discipline over petition circulators makes a volunteer effort generally less organized and more apt to suffer disruptions from work obligations and other scheduling conflicts among circulators. Using an army of *paid* circulators is a much more effective—and some people believe more cost-efficient—means to gather signatures.

The length of time it takes to gather the requisite signatures for ballot qualification depends both on how much money a campaign has and on "market conditions" that can drive up the cost of signature gathering, such as the amount of time remaining before an election and the number of other petitions in circulation. In California, a well-financed paid circulation effort can take as much or as little time as needed. In 2006, Kimball Petition Management circulated Proposition 89 (public financing) in 60 days because it was necessary to get the measure on the November ballot. In 2007, the firm took 120 days to circulate a term limits petition for 2008, simply because it had ample time before the next election. Less well-funded efforts are far more vulnerable to market conditions, so they often lack the flexibility to target a specific ballot unless they begin circulation efforts quite early on.[22]

Petitions can also be circulated, and signatures gathered, through direct mail, although this is usually a less certain means of gathering signatures than the use of paid circulators. If several mailings are required to reach the target audience, direct mail signature gathering will be slower and much more expensive than employing paid circulators. But when the mailing list has been sufficiently refined and tailored for the particular initiative proposal, direct mail has been a fast method of ballot qualification. On California's November 1988 ballot, for example, an insurance industry initiative proposal to establish a no-fault system of automobile insurance was ruled unconstitutional in the middle of the circulation period. Proponents rewrote the measure in acceptable form, enlisted an expensive direct mail firm to circulate petitions and qualified the measure (Proposition 104) for the ballot in about 48 days. Roughly 390,000 of the signatures submitted for the no-fault proposal were raised in 33 days.[23] Direct mail is sometimes used in tandem with a paid circulation drive. A measure limiting attorneys' fees (Proposition 106) on the same ballot made extensive use of both methods of signature gathering and successfully qualified for the ballot in a brief 57 days.

Geographical Distribution of Signatures

Thirteen states plus the District of Columbia require some form of geographic distribution of signatures for initiative petitions.[24] In six states, proponents are required to collect

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[22] Interview with Fred Kimball, president of Kimball Petition Management, in Los Angeles, July 12, 2007.

[23] Interview with Mike Arno, American Petition Consultants, in Sacramento, May 8, 1989.

[24] Jurisdictions requiring a geographic distribution of petition signatures for initiative statutes and constitutional amendments (if permitted) are Alaska, Arkansas, District of Columbia, Florida, Idaho, Illinois, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Ohio, Utah and Wyoming.

the same proportion of signatures in a minimum number of legislative or congressional districts. For example, proponents in Florida must gather 8% in at least 13 of the state's congressional districts, and statutory initiatives in Missouri must have 5% of the last gubernatorial election statewide and 5% from six of the nine congressional districts.

In four states, proponents must collect the same proportion of signatures in a minimum number of counties as are needed statewide for ballot qualification. Proponents in Ohio must submit signatures from a majority of the state's counties in amounts greater than or equivalent to a percentage of each county's last gubernatorial vote. The Massachusetts Constitution stipulates that no more than 25% of the signatures needed for ballot qualification can be derived from any one county, a requirement that prevents Boston residents from putting measures on the ballot by themselves.

Courts have struck down distribution requirements in two states. In 2003, the 9th Circuit Court of Appeals invalidated Idaho's requirement that 6% of the voters in 22 counties must sign an initiative.[25] Nevada's county geographical requirement that 10% of the voters in 13 of the 17 counties sign an initiative was ruled unconstitutional in 2004.[26]

California imposes no geographical distribution requirement on the collection of signatures for initiative petition drives. Among the eight initiatives on the state's November 2006 ballot, no initiative drive collected signatures proportionate to the last gubernatorial vote from more than 52% of the counties, and only in two cases were that many signatures collected from more than half of the counties.[27]

This does not mean, however, that a few populous counties provided more than their fair share of petition signatures. The eight initiative drives for the November 2006 election collected signatures from a mean of 43% and a median of 48% of the state's counties. Furthermore, most California counties have very small populations. The combined population of half the state's counties (29 of 58) amounts to slightly less than 5% of the entire state population. Registered voters number less than 50,000 persons in each of 23 counties.[28]

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[25] *Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073 (2003).

[26] *American Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010 (9th Cir. Nev. 2006).

[27] The number of California counties in which there was a proportionate distribution of signatures for ballot qualification of the initiatives on the November 2006 ballot, where signatures amounted to at least 5% of the gubernatorial vote for statutes and 8% for constitutional amendments, are as follows:

Proposition	Number of Counties (58 total)	Percentage of State's Counties
Proposition 83: sex offenders	17	29%
Proposition 84: water bond	18	31%
Proposition 85: parental notification for abortions	30	52%
Proposition 86: tobacco tax	29	50%
Proposition 87: oil severance tax	28	48%
Proposition 88: school parcel tax	30	52%
Proposition 89: public financing of campaigns	20	35%
Proposition 90: eminent domain	28	48%
		Median: 48%
		Mean: 43%

[28] California Secretary of State, *Report on Voter Registration* (Sacramento, October 2002). In Madera, had 50,066 registered voters. California Secretary of State, *Report on Voter Registration* (Sacramento, October 2006).

As shown in Table 4.2, the number of signatures collected is generally proportionate to the number of registered voters in each county.

TABLE 4.2 Geographical Distribution of Petition Signatures Among Selected Counties (for November 2006 Initiatives)

County	Median Number of Actual Signatures Collected per Initiative	Percentage of Total Valid Signatures of All Initiatives	Percentage of State's Registered Voters
Alameda			
Statute	16,005	3.5%	4.4%
Const. Amendment	27,340	4.2%	
Contra Costa			
Statute	9,450	2.89%	3.1%
Const. Amendment	22,341	3.1%	
Los Angeles			
Statute	138,529	30.6%	24.5%
Const. Amendment	236,995	32.9%	
Orange			
Statute	33,357	6.8%	9.5%
Const. Amendment	57,131	7.8%	
Riverside			
Statute	24,213	5.0%	4.8%
Const. Amendment	44,463	6.1%	
Sacramento			
Statute	13,785	3.3%	4.0%
Const. Amendment	27,218	3.8%	
San Bernardino			
Statute	28,901	6.4%	4.8%
Const. Amendment	52,862	7.3%	
San Diego			
Statute	46,605	10.3%	8.7%
Const. Amendment	81,485	11.3%	
San Mateo*			
Statute	3,911	1.1%	2.2%
Const. Amendment	10,805	1.5%	
Ventura			
Statute	15,306	3.4%	2.4%
Const. Amendment	18,090	3.3%	

* Based on raw signatures, since none of the signatures were verified.
Source: Center for Governmental Studies data analysis.

It is often suggested that Los Angeles, being a major urban center, contributes far more than its share of signatures for petition drives. Although Los Angeles clearly provides more signatures than any other county and the percentage of signatures from the county has gone up somewhat since 1990, its influence is only modestly disproportionate to the county's population. In the November 2006 petition drives, Los Angeles County provided a median of 31% of signatures for all successful statewide petition drives, but Los Angeles County contains 24.5% of the state's registered voters. In 1990, Los Angeles County provided a median of 27% of signatures for the 13 initiatives that qualified for the November ballot; 26% of California voters resided in the county at the time.

Among the counties sampled for November 2006, the share of signatures for all initiative petitions on the ballot that year was roughly equivalent to the counties' share of registered voters in the state: 69% of the signatures compared to 60% of the voters. In 1990, the only notable exception to this trend was San Diego, a county that routinely produced signatures amounting to almost twice its share of registered voters—although San Diego yielded a proportionate number of petition signatures in 2006.

A second form of a geographical distribution requirement establishes a maximum ceiling for signatures on an initiative petition that can come from any one county. The intention of a ceiling formula is to contain the ability of major urban centers to dominate the initiative agenda. As mentioned previously, Massachusetts imposes such a restriction on the city of Boston by prohibiting more than 25% of total qualification signatures for an initiative coming from any one county. The impact of the Massachusetts law today is minimal, given that Boston and its Suffolk County contain only 8% of the state's registered voters.

California has considered implementing a strong signature ceiling formula in the past. An unsuccessful bill introduced in the 1991 legislative session proposed that statewide initiatives be signed by electors in at least 10 counties, with no more than 10% of the total number of required signatures coming from any single county.[29] Judging from the November 2006 figures, only two counties in California have consistently supplied more than 10% of an initiative's qualification signatures. Los Angeles provided a median 31% of qualification signatures for all eight initiatives on the ballot, and San Diego provided a median 10.7% of the signatures. Los Angeles County contains 24.5% and San Diego 8.7% of the state's registered voters. While the role of both counties in setting the state's political agenda would diminish significantly under the signature ceiling proposal, Los Angeles County's influence in qualifying initiative proposals would be set far below its actual electoral strength.

SIGNATURES CAN BE COLLECTED THROUGH SEVERAL DIFFERENT MEANS

Proponents use several different procedures for circulating initiative petitions. In the early days of mostly volunteer petition circulation, signatures frequently were collected through large membership organizations distributing petitions door-to-door, at church

[29] SCA 36 (Leroy Greene, D-Carmichael).

Initiative sponsors have increasingly avoided grassroots methods of signature gathering as the signature requirement has risen to exceed several hundred thousand.

and at social gatherings. Temperance leagues, churches, unions, farm organizations and teacher associations would put their members to work collecting signatures in their neighborhoods and among their relatives.[30] Such grassroots activities were quite feasible in an era when 50,000 signatures or so would qualify a measure for the ballot.

Initiative sponsors have increasingly avoided the door-to-door method as the signature requirement has risen to exceed several hundred thousand. A circulator can only collect an estimated ten signatures per hour by this method, which is impractical by today's standards.[31] This circulation method can be useful, however, when initiative proponents want to solicit funds for the campaign and supplemental signatures. Activist groups such as Voter Revolt and Campaign California have made extensive use of the door-to-door method to solicit both money and petition signatures as well as to distribute informational leaflets.

Table Method

The People's Lobby, under the direction of Ed and Joyce Koupal, developed a far more efficient means of gathering signatures, especially for volunteer drives. Known as the "table method," a group of two volunteers sets up a folding table in a public place with a steady stream of slow-moving pedestrian traffic. Busy shopping malls are ideal locations.

Using the table method, one person works in front of the table, approaches adults who walk by and asks whether they are registered to vote. If they answer yes, the circulator then asks if they would like to sign the petition and briefly describes the measure's intent using ten or fewer popular catchwords. If the voter is hesitant, they are told to help "just put the measure on the ballot so the voters can decide." The voter moves over to the table where the second circulator oversees the actual signing and says, "Sign your name and address as you are registered to vote." Circulators are trained to avoid any extensive discussion or debate. If the voter wants more information before signing, they are guided to the side of the table outside the flow of pedestrians and handed a full petition and/or informational pamphlet to read.

> Ed Koupal candidly summed up his technique:
>
> Generally, people who are getting . . . signatures are too god-damned interested in their ideology to get the required number in the required time. We use the hoopla process.
>
> First, you set up a table with six petitions taped to it, and a sign in front that says: SIGN HERE. One person sits at the table. Another person stands in front of it. That's all you need—two people.
>
> While one person sits at the table, the other walks up to people and asks two questions. We operate on the old selling maxim that two yeses make a sale. First, we ask them if they are a registered voter. If they say yes to that, we ask if they are registered in that county. If they say

[30] Thomas Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Cambridge, Mass.: Harvard University Press, 1989), 62.

[31] *Initiative News Report*, February 8, 1982, 7.

> yes to that, we immediately push them up to the table where the person sitting points to a petition and says, "Sign this." By this time, the person feels, "Oh goodie, I get to play," and signs it. If the table doesn't get 80 signatures an hour using this method, it's moved the next day.[32]

A variation of the table method is to set up the table at the entrance or exit of a fair, racetrack or other event where people pass by slowly. Sports events are not good places to gather signatures, since everybody enters and leaves at once. In Ohio, innovative initiative proponents set up tables outside polling places on election day in November 1980. Paid circulators were stationed at over a thousand locations around the state and collected over a half million signatures in a single day to qualify an initiative for the next general election ballot. Nearly all of the signatures were valid since all signers were registered voters.[33] (California prohibits any electioneering within 100 feet of a polling place.)

Clipboard Method

Another favorite technique of paid circulators is the "clipboard method." It allows the circulator with a financial incentive to work alone, but the clipboard method can also be used by volunteers who do better with the morale boost they get from working in teams. The most effective version of this technique is for a single circulator to work long, slow-moving lines of people waiting to get into a movie, play, concert or other event. People waiting to board buses or trains oftentimes are good targets for circulators. On one occasion, a paid circulator for the Kimball Petition Management firm gathered 700 signatures in a single day by approaching people who were waiting in line to see the King Tut exhibit at the Los Angeles County Museum of Art.[34]

Frequently, paid circulators using the clipboard method will carry more than one petition—perhaps several at a time. In one instance, a professional circulator carried 11 clipboards at the same time.[35] Earnings for the circulator increase accordingly. In 1989, Kelly Kimball had already stated that the days of a clipboard with only one initiative by a professional circulator were over.[36] The approach used by a clipboard circulator is similar to that used by the table method. First they identify registered voters and then introduce them to the petition with a brief and appealing sentence. Keeping discussions to a minimum, a person with a single clipboard can get about 30 signatures an hour when conditions are favorable.

Bulletin Board Method

A handful of states—Florida, Massachusetts and Washington—do not require that signatures on a petition be witnessed by the circulator, thereby allowing petitions to be

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[32] Quoted in Duscha, *supra* note 1, at 83.

[33] *Initiative News Report*, *supra* note 31, at 6.

[34] Charles Price, "Seizing the Initiative: California's New Politics," *Citizen Participation* September/October 1981, 19–20.

[35] Interview with Arno, *supra* note 23.

[36] Interview with Fred Kimball, *supra* note 22.

unattended. In these states it is perfectly legal to pin a petition on a bulletin board in a store, church, office or school, or even tape a petition to a countertop in a retail establishment, and allow any interested persons to sign their name. A circulator returns a few weeks later to pick up the signed petitions. The potential for fraudulent signatures and other abuses is greater in a petition circulation system that does not impose some form of accountability. Consequently, most states (including California) require circulators to sign an oath that they witnessed all signatures placed on a petition.[37]

The bulletin board method can be effective if a clerk or store owner takes an active role in getting people to sign the petitions. Eye-catching signs or oral appeals by the people working in the establishment help prompt customers to sign. Grocers have used this technique in several states to qualify initiatives designed to legalize the sale of beer or wine in grocery stores.[38] Overall, however, this is an inefficient method of petition circulation. Few workers take an active role in soliciting signatures, and unattended petitions tend to have a high rate of invalid signatures.

Newspaper Insert Method

An uncommon technique for raising signatures is known as the "newspaper insert method." The legal standing of such a practice is not yet established in most states. Washington is one of a few states that specifically addresses newsprint petitions in its state statutes. The state allows initiative sponsors to have their petition printed as advertisements in newspapers for interested persons to clip, sign and mail back. While most states have not statutorily prohibited this form of petition circulation, standards for petition format specified by state law frequently make it impossible.[39]

Although the newspaper insert method can sometimes be useful as a complementary technique to other, more fruitful signature-gathering efforts in states with minimal restrictions on petition format, it is not cost-effective on its own. Newspaper advertisements are expensive. Many states require that petitions be printed on 11 X 14 inch paper, and nearly all readers of a general newspaper discard petition inserts. No initiative proposal has successfully qualified for the ballot by exclusively using this method of signature collection, although one petition drive in 1981 in the state of Washington came close. The Washington chapter of Common Cause sponsored a redistricting initiative but did not start the petition drive until about 40 days prior to the deadline. Realizing that there was not enough time to pursue normal circulation procedures, it placed petition

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[37] Even in states that require a petition to be signed in the presence of the circulator, it is not uncommon to see an unattended petition affixed to a countertop or refrigerator door in the lounge area of an office or business. But the total number of signatures gathered through such passive abuses of petition circulation laws can be assumed to be negligible.

[38] *Initiative News Report*, *supra* note 31, at 8.

[39] States that specify a certain quality of paper for printing petitions, for example, would not allow newsprint petitions. In most states, however, the issue of newsprint petitions has never been addressed. There does not appear to be any provision in California state statutes that would prohibit the circulation of petitions through newspapers. It has been done on at least one occasion in California. Lacking clear statutory guidance, the courts in most states must be the ultimate arbiter in determining whether the newspaper insert method is a permissible means for the distribution of initiative petitions.

advertisements throughout the state's major newspapers. Common Cause received 135,000 signatures in three weeks, just shy of the signature threshold.[40]

PETITION CIRCULATION THROUGH THE MAIL

The direct mail method of raising signatures was used most visibly in Howard Jarvis's 1980 income tax initiative, but it was first employed in a 1978 general election death penalty measure. The Butcher-Forde firm had been conducting direct mail fund-raising for state Senator John Briggs who was running for governor of California. At a staff meeting, the idea emerged of using the mail to gather signatures for the Briggs-sponsored death penalty initiative designed to catapult the candidate into the public limelight. No one was sure if the idea would work. In fact, some questioned whether direct mail signature solicitation would even be legal in California (research showed that it was).[41]

The firm subdivided the state's electorate into 20 different demographic groups and sent test mailings of the initiative petition to each group. Within two weeks, it became evident that several demographic groups were highly responsive to the petition, sending back funds as well as signatures. The responsive groups were further targeted for about 1.5 million mailings, which collected more than 400,000 signatures and $300,000 in contributions—nearly offsetting the costs of the direct mail drive.[42]

The direct mail method was used with much greater fanfare to qualify Jarvis's income tax–cutting initiative (Proposition 9) for the June 1980 ballot. Butcher-Forde obtained a statewide voter registration list and sent it to the R. L. Polk firm in Detroit for the most up-to-date addresses, reducing the list size by 10%. People who had indicated that they did not want to receive unsolicited mail also were removed from the list. Likely voters were broken down into different demographic groups, and different styles of petition mailers were sent out to targeted groups on a test basis.

Eventually 6 million pieces of mailing were sent to targeted groups. The petitions were mailed under the government-subsidized mailing rate available to nonprofit organizations. The response was 400,000 replies with 820,000 signatures and $1.8 million in contributions. The returns were then processed into the Butcher-Forde computer for future mailings and list rentals.[43]

The success rate of a direct mail petition drive depends on several factors. Most important is the quality of the mailing list. A mailing list that accurately pinpoints the appropriate target groups for a particular issue will result in a faster and less expensive direct mail effort. The degree of popular support for an initiative proposal also impacts the success rate. An issue with narrow appeal will have a harder time finding voters willing to sign a mailed initiative petition. Finally, the design of the mailer is important in

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[40] *Initiative News Report*, *supra* note 31, at 8.

[41] Larry Berg and Craig Holman, "The Initiative Process and Its Declining Agenda-Setting Value" (paper presented to the annual meeting of the American Political Science Association, New Orleans, August 30, 1985).

[42] Robert Fairbanks and Martin Smith, "There's Gold in Them Thar Campaigns," *California Journal*, December 1984.

[43] Maureen Fitzgerald, "Computer Democracy: An Analysis of California's New Love Affair with the Initiative Process," *California Journal*, June 1980.

influencing the response rate. A carefully crafted mailer stands a better chance of being opened and read.[44] To be cost-effective, a direct mail signature drive needs about a 5% response rate.[45]

Today, direct mail circulation is used far less often than it was in the late 1970s and 1980s.

Direct mail circulation is used far less often today than it was in the late 1970s and 1980s. The signature validity rate is high, around 75%–80%, but the hefty expenditures necessary to collect enough signatures through direct mail far outweigh that benefit. With production, printing, postage and return postage, the cost of one mail piece can amount to approximately $4. And the signed petition return rate is only about 1% unless the campaign has an extremely tailored and well-maintained mailing list. Thus, mailing 1 million petitions can yield as little as 10,000 signatures at the prohibitive cost of $400 per signature. As a result, direct mail is far more often used for fund-raising and political mobilization than for petition gathering.[46] When direct mail is used, it is normally used along with paid circulators to reduce the cost. Direct mail has not been employed to collect more than half the signatures on any initiative petition outside California.

Electronic Signature Gathering

The Internet could be a useful signature-gathering tool. Dr. Walter Baer, former senior analyst in RAND's science and technology division, and Roy Ulrich, a public interest attorney and consumer advocate, have recently described how electronic signature gathering might operate.[47] Each voter wanting to submit electronic signatures would first apply for a digital signature from the secretary of state's office, where the voter's handwritten signature would be kept on file. The applicant would then be assigned a unique pair of cryptographic keys (large numbers) for use in protecting the integrity of the voter's private records. The voter would use one key to encrypt the submitted signature, and the secretary of state's office would use the other key to decrypt it and verify the signature. As an extra security measure, the secretary of state would mail the voter another unique identifier via direct mail, which the voter would be required to submit along with the cryptographic key.

After voters obtain a secure electronic signature, they could then go to the secretary of state's Website, acknowledge that they have read the official summary of the initiative and click on an icon indicating "I want to sign this petition." On a secure online form, voters would enter their name, California voter identification number (usually a driver's license number), cryptographic key and unique identifier. The secretary of state would then

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[44] Design considerations of effective petition mailers often begin with the envelope. In 1980, California police and firefighters sponsored a direct mail petition drive in which the envelope stated that the enclosed letter was "in reference to a police matter" at the household address. The cover letter then said the matter was referred by Sergeant Mike Tracy with "urgent" appearing several times on the envelope and letter. Other direct mail petition drives have packaged their mailers on the stationery of a popular political official, a famous actor and a well-known consumer advocate.

[45] Mike Males, Be It Enacted by the People: A Citizens' Guide to Initiatives (Helena, Mont.: Northern Rockies Action Group, 1982).

[46] Interview with Fred Kimball, *supra* note 22.

[47] Walter Baer and Roy Ulrich, "Online Signature Gathering for California Initiatives" (draft paper, December 15, 2005). CGS funded this paper and has it on file for reference.

decrypt the information with the matching key, and if a voter's information matched state records, then the signature would be counted. A confirmation e-mail would then be sent to the voter.[48]

No state currently permits petitions to be signed over the Internet. As an interim step, however, there is nothing to stop signature gatherers from e-mailing a petition and having the recipient print out the exact petition, sign it and mail it back to the proponents, although this would require the e-mail recipient to have a printer that could accommodate the legal-sized petition and have sufficient postage—and willpower—to mail the petition.

EXCLUSIVE VOLUNTEER PETITION CIRCULATION IS A THING OF THE PAST

When the initiative process was first created, its founders envisioned a system of direct democracy in which concerned citizens could coalesce into a team of volunteers to work on behalf of a crucial political issue. These volunteers would then set out with petitions to demonstrate sufficient popular sentiment to submit the issue to a vote of the general electorate.

Although the initiative process has never fully realized this ideal, the concept of paying for petition circulation did not come into existence until several decades after the initiative was established in California. The first firm to pay persons to gather signatures was established by Joe Robinson of San Francisco in the late 1930s. Robinson's firm stood alone for years in the business of petition circulation because demand was limited. His teams of professional circulators were usually employed as a complement to a volunteer petition drive; they rarely replaced volunteer efforts altogether.

It was not until the late 1970s that the petition circulation market became sufficiently lucrative to attract a number of competing signature-gathering businesses.

It was not until the late 1970s that the petition circulation market became sufficiently lucrative to attract a number of competing signature-gathering businesses. One of the first and most successful competitors was Fred Kimball, father of Fred Kimball, who now runs the family business, Kimball Petition Management.[49] In 1968, Los Angeles County Assessor Phil Watson hired the Robinson firm to qualify a property tax–relief measure for the state ballot (a forerunner of the Jarvis-Gann Proposition 13). When Robinson's petition circulation effort began to fail, Fred Kimball, a real estate agent and active participant in the campaign, reorganized the signature-gathering drive and placed the measure on the ballot.[50]

Watson hired Kimball to qualify another tax relief measure in 1972, and Governor Ronald Reagan employed Kimball to help qualify his tax reform proposal in 1973.

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[48] *Id.,* at 5–7.

[49] Fred Kimball had hired two young entrepreneurs to assist in his petition circulation drives, his son, Kelly, and a friend, Mike Arno. Kelly Kimball later took control of the business but is no longer running the company. His brother is now in charge. Eventually, Mike Arno broke away from the Kimball firm and established his own signature-gathering business.

[50] Charles Price, "Experts Explain the Business of Buying Signatures," *California Journal*, July 1985. The property tax–relief measure was rejected by the voters.

Kimball formally established the Kimball Petition Management company in 1978. A year later, Tom Bader, a college student, and Mike Arno, previously employed by Kimball, answered a newspaper advertisement to gather signatures for a gambling initiative proposal. They founded their own firm in 1979, known then as American Petition Consultants. As the market expanded, Bader and Arno split their business into two companies, Bader & Associates, Inc., and Arno Political Consultants, Inc. Several other signature-gathering businesses have since come into existence.

Meyer v. Grant: Invalidating Prohibitions on Paid Signature Gathering

A handful of states sought to return signature gathering to volunteers and slow the growth of costly qualification drives by prohibiting the payment of petition circulators. Colorado, Idaho and Nebraska each banned financial rewards for signatures raised.[51] The U.S. Supreme Court overturned these laws in the 1988 decision *Meyer v. Grant*.[52] Relying on the reasoning behind the landmark 1976 *Buckley* decision,[53] the Court struck down Colorado's law prohibiting the use of paid circulators on the grounds that it violated freedom of speech.

The case arose out of an initiative proposal sponsored by a group known as Coloradans for Free Enterprise, which wanted to remove motor carriers from the jurisdiction of the Public Utilities Commission. Proponents had to raise 46,737 signatures to qualify the initiative. Because they lacked the necessary resources for a volunteer circulation effort, they filed for an injunction against enforcement of the state's criminal statute prohibiting paid signature gathering. A federal district court upheld the Colorado statute, but its decision was reversed by the U.S. Supreme Court.[54] In a unanimous decision, the Court concluded that the circulation of petitions is political expression of either dissent with existing public policy or a desire to create new policy. Justice Stevens buttressed the point with a description of the petition process that assumed extensive political discussion between solicitors and the public. The prohibition against paid circulators, Stevens wrote, is a violation of free speech because it curtails the "number of [circulators'] voices

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[51] Colo. Rev. Stat., art. 40, § 1-40-110 (1988); Idaho Code, ch. 18, § 34-1821 (1988); Neb. Rev. Stat, art. 7, § 32-705 (1988).

[52] *Meyer v. Grant*, 486 U.S. 414 (1988).

[53] *Buckley v. Valeo*, 424 U.S. 1 (1980).

[54] The district court did not publish its decision. However, District Judge Moore's opinion was incorporated by a three-judge panel of the 10th Circuit Court of Appeals, which also upheld the Colorado ban. The lower courts ruled that the prohibition did not impose an unreasonable burden on the right to free speech (Colorado was the fourth most active state in utilizing the initiative despite the ban) and that the plaintiffs were not restricted in their personal communication of their ideas on the proposition; that spending money on paid circulators is more like a contribution to the cause than an expenditure, and thus is subject to restrictions within the constitutional framework. The courts also ruled that the state had a valid interest in protecting the integrity of the initiative process. *Grant v. Meyer* 741 F.2d 1210 (1984). A strong dissenting opinion by Judge Holloway on the panel prompted a review by the entire tenth circuit court, which subsequently struck down Colorado's law as unconstitutional. *Grant v. Meyer*, 828 F.2d 1446 (1987). The court's final decision formed the basis of the opinion of the U.S. Supreme Court.

who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach."[55]

Payment per Signature

North Dakota and other states have experimented with a new tack in restricting money in the petition circulation process while attempting to remain within the constitutional boundaries of the Supreme Court's decision. Instead of prohibiting payment for the collection of signatures per se, the state regulates the *form* of payment for signatures.

Following criminal convictions of five paid circulators for petition fraud on a 1986 lottery initiative, the state banned the system of payment per signature, though not payment of salaries to circulators.[56] Thus, initiative proponents can hire circulators on an hourly or daily basis at a predetermined wage or salary. North Dakota's law was meant to remove the pressure for circulators to obtain a maximum number of signatures, a pressure that could encourage petition fraud. It was hoped that a regular wage system would alleviate the desperate sense of collecting huge numbers of signatures for greater financial gain. Although some thought the courts might strike down this law, it has withstood nearly two decades of court scrutiny.[57]

Ken Masterton of Masterton & Wright, a California signature-gathering and consulting firm, has suggested that a similar regulation on payment of circulators could encourage volunteer activity in the petition process. The Masterton firm has conducted many signature-gathering drives for grassroots organizations with salaried supervisors recruiting

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[55] *Meyer v. Grant*, 486 U.S. at 1892.

[56] N.D. Cent. Code § 16.1-01-12(11) (2006).

[57] Daniel Lowenstein and Robert Stern argued that the North Dakota law was unlikely to survive a constitutional test. They suggested that the courts found the problem of abuse insufficient to support a ban. Lowenstein and Stern, "The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal," *Hastings Constitutional Law Quarterly* 17 (1989): 175. Robert Stern is the president of CGS and a coauthor of this report.

Others argued that such a prohibition on payment per signature might survive a constitutional challenge. The opinion of the Court in the *Meyer* decision was that the potential of abuse is not sufficient to warrant a broadly encompassing prohibition on paid circulators. Rather than banning paid circulation, the North Dakota law regulates the payment of circulators—a distinction that legislators in both North Dakota and Florida (where the legislature has approved a ban on payment per signature that was vetoed by the governor) argue may be permissible. Precedents exist that could support such a distinction. For example, though the courts in California have ruled that petition circulation in shopping malls is a constitutional right, it is permissible for shopping malls to regulate the time and location of petition circulation on their premises.

A similar Oregon law was upheld by the 9th Circuit Court of Appeals. *Prete v. Bradbury,* 438 F.3d 949 (2006).

In 1991, a bill was introduced into the Florida legislature that proposed establishing a second test case by violating the *Meyer v. Grant* decision and banning all payment for signature gathering. A compromise measure eventually was approved by the legislature that prohibited payment per signature but not the payment of wages or salaries for signature gatherers. Governor Lawton Chiles vetoed the measure on May 29, 1991, stating in his veto message: "I object to this additional burden that would be placed upon a person who wishes to propose a constitutional amendment to the citizens of this state. I am unaware of any abuse of the current initiative petition procedure that would warrant more stringent regulation. . . . House Bill 1809 represents a remedy without a problem."

and organizing teams of volunteer circulators. A prohibition against payment per signature increases the attractiveness of a system in which a full-time staff directs a semi-volunteer effort.[58]

Volunteer Activities

The era of the volunteer-run initiative is over in California, though in many states, volunteer petition drives are common. The death of the volunteer-run initiative in this state is significant because history has shown that an initiative proposal that can attract a pool of dedicated volunteers to place it on the ballot tends to deal with issues that have broad popular appeal. One old study found that initiatives that qualified largely through volunteer activities received voter approval 51% of the time from 1980 to 1984—far more often than other initiatives. In contrast, initiatives falling within the 10%–33% paid signature category had a voter approval rate of 33%. Only 28% of the initiatives that qualified through predominantly paid methods were approved by voters.[59] The more an initiative needs to purchase its place on the ballot, the less likely it is to be a popular measure. In many cases, the paid initiative effort is a proposal designed to meet the narrow objectives of special interest groups.

The era of the volunteer-run initiative is over in California.

The same study also found that populous states that require the highest absolute number of petition signatures for ballot qualification—California and Ohio—also had the greatest reliance on paid methods of petition circulation. Twenty-three years ago, more than 85% of all successful petition drives in these two states were already paying circulators for a substantial portion of their signatures. This was almost exactly the opposite of the rest of the nation, where only 23% of successful petition drives relied heavily on paid means of signature collection.

Despite the potential benefits of a volunteer-led campaign, volunteer-led signature drives have now been almost completely eclipsed by paid signature gathering in California, as discussed in more detail below. These days, says Ken Masterton, "most campaigns just want to write a check and not be bothered with volunteers."[60]

Changing the Threshold

Volunteer petition drives are becoming increasingly difficult to mount, especially in populous states. The problem for volunteer drives stems from basing the signature threshold for ballot qualification on a *percentage* of those voting in a last statewide election, a standard practice in all initiative states, rather than setting the threshold at an *absolute* number of signatures. A percentage threshold means that initiative sponsors must gather an increasingly higher number of signatures as the state's politically active population expands. Sometimes the number of required signatures can be so massive that vast financial resources are needed to complete a successful petition drive. But to lower the signature threshold percentage, or to lower the absolute number of signatures required,

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[58] Telephone interview with Ken Masterton, Masterton & Wright, March 26, 1990.

[59] *Initiative News Report*, November 30, 1984, 1–2.

[60] Telephone interview with Ken Masterton, Masterton & Wright, October 11, 2006.

could encourage even more special interest groups to take advantage of the relative ease of qualification.[61]

Lowering the signature threshold would probably have no effect on ballot qualification for well-financed groups, but it could open the door for lesser-financed organizations to qualify their proposals for the ballot. Given the highly developed initiative industry in this state, well-financed special interest groups already have little problem gaining access to the state ballot, even with today's high signature threshold. In fact, for-profit signature-gathering firms are now willing to guarantee ballot qualification of *any* initiative—at a price. But the price is high, so interest groups that lack vast resources, as well as organizations made up of volunteers, currently have a much harder time financing access to the ballot.

Whether lowering the signature requirement would lead to a large increase in ballot measures is not clear. Qualifying for the ballot is only the first step in the process; the far more difficult step is securing voter approval of the measure. The campaign stage of the initiative process is also expensive, and voters more often than not reject ballot initiatives, especially measures of limited concern. These factors could well deter moderately financed organizations from undertaking an expensive and exhausting initiative drive regardless of any efforts to make qualification procedures easier or more affordable.

Decline in Volunteer Activity

Volunteer activities have continued to decline among California's initiative drives, becoming less and less of a realistic alternative to more costly circulation methods. The last truly volunteer qualification efforts occurred in the November 1982 election, although some initiative drives have relied on more moderate numbers of volunteers since then. The Water Resources Conservation Act (Proposition 13) and the Bilateral Nuclear Weapons Freeze initiative (Proposition 12) were almost exclusively qualified for the ballot by volunteer signature gatherers, and the Bottle Bill (Proposition 11) utilized extensive volunteer labor, with supplemental signatures collected by paid circulators. In 1990, Proposition 117, which banned mountain lion trophy hunting, qualified for the ballot with signatures gathered only by volunteers, but the campaign paid Ken Masterton close to what paid circulators cost in order to organize the volunteers.

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[61] Prior to November 1978, North Dakota followed the Swiss model on signature threshold. Instead of setting the petition signature requirement as a percentage of persons voting in previous elections, ballot qualification specifically required 10,000 signatures—the same number required since 1918. (From 1914 to 1918, North Dakota's initiative procedures set the signature threshold at 10% of registered voters collected within a majority of the state's counties.) North Dakota voters approved a constitutional amendment in 1978 that changed the signature threshold to 2% of the state's resident population. In comparative terms, the number of signatures set by the 2% resident population formula has roughly equaled the number of signatures that would have been set by the traditional formula of 5% of votes cast in the last gubernatorial race. In absolute numbers, this percentile qualification threshold amounts to approximately 13,000 signatures today. That means the original 10,000-signature absolute threshold had historically been higher than the number of qualification signatures that would have been required under a 5% gubernatorial vote formula. This explains why North Dakota did not face a flood of special interest initiatives even under the absolute signature threshold.

Now all of California's successful initiative petitions qualify through the use of at least some professional signature-gatherers. A 1996 campaign finance initiative (Proposition 208), for example, qualified for the ballot after paid circulators and volunteers each collected half the signatures. Most recently, the California Nurses Association collected over 200,000 signatures from nurse volunteers to qualify a 2006 public financing initiative (Proposition 89).

Using both volunteer and professional circulators allows a large member organization with an army of volunteers to keep qualification costs relatively low while still standing a reasonable chance of making the signature threshold within the specified time limit. Volunteers gather as many signatures as possible. The shortfall is estimated by initiative proponents, and professionals are hired to fill the signature gap. The fact that no California initiative has relied exclusively on volunteers since 1982, and that very few have used volunteers at all, indicates the difficulty in organizing and sustaining a grassroots movement capable of collecting several hundred thousand signatures.

An interesting development in paid petition circulation was pioneered by the signature-gathering firm of Masterton & Wright. This firm favors working on behalf of particular social causes that have widespread popular appeal. It employs regional coordinators on a salaried basis who recruit, organize and train petition circulators. Usually their circulators receive payment for signatures collected. Occasionally, however, grassroots support is available, allowing Masterton & Wright to recruit volunteer petition circulators who serve under the employed coordinators.[62] A public financing of elections initiative (Proposition 89) qualified for the 2006 general election ballot using this blend of volunteer circulators and employed coordinators, but the voters soundly defeated it.

Pay Wars

Competition for paid petition circulators has sometimes been cutthroat. Only a handful of professional petition circulation firms serve the California market. Given the need to employ professional circulation services to meet the state's high signature threshold, a new strategy has evolved to influence the state's political agenda. The strategy is simple: pay petition circulators *not* to collect signatures for an initiative proposal or pay for petitions opposing the measure.

This strategy was used, albeit unsuccessfully, by the tobacco industry in its effort to prevent a tobacco tax initiative from qualifying for the 1988 general election ballot (Proposition 99). Opponents of the tobacco tax enlisted the professional services of Clint Reilly Associates (a campaign management firm) and American Petition Consultants (a signature-gathering firm) prior to the measure even qualifying for the ballot. At a cost of $112,139, plus an additional $38,250 in various professional expenses, American Petition Consultants hired an army of solicitors to collect signatures of those opposed to a possible

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[62] Interview with Masterton (1990), *supra* note 59. Masterton's concept of a "volunteer qualification drive" clearly is at odds with the common understanding of volunteer efforts. Total qualification expenditures for the Wildlife Protection initiative (Proposition 117) amounted to $544,586, of which nearly half was spent on coordinator salaries and other expenses associated with the operations of Masterton & Wright. An additional estimated amount of $129,876 was spent on direct mail petition circulation.

tobacco tax measure. The petitions had no legal standing; they did not offer an initiative proposal and they were not designed to qualify an issue for the ballot. The signatures were clearly not used for fund-raising purposes either; only one contribution to the opposition campaign came from an individual (tobacco interests funded almost all of the campaign).

What was accomplished by collecting signatures in opposition to the proposed tobacco tax was a depletion of signature gatherers available to help qualify the tax to the ballot. All signature-gathering firms tend to draw solicitors from the same limited supply of labor. Kimball Petition Management was already employing petition solicitors on behalf of five initiative proposals, and American Petition Consultants was attempting to qualify an additional five proposals for the state ballot.[63] Employed by the tobacco industry to collect signatures against the proposed tobacco tax, American Petition Consultants was no longer available for hire by supporters of the tax.

Supporters of the tobacco tax turned to the new firm of Masterton & Wright for assistance in collecting signatures. That firm had considerable difficulty in finding enough petition circulators for the tobacco tax initiative, partly because of the firm's inexperience and partly because of the strained market. Competition for petition circulators among the many initiative proposals made their services more expensive.[64] Both Kimball Petition Management and American Petition Consultants paid their workers a higher rate than Masterton could afford, drawing solicitors away from the tobacco measure.[65] To complicate matters further, many petition circulators were under the distinct impression that they would be blacklisted from work with American Petition Consultants if they solicited signatures for Proposition 99.[66] Nevertheless, Masterton & Wright was able to muster an adequate petition drive that took the entire 150-day circulation period to qualify the measure for the state ballot.

Attempting to "buy up" the signature-gathering labor pool in order to prevent a measure from reaching the ballot has been a strategy used in local elections as well. In November 1988, the city of Los Angeles witnessed an initiative battle between a coalition of environmentalists and Occidental Petroleum Corporation over oil drilling off of Pacific Palisades coast. A proposal by environmentalists to ban any oil drilling (Proposition O) on

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[63] In the November 1988 election cycle, Kimball Petition Management was hired to qualify Propositions 84, 95, 97, 98 and 100 for the ballot. American Petition Consultants was contracted to qualify Propositions 96, 102, 104, 105 and 106 for the ballot.

[64] Several factors contribute to establishing the pay rate for petition circulation. One factor is the supply of circulators. The tighter the market of solicitors, the higher the price. A second factor is the number of initiative proposals being circulated. If many initiative proposals are competing for signature-gathering services, the price goes up. An initiative's popularity is also considered when determining how much to pay circulators. A proposal with a great deal of appeal is easier to qualify than one with limited attractiveness. The available time for petition circulation is another important factor. If there is very little time to gather the requisite signatures, the pay rate increases substantially to entice greater activity by the circulators. The time factor has been used by circulators to their own advantage. It is not uncommon for solicitors to gather signatures and refrain from submitting the petitions until the qualification deadline approaches and the price per signature increases.

[65] American Petition Consultants was having a difficult time gathering signatures to qualify Proposition 106 for the November ballot so they increased the pay rate to 80 cents per signature. Kelly Kimball of Kimball Petition Management expressed dismay at the exorbitant payment:

[66] Interview with Masterton, *supra* note 60.

the coast was countered by an oil industry proposal to allow drilling but with certain restrictions and safeguards (Proposition P). Occidental Petroleum enlisted the signature-gathering services of both Kimball Petition Management and American Petition Consultants with the clear understanding that neither firm would assist the qualification efforts of the anti–oil drilling initiative. Unable to engineer a sufficient paid circulation drive, proponents of Proposition O had to resort to the expensive method of direct mail petition circulation—a very uncommon means of signature gathering at the local level.[67]

Although not always a conscious effort to thwart other signature drive efforts, paying signature gatherers more per signature for a particular initiative often encourages paid signature gatherers to focus on getting people to sign that petition before any others they may be circulating simultaneously. In 1998, Proposition 5 (tribal gaming) needed to qualify in less than 30 days to make the November ballot, so National Petition Management paid a premium of $1.50 per signature. Suddenly, the other signature drives attempting to place initiatives on the November ballot faced unexpected competition: paid signature gatherers began asking people to sign the tribal gaming petition most often to maximize their own personal income.[68]

"Selling" the Petition

Petition circulation has become more than an art; it is a business. Both paid and volunteer circulators recognize the salesmanship nature of collecting signatures. Signature gathering is tedious, cumbersome work. In a populous state such as California, the high number of signatures needed, and the limited time period in which to collect these signatures, place efficiency at a premium in petition circulation. Circulators cannot afford the luxury of discussing meaningful aspects of the initiative proposal to potential signatories. There simply is not enough time. As Joyce Koupal, volunteer petition organizer, once said: "the signature table is not a library."[69]

The following example illustrates this dictum. A coalition of real estate interests sought to qualify an initiative for the June 1980 ballot that would end all existing rent control ordinances and exempt any future rental units built after the election from rent control. The measure, however, would have allowed communities to reestablish some form of limited rent control on the older units, subject to various restrictions, by a majority vote of the people. In essence, the measure was an anti–rent control proposal, but since it allowed for some form of limited rent control, circulators approached pedestrians with the following brief appeals:

> Are you registered to vote in this county?
> Support rent control!
> Sign here.

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[67] Citizens for a Livable Los Angeles, the principal proponents of Proposition O, spent $227,999 to gather signatures through the direct mail method. Another $50,100 was spent on a circulation drive conducted by Poffenberger and Associates and the League of Conservation Voters, which complemented petition circulation through the mail.

[68] David S. Broder, "Collecting Signatures for a Price," *Washington Post*, April 12, 1998.

[69] Telephone interview with Joyce Koupal, community activist, April 20, 1989.

Circulators obscured the truth, and the signatories misunderstood what they were signing as a result. Although this is one of the more extreme examples of deception, it does accurately portray the petition circulation process. Circulators do not try to teach the public what the initiative proposal is all about, or try to persuade voters on a certain issue; they just try to get signatures.[70]

SIGNATURE VALIDITY RATES

Professional signature-gathering firms check their own petitions for validity in order to monitor the integrity of their circulators and to determine a drive's progress. At Kimball Petition Management, signatures are placed in a single statewide database to allow for easy deletion of duplicate signatures. Supervisors also immediately check 10% of the signatures submitted by circulators. Previously, this 10% was drawn by a simple random sample. Now Kimball weights counties that regularly have lower validity rates more heavily in order to ensure a sufficient overall validity rate before submitting the signatures to the county. Once the sampling is finished, the petitions are finally turned over to the county clerks.

The validity rate of petition signatures varies according to both the method of signature collection employed and the county from which the signatures were gathered. Paid circulators tend to have the lowest validity rate. A 1984 study conducted by the Ohio secretary of state's office found that an initiative that qualified for the ballot through paid circulators had a validity rate of 68.7%. Two initiatives that qualified through volunteer efforts had validity rates of 83.4% and 83.6%—considerably higher than that of paid circulators.[71]

Differential validity rates between distinct methods of signature collection have been confirmed in the past work of professional signature-gathering firms. In the early 1990s, Kelly Kimball found that paid circulators obtained an average signature validity rate of anywhere between 58% and 68%, with a preferred target of 65% valid signatures. Well-trained volunteers tended to have a validity rate in excess of 76%, while direct mail petition circulation received an even higher rate of valid signatures than it does today (85% and 90%).[72]

Today, Kimball Petition Management has moved its focus from individual circulators to the counties from which signatures are gathered, as it has become clear that certain counties produce much lower validity rates than others. For example, Los Angeles and Oakland regularly yield the highest number of duplicate, or invalid, signatures, with validity rates ranging from about 65% to 70%. Petition signatures from Orange County, Santa Clara and San Diego, on the other hand, usually have a validity rate of approximately 80%.[73]

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[70] The coalition of landlords succeeded in qualifying this measure to the June 1980 ballot as Proposition 10. Although there is considerable evidence that voter confusion remained high throughout the campaign period, the measure was defeated at the polls.

[71] Letter to Sue Thomas, National Center for Initiative Review, from Margaret Rosenfield, director of elections programs, Ohio Secretary of State's office, June 20, 1984.

[72] Interview with Kelly Kimball, president of Kimball Petition Management, in Los Angeles, May 3, 1989.

[73] Interview with Fred Kimball, *supra* note 22.

Motive of the Circulator

Several reasons underlie the differential validity rates among circulators. First and foremost is the motivation of the circulator. Paid circulators generally are not concerned about the cause of the initiative proposal nor whether the proposal actually qualifies to the ballot. Their primary interest is personal—to acquire as many signatures as possible in order to maximize financial gain. This encourages some recklessness in pressing people to sign petitions, thus resulting in a higher proportion of duplicate signatures.

The number of petition circulators in a given season, as well as for a particular initiative, depends heavily on how many petitions are being circulated and on how far away the next election is. There have been, on average, about 5,000 paid solicitors circulating petitions for recent elections.[74] Although many circulators work on each signature drive, about 200 professional circulators—many of whom move from state to state to circulate petitions for a living—usually collect most of the qualifying signatures.

If they circulate several petitions at once, circulators can earn $30 to $50 per hour at best, but most earn considerably less. Circulators for the term limits initiative petition circulated in 2007 earned $1 per signature, but Kimball Petition Management has paid as much as $3 per signature for some measures in the past. Petitioners circulating a Republican-sponsored electoral college initiative in late 2007 paid up to $3.75 per signature to get the measure qualified within an extremely tight six-week deadline.[75] Actual earnings fluctuate dramatically depending on a wide range of factors. The popularity of the measure, the time frame for submission of signatures, the number of petitions being circulated and competition with other signature collection drives will all impact how much circulators get paid. When an initiative proposal is unpopular or is facing a rapidly closing deadline, signature-gathering firms will pay their circulators more per signature. For example, National Petition Management paid $1.50 per signature to rush circulation for Proposition 5 in 1998, but this was a rare exception to the standard fee at the time of about 75 cents per signature.[76]

Volunteers, on the other hand, are primarily concerned about furthering the cause and placing the issue on the ballot. They are more careful in making sure the signatures are valid. Volunteers are also much more timid than professional circulators in asking people to sign. The lack of aggressiveness of volunteers tends to allow people who are not interested in signing the petition to walk away undisturbed. An aggressive professional will attempt to hook all adult pedestrians into signing, even those who are reluctant. Many of these people will scratch down a quick name and address that may or may not be accurate simply because it is easier than saying no to an aggressive circulator.

Not surprisingly, direct mail has the highest signature validity rate. Signing a direct mail petition is an entirely voluntary act, with no pressure being applied by a solicitor. A respondent can take time to deliberate over the initiative proposal and study the instructions

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[74] *Id.*

[75] Jennifer Steinhauer, "New Life for Initiative to Apportion Electoral Vote," *New York Times,* November 3, 2007.

[76] The all-time record income for a paid circulator was achieved by Dan Shapiro. In one year, Shapiro received an income of $90,000 from circulating petitions. He "burned out" after working day and night, quit the profession, and moved to New Jersey.

for properly signing the petition. Persons who respond to a direct mail appeal want to be sure that their effort counts.

Since many signatures are found invalid by the county clerks, a successful initiative drive must collect a number of signatures well in excess of the actual qualification threshold.[77] The Kimball firm, with a targeted validity rate of 65%, must adjust for that 35% shortfall in the number of signatures obtained. In order to ensure qualification, Kimball attempts to exceed the threshold by 35% plus an additional 8% "cushion."[78]

Fraudulent Signatures

The problem of fraudulent signatures on a petition does not appear to be the exclusive domain of any one method of signature gathering. Money clearly can serve as a motive for a professional circulator to make up signatures. Several cases of fraud by paid circulators have been revealed. Since 2000, there have been 13 convictions on charges of falsified petitions in California. The most recent fraud conviction was in August 2006 and involved a solicitor who signed 14 fictitious signatures to a measure that later qualified for the November 2004 ballot as Proposition 62 (elections).

There are no known cases in California of volunteer signature gatherers submitting fraudulent signatures.

Volunteers may sometimes forge signatures, but for a different reason—they do it for the cause rather than for personal financial gain. There are no known cases in California of volunteer signature gatherers submitting fraudulent signatures, but in Colorado, the secretary of state voided 25,000 fraudulent signatures in 1982 for a measure to legalize gambling; at that time paid petition circulation was prohibited in Colorado.

The extent of the fraud problem in signature gathering is not really known, but it is not so pervasive as to undercut the credibility of the initiative process. Signature verification procedures administered by professional petition circulation firms and the secretary of state's office appear adequate to curtail abuses in this area.

DIRECT MAIL PETITION CIRCULATION IS A PROFITABLE (AND EXPENSIVE) BUSINESS

Direct mail petition circulation has transformed the nature of signature collection in California. It deserves special attention because of its significant impact on money in the initiative process. The introduction of direct mail signature gathering in 1978 and its subsequent development has dramatically increased the flow of campaign dollars into qualification drives and consequently enhanced the market for an initiative industry (see Table 4.3).

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[77] Cariton Yee, a forestry professor at Humboldt State University in California, admitted signing bogus names to initiative petitions in an effort to invalidate qualification of proposals he disliked. "I took the position that if I don't like the initiative, I used to not sign," Yee said at a meeting of the California Cattleman's Association. "Now I just sign aliases, hoping to trigger . . . the rejection rate." Signing a false name to a petition for a ballot initiative is a felony violation of the Elections Code. During a state attorney general's investigation into the remarks, Yee claimed he was only joking (Yee said transcripts of his remarks were sent to the attorney general by a "future ambulance chaser"). David Forster, "HSU Prof Investigated for Remarks at Meeting," *Standard Times*, May 5, 1990.

[78] Interview with Fred Kimball, *supra* note 22.

TABLE 4.3 Signature-Gathering Expenditures for Paid Circulators and Direct Mail 2000–2007 General Election Initiatives (in actual dollars)*

Proposition			Paid Circulator	Direct Mail	Total Qualification
2000	35	Public Works	$0	$27,396	$622,956
	36	Drug Treatment	$1,143,328	$7,223	$1,351,291
	37	Taxation	$1,472,396	$0	$1,742,466
	38	School Vouchers	$2,181,121	$379,321	$3,578,101
	39	School Facilities	$3,566,654	$6,933	$7,693,627
2002	49	After-School Programs	$1,202,559	$48,512	$3,658,442
	50	Water and Wetlands	$1,222,779	$0	$1,587,237
	51	Transportation	$1,805,126	$126,254	$2,058,282
	52	Voter Registration	$975,074	$83,712	$1,776,606
2004	61	Children's Hospitals	$723,500	$27,262	$902,693
	62	Elections	$2,175,658	$101,893	$2,507,407
	63	Mental Health Services	$996,431	$0	$1,197,053
	64	Business Competition	$1,122,244	$0	$2,925,125
	65	Local Government Funds	$2,751,929	$12,748	$4,512,109
	66	"Three Strikes" Limits	$334,319	$116,088	$1,489,238
	67	Emergency Medical Services	$1,735,274	$66,470	$3,022,805
	68	Nontribal Gambling	$6,136,134	$507,177	$16,898,966
	69	DNA Samples	$1,619,229	$57,298	$1,771,272
	70	Tribal Gaming	$0	$0	$6,951,560
	71	Stem Cell Research	$2,740,591	$181,893	$6,931,040
2006	83	Sex Offenders	$980,000	$16,804	$1,635,469
	84	Water Resources	$1,043,485	$103,456	$1,278,851
	85	Parental Notification	$2,590,520	$290,983	$3,344,474
	86	Tobacco Tax	$2,451,243	$162,356	$4,163,532
	87	Oil Tax	$2,341,642	$89,779	$4,947,134
	88	Education Funding	$4,426,626	$1,692	$10,340,907
	89	Public Financing of Campaigns	$1,110,255	$320,987	$1,696,201
	90	Eminent Domain	$1,788,709	$451,092	$2,352,044

Note: To estimate total qualification expenditures, all campaign committee spending up to June 30 before the election was aggregated. Mailings or postage expenditures during that time period were counted as direct mail petition circulation expenses.
* Data for Propositions 35 (2000), 66 (2004) and 70 (2004) are missing or incomplete.
Source: Center for Governmental Studies data analysis.

Direct mail is clearly the most expensive means of petition circulation. As described earlier, the cost of direct mail circulation can amount to $4 per signature. Paid signature gathering, by contrast, costs about $1.35 per signature on average. With the current signature thresholds of 433,971 for statutory initiatives and 694,354 for constitutional initiatives, $4 per signature amounts to about $2 million for a statutory initiative and $3 million for a constitutional initiative. These costs depend on how well-tailored and accurate the mailing list is, as well as how extensively the mail system is used.[79]

[79] See Fitzgerald, *supra* note 43, at 234. Also see interview with Fred Kimball, *supra* note 22.

Some of the mailing cost can be recovered by issuing a fund-raising appeal along with the petition. In his 1980 direct mail petition drive, Howard Jarvis actually made a profit from mailing petitions accompanied with fund-raising appeals. More frequently, however, even a well-targeted direct mail drive will recover only a portion of the expenses.

Whether or not initiative proponents receive substantial contributions with their mailed petitions, a direct mail drive requires a massive initial investment.[80] The limited time period in which to collect signatures allows only a few chances to mail out petitions. Each mailing must be a large undertaking. It is not possible in California to first send out an inexpensive limited mailing, wait for a return of contributions and then expand the mailing based on those contributions.[81] Consequently the direct mail method of signature collection is available only to very well-financed groups.

Although it may be deemed unconstitutional to prohibit direct mail petition circulation, nine states make it very difficult to solicit signatures through the mail.[82] To minimize fraudulent signature gathering, these states require that all petitions be notarized by the circulator, attesting that the signatures are valid. One consequence of requiring notarization is that petition circulation through the mail becomes impractical; few households will have convenient access to a notary public. It is conceivable that such inadvertent obstructions to direct mail petition circulation, if challenged, could be held invalid.

OBJECTIVES OF THE SIGNATURE THRESHOLD

Direct mail petition circulation tends to sidestep the test of significant popular support that is theoretically established by qualification procedures. Direct mail solicitation provides no element of polling a somewhat random sample of the public to see if there is a breadth of popular support for an initiative as is the case with randomly collecting signatures on the street. In fact, a well-orchestrated direct mail campaign prides itself on the fact that it petitions a very limited and refined group of people—a demographically defined group that is deliberately unrepresentative of the public as a whole. Unlike person-to-person signature gathering in which circulators immerse themselves in large public gatherings, the direct mail firm sends its petitions directly to a small group of like-minded people predetermined to be supporters of the proposal. Theoretically, a "perfect" mailing list could qualify a proposal to the ballot even if no more than the required qualification threshold of persons favored the measure. Some mailing firms are so well-developed in their computer technology and mailing lists that they are confident of their

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[80] In one instance, Proposition 99 (the tobacco tax increase) on the November 1988 ballot, initiative proponents were provided direct mail petition circulation services free of charge by the Butcher-Forde firm. The signature-gathering firm agreed to provide the service in exchange for the mailing list of health care workers, medical professionals, and members of health care organizations available to proponents of the tobacco tax initiative. The direct mail drive was unable to produce sufficient numbers of signatures and so Butcher-Forde was dismissed and replaced by paid circulators of the Masterton & Wright firm.

[81] In a state with a long petition circulation period, it would be possible to launch a direct mail signature drive with limited financial resources. If initiative proponents have plenty of time, they could fund a small first mailing and expand the effort as more and more contributions are returned by petition signers. This slow process could easily take up to a year before enough signatures would be gathered.

[82] Arizona, Arkansas, Colorado, Idaho, Missouri, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota and Utah require initiative petitions to be notarized by the circulator.

ability to qualify any initiative for the ballot at a price, regardless of the popularity of the issue. By minimizing the factor of polling a somewhat random sample of the public, direct mail petition circulation can evade the test of significant popular support intended in the concept of a signature threshold.

The concept of a signature threshold also encompasses a second test of significance—that of the *intensity* of popular support. Having enough people who are willing to dedicate their time and labor to collecting the requisite signatures is an indication that an initiative proposal has serious support among the community. Even more so than paid circulators, direct mail petition circulation tends to thwart the intensity-of-support test established by the signature threshold. Petitions can be circulated through the mail with virtually no more intensity of support than an individual or single corporation footing the $1 million to $2 million price tag.

Advertisements by direct mail specialists have underscored the notion that this form of petition circulation does not constitute a measure of either the amount or the intensity of public support for a proposal. The Butcher-Forde direct mail firm once *guaranteed* ballot qualification for any initiative proposal. The price for their direct mail services varied depending on how limited an appeal the proposal carries and the subsequent difficulty of finding supporters. But the point was clear: Virtually any idea could receive "instant initiative qualification" through a targeted direct mail program—guaranteed at a hefty price.

Despite the drawbacks of direct mail circulation, the practice also has some positive aspects. In particular, it gives voters much more time than any other signature gathering method to read the measure in question, research it, discuss it with friends and consider whether to sign it. Direct mail circulation gives voters an opportunity to learn much more about a measure than they could, for example, on the street in front of a market.

Popularity of Direct Mail

The direct mail method of petition circulation thus far has not developed into the primary means of signature gathering. Some observers of the initiative process had expected direct mail to become such a refined and efficient means of collecting signatures as to dominate the circulation process.

Table 4.3 shows the extent to which direct mail, as opposed to professional circulators, is used for gathering signatures. The 1978 general election was the first time in California that direct mail was used to qualify an initiative for the ballot. Petition circulation through the mail has become an established method of signature gathering.

Some of these fears have indeed come true. Direct mail vendors appear to be capable of placing virtually any issue on the ballot. But the price tag is so exorbitant that direct mail is not often an efficient means of signature gathering. Mailing lists require constant updating from election to election and issue to issue, so direct mail firms have not been able to reduce the costs of their service.

E-mail is a much less costly means of distributing petitions, but as mentioned earlier, petitioners must then rely on e-mail recipients to print, sign and mail in the petition on their own. And like mailing lists, e-mail lists must also be maintained regularly. Until online signature gathering, discussed in more detail below, is allowed and becomes a

mainstream practice for initiative qualification, hiring professional petition circulators will continue to be the most productive signature-gathering method.

There have been some exceptions, of course. The 1988 general election ballot contained several insurance reform measures written by the sponsoring insurance industry or trial lawyers. The campaign for Proposition 104, a no-fault insurance plan, is most revealing. The proposal would have reduced costs to the industry by minimizing payments to injured persons and eliminating court challenges and simultaneously prohibited consumer regulation of insurance prices. An initial version of the measure also contained a provision that would have exempted the insurance industry from certain campaign finance restrictions. After spending nearly $1 million on professional circulators, the initial version was voided by the courts for violation of the single subject rule. The offending campaign finance provision was removed from the proposal, and an intense direct mail drive collected 167% of the required signatures for qualification of the amended measure in 48 days. In the end, the insurance industry spent approximately $2.3 million on direct mail and easily gathered more than enough signatures for ballot qualification. The measure fared poorly at the polls, however, with 75% voting against it.

Proposition 104 was not the only special interest measure that "purchased" ballot access through direct mail, only to be soundly rebuked by the voters. Another insurance reform proposal written by one insurance company, Proposition 101, secured a place on the ballot after spending $979,805 on a direct mail qualification effort. This measure also raised far more than the required number of signatures (121%) but only mustered 13% of the vote.

INITIATIVES DOMINATE CALIFORNIA'S POLITICAL LANDSCAPE

Prior to the 1970s, fewer than 10 initiative petitions on average were circulated during any two-year period. The total number of titled initiatives in each decade before the 1970s never exceeded 66, with an all-time low of 17 initiative proposals attempting to qualify to the ballot in the 1950s. Beginning in the 1970s, the number of initiative petitions circulated for signatures quadrupled, reaching double digits for each two-year period. The number of initiatives circulated has increased by about 50% per decade since then, with 181 in the 1970s, 266 in the 1980s and 374 in the 1990s. If this trend continues through 2009, the total number of initiatives circulated in the first decade of the 2000s may equal that of the 1990s.

This trend has had some interesting consequences for the initiative process. As shown in Table 4.4, a sharp rise in the absolute number of signatures required for ballot qualification between the 1950s and the 1960s occurred alongside a dramatic fall in the percentage of initiatives qualifying for the ballot.[83] While 59% of all petition drives in

[83] Mike Arno of Arno Political Consultants, Inc., reiterated the significance of the absolute number rather than percentage of signatures required for ballot qualification. Arno estimated that there exists a saturation point of roughly 600,000 to 700,000 signatures that few petition drives could exceed. It becomes exponentially difficult to obtain signatures after the initial few hundred thousand. The reason for this is that petition circulation is naturally limited to particular areas where people are concentrated. Circulators tend to work in the same general areas—the same college campuses, the same supermarkets, the same malls. Interview with Arno, *supra* note 23.

TABLE 4.4 Signature Thresholds and Initiative Activity in California by Election Year (1950–2006)

Year	Signature Threshold	Titled Initiatives	Qualified Initiatives	Percent Qualified
1950	204,672	4	3	75%
1952	303,687	5	2	40%
1954	303,687	2	1	50%
1956	322,429	2	1	50%
1958	322,429	4	3	75%
1950–59	**291,381**	**17**	**10**	**59%**
1960	420,462	7	1	14%
1962	420,462	7	2	29%
1964	468,259	10	4	40%
1966	468,259	10	1	10%
1968	325173†	10	1	10%
1960–69	**420,523**	**44**	**9**	**20%**
1970	325,173	7	1	14%
1972*	325,504	22	11	50%
1974	325,504	40	2	5%
1976	312,404	35	3	9%
1978*	312,404	77	5	6%
1970–79	**320,198**	**181**	**22**	**12%**
1980	346,119	59	4	7%
1982	346,119	65	9	14%
1984	393,835	45	9	20%
1986	393,835	34	6	18%
1988	372,178	63	18	29%
1980–89	**370,417**	**266**	**46****	**17%**
1990	372,178	69	18	26%
1992*	384,974	59	8	14%
1994	384,974	72	5	7%
1996	433,269	91	17	19%
1998	433,269	83	12	14%
1990–99	**401,733**	**374**	**60**	**16%**
2000	419,260	68	12	18%
2002*	419,260	72	6	8%
2004*	373,816	157	20	13%
2006	373,816	53	9	17%
2008***	433,971	63	3	5%
2000–08	**404,025**	**345**	**38**	**11%**

* Includes special election balloted initiatives of the following year.
** Includes two measures removed from the ballot by the courts.
*** As of the February 2008 election.
† Following 1966, the signature threshold for statutory initiatives was lowered to 5% of the gubernatorial vote in the previous election. The threshold for constitutional initiatives remained at 8%.
Source: Center for Governmental Studies data analysis.

the 1950s qualified for the ballot—a qualification rate typical of all previous decades—only 20% of such drives were successful in the 1960s. The growing signature threshold appears to have caused this drop in qualification rate. In the 1950s, an average of 291,380 signatures placed a statutory measure on the ballot; in the 1960s, the average number of requisite signatures jumped to 420,523. Immediately thereafter, a much smaller share of initiative proposals made it to the ballot.

Since the 1950s, the number of circulated initiatives has grown dramatically, driving down the initiative qualification rate.

Since the 1950s, however, the number of circulated initiatives has grown dramatically, driving the qualification rate even lower. In 1966, the signature threshold for initiative statutes was reduced from 8% of the number of votes cast in the last gubernatorial election to 5%, and the absolute number of required signatures dropped down to slightly over 300,000. Nevertheless, the qualification rate continued to decline. Instead of being a reflection of the difficulty in obtaining 300,000 signatures—a goal readily attainable in the 1950s—the low qualification rate at this point was likely the result of the explosion in the number of titled initiative petitions being circulated.

Many new petition drives are not serious efforts. The secretary of state's office has no record of signature-gathering activity on most titled initiatives that failed to qualify for the ballot. Proponents in these cases have simply not bothered to submit petitions for a signature count. Other unballoted initiatives record anywhere from a few thousand signatures to just a few hundred. Such instances have kept the overall initiative qualification rate low.

Since the late 1980s, the number of valid signatures required for qualification of initiative statutes has remained steadily around 400,000. The resources necessary to collect 400,000 valid signatures are enormous, which may be a powerful reason why 1982 was the last year to witness a successful volunteer initiative drive.[84] Future years may see an even higher threshold in absolute numbers.

Spiraling Costs

As the number of signatures required to qualify an initiative for the California ballot has increased, so has the expense. Nevertheless, the spiraling costs of initiative qualification cannot be solely attributed to the signature threshold. Costs have increased suddenly and at a rate that has far exceeded the growth in the absolute signature threshold.

The median cost of qualifying an initiative for the ballot rose dramatically following the well-publicized Jarvis tax initiative—Proposition 13—in the 1978 primary election. Beginning with a median qualification cost of $44,861 in actual dollars for the 1976 election cycle, the cost of qualifying rose to $243,812 in 1978. Due to expensive direct

[84] In all likelihood, numerous factors have contributed to the decline of volunteer activity in the initiative process. Some of these factors include: the rise of professionalism makes hired circulators more convenient than attempting to manage a volunteer drive; the population is getting older and less inclined to "hit the streets"; today's working environment pushes both spouses into the workforce, limiting free time available for volunteer services; and a new age of materialism has tempered ideological commitment.

TABLE 4.5 Qualification Expenditures and Median Cost, by Initiative and Election Year Cycle 2000 General Election to 2006 General Election (in actual dollars)*

Election	Proposition	Qualification Expenditure
2000 G	35	$622,956
	36	$1,351,291
	37	$1,742,466
	38	$3,578,101
	39	$7,693,627
2002 P	45	$2,485,452
2002 G	49	$3,658,442
	50	$1,587,237
	51	$2,058,282
	52	$1,776,606
2003 S	54	$1,817,816
2004 P	56	$2,337,075
2004 G	61	$902,693
	62	$2,507,407
	63	$1,197,053
	64	$2,925,125
	65	$4,512,109
	66	$1,489,238
	67	$3,022,805
	68	$16,898,966
	69	$1,771,272
	70	$6,951,560
	71	$6,931,040
2005 S	73	$1,373,499
	74	$3,503,596
	75	$1,401,209
	76	$3,503,596
	77	$1,450,388
	78	$4,162,903
	79	$2,530,690
	80	$2,530,690
2006 P	82	$3,107,612
2006 G	83	$1,635,469
	84	$1,278,851
	85	$3,344,474
	86	$4,163,532
	87	$4,947,134
	88	$10,340,907
	89	$1,696,201
	90	$2,352,044

Year	Median Qualification Expenditure
2000	$1,742,466
2002	$1,917,444
2003	$1,817,816
2004	$2,925,125
2005	$2,530,690
2006	$2,848,259

* Data filed for Propositions 35 (2000 General) and 66 (2004 General) are missing or incomplete.
Source: Center for Governmental Studies data analysis.

mail qualification efforts in the 1980 primary, the median cost of qualifying an initiative for the ballot in that year leaped to $1,153,911, only to settle down to $568,815 in the following election cycle. Thereafter, qualification costs again escalated, reaching a median $1,029,181 in 1990. As shown in Table 4.5, qualification costs have continued to rise. The median cost for qualifying an initiative ranged from slightly under $2 million to just over $3 million from 2000 through 2006.

NATURE OF EXPENDITURES

The nature of qualification expenditures changed radically in the late 1970s. Petition circulation has become increasingly professionalized as more and more funds are targeted toward campaign management and consulting, computer services, direct mail solicitations and the employment of outside professional signature-gathering firms. Meanwhile, initiative proponents are allocating less and less money to grassroots activities such as supporting a staff and organization and printing and distributing literature. Initiative proponents today almost exclusively hire specialized businesses to conduct all aspects of ballot qualification.

Initiative proponents are allocating less and less money toward grassroots activities such as supporting a staff and organization and printing and distributing literature.

A study of the professionalization of the signature-gathering process concluded that the increasing difficulty of qualifying an initiative for the statewide ballot in California and the rise of an expensive "initiative industry" have both pushed initiative proponents into allocating more of their budgets for outside professional services. For titled initiatives that successfully qualified for the 1976 ballot and the 1978 primary, only up to 4% of qualification expenditures were allocated to the professional "initiative industry." This figure jumped to 76% in the 1978 general election and reached 84% and 91% for the 1986 primary and general elections respectively. This trend by initiative proponents toward paid circulation even occurred among unballoted initiative proposals. In 1975–76, about 15% of expenditures for unsuccessful qualification drives were spent on outside professional services.

Today, allocating an overwhelming percentage of qualification expenditures to firms in the professional initiative industry is the norm. For all balloted initiatives from 2000 through 2006, payments to the professional initiative industry accounted for a mean of 83% of qualification expenditures. Eighteen of the 39 initiative campaigns since 2000—nearly half—have used over 90% of their qualification funds to hire professional initiative businesses, and 10 used more than 95%.

MONEY: THE KEY TO QUALIFYING AN INITIATIVE

For the last few decades, the most important factor determining whether an initiative will qualify for the ballot has been the amount of money spent on petition circulation. In the late 1970s, a gap began to grow between the amount of money spent on successful and unsuccessful attempts to qualify initiatives. Prior to the upsurge in ballot qualification costs that began with the 1978 general election, expenditures on petition circulation for both successful and unsuccessful efforts were reasonably close.

For all balloted initiatives from 2000 through 2006, the professional initiative industry accounted for a mean of 83% of qualification expenditures.

While expenditures on unballoted initiatives have barely risen, the amount of money spent on successful qualification efforts has increased exponentially. In the early 1990s, ballot qualification could reasonably be assured at a cost of $500,000 and guaranteed at a price tag of $1 million or more. Some initiatives had managed to qualify spending less, and, throughout the entire history of California's initiative process, only two initiative proposals that spent as much as $500,000 on qualification efforts failed to make it to the

The fact that ballot access can be so reliably measured in terms of dollars rather than degree of public concern clearly runs counter to the original intent of the initiative process.

ballot.[85] Proponents of 10 of the 50 balloted initiatives from 1984 through 1990 spent under $500,000 for qualification, while 24 campaigns spent over $1 million.[86] By contrast, the vast majority of the 39 campaigns for balloted initiatives between 2000 and 2006 spent more than $1 million on qualification, and 16 spent over $2 million.[87]

The fact that ballot access can be so reliably measured in terms of dollars rather than degree of public concern clearly runs counter to the original intent of the initiative process. Even initiatives that were originally popular, such as the Proposition 103 insurance reform measure on the 1988 general election ballot, spent an average of $1,416,394 during the qualification cycle, of which $425,810 was spent directly on paid signature gathering and petition circulation through the mail. Ballot qualification in California today is an enormous task requiring the application of expensive campaign technology, a large infusion of funds, and the employment of one or more professional companies from an ever-expanding initiative industry. Money, rather than breadth or intensity of popular support, has become the primary threshold for determining ballot qualification.

Lower Popularity, Higher Costs

It is clear that virtually any proposal can be placed on the ballot at the right price, but that price can be particularly high if the proposal does not enjoy substantial popular support. Professional petition circulators charge proponents more to circulate petitions for initiatives that fare poorly in early public opinion polls, and unpopular measures tend to require more advertising and overall spending to gain traction with the voting public.

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[85] Citizens for Better Public Safety spent $513,263 on an unsuccessful effort to qualify a criminal court procedures initiative to the June 1984 ballot. Proponents of a victims rights measure concerning compensation for injuries caused by health care providers spent $559,862 in a qualification drive that gathered 1,013,323 raw signatures, almost half of which were found invalid and thereby failed to qualify to the November 1986 ballot.

[86] The successful ballot qualification drives that spent less than $500,000 in qualifying for the ballot are as follows: in 1984, English Only (Proposition 38) and Campaign Finance (Proposition 40); in 1986, AIDS (Proposition 64) and Toxics (Proposition 65); in 1988, Campaign Finance (Proposition 68), AIDS (Proposition 69), Wildlife (Proposition 70), Campaign Finance (Proposition 73), Communicable Disease (Proposition 96) and Disclosure (Proposition 105). The successful ballot qualification drives that spent in excess of $1 million in qualifying for the ballot are as follows: in 1984, Taxation (Proposition 36), Lottery (Proposition 37), Reapportionment (Proposition 39) and Welfare Reform (Proposition 41); in 1986, Tort Damages (Proposition 51) and Taxation (Proposition 62); in 1988, Appropriations Limit (Proposition 71), Transportation Tax (Proposition 72), Tobacco Tax (Proposition 99), Insurance Reform (Propositions 100, 101, 103 and 104) and Attorney Fees (Proposition 106); in 1990, Victims' Rights (Proposition 115), Reapportionment (Proposition 119), Drug Enforcement (Proposition 129), Forests Forever (Proposition 130), Alcohol Surtax (Proposition 134), Pesticide Regulation (Proposition 135), Taxation (Proposition 136), Initiative Process (Proposition 137), Forestry Programs (Proposition 138) and Prison Labor (Proposition 139).

[87] Probably all of the 39 campaigns from 2000 to 2006 spent more than $1 million on qualification, but this cannot be determined with certainty because campaign finance data submitted to the secretary of state were not complete for each of these campaigns.

The conclusions that can be drawn appear rather straightforward: The less popular an initiative idea, the more money it takes to qualify it for the ballot; the more money it takes to qualify, the fewer votes the measure will receive on election day and the more likely the measure will go down in defeat. These observations are general tendencies, however, that may at any time be affected by other factors, such as high levels of campaign spending.

THE BURDEN ON LESSER-FUNDED GROUPS

Spending patterns by initiative proponents in the November 2006 election (see Chapter 8) reveal the impact of qualification costs on initiative campaigns. With a median qualification expenditure of $2.8 million in 2006, approximately 24% of all proponent expenditures made throughout a campaign went to ballot qualification. Of the $122.7 million expended by all initiative proponents in combined qualification and campaign costs, $29.8 million went to qualification drives. Paid circulation consumed 56% of these qualification expenditures, direct mail accounted for an additional 5% of qualification costs and professional consulting services made up an additional 7%.

Today's qualification costs are especially burdensome on lesser-funded initiative campaigns. Excluding the extremely costly campaigns for Propositions 86 (tobacco tax) and 87 (oil tax), which accounted for 63% of all November 2006 campaign expenditures, qualification costs for the rest of the initiatives in that election took up a much greater portion of total campaign expenditures. Of the $45 million in campaign spending for the other six initiatives on the ballot, 46% was used to cover qualification expenditures. In November 2005, circulation costs accounted for 77% of all funds available to promote San Diego publisher James Holman's unsuccessful 2005 parental notification measure (Proposition 73). And proponents of a successful November 2004 initiative requiring DNA samples to be collected from certain types of convicts (Proposition 69) spent 81% of their total campaign contributions received on qualification.

Many lesser-funded initiative campaigns rely heavily on a limited contribution base of individuals. Unlike a contributor base of wealthy businesses, individuals quickly "tap out" of funds available for campaign efforts. Proposition 73 (parental notification) proponents, for example, raised enough through loans and contributions to spend $1.4 million on petition circulation but only raised slightly less than half a million dollars for the actual campaign.

RECOMMENDATIONS: SOME QUALIFICATION AND CIRCULATION REQUIREMENTS SHOULD BE EASED, OTHERS TIGHTENED

One of the more important objectives of the initiative process is to limit ballot qualification to "serious" issues. The originators of direct democracy envisioned a system in which a determined cadre of volunteers could submit a policy proposal for voter approval if their cause was sufficiently popular. The system of petitioning the people was meant to be a test of significance and public support—and a way to restrict the number of measures submitted to voters.

Now, however, this vision of ballot access in California has been replaced by a highly profitable signature-gathering business available to any cause and anyone willing to pay

the price. Ballot qualification through the collection of signatures in California has become a function of resources; *money*, not popular support, is frequently the primary determinant of a petition drive's success. A viable proposal for reestablishing the principle of popular support as the primary factor behind successful ballot qualification must either restrict the role of money in the petition circulation process or devise a new method of ballot qualification that does not require extensive monetary resources.

Any alternative to petition circulation for ballot qualification would constitute a radical departure from existing norms and practices. While this chapter later explores one such possibility—a polling threshold rather than a signature threshold—it is not offered as a recommendation here. Because polling would so fundamentally restructure the circulation process, it requires further evaluation.

Constitutionality is another important criterion when considering alternatives to today's petition circulation system. To date, the courts have steadfastly refused to allow the states to restrict money in the ballot qualification stage. In 1976, the California Supreme Court invalidated an overall limit on expenditures for ballot qualification in the state,[88] and in 1988, the U.S. Supreme Court voided a ban on payments to petition circulators in Colorado.[89] In light of California's experience, these decisions may no longer make sense.

Lastly, any alternative to the current petition circulation system should leave the initiative process better off as a whole. Many potential reforms of the circulation process would create even more problems than they might resolve.

This report recommends several moderate steps, which would be practicable and useful, to help protect the fundamental purpose of the circulation process. These recommendations include an extended circulation period, improved disclosure during circulation, streamlined signature verification procedures and moderately increased filing fees.

Lengthening the Petition Circulation Time Period to One Year

California currently has one of the shortest circulation periods among states that employ the initiative process, ranking third of 24. Nevertheless, California also requires proponents to collect the largest number of signatures of any state.

To allow for extensive public comment on initiatives during the qualification phase, as proposed in Chapter 3, this report recommends extending the 150-day circulation period to 365 days. A longer circulation period will offset any procedural burdens caused by other recommendations and will ease the time pressures on lesser-funded or volunteer-based qualification drives.

Based on California's past experiences, lengthening the circulation period to one year is unlikely to significantly increase the number of measures qualifying for the statewide ballot. California has had both an unlimited circulation period (from 1911 to 1943) and a two-year circulation period (between 1943 and 1973). These longer circulation periods do not seem to have led to noticeably greater numbers of initiatives.

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[88] *Hardie v. Eu*, 18 Cal. 3d 371 (1976).
[89] *Meyer v. Grant*, 486 U.S. 414 (1988).

Well-funded circulation efforts will not be affected by this recommendation, since they will qualify in any event, but volunteer and lesser-funded drives require more time than all-paid or direct mail petition drives. California's present 150-day circulation period handicaps some initiative qualification drives of lesser-funded organizations, and some groups are forced to pay professional circulators because they do not have the time to organize volunteer efforts.

A longer circulation period will enable lesser-funded organizations to rely more on volunteer signature gatherers and less on outside professional firms—without increasing the number of unpopular measures, whose proponents could not corral enough volunteer circulators to take advantage of the longer period. A greater reliance on volunteer circulators may also make citizen-based groups less susceptible to the ability of large contributors to negotiate changes in the content of initiatives in return for financial support.

In essence, a looser circulation period would modestly assist the grassroots and lesser-funded organizations that are increasingly excluded from the initiative process due to the rising costs of circulation. This recommendation will bring the initiative process more in line with its creators' original intent.

Improving Disclosure During Circulation

This report also recommends improving campaign financing disclosures during circulation in three ways. First, petitions should list the secretary of state's Website address and indicate, at the top and in bold type, that the names and affiliations of major campaign contributors may be found on the Website. (See Chapter 8 for further discussion of requiring increased disclosure during an initiative's circulation period.) Second, initiative proponents should be required to file financial statements with the secretary of state within 30 days after the attorney general titles the proposal. Such statements should list all contributions received within seven days of the filing. Third, the petition should disclose in bold type that the proponent may amend the initiative proposal, as discussed in Chapter 3, so long as the amendments are consistent with the initiative's "purposes and intent."

The campaign finance disclosures currently required during the circulation process are not extensive enough.

Current disclosure requirements are not extensive enough. Many states, including California, require petition circulators to disclose whether they are being paid to collect signatures. This often takes the form of a button prominently displayed, a notice on the petition itself or a mandatory oral statement when approaching a potential signer. California petitions must state: "NOTICE TO THE PUBLIC. THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK." It is a misdemeanor to respond falsely to the question.[90] Most practitioners in the signature-gathering business agree that such disclosure has very little impact on their ability to raise signatures.[91]

Including text to help voters learn the identities of an initiative's financial backers would be more informative than much of the information petitions now disclose. Many

[90] Cal. Elec. Code § 101 (2007).

[91] Interview with Fred Kimball, *supra* note 22.

California voters do not know that the secretary of state's Website provide campaign finance information. Potential petition signatories could use the site to learn which individuals, corporations or other organizations have given an initiative its principal early funding. Signatories would also learn the affiliations (e.g., tobacco, environment, labor, etc.) of the largest contributors. Seeing these disclosures would help potential signatories better understand the motives of the initiative's major backers and thus the merits and likely effects of the initiative itself.

Seeing disclosures during the circulation period would help potential petition signatories better understand the motives of the initiative's major backers and thus the merits and likely effects of the initiative itself.

Mandating public disclosure of major financial backers within 30 days after the attorney general's captioning is quite workable. By the time petition circulation begins, many initiative proponents have already spent considerable sums of money to conduct public opinion polls, hire lawyers and other experts, and employ signature-gathering and public relations firms.

To be sure, an initiative campaign could try to conceal the identities of major financial backers by asking them to make large contributions at a later date. These contributors' names would not appear in the early campaign disclosures. But in most instances such a deceptive strategy would not be possible. Prior to circulation, many initiatives require considerable early expenditures for research, public opinion polling and the start-up expenses of employing signature-gathering firms. Furthermore, any attempt to deceive the public in this matter would eventually be exposed in later financial statement reports and thus could prove counterproductive to the campaign effort as a whole.

In Chapter 3, this report recommends allowing proponents to amend their initiative immediately following formal qualification of the initiative and completion of the legislature's public hearing. To alert petition signatories to the possibility of proponent-made amendments, the following notice should appear at the top of all signature petitions:

> **The proponent may later amend the initiative measure set forth in this petition before it appears on the ballot, provided that the amendments are consistent with the initiative's purposes and intent.**

This notice will dispel any concerns that petition signatories may be unfairly surprised by subsequent proponent-made amendments.

Streamlining Verification Procedures

Initiatives should qualify for the ballot if the random sample verification of signatures indicates that proponents have gathered at least 105% (as opposed to the current 110%) of the valid signatures needed for qualification. To conduct a random sample, each county would verify *all signatures submitted* up to 500. Counties that received more than 500 raw signatures would verify a random sample of the total.[92] Regardless of the total number of signatures submitted, however, no county would be required to verify more than 1,500 signatures.

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[92] The random sample of signatures for verification would consist of (i) at least 500 signatures or 3% of all signatures submitted, whichever is greater, or (ii) 3% of all signatures submitted or 1,500 signatures, whichever is less.

State law mandates that counties use probability sample procedures in verifying petition signatures.[93] The present practice of signature verification, however, does not fully conform to probability sampling techniques. Experience indicates that if probability sampling procedures are strictly followed, a sample size of 1,500 persons will reflect almost as accurately the characteristics of a total population of 10,000 persons as it would reflect the characteristics of 1 million persons. Little is gained in the signature verification process by increasing the size of the sample beyond 1,500 persons, regardless of the total number of signatures submitted in each county.[94]

Sampling error is the degree to which the results of a sample can be expected to differ from the results if the entire population had been surveyed. In a probability sample, sampling error is largely determined by the absolute size of the sample, not by the proportion of the sample size to the population as a whole. Statistically, the larger the sample, the smaller the sampling error that can be expected. But the law of diminishing returns comes into play when each additional person added to the sample contributes less and less to sampling error—to a point at which it is no longer worthwhile to increase the sample size. Gallup has calculated the relationship of sample size with sampling error through its experience with public opinion polling. A sample size of 1,500 persons has a ±3% margin of error.[95]

An effort in 2007 to qualify a term limits initiative for the February 2008 ballot demonstrated that California's current threshold for examining signatures is unnecessarily high, generating extra work for counties and giving stakeholders room to politicize the qualification process. The proposed measure would reduce legislators' total time in office from 14 to 12 years but allow them to serve those years in the assembly, the senate or a combination of both. Circulators had clearly gathered enough signatures to qualify the measure for the ballot, but before the secretary of state was to tally the signature totals submitted by the counties, it appeared possible that the number of valid signatures collected might fall slightly below 110% of the requirement. Had this happened, the secretary of

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[93] "The random sample of signatures to be verified shall be drawn so that every signature filed with the elections official shall be given an equal opportunity to be included in the sample." Cal. Elec. Code § 9115(a) (2007).

[94] An analogy may clarify this point. Imagine two barrels full of marbles. One barrel contains 10,000 marbles, the other 1 million. Both barrels contain half red marbles and half blue marbles. If the barrels are shaken to mix the red and blue marbles perfectly, samples of 1,500 marbles for each barrel should contain 50% red marbles and 50% blue. Increasing the sample size for the larger barrel does not significantly contribute to the accuracy of the survey.

[95] Sample size and sampling error, according to the Gallup poll standard.

Number of Interviews	Margin of Error
4,000	±2%
1,500	±3%
1,000	±4%
750	±4%
600	±5%
400	±6%
200	±8%
100	±11%

state would have required counties to do a full count of all signatures collected, causing the measure to qualify for the June ballot rather than the February ballot.

Five days before the secretary of state was to tally the counties' signature totals, a handful of counties looked again at the duplicate signatures, recounted their initial random samples and revised their totals. Each additional valid signature in a county's random sample can bump up the final statewide count by several thousand signatures; indeed, Alameda County found two more valid signatures in its recount, which added 2,223 signatures to the statewide total. After the counties' revisions, the statewide tally totaled a scant 957 signatures over the 110% threshold. The counties that revised their signature counts claimed that they had simply noticed errors in their initial calculations, but some believed that politics influenced their decisions to recount the signatures. Either way, the counties had to waste time recounting signatures when the measure had clearly qualified.

Streamlining the signature verification process would substantially ease the burden imposed on large counties and minimally impact smaller counties. California's county governments are mandated by the state to absorb all costs associated with signature verification of statewide initiatives. This can be expensive for populous communities. The Los Angeles County Registrar's office, for example, estimates that it costs an average of 60 cents to verify each signature. The county is routinely presented with well over 200,000 raw signatures for every successful initiative petition drive, of which 3% (or at least 6,000 signatures) must be checked. Los Angeles has found it necessary to employ a permanent staff of 31 people for signature verification duties and to hire a number of part-time workers to assist at peak periods. A maximum verification count of 1,500 signatures per initiative would make it possible for six or seven people to determine petition sufficiency in as little as a single day.

This proposal may generate resistance from those who are unfamiliar with advanced statistical sampling techniques. For this reason, this report recommends a conservative approach toward streamlining the size of the sample in which *each* county is obligated to verify 500 to 1,500 signatures. Arkansas, for example, used current statistical sampling methods to examine a random sample of only 1,079 signatures *statewide* to verify the qualification of three initiative constitutional amendments in 1986. The procedure was reliable but was mired in controversy due to the sensitive nature of the issues involved and the practice was ended.[96]

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[96] Arkansas Secretary of State W. L. "Bill" McCuen used the random sampling technique developed by Dr. M. D. Buffalo and Maryagnes Moore of the Center for Research and Public Policy, University of Arkansas/Little Rock, to verify initiative petition signatures in 1986. McCuen certified three initiative constitutional amendments to the state ballot, including an antiabortion amendment, after randomly checking only 1,079 signatures for each initiative at a 95% confidence level. Timothy Kennedy, "Initiative Constitutional Amendments in Arkansas: Strolling Through the Minefield," *University of Arkansas Little Rock Law Journal* 9 (1986).

In 1980, Arkansas Secretary of State Riviere utilized an *untested* random sampling method for signature verification in which his office checked only 184 names out of 200,000 signatures on a proposed amendment to raise the state's interest rate ceiling. Riviere certified the amendment for the ballot but was so sharply rebuked by former secretaries of state that he relented and hired extra help at a cost of about $20,000 to verify all signatures. Ironically, the results were similar. Today Arkansas verifies all signatures and has not tried a random sampling method again.

Increasing the Filing Fee

Proponents of an initiative proposal now pay a $200 filing fee, which is refunded if the initiative qualifies for the ballot. The fee's primary purpose is to discourage frivolous proposals, and it also helps to defray some of the administrative costs associated with processing initiatives.

This report recommends that the filing fee be raised to $500 plus annual cost-of-living adjustments. Although the attorney general's office currently spends an average of $2,042 to title and summarize each filed initiative, this report recommends only a moderately higher filing fee. First, using high pricing mechanisms to regulate initiative activity conflicts with the fundamental precepts of direct democracy. Second, raising the filing fee to around $2,000 would face strong public opposition. A $500 fee thus presents a reasonable compromise. It will deter some frivolous proposals and offset some costs to the attorney general's office, but it is not so large a burden that the public would see it as an impediment to direct democracy.

SOME POTENTIAL REFORMS OF THE CIRCULATION PROCESS NEED FURTHER STUDY OR ARE NOT DESIRABLE

Few alternatives to petition circulation are a test of whether an initiative has substantial popular support, and many ideas could create more problems than they solve. The following is a list of potential reforms that various students of and participants in the initiative process have suggested. Some appear to be inappropriate remedies at this stage in the history of the initiative. Others warrant further study.

Using Public Opinion Polls to Qualify Initiatives

When the initiative process was established, petition circulation seemed the only reliable method to test the extent of an initiative's popular support. Public opinion polling and other modern survey techniques were not developed for the social sciences until the 1950s. Now that public opinion polling is a viable means of assessing popular will, it might be better suited than petition circulation to determine what issues are of sufficient public concern to warrant being placed before the voters.

A plan for developing a polling qualification process might contain the following elements. First, proponents of an initiative could submit their proposal to the secretary of state's office for titling, summary and preparation of a preliminary petition. Proponents would then gather a minimum number of signatures (perhaps 50,000) to demonstrate that their proposal is not frivolous. Proponents successful at this stage would submit their proposals to a state-administered hearing. The hearing would produce a report on the initiatives, including a brief description of each proposal. The secretary of state's office would compile the descriptions of all preliminary initiative proposals onto a single questionnaire

A full discussion of the sampling technique used by McCuen in 1986 is provided in M. D. Buffalo and Maryagnes Moore, "Validating Petitions by Sampling" (policy paper prepared for the Center for Research and Public Policy, University of Arkansas/Little Rock, July 1986).

and conduct a random sample in-house survey of voter attitudes toward each proposal. Proposals of the same subject matter would be grouped together and explained by the interviewer. Measures receiving a majority approval of those surveyed would qualify for the ballot at the next election.

This in-house survey procedure might adequately limit ballot access to serious measures in several ways. First, frivolous measures would be screened out by the preliminary petition circulation. Second, the comprehensive, explanatory nature of an in-house interview—complete with an analysis of each measure's impact produced by the public hearing—would encourage greater scrutiny and cautious selection by those being surveyed. Third, by placing conflicting measures side by side, respondents may be inclined to select one against the other, potentially reducing the number of confusing, expensive counter-initiative campaigns. Finally, interviewers would also record "don't care" responses, leading to respondent approval only of those measures of sincere concern.

Using public opinion polling instead of petition circulation to test public concern for a proposal might also yield more accurate results. It would be an affordable method of ballot qualification, removing money as the primary threshold. And it would provide grassroots access to the state ballot.

The polling threshold, however, would fundamentally restructure the qualification process, and thus quite possibly be politically unacceptable at this time. Significant controversies might surround the selection of polling questions, as well as the idea of having a representative of the state rather than a proponent "circulating" the proposal. The public's lack of familiarity with the idea might also cause alarm, particularly since polling's impact on the initiative process would be uncertain.

The polling approach has other serious flaws as well. In particular, it could stack the initiative process against grassroots groups. Wealthy interests could keep measures they dislike off the ballot by running statewide advertising campaigns at the same time as the polls to convince respondents to say the measure should not appear on the ballot. Less well-funded interests would lack such clout. The ballot also could become overloaded with initiative proposals unless a cap were placed on the number of initiatives that could be placed on the ballot using this method.

For these reasons, this report does not now recommend changing to a polling threshold. The idea has clear strengths, however, and is worthy of public discussion. It should be widely reviewed and debated before being offered as a concrete policy recommendation.

Limiting Contributions During the Qualification Period

Professional signature-gathering organizations offer a single wealthy individual or organization the opportunity to "purchase" a ballot position for a favored initiative, so long as they have enough money to do so. During the qualification period for Proposition 71 (stem cell research), for example, proponent Robert Klein contributed $1.9 million, or 70%, of the $2.7 million the initiative campaign spent on paid circulators.

In other instances, groups of four or five related organizations have raised staggering sums to qualify measures, despite the fact that these measures later demonstrated little public support. In the 2004 general election, for instance, 14 California casinos and racetracks spent a total of $16.9 million to place a nontribal gambling expansion initiative on

the ballot. Despite this enormous sum of money, the measure received only 15% of the vote. This example dramatically illustrates that even unpopular measures can be qualified with large sums of money.

Allowing one or even a few individuals or organizations to single-handedly pay for the qualification of ballot initiatives is not sound public policy for several reasons. First, although virtually any initiative can be qualified through the use of professional signature gatherers, some of these measures lack ultimate popular support. Allowing individuals or organizations to buy ballot access for unpopular measures subjects the state to unnecessary and expensive processing costs. Second, unsuccessful measures clutter up the ballot and frustrate voters, leaving them more reluctant to vote and disenchanted with the initiative process itself. Third, allowing one or a few large contributors to place an initiative on the ballot circumvents the fundamental purpose of the signature-gathering process—to demonstrate broad, as opposed to narrow, popular support. Even though successful petitions require that many voters sign, with enough money petitions can be placed in front of enough people who will sign them, even though those who signed may ultimately oppose and vote against the measure. Fourth, it is simply inequitable for one or a few individuals or organizations to pay close to $1 million and be able to place any measure on the ballot.

Although the problems of high qualification spending are significant, the U.S. Supreme Court has invalidated a limit on contributions to ballot measure committees on free speech grounds.

This report has carefully considered the possibility of an upper limit—for example, $10,000 to $50,000—on contributions to a ballot initiative committee prior to qualification. Such a limit would prevent one or a handful of individual contributors from single-handedly paying for the qualification of ballot measures. A $50,000 limit would require at least 20 contributors to raise the necessary $1 million; a $10,000 limit would require at least 100 contributors. Such a limit would require significantly broader support to qualify measures than is often found today.

The U.S. Supreme Court, however, has invalidated a limit on contributions to ballot measure committees on free speech grounds. (For further discussion, see Chapter 8.) Although some language in court opinions has indicated the possibility that this doctrine might be modified, it would take additional research and a carefully framed test case to present those issues properly to the Supreme Court. Nevertheless, problems of high qualification spending are significant, and the possibility of framing a new test case to encourage the Court to reverse its previous ruling deserves further study.

PAYING THE STATE FOR INITIATIVE QUALIFICATION: THE "CYNIC'S CHOICE"

This report does not recommend allowing proponents to pay the state to get on the ballot, known as the "cynic's choice." Adherents of this reform argue that since proponents can qualify their measure by raising enough money to pay professional signature gatherers, initiative proponents should be allowed to bypass the formality of signature gathering and simply pay the state $2 million to $3 million for ballot access. Instead of letting the initiative industry benefit wealthy proponents, proponents could pay the state directly, thereby avoiding a useless exercise and enriching the state treasury at the same time.

Candidates are given a similar option for ballot access. For all statewide offices, formal candidacy may be initiated either by paying a filing fee to the state or by collecting a certain number of signatures. Candidates most often choose to pay the state.

Whatever the financial rewards may be for the state under this reform option, the apparent cynicism of the proposal would be detrimental not only to initiative proponents but also to public perception of the initiative process. Any initiative proponent that purchased a place on the ballot in this manner would risk significantly damaging publicity. Worse, voter confidence in the initiative process as a "people's check" on government would be further reduced. The cynic's choice might also result in more special interest proposals being placed on the ballot. Making it convenient and easy for wealthy individuals, special interest groups and corporations to purchase ballot access without the headache of overseeing qualification operations could encourage greater use of initiatives.

Requiring Geographical Distribution of Signatures

Requiring petitioners to collect signatures from across the state appears attractive at first glance. Its appeal rests on the premise that voters in a few counties should not dictate the policy agenda for the entire state. Large urban centers, such as Los Angeles, conceivably could generate enough signatures to place an initiative on the ballot even if the issue is of little concern to voters elsewhere in California. If an initiative proposal is truly popular, it is argued, initiative proponents should be able to collect signatures from most counties throughout the state.

A geographical distribution requirement would ultimately serve very little purpose in California or any other state. Qualification drives for any statewide measure tend to collect signatures throughout the state. As discussed earlier, most initiative drives collect some signatures from most counties, and populous counties do not generally account for a disproportionate number of petition signatures relative to their base of registered voters.

Proposals to cap the number of valid signatures from any one county below that county's share of registered voters are also unfair and risk violation of the constitutional norm of "one person, one vote." Furthermore, over half of the state's counties have an aggregate population less than 5% of the population of the entire state—and some of these counties lack practical places where circulators might gather signatures. A geographical distribution requirement would also burden underfunded groups and provide no impediment to well-funded ones.

Restricting the Method of Payment to Signature Gatherers

North Dakota and Oregon laws requiring payment in the form of hourly wages or salaries rather than on a per signature basis have recently been tested in the courts.[97] Supporters of a ban on payment per signature argue that it alleviates the pressures on signature gatherers to collect signatures by any means, such as misrepresenting the contents of initiatives or falsifying signatures. Both the 8th and 9th Circuit Courts of Appeals have upheld the bans, holding that prohibiting only one method of payment is not a severe

[97] *Initiative & Referendum Institute v. Jaeger* 241. F.3d 614 (2001); *Prete v. Bradbury*, 438 F.3d 949 (2006).

limit on political speech and thus does not violate the First Amendment. In the North Dakota case, the court also held that the state has a compelling regulatory interest in protecting the integrity of the initiative process, which is furthered by the ban on per signature payment. North Dakota, Oregon and Wyoming currently have such bans in place.[98]

Prohibiting all payments to petition circulators may be appealing at first glance. However, the practice was ruled unconstitutional on First Amendment grounds by the U.S. Supreme Court.[99] Moreover, it is unclear whether a ban on payment per signature would have a significant impact on misleading or high-pressure signature-gathering practices. Under an hourly wage system, petition circulation businesses might still retain incentives for circulators to use high-pressure tactics by requiring signature quotas as a condition of employment. Motives to collect fraudulent signatures might be lessened somewhat but could not be entirely removed.

CHANGING THE SIGNATURE THRESHOLD

A dual dilemma has emerged in the maturation of California's initiative process. On the one hand, the well-developed initiative industry has made ballot qualification *too easy* for wealthy individuals and special interest groups. On the other hand, the sheer number of absolute signatures now required has made ballot qualification *too hard* for less-wealthy organizations and volunteer groups.

Raising or Lowering the Signature Threshold

Some have suggested raising the signature threshold in order to make it more difficult for narrow special interest measures to qualify for the ballot. Raising the signature threshold would make it somewhat more expensive for well-financed special interest groups to qualify their measures but would be unlikely to diminish the number of such measures making it onto the ballot. It would also place a far more serious burden on lesser-financed groups wishing to qualify issues of popular concern.

Other reformers have suggested lowering the signature threshold, perhaps to some absolute number of signatures that would be reachable by a disciplined volunteer organization. This proposal would open up direct democracy to more citizen-oriented groups. But more special interest groups would be guaranteed ballot access as the cost for qualification is reduced. Hence, this proposal might result in a large and undesirable increase in the number of measures on each ballot.

UCLA law professor Daniel Lowenstein has proposed reducing the signature requirement, not to ease the qualification process, but as part of a larger proposal to discard the current signature-gathering process altogether. Under the Lowenstein proposal, proponents could circulate all the advertisements and campaign information they wanted, but they could not circulate petitions as they do now. Rather, petitions would be placed in an array of public places—locations such as firehouses and libraries, for example—and

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[98] N.D. Cent. Code § 16.1-01-12(11) (2006); OR. Rev. Stat. § 250.045 (2005); WY. Stat. Ann. § 22-24-125 (2007).

[99] *Meyer v. Grant*, 486 U.S. 414 (1988).

signatories would have to go to these places to sign the petitions. Lowenstein suggests reducing the signature threshold as part of this plan to make this new signature-gathering approach more feasible, since relatively few people would willingly make the effort to go out and sign a petition. This report does not recommend making these changes to the signature-gathering process because they could limit access to the initiative process to proponents of ideologically extreme issues for which certain groups would turn out to sign the petitions and to groups with pockets deep enough to fund a campaign to motivate people to go out and sign the petitions.

Assigning Greater Value to Volunteer Signatures

Daniel Lowenstein and Robert Stern have proposed a reform plan that involves instituting a differential qualification threshold for volunteer versus paid signature gatherers.[100] Using their suggested figures, the signature threshold would be increased by 150% to make it harder for special interest measures to qualify to the ballot. Each signature collected by a volunteer, however, would equal five signatures collected by paid circulators. Consequently, "purchasing" ballot access would become much more difficult, while a volunteer effort would become considerably easier. Special interest groups without a popular cause would no longer be guaranteed access to the ballot unless they spent large sums of money to qualify their initiatives. Citizen action organizations, on the other hand, would be given a greater opportunity to place their proposals before the voters, provided that such proposals possessed broad popular appeal.

This proposal has some limitations. First, it provides no middle ground. Moderately financed organizations with a limited volunteer base might be denied ballot access. If such organizations were unable to rally an army of dedicated volunteers, they would be effectively locked out of the initiative process. Second, it would be difficult to enforce in practice. Circulation drives might have to be monitored to determine which signatures were collected by volunteers and which by paid circulators—and even then it would not be easy to detect violations. Third, the proposal might be challenged as an unconstitutional infringement of the equal protection clause. Valuing the signature of one voter over that of another voter simply because the first voter signed up with a volunteer may not withstand court scrutiny. Finally, the proposal could allow more initiatives to qualify for an ever-longer ballot. Wealthy special interest groups would not be deterred from qualifying their measures, while the ballot would become more accessible to a whole new category of potential initiative sponsors.

Requiring Notarization of Direct Mail Petition Circulation

Another potential reform option not recommended here is to discourage direct mail petition circulation by requiring notarization of petitions. Notarization might effectively eliminate expensive direct mail petition drives, thereby requiring all proponents to seek signatures from a broader swath of the population.

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[100] See Lowenstein and Stern, *supra* note 57.

Deterring this method of signature collection has some advantages. Because direct mail solicitations search for signatures among a deliberately narrow and unrepresentative sample of the population, the practice defeats signature gathering's purpose as a measure of the amount and intensity of popular support for a proposal. And although direct mail has not overwhelmed the petition circulation process, it is a driving force behind the growth and professionalization of the initiative industry in California.

This report objects to this plan on two grounds. First, the real purpose of requiring petition notarization is to eliminate the direct mail method of signature gathering. It is therefore ipso facto a prohibition on direct mail and might be interpreted as an unconstitutional infringement on free speech. Second, direct mail is the most deliberative form of signature gathering. People are not pressured into signing something in which they do not believe. They are free to consider the merits of the proposal on their own time and in their own home. And because direct mail petitions have a very high signature validity rate, some believe they are one of the best methods of ensuring that signatures are willingly given in support of an initiative.[101]

ALLOWING ONLINE SIGNATURE GATHERING

To make signature gathering less prohibitively expensive, the secretary of state could allow voters to submit their signatures over the Internet. Qualifying an initiative for the ballot now requires significant financial resources. Moreover, significant volunteer petition circulation has been extremely rare since 1982, suggesting that volunteers may no longer be a realistic alternative to paid signature gatherers for many groups. E-mail petition circulation has not materialized as a better option. Thus, the signature-gathering processes currently available effectively limit ballot access to groups that can afford paid signature drives in whole or part.

To make signature gathering less prohibitively expensive, the secretary of state could allow voters to their signatures over the Internet—this idea should be studied and considered in the future.

Securing and using an authenticated online signature is currently an unfamiliar process to most voters, but the approach would have many benefits. Allowing online signature gathering would make the initiative process more affordable and accessible to grassroots groups. Grassroots groups may lack sufficient resources to round up enough volunteer signature gatherers or pay professional circulators. For certain policy issues, however, they could mobilize many people through e-mail and encourage them to sign petitions online. This would, in turn, bring the initiative process closer to fulfilling its original purpose. Online signature gathering would also provide voters with at least as much information as a direct mail piece. In addition, online petition signing could improve the accuracy of signature verification, since every signature submitted online would be verified, rather than just a random sample of signatures. The e-mail confirmation process may also detect certain fraud problems more easily than the current random sampling approach can.

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[101] Philip Dubois and Floyd Feeney, "Improving the Initiative Process: Options for Change" (California Policy Seminar Brief, November 1991).

Jurisdictions would probably be reluctant to permit petitions to be signed online. In particular, electronic signature submission may be vulnerable to fraud. Dr. Wally Baer acknowledges that, despite the security precautions built into his suggested process, online signature gathering still involves some risk of fraud or malicious attacks. He also argues, however, that committing undetected fraud in his system would be very difficult to do on a large scale.[102] Because of the potential for fraud, Fred Kimball of Kimball Petition Management believes that online signature submission will not happen until online voting becomes a tried-and-true reality.[103]

Public officials are also unlikely to allow online signature submission, as it would reduce circulation costs so much that many more initiatives might qualify for the ballot. One way to counter this concern could be to allow signatories to vote either yes or no on petitions.

Given the questions that remain about the possibility of fraud, this report does not recommend electronic signature gathering at this time, but the idea should be studied and considered in the future. When it is pursued, proponents of online signature gathering will likely have to establish it via the initiative process itself rather than through the legislature, since most elected officials make no secret of their aversion to the initiative process.

CONCLUSION

Petition circulation is the traditional test to determine which issues shall be placed before the voters. The collection of a certain threshold of signatures, usually set as a percentage of votes cast in the last gubernatorial election, is designed to measure amount and intensity of popular support for a proposal. The threshold is also intended to curtail the number of initiatives presented to the voters and to keep frivolous measures off the ballot.

Ballot qualification procedures, however, have evolved into a process somewhat removed from original intentions. This is especially true in California, where the massive task of raising around 400,000 valid signatures (more for initiative constitutional amendments) tends to exclude volunteer organizations from ballot access and to nurture a profitable and growing market for professional signature-gathering firms. Petition circulation businesses in California can, for a price, virtually guarantee qualification.

Petitioning for signatures has lost much of its meaning as money has become the major factor in determining qualification, in California and in other states. As the task of collecting signatures has become an increasing burden in populous states, the initiative industry has expanded. Hindered by court rulings against limitations on money in the initiative process, states will need to devise innovative and practical ways to manage ballot qualification. The ultimate solutions remain to be found.

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[102] Baer and Ulrich, *supra* note 47, at 9.

[103] Interview with Fred Kimball, *supra* note 22.

CHAPTER

5

Constitutional Revisions and Voting Requirements

I think there should be a constitutional convention to amend the constitution, but the people who would be appointing people to the constitutional convention would be people interested in preserving the status quo.

—Dan Walters[1]

SUMMARY

Californians often use the initiative process to amend their constitution, even though constitutional initiatives are somewhat more difficult to qualify than statutory initiatives. Several decades of initiative constitutional amendments have produced a long and sometimes redundant state constitution that can only be amended by placing another amendment on the ballot and obtaining voter approval.

California voters have only the limited tool of further constitutional initiatives to amend their increasingly cluttered state constitution. They never have a chance to review the document as a whole and assess whether it reflects their needs and values. The legislature, on the other hand, can make constitutional revisions—that is, larger-scale overhauls of the constitution, often involving changes in the balance of power between the various branches of government—in addition to being able to place amendments on the ballot.

California should increase the number of opportunities for *voters* to streamline the state constitution by moving statutory language from the constitution into the statutes. Californians should also be allowed to propose constitutional revisions via the initiative process. In addition, the state should automatically convene either a constitutional revision commission or a constitutional convention once every decade. These reforms would reduce the need to amend the constitution in the first place and, as a result, reduce the number of initiatives on the ballot.

[1] Dan Walters, comments at Edmund G. "Pat" Brown Institute of Public Affairs Conference, Los Angeles, November 14, 2006.

Also, any initiative requiring future supermajority votes to address a particular policy issue should be subject to the same supermajority vote requirement. This change would preserve the fundamental constitutional concept of "one person, one vote" in California.

A critical issue in any system of direct democracy is the ease with which voters can enact citizen-initiated ballot measures. All states that have adopted the initiative process allow the electorate to adopt statutory amendments by a simple majority vote. Most of these states also allow voters to amend their state constitutions through the initiative process, although a number of these, including California, impose additional requirements—such as higher signature or vote requirements—to make the process of constitutional amendment more difficult.

In many states, and particularly in California, the initiative process has often been used to amend state constitutions as opposed to state statutes. This practice has several troubling consequences. Because state constitutions are more difficult to amend than statutes, the resulting constitutional amendments are more permanent—thereby, in some instances, enshrining ill-considered policies into state law. Constitutional amendments also prevail over conflicting statutory amendments, and thus the proponents of controversial policies have increasingly sought to immunize their ballot propositions against future statutory amendments by resorting to constitutional initiatives.

This chapter considers the extent to which the state constitution should be amended via the initiative process. A key reason for the large number of constitutional initiatives in recent years is the fact that the constitution already contains a significant amount of statutory language that must be amended to enact related initiatives. Given this context, this chapter's principal recommendation is that California should hold a constitutional convention once every other decade and a revision commission in the alternate decade. This change would increase the number of opportunities to streamline the constitution and eventually reduce the need to amend it in the first place. The chapter also addresses the tendency of initiative proponents to propose special voting requirements beyond a simple majority vote for approval of future initiatives. And it considers a number of other reform proposals, such as imposing a supermajority vote requirement on initiatives adding language to the constitution, limiting the number of measures on the ballot or confining initiatives to the general but not the primary election ballot.

INITIATIVE PROPONENTS ARE ATTEMPTING TO AMEND THE CONSTITUTION MORE FREQUENTLY, EVEN THOUGH A HIGHER SIGNATURE REQUIREMENT MAKES CONSTITUTIONAL AMENDMENTS SOMEWHAT MORE DIFFICULT TO QUALIFY

State constitutions, among other things, establish the structure of state government, allocate and distribute governmental powers among the various branches of government, and establish or affirm basic civil rights. These fundamental precepts of governance are generally distinct in scope and purpose from the specific laws promulgated by government itself. In theory, constitutions address the distributions of governmental authority, while

statutory laws enumerate the public policies developed by governments under the constitutional framework.

For these reasons, constitutions are generally higher in authority than statutory legislation. If constitutional and statutory provisions conflict, the constitutional provisions prevail. Also, governments can change statutory laws, but constitutions are frequently subject only to change by a vote of the people.[2] States that integrate the initiative process into their system of governance almost always attempt to respect the higher integrity of constitutional law by imposing somewhat greater burdens on citizen-initiated constitutional amendments than initiative statutes.

Methods of State Constitutional Change

All states permit their constitutions to be amended in one or more of four ways. First, all states allow their legislatures to place proposed constitutional amendments on the ballot for approval by the voters.[3] Second, most states, including California, allow their legislatures to establish "constitutional conventions" to draft proposed amendments and place them directly on the ballot without further legislative review. Third, several states, including California, allow the legislature to establish "constitutional revision commissions" that can propose constitutional amendments to the legislature, which the legislature can then place on the ballot.[4] Florida is unique in mandating that such a commission be activated automatically every 20 years and that its recommendations be placed directly on the ballot.[5] Fourth, 18 states, also including California, allow their citizens to directly amend the constitution by placing constitutional initiatives on the ballot.

Regardless of the method employed for amending or revising the constitution, nearly every state makes it more difficult to amend its constitution than to change its statutory laws.[6] Besides mandatory voter ratification of changes to the constitution, additional barriers—such as a supermajority vote of the legislature to place amendments on the ballot or, in the case of initiatives, a higher signature qualification threshold—make placing proposed constitutional alterations on the ballot more difficult.

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[2] California's initiative process permits both citizens and the legislature to change state laws, but California's constitution can only be changed by a vote of the people.

[3] California allows the legislature to place a constitutional measure on the ballot by a two-thirds vote of the membership of both houses of the legislature.

[4] States like Georgia, Utah and New Hampshire specifically provide for the creation of constitutional commissions, but the commissions lack authority on their own to submit constitutional revisions for ratification by the people. These commissions are in fact study commissions that serve as research agencies for the legislature or constitutional convention.

[5] Florida's constitutional revision commission is composed of 37 members: the attorney general, 15 members selected by the governor, nine members each selected by the Speaker of the house and the president of the senate, and three members selected by the chief justice of the supreme court. It met in 1998 and will meet every 20 years thereafter. Following public hearings and analyses, the commission submits its proposals for revision of the constitution, if any, to the voters at the next general election without legislative review. (Florida Const. art. XI, § 2.)

[6] Although Colorado makes it harder for the legislature to amend the constitution than to pass a statute—requiring a two-thirds vote of the legislature to place a constitutional amendment on the

The method most commonly employed to amend or revise state constitutions is the legislative proposal. During the 1980s, about 92% of all proposals for constitutional change nationwide originated in state legislatures.[7] Most states require a supermajority vote before their legislatures can place a constitutional amendment on the ballot. In all, 32 states require the legislature to vote by a three-fifths to two-thirds majority to place a constitutional amendment on the ballot.[8] Although several states allow their legislatures to propose constitutional amendments by a simple majority vote, other obstacles to constitutional change are frequently imposed, such as requiring the legislatures to approve the proposed amendments in two separate sessions. In every state but Delaware, any constitutional change must be ratified by a vote of the people after approval by the legislature. Delaware permits its legislature to make constitutional changes by a two-thirds vote in two successive sessions but without ratification by a popular vote.[9]

Only a few states impose special voting requirements on initiative constitutional amendments, such as a supermajority vote for approval or popular ratification at two successive elections. Constitutional changes proposed by initiative petition are submitted to the voters without a legislative vote of approval, except in Massachusetts.[10] In all but five states that permit constitutional change through the initiative process, approval by a simple majority vote of the people puts a measure into effect. Nebraska and Massachusetts require ratification of constitutional amendments by a majority vote, so long as that majority amounts to at least 30% or 35% of total votes cast in their respective statewide elections. A constitutional amendment in Illinois can only become effective when approved by a three-fifths majority of those voting on the issue or by a majority of all those voting in the statewide election. Nevada requires majority voter approval in two

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ballot—the state's initiative process applies the same procedures for citizen-initiated statutory and constitutional amendments. For both types of initiative petitions, the collection of signatures amounting to 5% of those who voted for secretary of state in the last general election places a measure on the ballot. Simple majority approval puts the measure into effect. Colorado is the only state in which it is just as easy for citizens to amend the constitution as it is to amend statutory law. Nevada and Massachusetts apply the same qualification signature threshold to initiative constitutional amendments and initiatives statutes, but both states require a special popular vote for approval.

[7] Janice May, "Constitutional Revision in 1988," *Emerging Issues in State Constitutional Law* 2 (1989): 61–62.

[8] Five non-initiative states require some form of special vote for ratification of constitutional amendments by the people: Hawaii (majority must be at least 50% of votes cast in a general election, or at least 30% of all registered voters in a special election); Minnesota (majority must be at least 50% of total votes cast); New Hampshire (two-thirds approval of those voting on the issue); New Mexico (for amendments approved by the legislature, majority must be at least 50% of total votes cast, while certain franchise and education subject matters require approval of three-fourths of those voting in the state and at least two-thirds of those voting in each county); and Tennessee (majority of all citizens voting for governor).

[9] See generally, John Dinan, "State Constitutional Developments in 2005," *The Book of the States* (Lexington, Ky.: Council of State Governments, 2006), 38:5.

[10] Initiative constitutional amendments in Massachusetts must be submitted to the legislature in two consecutive sessions. The measure must receive a vote of support of at least 25% of members in a joint session in order to be placed on the ballot. At any time in joint session, the initiative may be amended by a 75% vote with or without the proponent's consent.

A higher signature threshold for constitutional amendments is not an effective barrier to constitutional initiatives or an incentive to encourage greater use of statutory initiatives.

consecutive statewide elections.[11] And in November 2006, Florida enacted a 60% vote requirement for approval of all initiative constitutional amendments on the ballot.

The primary impediment most states place in the path of constitutional initiatives is a higher signature threshold for qualification. Every state, except Colorado and Nevada, makes it more difficult to qualify an initiative constitutional amendment for the ballot than an initiative statute. Typically, proponents must gather 25%, 50% or 100% more signatures to qualify a constitutional amendment than to qualify a statutory amendment.

In high-use initiative states—especially those with well-developed professional initiative industries—a higher signature threshold for constitutional amendments is not an effective barrier to constitutional initiatives or an incentive to encourage greater use of statutory initiatives. California's experience suggests that higher signature thresholds for constitutional amendments do not deter well-financed interest groups willing to pay a professional signature-gathering firm for the additional signatures.

FREQUENCY OF STATE CONSTITUTIONAL AMENDMENTS

Although several state constitutions have been amended hundreds of times (see Table 5.1), the last two decades have seen an overall decline in both legislative and citizen-initiated efforts to amend state constitutions. Fewer changes were proposed and adopted in the 1980s than in the preceding two decades,[12] and the number has since continued to fall. Between 1982–83 and 2004–05, the number of constitutional amendments on the nation's ballots dropped 52%, from 345 to 166, while the number enacted dropped 57%, from 258 to 112.[13]

In contrast, although small when compared to the number of legislative constitutional amendments, the number of initiative constitutional amendments on state ballots throughout the country has grown since the 1980s.[14] A total of 72 initiative constitutional amendments were proposed and 28 adopted among the states in the 1980s, breaking all

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[11] In addition to the five initiative states that impose some form of special vote requirement for approval of constitutional amendments, two states require a supermajority vote for passage of some or all statutory initiatives. Washington requires a simple majority approval for all measures except those concerning gambling, which require a 60% affirmative vote for passage.

[12] Janice May, "State Constitutions and Constitutional Revision: 1988–1989 and the 1980s," *The Book of the States* (Lexington, Ky.: Council of State Governments, 1990), vol. 30.

[13] *Id.*

[14] Despite past increases in initiative activity for amending state constitutions, initiatives make up a very small part of total proposals and adoptions. Initiatives amounted to only 16% of proposed constitutional amendments and 9% of adopted amendments across the nation between 2000 and 2006. Additionally, voters appear to be far more inclined to approve legislative constitutional amendments than initiatives. The approval rate for legislatively referred measures between 2000 and 2006 was nearly twice as high as for initiatives—80% for legislative constitutional amendments compared to 41% for initiatives. One reason may be that initiative constitutional amendments touch upon more controversial issues than their legislative counterparts, while legislative amendments are often more technical.

TABLE 5.1 Constitutional Amendments (through January 1, 2007)

State	Year Constitution Adopted	Amendments Since Adoption	Initiative Amendments Since Adoption	Amendments per Year	Constitution, Current Number of Words
Alabama	1901	777	—	7.40	351,280
Alaska	1959	29	—	0.62	15,988
Arizona	1912	136	26	1.45	28,876
Arkansas	1874	92	30	0.70	59,816
California	1879	514	43	4.05	55,031
Colorado	1876	148	46	1.14	76,808
Connecticut	1965	29	—	0.71	17,256
Delaware	1897	138	—	1.27	19,000
Florida	1969	110	28	2.97	55,209
Georgia	1983	66	—	2.87	39,872
Hawaii	1959	108	—	2.30	20,729
Idaho	1890	119	—	1.03	24,656
Illinois	1971	11	1	0.31	16,510
Indiana	1851	46	—	0.30	10,379
Iowa	1857	52	—	0.35	12,616
Kansas	1861	93	—	0.64	12,296
Kentucky	1891	41	—	0.36	23,911
Louisiana	1975	150	—	4.80	57,550
Maine	1820	171	—	0.92	16,379
Maryland	1867	221	—	1.60	46,629
Massachusetts	1780	120	2	0.53	36,700
Michigan	1964	28	8	0.67	37,362
Minnesota	1858	119	—	0.80	11,682
Mississippi	1890	123	0	1.06	24,323
Missouri	1945	110	15	1.80	45,189
Montana	1973	30	5	0.91	13,145
Nebraska	1875	224	14	1.71	20,349
Nevada	1864	135	14	0.95	32,722
New Hampshire	1784	142	—	0.64	9,188
New Jersey	1948	41	—	0.71	26,159
New Mexico	1912	155	—	1.65	27,674
New York	1895	216	—	1.95	51,700
North Carolina	1971	34	—	0.97	16,532
North Dakota	1889	149	26	1.27	19,318
Ohio	1851	163	16	1.05	49,547
Oklahoma	1907	174	26	1.76	74,823
Oregon	1859	238	49	1.62	54,083
Pennsylvania	1968	30	—	0.79	27,711
Rhode Island	1986	10	—	0.50	10,952
South Carolina	1896	492	—	4.47	31,040

State	Year Constitution Adopted	Amendments Since Adoption	Initiative Amendments Since Adoption	Amendments per Year	Constitution, Current Number of Words
South Dakota	1889	213	5	1.82	27,717
Tennessee	1870	38	—	0.28	13,614
Texas	1876	439	—	3.38	90,000
Utah	1896	107	—	0.97	11,078
Vermont	1793	53	—	0.25	10,286
Virginia	1971	43	—	1.23	21,394
Washington	1889	96	—	0.82	33,564
West Virginia	1872	71	—	0.53	26,000
Wisconsin	1848	135	—	0.85	14,437
Wyoming	1890	97	—	0.84	31,917

Source: For data through January 1, 2006, John Dinan, "State Constitutional Developments in 2005," *The Book of the States,* (Lexington, Ky.: Council of State Governments, 2006), 38:9; the Center for Governmental Studies (CGS) compiled and incorporated all 2006 data.

previous records.[15] And from 2000–06—with only one remaining election year in the decade—voters have already considered 128 initiative constitutional amendments and approved 50. In 2004–05 alone, voters across the nation deliberated on 39 initiative constitutional amendments and approved 44% of them.[16]

Oregon, California and Colorado top the list of initiative states in the number of proposed and adopted initiative constitutional amendments, while Mississippi, with its relatively new initiative process, has had no citizen-initiated activity (see Table 5.2).

California's political landscape has been dotted with citizen-initiated constitutional amendments. As shown in Table 5.3, the number of initiative constitutional amendments on California's ballot grew gradually until the 1990 election cycle, when voters considered 11 amendments. For the first time in recent history, initiative constitutional amendments actually outnumbered statutory initiatives on the state ballot. Although the number of initiative constitutional amendments in an election year has not neared 11 since 1990, initiative amendments in California have outnumbered those in most other initiative states.

Several reasons account for the relatively high number of initiative constitutional amendments in California. Although constitutional initiatives require signatures equal to 8% of the vote in the last gubernatorial election to qualify for the ballot, this threshold is not significantly higher than the 5% required for initiative statutes. Proponents willing to pay the extra cost of professional signature gatherers can qualify constitutional initiatives nearly as easily as they can statutory initiatives.[17] And constitutional initiatives afford

[15] See May, *supra* note 7, at 61–62.

[16] See Dinan, *supra* note 9, at 3.

[17] In the 2006 gubernatorial election, 8,679,420 million votes were cast, so 433,971 signatures are currently required to qualify a statutory initiative, and 694,354 signatures are required to qualify a constitutional initiative. At $1 per signature, it only costs an additional $260,383 to qualify a constitutional amendment compared to a statutory initiative.

TABLE 5.2 Initiative Constitutional Amendments (since Adoption of the Constitutional Initiative)

State	% Signatures	Number of Successful Initiated Amendments	Initiated Amendments per Year
Arizona (1911)	15	26	0.28
Arkansas (1910)	10	30	0.32
California (1911)	8	43	0.46
Colorado (1910)	5	43	0.45
Florida (1968)	8	22	0.59
Illinois (1970)	8	1	0.03
Massachusetts (1918)	3	2	0.02
Michigan (1908)	10	18	0.19
Mississippi (1992)	12	0	0.00
Missouri (1908)	5 1/3	19	0.20
Montana (1972)	10	5	0.15
Nebraska (1912)	10	14	0.15
Nevada (1912)	10	11	0.12
North Dakota (1914)	4	25	0.27
Ohio (1912)	10	15	0.16
Oklahoma (1907)	15	26	0.27
Oregon (1902)	8	49	0.48
South Dakota (1972)	10	5	0.15

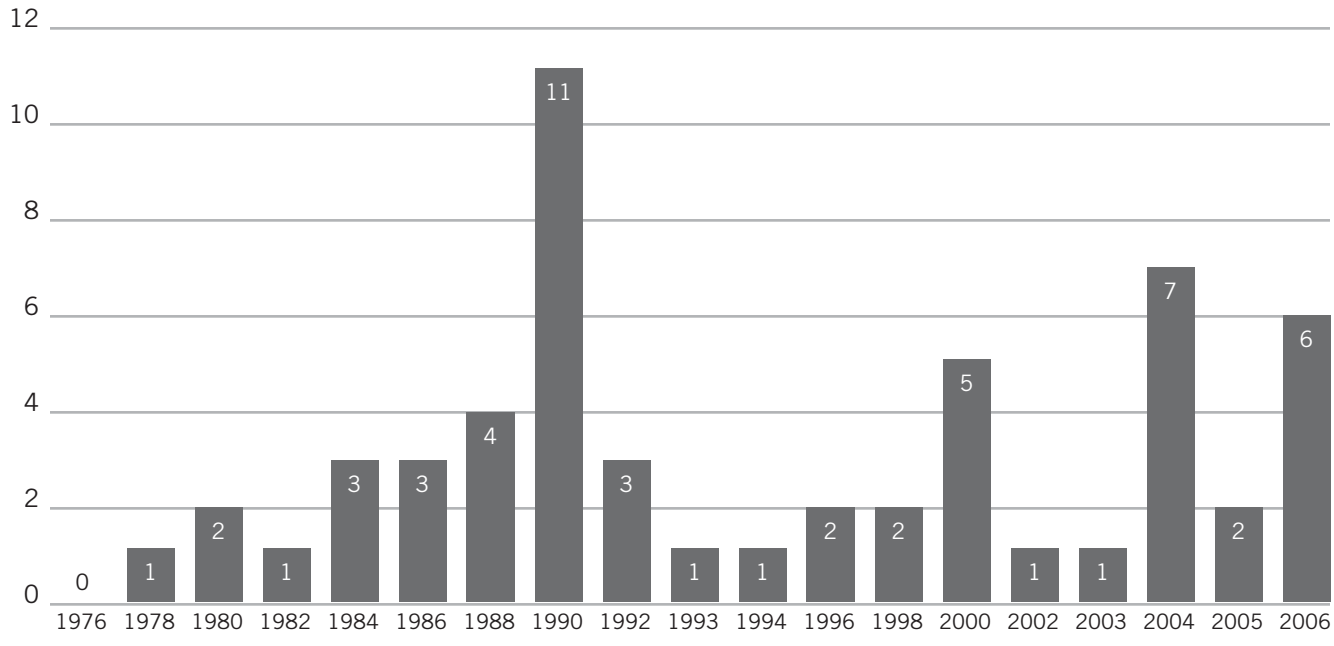
Source: John Matsusaka, "Constitutional Amendments," *Initiative and Referendum Institute Report*, October 2006, 2.

better protection against future challenges, since they are immune to statutory initiatives and can only be changed by additional constitutional amendments. Moreover, nearly 60 percent of likely voters in California like the fact that the initiative process allows a majority of voters to modify the state constitution.[18] As a result, California's constitution now governs a wide array of subjects more appropriately placed in statutes—such as gill-net fishing restrictions and chiropractic practices.

While the number of statutory issues in the constitution has increased for these reasons, so has the need to amend the constitution. Proposition 98, which passed in November 1988, is the most far-reaching example of such an initiative. The measure amended the constitution to require that a percentage of all General Fund revenues go to K–14 public education; the measure also enshrined in the constitution an exact formula for how that percentage of education funding must be determined. Attempts to amend or exempt a measure from these constitutional provisions have accounted for nine, or 22%, of the 41 initiative constitutional amendments that have appeared on the ballot since voters enacted Proposition 98.

[18] Public Policy Institute of California, "The California Initiative Process—How Democratic Is It?" (Occasional Paper, February 2002), 2.

TABLE 5.3 Number of Initiative Constitutional Amendments on the California Ballot (1976–2006)



Source: Center for Governmental Studies data analysis.

CONSTITUTIONAL "REVISION" VERSUS "AMENDMENT"

A complete restructuring of a constitution or a significant alteration in the balance of powers through the constitution is known as a "constitutional revision," as opposed to a "constitutional amendment."[19] Although useful criteria to define and distinguish a revision from an amendment have never been well articulated, the distinction is important because states that allow initiative constitutional amendments generally prohibit their use for constitutional *revisions*. Constitutional revisions usually require the deliberations of an official constitutional convention.[20] (For a discussion of the problems and legal entanglements caused by this distinction, see Chapter 9.)

The constitutional convention is the oldest and best-known method of rewriting an entire constitution. In fact, most state constitutions were adopted by a constitutional convention that submitted a document to the electorate for ratification. Procedures in most states for initiating a constitutional convention require, first, a vote by the legislature to place a "convention call" on the ballot; and second, voter approval authorizing the

[19] The distinction between a constitutional revision and a constitutional amendment is largely a matter of degree, which makes the line of demarcation between the two difficult to draw. No clear-cut guidelines exist for lawmakers or courts to follow in drawing this line.

[20] Many initiative states, but not California, specifically declare that constitutional revisions can only be made through a constitutional convention. Other states restrict the subject matters that initiatives may address or impose a single subject rule on initiatives, all of which effectively preclude the use of initiatives to propose entirely new constitutions.

convention.[21] Delegates to the convention are frequently chosen in nonpartisan elections. Although a constitutional convention may be established with a particular set of revisions in mind, the convention is free to recommend any changes it deems appropriate unless the authorizing document limits the scope of the convention to a particular subject.[22] The recommendations must ultimately be submitted to the voters for ratification.

Some states provide for extensive voter participation in the call for a constitutional convention. An increasing number of state constitutions require that a convention call be periodically submitted to the voters regardless of need. In 1939, only eight states periodically placed convention calls on the ballot; in 2007, 14 states have such a provision.[23]

Only four states permit citizen-initiated calls for a constitutional convention. South Dakota and Montana allow citizens to petition for a constitutional convention in the same manner as citizens petition for a constitutional amendment. Proponents of a constitutional convention submit a petition proposal to the secretary of state for titling and approval of form. Upon gathering signatures amounting to at least 10% of the vote in the last gubernatorial election, a call for a constitutional convention goes on the next general election ballot. If a majority of voters agree, the state schedules a convention for the purpose of revising the constitution. The convention's recommendations are submitted to the voters for ratification by a simple majority. North Dakota's constitution also allows citizens to petition for a constitutional convention. However, neither the constitution nor the elections code spell out any procedures for petitioning for a convention call. Evidently, the initiative process has never been used for this purpose in North Dakota.

In Florida, the right to initiate a call for a constitutional convention rests exclusively with citizens through petition. Interested persons circulate official petitions in an effort to collect signatures amounting to 15% of the votes cast in each of one half of the congressional districts of the state and in the state as a whole in the last presidential election. A majority vote on the call authorizes a constitutional convention. The package of recommendations adopted by the convention is then submitted to voters for ratification. The fact that Florida also automatically activates a constitutional commission every 20 years renders the citizens' right to petition for constitutional change somewhat redundant.

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[21] In some states the legislature may call a constitutional convention without submitting the question to the people. Alaska, Georgia, Louisiana, Maine, South Carolina, South Dakota and Virginia allow their legislatures to initiate a constitutional convention with a specified supermajority vote of both houses.

[22] Throughout American history, states have used constitutional conventions which have been limited in scope to predefined subjects. See Wilbur Edel, "Amending the Constitution: Myths and Realities," *State Government*, 55 (1982).

[23] Connecticut, Illinois, Maryland, Missouri, Montana, New York, Ohio and Oklahoma require submission to the voters of a call for a constitutional convention every 20 years. Alaska, Iowa, New Hampshire and Rhode Island mandate submission of a convention call every 10 years. Voters in Michigan and Hawaii must cast ballots on the call every 16 years and 9 years, respectively. While Florida does not require periodic submission to the voters of a convention call, it does automatically activate a constitutional commission every 20 years, and that commission may place amendments directly on the ballot. See Dinan, *supra* note 9 at 14.

Constitutional Change in California

California provides four methods for changing the constitution. Constitutional *amendments* may be submitted to the voters either by (1) a two-thirds vote of the membership of both houses of the legislature or (2) by citizen petitions in which initiative proponents must gather signatures amounting at least to 8% of the last gubernatorial vote. Constitutional *revisions* may be submitted to the voters for ratification after being proposed either (3) by a two-thirds vote of the legislature or (4) directly by a constitutional convention. The legislature usually establishes a constitutional revision commission to prepare its package of constitutional revisions.

Constitutional Convention

In California, a constitutional convention may only be proposed by a two-thirds vote of the membership of both houses of the legislature. The convention call is then placed on the "next general election" ballot for approval by a simple majority of those voting on the issue. If approved, delegates to the convention are elected from districts with populations of equivalent size. The new constitution agreed on at the convention is then submitted to the voters for ratification by a simple majority.[24] California has no procedure for allowing citizens to initiate a call for a constitutional convention. As a result, constitutional revisions can only be initiated by the legislature—which either places them directly on the ballot or places a call for a constitutional convention on the ballot.

In California, a constitutional convention may only be proposed by a two-thirds vote of the membership of both houses of the legislature. California has no procedure for allowing citizens to initiate a call for a constitutional convention.

Until 1962 in California, a revision could be proposed solely by a constitutional convention. Only two conventions had been called in the state's history. The first constitutional convention occurred prior to statehood in 1849. A constitution was developed for the new state of California based primarily on the form and substance of constitutions in other states. Over the next three decades, California's constitution was amended only three times. Legislative proposals to call conventions for drafting a second constitution were steadfastly rejected by voters until 1877, a time of economic crisis and lack of confidence in state government.[25]

The state's second convention, composed of 152 delegates, deliberated for seven months before finally offering a controversial package of recommendations. Convention delegates attempted to address the many economic and legislative problems confronting the state. Consequently, the proposed document was lengthy and littered with rules that should have been statutory in nature. Despite the length of the document, voters ratified the new constitution in May 1879. Partly because of its comprehensiveness, California's second constitution was constantly updated to meet changing conditions. By 1960, it had been amended 323 times and contained more than 80,000 words—making it the second longest constitution in the nation (Louisiana

[24] Cal. Const. art. XVIII, § 2.

[25] See Joint Legislative Budget Committee, "The California Budget Process: Problems and Options for Change," a report issued to the California legislature, November 28, 1990.

had the longest at that time).[26] In 1962, the voters approved a constitutional amendment giving the legislature the power by a two-thirds vote to place constitutional revisions directly on the ballot.[27]

Constitutional Revision Commission

Although California's constitution has never specified procedures for the legislature to follow in placing a constitutional revision on the ballot, it has become routine practice for the legislature to establish a constitutional revision commission to study potential revisions and make recommendations back to the legislature for placement on the ballot. The first constitutional revision commission, set up in 1963, eventually submitted a proposed redrafted constitution to the legislature in 1966. Following legislative approval, the voters ratified a package known as Proposition 1-A in November of that year. This third revision of the constitution transferred much of its material back to the statute books and reduced the constitution to an estimated 33,350 words, roughly average in size among all states.[28] California's constitutional revision commission remained active through 1976, submitting 17 proposals to the legislature for placement on the ballot. Most of these proposals were noncontroversial; only three were defeated by the voters.[29]

The last constitutional revision commission acted for a short period only, from 1994 to 1996. Concerned that state coffers were not keeping pace with booming population growth and the consequent need for increased public service, the commission set forth 35 recommendations intended to increase government efficiency, responsiveness and fiscal discipline.[30] The legislature did not place any of the recommendations on the ballot for a vote by the people.

COUNTER-INITIATIVES ARE BEING USED IN QUESTIONABLE ELECTION STRATEGIES

Counter-initiatives have principally been used by business interests in California to defeat consumer and environmental protection initiatives. The strategy is often part of a two-prong effort to defeat an initiative proposal. It involves first placing an initiative proposal on the ballot to cancel an opposing reform measure if approved and, second, waging an opposition campaign against the reform measure as well.

Counter-initiatives pursue several objectives. First, they foster voter confusion in the hope that voters will reject all reform measures on the ballot. They add length and complexity to the ballot and often attempt to masquerade as the measure offering true or

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[26] Prior to the Great Depression, the legislature placed four convention calls on the ballot, all of them rejected by the voters. In 1933, stirred by economic crisis, voters narrowly approved a fifth proposal for a constitutional convention. However, interest in revising the constitution quickly waned, and the legislature never approved enabling legislation for the convention to take place. *Id.*

[27] Cal. Const. art. XVIII, § 1.

[28] Council of State Governments, *The Book of the States* (Lexington, Ky., 1991), 30: 40.

[29] Joint Legislative Budget Committee, *supra* note 25, at 20.

[30] California Constitution Revision Committee, *Final Report and Recommendations to the Governor and the Legislature,* 1996.

easier reform. Confused voters may tend to throw up their hands and vote against all initiatives.

For example, local Propositions "O" and "P" on the 1988 Los Angeles ballot are a case in point. One measure (Proposition O) filed by environmental groups sought to prevent planned coastal oil drilling; a second measure (Proposition P) drafted by Occidental Petroleum Corporation sought to preserve a plan for coastal drilling. Both initiatives were labeled "Oil Drilling" and both were touted as *the* proenvironmental initiative. In fact, the industry initiative called for the city of Los Angeles to oppose oil drilling in state and federal waters—areas in which the city had no jurisdiction. This clause and others like it, though meaningless and ineffectual, provided the basis for Occidental's major campaign thrust: "Oppose Oil Drilling in Santa Monica Bay—Vote *for* Proposition P and *against* Proposition O." Proposition O, the environmental protection initiative, survived the onslaught by Occidental Petroleum and was approved by voters despite being vastly outspent by the oil industry.

Counter-initiatives have principally been used by business interests in California to defeat consumer and environmental protection initiatives.

Second, counter-initiative sponsors hope that if both measures are approved by the voters, their measure will receive more votes than the competing reform measure. The countermeasure is written to negate the original measure if the countermeasure receives more votes.[31] The counter-initiative is often written in such a way as to offer a less dramatic reform and is sold to the voting public as a more reasonable and moderate step. In 1988, for example, reform groups placed a campaign finance reform measure (Proposition 68) on the California ballot that would have offered public matching funds to state legislative candidates. To combat this measure, several legislators placed a competing measure (Proposition 73) on the ballot that created contribution limits but *prohibited* public financing of campaigns. Both measures passed, but because Proposition 73 received more votes (58% compared to 53%), it superseded Proposition 68.

More recently, Propositions 78 and 79 in 2005, both of which would have instituted a prescription drug discount program for eligible Californians, battled on the ballot in Governor Schwarzenegger's special election. In early 2005, a coalition of labor, health and consumer groups began circulating the petition that was to become Proposition 79. The measure would have required pharmaceutical companies to negotiate drug discounts for Californians with incomes under 400% of the federal poverty level or be barred from selling drugs through Medi-Cal, a sizeable prescription drug market. Due to both mounting popular pressure to address rising prescription drug prices and the drug industry's poor public image, the well-funded pharmaceutical industry chose to circulate its own petition instead of simply opposing Proposition 79. The counter-initiative would have provided discounts to Californians with incomes under 300% of the federal poverty level, and drug company participation would have been optional. This measure became Proposition 78 when the drug industry submitted the required number of petition signatures before the Proposition 79 coalition could. Largely because the two initiatives were confusingly similar and complex, both failed at the polls.

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[31] For further discussion, see Chapter 9.

EXPLOITING THE CONSTITUTION IN A COUNTER-INITIATIVE STRATEGY

The art of deception through counter-initiatives reached new heights in California's 1990 general election. Because the alcohol industry had successfully lobbied the legislature for decades to block any proposed increase in the state's alcohol tax, a coalition of health, law enforcement and consumer groups placed a statutory "nickel-a-drink" liquor tax on the state ballot (Proposition 134). The industry decided that the tax initiative had a good chance of receiving voter approval and responded by prodding the legislature to place a second measure—this time a constitutional amendment countermeasure—on the ballot calling for a much smaller tax increase on liquor (Proposition 126). At the same time, the alcohol industry also supplied the bulk of the financing for a third initiative (Proposition 136) that, if approved, would have cancelled any special tax increase on the ballot that did not receive two-thirds voter approval. A hidden clause in Proposition 136, nicknamed the "poison pill," made its supermajority vote requirement for tax increases retroactively effective to measures on the same ballot. Thus, the liquor industry not only campaigned against the first alcohol tax measure, it supported a second countermeasure designed to negate the first tax and also discreetly supported a third measure that would have eliminated both liquor tax proposals.

The alcohol industry's strategy did not stop here. Both industry countermeasures—Propositions 126 and 136—were drafted as constitutional amendments, while the relevant tax provisions of the nickel-a-drink initiative were statutory. Normally, if voters approve two conflicting measures, the one receiving the most votes becomes law. In this case, however, the constitutional provisions of Proposition 126 would have taken precedence over the statutory law of Proposition 134, no matter which initiative was approved by the highest margin. Thus, if voters approved two conflicting measures—one a constitutional amendment and the other a statute—the constitutional amendment automatically would nullify the statutory measure, even if the constitutional amendment received fewer votes. The voters rejected all three alcohol-related initiatives, so the alcohol industry's tactics could be viewed as successful.[32]

California's November 1990 ballot also contained a number of additional counter-initiatives addressing food regulation (Propositions 128 and 135) and forest harvesting (Propositions 130 and 138). Because the ballot was long and confusing, voters rejected 10 of the 13 initiatives, including all of the targeted initiatives and counter-initiatives.

IMPOSITION OF FUTURE SUPERMAJORITY VOTE REQUIREMENTS

Proposition 136, which appeared on the 1990 ballot, also incorporated another new development in California's initiative process. The tax regulation measure would have imposed a strict supermajority vote requirement on all future initiatives—statutory or constitutional—calling for an increase in special taxes. Henceforth, any special tax proposed by an initiative would have required two-thirds voter approval. Since 1976, no initiative that established revenues for programs has ever received two-thirds voter approval.

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[32] Ironically, because of California's budget crisis in 1991, the basic provisions of Proposition 126 increasing the tax on alcohol were adopted by the legislature.

A simple majority at one point in time should not be allowed to strip future supermajorities of their rights and powers to enact initiative legislation.

Even measures that have not affected taxes have rarely received two-thirds of the vote. The effect of Proposition 136 would thus have been to stifle the citizens' power to adopt special taxes through the initiative process.

The real issue posed by this measure, however, was not the feasibility of attaining a supermajority vote of approval; it was the philosophical question whether a simple majority at one point in time could strip future supermajorities of their rights and powers to enact initiative legislation. Although Proposition 136 failed at the polls, its approval by a 51% simple majority would have required future tax proposals to receive two-thirds voter approval to become effective. The will of 51% of the voters in 1990 would have trumped the will of just under two-thirds of the voters in subsequent years.

It is widely accepted that constitutional law should be harder to amend than statutory law. The fundamental precepts that create government and organize the distribution of power should not be as easily altered as the policies produced by that government. Moreover, because constitutional law is dominant in any conflicts with statutory law, a justification would seem to exist for some form of special vote requirement to alter the constitution, so long as the requirement is practical and non-obtrusive.

EXCESSIVELY LONG BALLOTS IRRITATE AND CONFUSE VOTERS

Voters want a say in important public policies, but the sheer number of propositions on California's ballots in recent years has unsettled even the most civic-minded voter. Although the number of initiatives on the ballot has varied from decade to decade, more initiatives appeared on the ballot between 1990 and 1999 (a total of 61) than in any other decade in California history.

Most California ballot measures come not from initiative proponents but from state legislators.

Yet the proliferation of initiatives on California's statewide ballot is only half the story. Most statewide measures come not from initiative proponents but from state legislators and local governments. In November 2006, for example, San Francisco voters confronted 8 citizen-sponsored initiatives, 5 legislatively referred propositions and 11 local measures. Voters thus made 24 public policy decisions in addition to voting on candidates.

Public opinion polls indicate that voters have long been irritated by the length and complexity of ballots.[33] Just after the November 2006 election, 63% of voters agreed that the wording of the initiatives on the ballot was too confusing, and two in three felt that there were simply too many initiatives on the ballot.[34] And, although it has not happened recently, their agitation is increased when measures deal with mundane issues of little public policy significance but require a popular vote because they are the only way to amend the state constitution. In June 1990, for example,

[33] Mark Baldassare, *Californians and the Future*, statewide survey by the Public Policy Institute of California, November 2006, 12; Mervin Field, *The California Poll*, September 13, 1990. For a fuller discussion of public opinion toward the initiative process, see Chapter 2.

[34] Baldassare, *supra* note 33.

voters were asked to amend the constitution to allow the renewal of chiropractic licenses during the chiropractor's month of birth rather than at the beginning of the year. Another constitutional measure on the same ballot adjusted deadlines for the governor's review of legislation. In November 1990, voters were asked among other things to change the constitution so that local hospitals could invest in private corporations.[35]

Inevitably, a few high-financed ballot issues capture most of the media's attention, while other issues are left with inadequate public scrutiny.

Trivializing the ballot with many minor propositions is one source of voter frustration. More detrimental is the fact that, inevitably, a few high-financed issues capture most of the media's attention, while other issues are left with inadequate public scrutiny. The November 2006 ballot was a case in point. Proposition 86 (a tobacco tax) pitted hospitals and tobacco companies against each other, and oil companies fought hard to defeat Proposition 87 (an oil tax). Combined, proponents and opponents of Propositions 86 and 87 overshadowed the other 11 measures on the ballot with record-breaking campaign expenditures of about $237 million, dominating the media's attention. Yet some of these other propositions raised critical public policy questions. For example, few voters knew much about an eminent domain measure (Proposition 90) on the ballot, even though that measure would likely have had an immense impact California policy making.[36] Many other policy questions on the ballot were even less visible to voters.

A lengthy ballot is not only confusing; it is also costly. Printing and mailing the June 2006 ballot pamphlet cost an estimated $5.9 million, and the November 2006 pamphlet cost an estimated $13.5 million.[37] In addition, local governments must often pay for and distribute their own pamphlets explaining local ballot propositions. The workload of printing and handling state ballots associated with each additional ballot proposition is also borne primarily by county governments.[38]

Restrictions on the Length of the Ballot

A few states limit the number of legislatively referred constitutional amendments that may be submitted to the voters, but only Illinois specifically limits the number of initiatives.[39] No Illinois ballot may pose more than three public questions to the voters, including both legislative measures and initiatives, and no more than one measure may propose changing the form of a municipal government.[40] If more than the allotted measures qualify to the ballot of an election, the first measures certified are selected for the ballot.

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[35] Voters approved all of them.

[36] Proposition 90 would have amended the state constitution to require government compensation to property owners any time a new or changed law, rule or regulation substantially diminished the property value.

[37] Amounts may change slightly after the state receives expected postage refunds. Telephone interview with Joanna Southard, elections analyst, Elections Division, California Secretary of State's office, January 11, 2007.

[38] Cal. Elec. Code § 13001 (2006).

[39] Arkansas, Colorado, Illinois, Kansas and Kentucky limit the number of constitutional amendments that may be placed on a single ballot.

[40] Ill. Rev. Chap. 46, art. 28, § 1.

Limiting the number of initiatives on the Illinois ballot does not appear to be much of a problem. The initiative process in that state is quite restrictive. Initiatives can only deal with "structural and procedural" issues involving the legislature.[41] Public policy may not be affected by initiatives. Consequently, initiative proposals are uncommon in Illinois and not likely to be constrained by the limit.

Arkansas imposes a rather unique limitation on ballot length. Whereas the legislature cannot place more than three constitutional amendments on any single ballot, no such limit applies to citizen-sponsored initiatives.[42]

California, like almost every other state, does not restrict the number of measures that may appear on any given ballot. In Chapter 3, this report recommends that California allow the legislature to make amendments to initiative legislation under certain conditions without voter approval. This could help to reduce the length of California's ballot by removing the need to seek voter approval of every amendment, regardless of how perfunctory, to initiative statutes. This report does not, however, recommend limiting the number of measures on the ballot (see discussion in section "Other Specific Reforms Are Unnecessary or Undesirable" on p. 225).

Restrictions on Successive Submissions of Similar Ballot Propositions

A few states—Massachusetts, Nebraska, Oklahoma and Wyoming—restrict how often an initiative proposal may be submitted to the voters. Massachusetts and Nebraska prohibit placing on the ballot a measure with a subject that is substantially the same, either affirmatively or negatively, as any measure submitted to the people within three years and four years, respectively.[43] Oklahoma prohibits a rejected initiative from reappearing on the ballot within a three-year period unless proponents gather signatures amounting to 25% of the last gubernatorial vote.[44] Wyoming does not allow a defeated initiative proposition to be reintroduced on the ballot for five years.[45] By contrast, California does not restrict the frequency with which an issue may be resubmitted to the voters.[46]

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[41] Ill. Const. art. XIV, § 3.

[42] Ark. Const. amend. 7. Initiatives in Arkansas have not always been free from numerical limitations. Arkansas first adopted the initiative process with passage of Amendment 10 in 1911. At that point, initiatives were included under the limit of three constitutional amendments per ballot. Amendment 10, however, was poorly drafted and left considerable ambiguity in how the initiative process was to work. In 1920, voters approved Amendment 13, which redefined and extended the authority of the people to initiate laws and constitutional amendments and exempted initiatives from the limit on ballot measures. The Arkansas Assembly Speaker, a staunch opponent of initiatives, ruled that Amendment 13 would not become effective because the measure was not approved by a majority of all votes cast at the election. Five years later, the Arkansas Supreme Court reversed the Speaker's ruling (also changing the name of Amendment 13 to Amendment 7), and the initiative process became a full part of the state's system of governance in 1925.

[43] Neb. Const. art. III, § 2; Mass. Const. art. 74, § 1.

[44] Okla. Const. art. 5, § 6.

[45] Wyo. Const. art. II, § 52(d).

[46] One example of virtually identical initiatives being placed on subsequent ballots in California are two parental notification measures sponsored by San Diego newspaper publisher James Holman. Proposition 73 on the November 2005 ballot would have amended the California Constitution to require

Lack of Voter Fatigue and Voter Drop-Off

Long ballots present two other related concerns: voter fatigue and voter drop-off. When voters face a lengthy ballot, a decreasing number of votes are sometimes cast for items located near the bottom of the ballot. This has been called "voter fatigue." "Voter drop-off" consists of the disinclination of voters to cast ballots for less important offices and propositions. While nearly every voter casts ballots in the presidential race, for example, significantly fewer votes are cast for Congress, fewer still for legislative candidates and fewest of all for judgeships.

Voter fatigue and drop-off relate to the order in which ballot measures appear on the ballot. Most states list propositions last on the ballot, following candidate races.[47] Thus, ballot measures are most susceptible to the effects of declining voter participation. California further specifies that initiatives must appear after bond measures and legislatively referred measures. If voter fatigue and drop-off are real, initiatives in California can be decided by a minority of voters. More importantly, voter fatigue and voter drop-off might suggest that the quality of voter decisions is lower for initiatives.

In five of the eight state primaries from 1978 to 2006, more people voted on the only initiative on each ballot than voted for governor.

An analysis of voting behavior since 1978 indicates, however, that voter fatigue and voter drop-off are not significant problems in California. While some drop-off usually, but not always, occurs between the most important candidate race and the lesser offices and ballot propositions, the extent of initiative drop-off is minimal—comparable to voter drop-off for such statewide offices as lieutenant governor and secretary of state. In five of the eight state primaries from 1978 to 2006, more people voted on the only initiative on each ballot than voted for governor.[48] Moreover, in every election, more people voted on initiatives than on legislative measures, despite the fact that legislative measures always appear before initiative measures on the ballot.

As shown in Table 5.4, initiatives tend to attract more voter attention than many statewide candidates, especially in primary elections. The greatest drop-off occurs for legislatively referred measures—which are positioned before initiatives on the state ballot. Evidently problems of ballot fatigue and voter drop-off are greatly exaggerated. A more plausible explanation for variation in the number of votes for a given candidate or measure on the ballot is that voters pick and choose among the candidate races and ballot propositions that are of greatest interest to them. Voting activity follows those candidates and issues perceived to be important by the electorate, regardless of their ballot position.

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parental notification for minors' abortions in most cases. The measure failed at the polls by a margin of 47% to 53%. Holman qualified a virtually identical parental notification initiative for the November 2006 ballot. The only difference for Proposition 85 was that proponents removed a clause that would have defined abortion as causing "death of the unborn child, a child conceived but not yet born." Voters rejected Proposition 85 50% to 54%.

[47] Alaska places candidates and issues on different ballot punch cards. Oregon and Washington list propositions first on the ballot.

[48] Proposition 13 in 1978, Proposition 51 in 1986, Proposition 180 in 1994, Proposition 45 in 2002 and Proposition 82 in 2006.

TABLE 5.4 Percentages of Votes Cast in California for Offices, Legislative Measures and Initiatives in Non–Presidential Election Years (1978–2006)

	Governor	All Other Statewide Offices Combined	Legislative Measures	Initiatives
1978 Primary	90.8%	78.6%	78.1%	96.5%*
1978 General	97.0%	92.7%	83.7%	92.5%
1982 Primary	94.1%	92.5%	86.2%	87.3%
1982 General	97.7%	93.5%	88.8%	92.7%
1986 Primary	86.0%	82.4%	86.2%	93.5%*
1986 General	97.7%	93.4%	88.6%	92.0%
1990 Primary	88.4%	78.6%	85.4%	85.5%
1990 General	97.5%	93.5%	89.3%	91.4%
1994 Primary	88.7%	77.1%	89.6%	90.5%*
1994 General	97.4%	83.7%	86.6%	93.9%
1998 Primary	98.5%	94.4%	86.5%	91.1%
1998 General	97.3%	83.8%	86.9%	91.4%
2002 Primary	85.9%	77.8%	90.9%	91.5%*
2002 General	96.6%	74.3%	89.9%	90.5%
2006 Primary	84.7%	76.0%	93.3%	94.8%*
2006 General	97.5%	91.0%	93.5%	94.1%

* Only one initiative appeared on these ballots (Proposition 13 in 1978, Proposition 51 in 1986, Proposition 180 in 1994, Proposition 45 in 2002 and Proposition 82 in 2006).
Source: California Secretary of State election returns.

Anticipated Impact on Ballot Length

In Chapter 3, this report recommends that all statutory initiative legislation enacted by the people be subsequently amendable by a supermajority vote of the legislature, so long as such amendments are consistent with the purposes and intent of the original initiative. California's present restriction against legislative amendments to laws created by initiative has lengthened the state ballot by requiring many changes in the law, however minute, to be ratified by the voters. Elimination of this rigidity in lawmaking by permitting limited legislative amendments to initiative legislation should help somewhat to reduce the length of the ballot while safeguarding the initiative process from undue or excessive legislative tampering.

SHOULD INITIATIVES BE LIMITED TO GENERAL ELECTION BALLOTS?

Most initiative states—18—do not allow initiatives to be placed on primary or special election ballots.[49] Their rationale is straightforward: Primary and special elections draw

[49] States that restrict initiatives to general election ballots only are Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, Ohio, Oregon, South Dakota, Utah, Washington and Wyoming.

fewer, more partisan voters than general elections, so voters in such elections do not represent the needs and priorities of the population at large and therefore should not determine the state's future alone.

Many voters choose not to participate in primary elections because primaries only determine the parties' nominees, not the ultimate winners. In 1952, turnout in California's primary elections peaked at an unusually high 53% but has hovered around only 30% of eligible voters since the late 1980s.[50] The two lowest primary election turnouts in California history took place in 2002 and 2006, with 25% and 23% participation of eligible voters respectively. In contrast, general election voter turnout averaged 53% in the 1980s, declined slowly through the 1990s, and averaged 44% between 2000 and 2006.

Special elections not consolidated with primary or general elections consistently have usually had the lowest, least diverse turnout of all. Until 2003, special elections were typically called to fill a single legislative vacancy or decide the outcome of a single ballot question.[51] In these elections, only 25 to 32 percent of eligible voters cast a ballot. More recent special elections, however, have attracted more attention and thus somewhat higher turnouts. In 2003, 43% of eligible voters turned out for the first gubernatorial recall election in California history, and 35% of eligible voters participated in the 2005 special election called by Governor Schwarzenegger, in a controversial attempt to bypass the legislature and enact a package of ballot initiatives.

The Strange Case of Primary Election Ballot Initiatives in California

Initiatives first appeared on a California primary election ballot in 1970 and have appeared regularly in subsequent primaries, including the June 2006 ballot. No provision in the state constitution or elections code, however, specifically permits initiatives to appear on primary election ballots. In fact, the constitution specifies clearly that an initiative is to appear "at the next *general election* held at least 131 days after it qualifies or at any special statewide election held prior to that general election."[52]

The appearance of initiatives on primary election ballots may have been caused by a simple administrative error. In 1970, legislatively sponsored propositions could not be placed on primary election ballots unless the legislature declared the primary election a "consolidated special election."[53] The legislature did precisely that for the 1970 primary

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[50] Californians are eligible to vote in an election if they are U.S. citizens over the age of 18 and have been registered to vote in their precinct for at least 15 days.

[51] In California, vacancies in statewide public office are filled by gubernatorial appointment.

[52] Cal. Const. art. II, § 8(c) (emphasis added).

[53] Before 1968, existing law required the legislature to specify on which ballot each legislatively sponsored measure was to appear. In that year, the legislature amended state law to provide that legislative ballot propositions would automatically appear on the "first *general* election" ballot after legislative adoption (emphasis added). Cal. Elec. Code § 3527 (1970). Although this law was intended to simplify the placement of legislative bond measures on statewide ballots, it perhaps inadvertently precluded bond measures from easy placement on primary election ballots. In order for the legislature to place bond measures on a primary ballot, it had to call a "special election" for the bond measures, which possessed all the necessary characteristics of a *general* election, and then consolidate the special election with the primary election. This problem was corrected in 1971 when the same law was amended to allow legislative propositions on any *statewide*, rather than any *general*, election ballot.

election in order to submit several legislative bond measures to the voters for approval. Since the constitution permitted initiatives to be placed on special election ballots (but not primary election ballots), the secretary of state's office decided to place one initiative measure (Proposition 8) on the 1970 consolidated special-primary election ballot along with the legislative bond measures. In the words of the secretary of state's office, the initiative "piggybacked" onto the primary ballot.[54]

In 1971, the legislature modified the law again to allow voter approval of legislative bond measures on primary election ballots without the need for a declaration of a consolidated special election, but it did not extend this courtesy to initiatives.[55] Nevertheless, in subsequent years, the secretary of state routinely followed the 1970 precedent of placing initiatives on primary election ballots, whether or not the election was declared a consolidated special election, apparently without anyone realizing that such a practice was not sanctioned by law or the constitution.

A decade later, Eugene Lee, a professor of political science at the University of California at Berkeley, inquired about the practice at the secretary of state's office. The secretary of state thereupon issued a memorandum stating three "legal rationales" for the office's policy of placing initiative measures on primary election ballots:

1. A "special election" having been called for June by the legislature to vote on a bond or other measure (Propositions 1 and 2 on the June 1980 Primary Election ballot, for example);
2. A "special election" having been called in June by the Governor by proclamation;
3. Construing "general election" to include the direct primary in June. (See, for example, *County of Alameda v. Sweeney*, 151 Cal. App. 2d 505 [1975].)[56]

These explanations appear more like rationalizations of an act already done than a uniform policy guiding earlier decisions to place initiatives in primary elections. It is inconsistent to proclaim that primary elections can be defined as "special" elections or, failing that, to define primary elections as "general" elections.

To be sure, instances do exist in which the courts have defined references in the state constitution to "general elections" as meaning any regularly scheduled election, including primary elections.[57] Such interpretations, however, apply to specific constitutional articles that refer implicitly to regularly scheduled elections versus special elections. Elsewhere, the California Elections Code clearly defines general, primary and special elections as distinct political events. A general election is "the election held throughout the state on the first Tuesday after the first Monday of November in each even-numbered year."[58] A primary election "includes all primary nominating elections provided for by this code."[59] A special

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[54] Memorandum from Anthony L. Miller, chief counsel, California Secretary of State's office, to Eugene Lee, professor, Political Science Department, University of California, Berkeley, March 21, 1980.

[55] Cal. Elec. Code § 9040 (2006).

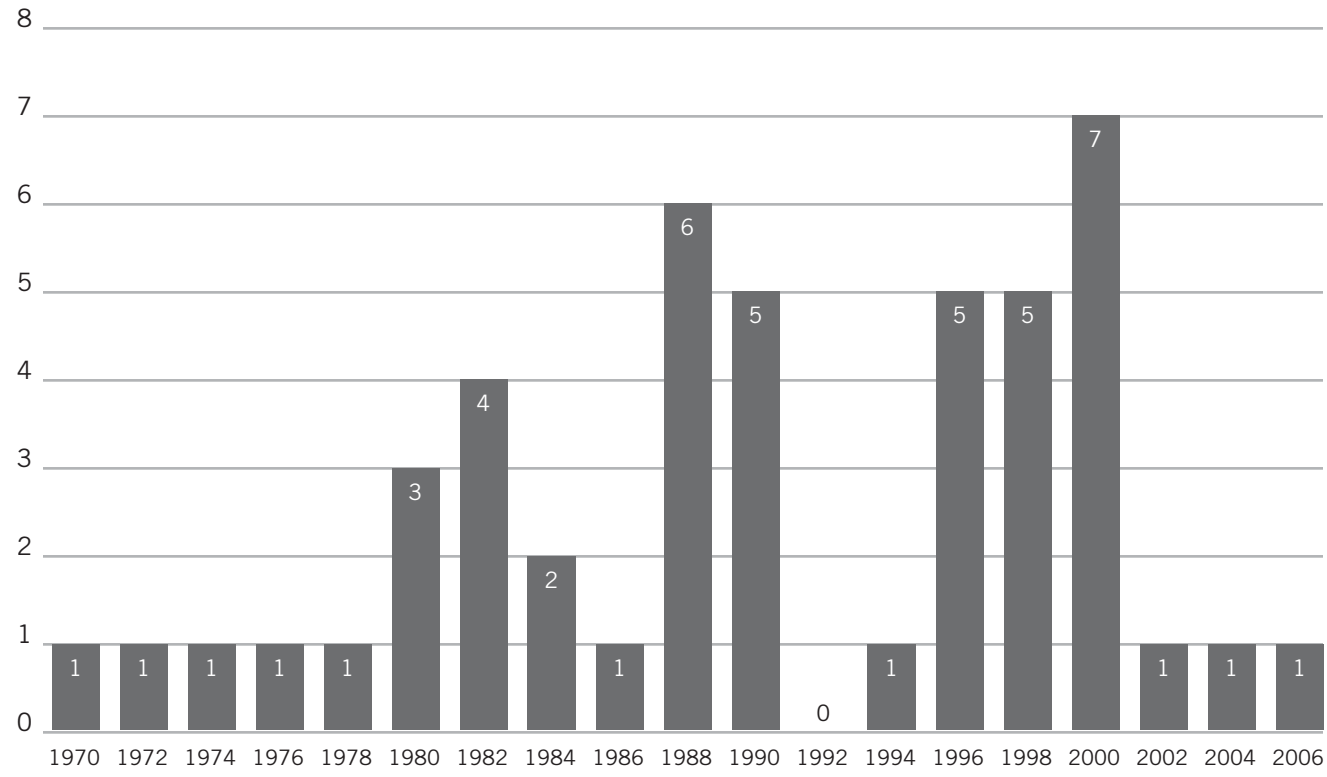
[56] *Id.*

[57] See *County of Alameda v. Sweeney*, 151 Cal. App. 2d 505 (1975).

[58] Cal. Elec. Code § 324 (2006).

[59] Cal. Elec. Code § 341 (2006).

TABLE 5.5 Number of Initiatives on California's Primary Election Ballot (1970–2006)



Source: Center for Governmental Studies data analysis.

election "is an election, the specific time for the holding of which is not prescribed by law."[60] It is difficult not to conclude that the practice of placing initiatives on primary election ballots is erroneous.[61]

Whether voting on initiatives in primary elections came about through loose interpretations of the law or by administrative error, the practice has become so institutionalized that it may be beyond challenge. As shown in Table 5.5, initiatives have appeared consistently on primary election ballots in California for more than 35 years, with the exception of June 1992.

Despite this overall pattern of consistency, the number of initiatives per primary ballot has fluctuated considerably over the years. Relatively few initiatives appeared on primary election ballots throughout the 1970s. Beginning in 1980, many more initiatives appeared on primary ballots—reaching a high of seven on the June 2000 ballot. After two upsurges in the 1980s, primary election initiatives took a nose dive in June 1992, when not one initiative qualified for the ballot for the first time since 1968. "It is as if

[60] Cal. Elec. Code § 356 (2006).

[61] If so, the next question is whether initiatives adopted in primary elections that were not consolidated with special elections are valid. Proposition 13, for example, was adopted during a nonconsolidated June 1978 election. Although this question has not been presented to the courts, it appears doubtful that they would invalidate established state law years after its enactment.

Toyota stopped making little trucks, or Congress swore off press releases, or the Super Bowl banned beer commercials," exclaimed one analyst.[62] Initiatives did not reappear in greater numbers on primary election ballots until 1996.[63] This recovery lasted until 2000, and then the number fell to one initiative per primary.

Ideological Differences between General Election and Primary Election Voters

Due to the relatively high voter turnout in general elections, some have argued that general election outcomes reflect the will of the people better than primary or special election outcomes. Not only do more voters turn out, but a more balanced cross-section of the population casts its ballot in general elections than in primary and special elections. By contrast, primary and special election voters tend to be better educated, more involved in politics and members of a higher socioeconomic stratum.[64] The divergence between primary and general election voters is growing as more and more Californians register as nonpartisans, many of whom can only participate in Democratic primary election candidate races.[65]

Based on the differences between general and non–general election voters, some scholars have speculated that conservative ballot measures would fare better than liberal issues in primary and special elections.[66] In line with this logic, general election outcomes should be more ideologically balanced than non–general election outcomes. A comparison of primary and general election outcomes from 1976 through 2006 appears to support these hypotheses. Voters have approved a higher percentage of conservative initiatives than liberal initiatives in primaries as compared to general elections over time. As Table 5.6 shows, 44% of the conservative initiatives in primaries from 1992 through 2006 passed, whereas not one liberal initiative passed. In general elections, a smaller gap fell between the two ends of the ideological spectrum: voters approved 64% of conservative initiatives and 37% of liberal initiatives. The election outcomes from 1976 through 1990 saw a similar pattern.

On the other hand, *all* types of initiatives fared better in primaries than in general elections from 1976 to 1990—and exactly the opposite trend prevailed between 1992 and 2006. From 1976 through 1990, voters in California approved 56% of all initiatives on primary election ballots and only 35% of all initiatives on general election ballots. Conversely, between 1992 and 2006, voters approved only 19% of initiatives on primary election ballots but a full 43% on general election ballots.

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[62] Jay Mathews quoted in William Endicott, "What!? No Initiatives?" *Los Angeles Daily Journal*, January 14, 1992.

[63] Californians may have avoided using the initiative process in the early 1990s after voters expressed an unusual degree of disgruntlement with the long November 1990 ballot, rejecting 22 of 28 measures—even noncontroversial bond measures that otherwise would have been routinely approved.

[64] David Magleby, *Direct Legislation* (Baltimore: Johns Hopkins University Press, 1984), 87–89.

[65] The Democratic Party allows registered Democrats and registered voters who "declined to state" a party to participate in Democratic primaries, whereas voters must be registered Republicans to vote in Republican primaries.

[66] Interview with Professor Daniel Lowenstein, UCLA Law School, in Los Angeles, July 16, 1990.

TABLE 5.6 Initiative Approval Rates in Primary versus General Elections by Ideological Orientation (1976–2006)

	Conservative		Liberal		All Initiatives	
1976–1990						
Primary Elections	9/15	(60%)	5/10	(50%)	14/25	(56%)
General Elections	10/16	(38%)	7/21	(33%)	20/57	(35%)
1992–2006						
Primary Elections	4/9	(44%)	0/7	(0%)	4/21	(19%)
General Elections	9/14	(64%)	13/35	(37%)	26/60	(43%)

Note: CGS determined the ideological orientation of initiative measures using the political leanings of the organizations supporting or opposing each measure. For example, the Democratic Party or its officials and other groups generally allied with the Democrats, such as environmental organizations, are classified as "liberal." Republican officials and business interests aligned with the Republican Party are classified as "conservative." Business interests with no particular political perspective, such as lottery proponents, are classified as "neutral" and appear only in the "all initiatives" column.
Source: Analysis by CGS and the California Commission on Campaign Financing.

Initiatives on California's primary election ballots generally drew less financial opposition—presumably because they were less controversial—than initiatives on general election ballots.

Although primary and general election voters seem to differ ideologically, several interrelated reasons aside from election type affect who votes and how in any given election. Examples of such variables include whether proponents or opponents successfully mobilize key constituencies; the political, fiscal and economic context at the time; voter mood; a particular initiative's merit and clarity; how much is spent for or against the initiative and by whom; whether another item on the ballot turns out voters who are more or less likely to vote for the initiative; and whether a countermeasure is on the ballot to undermine support for the initiative. Not enough data exist from each individual election to support firm conclusions about election outcomes—especially for primaries. As shown in Table 5.5, nearly two-thirds of California's primary election ballots since 1970 included only one or two initiatives.

Even so, the success of primary election initiatives from 1976 through 1990 appears to reflect the effectiveness of well-financed campaigns against *general* election initiatives. Initiatives on California's primary election ballots generally drew less financial opposition—presumably because they were less controversial—than initiatives on general election ballots. The median expenditure in support of initiatives on primary election ballots totaled $1,578,292, while the median opposition expenditure was only two-thirds that amount, or $1,046,374. Over the same time period, however, median expenditures for initiatives on general election ballots was $1,231,914, while opposition campaigns spent a median $1,817,932—or 148% more than median expenditures in support—to defeat these measures. As discussed in Chapter 8, opposition campaign advertising is highly effective in persuading voters to vote against initiative proposals.

RECOMMENDATION: STATUTORY LANGUAGE SHOULD BE REMOVED GRADUALLY FROM THE STATE CONSTITUTION TO REDUCE THE NEED FOR FUTURE CONSTITUTIONAL AMENDMENTS

California ballots have become increasingly cluttered with constitutional initiatives that cannot be amended without placing further legislative or initiative constitutional amendments on the ballot. Moreover, the resulting increase in the number of issues addressed in the state constitution has in turn compelled a growing number of initiative proponents to propose constitutional rather than statutory measures to achieve their desired ends.

The initiative process should be modified to encourage proponents to place their proposals in state statutes when appropriate, where they would, according to other reforms proposed in this report, be subject to limited amendments by a supermajority vote of the legislature (see Chapter 3).

The initiative process should be modified to encourage proponents to place their proposals in state statutes when appropriate.

Giving California Voters More Access to the Constitutional Revision Process

California's constitutional revision process should change in two ways. First, voters should be allowed to place constitutional revisions on the ballot via initiative petitions. Second, a constitutional convention should assemble once every other decade, and a constitutional revision commission should convene in the alternate decades. California voters and the legislature could use these opportunities to assess and revise the constitution regularly and move statutory language from the constitution to the statutes without riddling the ballot with multiple constitutional amendments. Winnowing statutory language out of the constitution will reduce the need to amend the constitution in order to enact policy changes.[67] For cases in which the original initiative allows legislative amendments, moving such language from the constitution to the statutes would eliminate the need to submit future ballot questions to the voters.

As noted earlier, the California Constitution distinguishes between a constitutional amendment, which modifies a part of the constitution, and a constitutional revision, which makes more sweeping, comprehensive or structural changes to the constitution. In California, only the legislature can initiate the constitutional revision process, which it can do in one of three ways—by placing a revision on the ballot by a two-thirds vote; by establishing a constitutional revision commission by a simple majority and then placing its recommendations on the ballot by a two-thirds vote; or by establishing a constitutional convention by a two-thirds vote after which the convention itself can place a revision directly on the ballot by a simple majority vote. In all instances the proposed revisions must be ratified by the voters to become effective.

The people of California are currently not empowered to initiate a constitutional revision through any means. The state constitution provides that citizen ballot initiatives can only *amend* the constitution, not *revise* it—a provision that the courts have enforced in

[67] For instance, a ballot measure could move the constitutional language governing chiropractic and gillnet fishing practices to the statutes to eliminate the need to submit constitutional measures to the voters for even the smallest legislative changes on either subject.

the past.[68] And voters can neither call for a constitutional convention nor create a constitutional revision commission through the initiative process. This means that in certain instances the public may never be able to initiate certain reforms—for example, to change the state's form of governance to a unicameral legislative system—if the courts conclude that such reforms constitute constitutional revisions.

California has entrusted its citizens with the authority to amend the constitution through the initiative process. It also seems reasonable to enable them at least to initiate the process of revising the constitution by allowing them to place on the ballot a call for a constitutional convention. Voters have apparently not abused this process in other states that permit citizen-initiated convention calls.[69]

California entrusts its citizens with the authority to amend the constitution through the initiative process. It also seems reasonable to enable them at least to initiate the process of revising the constitution by allowing them to place constitutional convention calls on the ballot.

A possible convention call procedure for California might resemble the current constitutional initiative process. If petitioners for a constitutional convention gather valid signatures amounting to at least 8% of the last gubernatorial vote, the convention call would be placed on the next statewide ballot. Majority voter approval of the convention call initiative would establish a constitutional revision convention. If the convention proposed a constitutional revision, it would be placed on the next statewide ballot and would then have to be ratified by a simple majority vote.

To further increase the number of opportunities to review and revise the state constitution as a whole, a constitutional convention should be called automatically once every other decade, and a revision commission should be convened automatically in the alternate decades. Constitutional revision commissions, as opposed to conventions, would submit to the legislature their recommendations for how to revise the constitution. The legislature could either ignore the recommendations or place some or all of them on the ballot. As with revisions recommended by citizen-initiated conventions, all revisions from automatic conventions and commissions would require a simple majority vote of the people for passage.

Some may be reluctant to grant citizens the right to initiate constitutional conventions. They argue that such a right may be unnecessary—particularly since it has not been used in those states that permit citizen-initiated convention calls. They suggest that the California State Legislature historically has been willing and able to issue convention calls when the need arises. They also argue that it would be undesirable to submit convention calls to the same type of political campaigning that is currently conducted over initiative constitutional amendments. They worry that a constitutional convention, once convened, might engage in "issues of the moment" tinkering—especially if given a chance to revise the constitution once per decade—or reach out to address issues not initially considered to be within the scope of such a convention. And they argue that well-financed special interest groups might use citizen-initiated convention calls to further their own particular agendas.

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[68] See *McFadden v. Jordan,* 32 Cal. 2d 330 (1948).

[69] Citizens can call for constitutional conventions in three states. In Florida and North Dakota, the people have the power to call a convention by petition; in Montana, either the legislature *or* the people may call for a constitutional convention.

These fears, however, have not materialized in states that allow citizen-initiated convention calls. These citizens have demonstrated prudence toward constitutional conventions. Furthermore, numerous safeguards could be put in place to protect the integrity of California's constitution from conventions promoted by single-interest groups. For example, citizen-initiated convention calls could be required to limit their activities to a single or specified subject.

Discouraging Initiative Proponents from "Locking In" Their Policy Proposals with Future Special Vote Requirements

If an initiative seeks to impose a specified supermajority vote requirement on future statutory measures, it should itself be approved by the same special vote and go into effect the day after the election. If, for example, a tax initiative seeks to require that any future tax be adopted or repealed by a 75% supermajority of the voters, then that initiative itself must be approved by 75% of the voters to be effective.

It is inappropriate for initiative proponents to "lock in" their policy proposals by requiring a special vote for future statutory initiatives touching on the same subject. This practice allows a bare majority of voters to tie the hands of future larger majorities—an undemocratic and possibly unconstitutional practice. It also makes it difficult to reverse policies approved in the heat of the moment, such as requirements that future special taxes be approved by a two-thirds or three-fourths majority. These devices have thus far been used infrequently, but under present law it is only a matter of time before they become more common. The recommendation that special vote requirements go into effect the day after the election would prevent constitutional amendments from creating exceptions to this rule simultaneously with their passage.

A requirement that initiatives proposing a special vote for future amendments be approved by the same special vote is consistent with established constitutional norms. It not only respects the principle of "one person, one vote," but it also follows the norm in which a body of law, such as a constitution, that imposes a supermajority requirement for future amendments itself be ratified by a supermajority vote.

OTHER SPECIFIC REFORMS ARE UNNECESSARY OR UNDESIRABLE

In the quest to enhance the quality of decision making at the polls, the California Commission on Campaign Financing previously recommended imposing a supermajority vote requirement on measures seeking to add language to the constitution. Others suggest that the number of initiatives on the ballot should be limited so that voters may reasonably deliberate on each issue. Still others worry that placing initiatives on primary election ballots leads to unrepresentative voting and argue that initiatives should only appear on general election ballots. These proposed solutions would have adverse side effects that outweigh their desired benefits.

Imposing a Special Vote Requirement to Add Language to the Constitution

In 1992, the California Commission on Campaign Financing recommended that any constitutional initiative or legislative constitutional amendment adding new language to

the constitution should be required to receive the approval of 60% of those voting on the issue at any one election, or alternatively to be approved by a simple majority vote in two successive elections. Initiatives deleting language from the constitution would require only a simple majority vote in one election for passage. Under this recommendation, a constitutional amendment with strong popular support (over 60%) could be adopted immediately. If an amendment enjoyed simple majority support, the extra burden of ratification at two successive elections would preserve the wishes of the majority while encouraging a more deliberative process and discouraging those who seek to exploit the initiative's power.[70]

The commission did not wish to deprive a simple majority of voters from being able to change the constitution via the initiative. Rather, it sought to maintain an inconvenient barrier to constitutional change in order to minimize the likelihood that laws statutory in nature will be casually codified into the constitution and maximize the likelihood that such laws will be placed in the statute books. By allowing simple majority ratification in two successive elections, the commission argued, the right of the majority to amend the constitution would be preserved, while an inconvenience factor would be established to encourage more deliberative consideration by the voters and thus to maintain respect for the primacy of constitutional law.

Fifteen years later, this report concludes that making the constitution more difficult to amend would make it unnecessarily difficult to change policies that are already enshrined in the constitution. The constitution, for example, currently requires a percentage of all tax revenues in the general fund to go to education. Thus, for an otherwise statutory tax initiative to generate revenues exclusively for a noneducational purpose, it must amend the constitution to exempt those revenues from the education requirement. Propositions 86 (tobacco tax), 87 (oil tax), and 88 (education funding) in the November 2006 election faced this problem. All three initiatives called mainly for statutory changes but also had to amend the constitution so that all taxes levied by the measures could fund the programs and services in the manner intended by the initiative proponents. Because supermajority voter approval is so difficult to achieve, such measures would rarely, if ever, pass with such a rigorous vote requirement in place.

Initiative proponents have used the authority to amend the constitution prudently in recent years. This suggests that making the constitution harder to amend may be unnecessary and may create more problems than it resolves. Some language placed in the state constitution by initiatives clearly belongs in the statutes, such as gillnet fishing restrictions from Proposition 132 in 1990. But most constitutional initiatives on California ballots since 1990 have either dealt with truly constitutional issues, ranging from redistricting and legislative term limits to civil rights; or they have been both statutory and constitutional and only amended the constitution to make the statutory change constitutional, as in the cases of Propositions 86, 87 and 88.

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[70] Precisely how high to set a supermajority ratification threshold has been a matter of considerable debate. The supermajority threshold most commonly imposed on legislatures is a two-thirds vote. Judging from election results for California ballot propositions, however, a two-thirds ratification requirement for voter approval would be very difficult to obtain. The commission's objective in 1992 was to make the task of constitutional change through initiatives more difficult but not prohibitively arduous. A 60% supermajority for ratification appeared best suited to this objective.

Restricting the Number of Measures on the Ballot

In the November 1990 election, voters expressed strong dissatisfaction with the number and complexity of the measures on the ballot and voted most of them down. Such sentiments persist today. Long ballots may confuse or frustrate voters, but the problem may also be self-correcting. If anything, a longer ballot means that more important issues will generally receive more voter attention and the lesser issues will be left to those who are concerned about them. Apparently, voters are reasonably informed of pressing issues on even a long ballot and cast their votes accordingly, as discussed earlier in this chapter.

Lengthy ballots may mean that voters and the media will neglect some important issues because they are of less concern than more controversial initiatives. Limiting the number of measures on the ballot to solve this problem would do more harm than good simply because there is no reasonable way to decide which issues should appear on the ballot and which should not. For example, one way to limit the issues on the ballot would be an arbitrary "first-to-qualify" rule. But this would heavily favor ballot access for well-endowed special interest groups capable of affording expensive—and rapid—signature-gathering services. Another way would be to substantially raise the qualification signature threshold to eliminate some measures. Both proposals would favor wealthy organizations.

Restricting the number of ballot propositions may work well in other states—such as Illinois, where little initiative activity exists—but it would seriously impair California's initiative process.

Restricting the number of ballot propositions may work well in other states—such as Illinois, where little initiative activity exists—but it would seriously impair California's initiative process. First, the selection of issues placed before the voters would become arbitrary. The first initiatives to qualify for the ballot may not be the most important. Second, legislative propositions could easily dominate the ballot, since the legislature can place measures on the ballot easily and quickly. They, too, would have to be limited; yet restrictions on the number of legislative measures would mean that areas of public policy might go unattended. The legislature might have to decide, for instance, whether to delay funding for schools in order to place a bond measure for earthquake damage on the ballot. Third, and perhaps most importantly, well-financed special interest groups have mastered initiative qualification procedures. While it might take a grassroots organization the maximum 150 days to qualify an initiative for the ballot, others able to pay for professional petition circulators could qualify measures much more quickly. One 1998 Indian gaming initiative (Proposition 5) qualified for the ballot in a record-breaking 28 days at the cost of millions of dollars.[71] A numerical limit on initiatives might make the ballot the exclusive domain of those who could pay for the fastest signature gathering.

One reason why so many measures appear on California's ballot is that the legislature places them there, sometimes in response to special interest pleading and sometimes out of necessity. In some instances constitutional constraints force the legislature to place bond measures and other items on the state ballot. For example, 4 of the 13 measures on the November 2006 ballot were legislative bond measures. Perhaps the legislature should

[71] The campaigns for and against Proposition 5 also surpassed all previous initiative campaign expenditure records, spending a total of $100 million. Richard Maullin, "Passing California's Proposition 5; Indian Gaming Initiative," *Campaigns & Elections Magazine*, February 1999. (See Chapter 8 for more details on the influence of money on California's initiative process.)

consolidate some bond measures or seek alternative sources of financing. As Chapter 3 recommends, the legislature should be able to amend statutory initiative legislation under appropriate circumstances, thus avoiding the need to place all such amendments on the ballot.

Prohibiting Initiatives on Primary Election Ballots

The Center for Governmental Studies takes no strong position on the matter of placing initiatives on primary ballots. The California Constitution probably did not intend that initiatives be placed on primary election ballots, but it appears that no significant harm has resulted from this practice. Although a slight conservative bias is apparent among primary election voters, the ideological bias of primary election voters does not appear to disadvantage liberal issues enough to merit banning initiatives from primary election ballots. By allowing initiatives to appear on both primary and general election ballots, the general election ballot may be made shorter and less daunting to voters.

In March 2007, the legislature moved California's presidential primary to February 5, creating an extra primary election every four years in addition to the existing biannual June primary for state offices. The new presidential primary will yield a high voter turnout and thus be better suited for initiatives than non–presidential primary elections. Also, while a high-profile initiative on a non–presidential primary ballot may sometimes draw voters who would not usually turn out for such an election, voter turnout for non-presidential primaries will likely fall even further and become even less representative of the population as a whole. Moreover, three ballots in a single election year, each loaded with initiatives, may be seen by some as too disruptive of the state's policy-making process. If these negative effects materialize, then the legislature should consider amending the constitution to specify which ballots can and cannot contain propositions.

CONCLUSION

The state's two forms of democracy—representative and direct—are sometimes at odds with each other and must be carefully crafted to accommodate inevitable conflicts. Safeguards to preserve the integrity of the state constitution should be strengthened now that the higher threshold for signatures to qualify citizen-initiated changes to the constitution no longer serves as an adequate deterrent to constitutional amendments. To accomplish this goal, Californians should be allowed to propose constitutional revisions through the initiative process, a constitutional convention should take place once every other decade and a constitutional revision commission should be convened in the alternate decades. This recommendation would increase the number of opportunities to streamline the constitution and eventually reduce the need to amend it in the first place. The integrity of constitutional law should also be protected by preserving the fundamental precept of "one person, one vote." Any initiative proposal calling for a special vote for future amendments should be required to receive that same vote of approval for enactment. In an era in which voters are being asked to decide on an increasing number of important public policies, the rules of the game should be applied equally.

CHAPTER

6

Voter Information

The best defense of democracy is an informed electorate.

—Thomas Jefferson

A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. . . .

[A] people who mean to be their own governors must arm themselves with the power knowledge gives.

—James Madison

SUMMARY

Accurate and accessible voter information about ballot measures is essential to making voters a mature and responsible fourth branch of government. Californians can draw on a wide diversity of ballot initiative information each election season—so much that many do not know where to begin.

The secretary of state's Official Voter Information Guide, available both online and by mail, is neutral and generally trusted but often inaccessible, somewhat poorly organized and written in overly difficult language. Civic groups provide a wealth of nonpartisan voter information in formats that are more useful than what the secretary of state offers. Special interest groups also provide custom-made information for certain communities or audiences. And face-to-face exchanges of political information between friends and family remain important.

To give voters information in user-friendly and succinct formats, the secretary of state should provide them with pro and con statements about ballot measures in video on demand format over cable television and the Internet. To help voters understand the outcomes of their ballot decisions, the official ballot pamphlet should group conflicting propositions together and explain that, if both measures pass, the one receiving the most votes prevails. To give voters better cues about what a proposition would do, the ballot pamphlet should list endorsements and opposition for each ballot measure. To foster better understanding of the voter information provided, the secretary of state should target a twelfth-grade reading level in its written materials and redesign its ballot pamphlet

and website. Finally, so that voters can choose their preferred format of voter information, the secretary of state should offer to send them ballot pamphlets by e-mail instead of surface mail.

Access to voter information is an essential component of direct democracy. Critics and defenders of the initiative process alike agree that wise policy decisions require useful and accurate information. When voter information is inadequate or distorted, the quality of decision making suffers. Increases in the number of initiatives placed before voters in recent decades and the growing complexity of ballot initiative proposals have intensified the need for clear and digestible information.[1]

Technological advances have revolutionized the way people receive and process information. To equip voters to meet the demands of decision making in today's democracy, voter information must keep pace with new forms of digital content and distribution. Emerging technologies, such as the Internet, cable and video on demand, have opened opportunities for voters to engage in civic and political discourse, and they have influenced the kind of information that voters demand. Although certain segments of the population may want all available information on ballot initiatives, most people prefer information that is clear and concise. Provided that they trust the source, voters will gravitate toward the most easily obtainable information, whatever the source or medium of distribution may be. Convenience wins out over comprehensiveness.

This chapter evaluates the current state of voter information on California ballot measures and the impact technological advancements have had on its content, dissemination and usage. The discussion first focuses on governmental sources of information including the secretary of state's ballot pamphlet—its structure, design, official wording and online content. This chapter also provides an overview of additional sources from which California voters obtain ballot initiative information, including a growing number of civic and community organizations that provide voter information to supplement official sources.

VOTERS OBTAIN INFORMATION FROM A VARIETY OF SOURCES AND IN A NUMBER OF FORMATS

A useful way to evaluate available voter information in California is to identify it by source and medium. Traditionally, California voters draw on six primary resources in making initiative decisions:

1. Government-sponsored information
2. Candidates and ballot measure committees

[1] In a 2006 CGS-sponsored statewide poll of likely voters, over 60% of respondents reported that they felt that ballot initiatives were "often confusing" or "deceptive."

3. Nonpartisan civic groups
4. Special interest groups
5. News media coverage
6. Friends, family and other trusted sources

Voters also obtain this information through a growing variety of different media ranging from the Internet to more traditional modes, such as mailers and events (an overview appears in Table 6.1).

This chapter evaluates these sources and their relationship to one another. It examines government-sponsored voter information and information provided by nonpartisan civic groups and interest groups. Chapter 7 continues the discussion of voter information with an in-depth exploration of paid political advertising and how the news media covers elections.

TABLE 6.1 Sources of Voter Information in the Media

	Media Distribution					
Information Sources	**Print**	**TV & Radio**	**Web**	**Events**	**Emerging Technology**	**Other Media**
Government	Ballot Pamphlet		Secretary of State Website			
Candidates & Ballot Measure Committees	Mailers, Newspapers, Ads & Campaign Literature	Commercials	Websites, E-mails & Campaign Blogs	Rallies, Speaking Engagements & Debates	YouTube	Robo Calls
Nonpartisan Civic Groups	Easy Voter Guide	Video Voter, Interviews & Voter Minutes	Videovoter.org & Smartvoter.org	Voter Debates & Forums	Podcasts	Video Voter on VOD Time Warner/ Comcast
Special Interest Groups	Slate Mailers & Newspaper Ads	Commercials	Websites, E-mails & Blogs	Debates, Press Conferences, Door-to-Door Canvassing & Rallies	Podcasts	Robo Calls
News	Newspaper & Magazine Articles & Editorials	News Broadcast & News Magazines	News Websites, Blogs, Chat Rooms & Message Boards	News-Sponsored Debates	Podcasts	
Friends & Family			Personal Blogs, Chat Rooms & E-mail	Coffee Klatches	Text Messages	

THE OFFICIAL CALIFORNIA BALLOT PAMPHLET REMAINS A TRUSTED AND VALUED SOURCE OF VOTER INFORMATION

The ballot pamphlet remains the only source of unbiased voter information that reaches all California voters. Research shows that the public uses the pamphlet and is satisfied with the information provided. In a November 2006 Public Policy Institute of California (PPIC) poll, 42% of respondents found the official voter information guide to be the most helpful source of information. In a 2005 PPIC poll, 31% of voters cited the ballot pamphlet as the most helpful available information source. The same poll indicated that 40% were very satisfied and 43% were somewhat satisfied with the information they received from their chosen source of voter information. This research suggests that people use the ballot pamphlet and are generally satisfied with the information it provides. Improving the ballot pamphlet will allow the state to reach even more voters with increasingly accurate and understandable information.

Importance of Information, Education and Voting Behavior

Voting behavior and use of the ballot pamphlet rests heavily on educational background. According to the 2004 U.S. census, less than half of eligible voters who have not graduated from high school are registered, and less than 30% of these registered voters actually vote. In contrast, nearly 70% of individuals with advanced degrees vote. The California Voter Foundation's 2004 California Voter Participation Survey found that over 40% of California nonvoters are high school graduates or less, while only 16% of nonvoters have a college degree. Additionally, half of frequent voters have a college degree or more, and frequent voters are nearly four times more likely to hold a postgraduate degree than nonvoters.

Infrequent and nonvoters cite a lack of information as a primary reason for not voting.

Infrequent voters and nonvoters cite a lack of information as a primary reason for not voting.[2] Many citizens say that the ballot pamphlet is too difficult to understand or not available in their own language. Despite the availability of California voter information in seven different languages,[3] many cite these problems as two of the greatest barriers to voting. This suggests that less educated voters seek relevant information but are frustrated by its complexity or lack of easy availability in a potential voter's fluent language. A simpler presentation of information would increase voter understanding, as would making the translations of the official ballot pamphlet into different languages more readily available. The state, in releasing a ballot pamphlet that may be difficult to understand for the average voter, and in burying the translated versions of the ballot pamphlet on its Website, is perpetuating the problem of the non-English-speaking or less educated citizens feeling that they are unequipped to vote.

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[2] California Voter Foundation, *2004 California Voter Participation Survey*, March 2005.

[3] The California Secretary of State's ballot pamphlet is available in English, Spanish, Chinese, Japanese, Tagalog, Korean and Vietnamese.

Writing California's Ballot Pamphlet

In California, the secretary of state prepares the ballot pamphlet and distributes it by mail to the households of all registered voters.[4] Copies are also distributed to all county and city clerks, legislators, public libraries, public high schools, and public colleges and universities. California invests millions of dollars in printing and mailing the pamphlets each election. The June 2006 primary ballot pamphlet was 63 pages long and cost approximately $5.9 million to produce and distribute. The November 2006 general election pamphlet was 192 pages long and cost $13.5 million. At a cost per page, that's approximately $94,000 and $73,000 per page respectively. Such widespread distribution and extensive investment by the state makes the ballot pamphlet a major source of voter information. It also suggests that the state would benefit from finding less costly forms of distribution, such as the Internet.

The November 2006 general election voter information pamphlet was 192 pages long and cost $13.5 million to produce and distribute.

State law clearly dictates the structure of California's ballot pamphlet.[5] Each measure is allotted four pages for all content other than the text of the measure itself (which appears at the back of the pamphlet). The first page for each measure includes the official caption, proposition number and summary, all prepared by the attorney general. If the measure originates from the legislature, the numbers of votes cast for and against the bill are listed under the summary. An analysis by the legislative analyst follows and extends, if necessary, onto the second page. It includes a brief discussion of relevant background information, an explanation of what the proposal seeks to accomplish and a fiscal impact statement. The third and fourth pages for each measure are reserved for pro and con arguments facing each other on opposing pages, with rebuttals placed at the bottom of the pages.

Ballot measures appear in the pamphlet in the same order that they are slated to appear on the ballot. Legislative measures come first, followed by initiatives and referenda in the order in which they qualified for the ballot.[6] The legislature often postpones the final deadline for submission of legislative measures to the ballot (but not initiatives) in order to accommodate last-minute emergency bills. Unless the legislature puts their measures first—which is now common—these measures appear last on the ballot and in the ballot pamphlet; or, if the legislature places them on the ballot after the ballot pamphlet is printed, they appear in a supplemental ballot pamphlet.

Attempts to Achieve Plain, Simple and Accurate Language in California's Ballot Pamphlet

California statutes instruct the legislative analyst to write an impartial analysis of each initiative measure in "clear and concise terms" comprehensible to the average voter.[7]

[4] If counties do not furnish data processing information of names and addresses of registered voters to the secretary of state, they are responsible for distributing the pamphlet themselves. Cal. Elec. Code §§ 9094, 9095 (2007).

[5] Cal. Elec. Code § 9086 (2007).

[6] Cal. Elec. Code § 9089 (2007).

[7] Cal. Elec. Code § 9087 (2007). Oklahoma and Oregon impose readability standards on official ballot titles and summaries. Oklahoma requires that the official title and summary be written at the 8th-grade comprehension level. Oregon permits the secretary of state to determine an appropriate reading level standard for the official title.

Readability requirements apply only to the legislative analyst's portion of the pamphlet. To comply with this provision, the legislative analyst can request assistance from professional writers or educational specialists who serve on a readability committee, as discussed below.

Although the legislative analyst strives to prepare an easily comprehensible analysis, the material usually reads at a higher level when the commonly used Flesch-Kincaid formula is applied. Flesch-Kincaid uses the number of syllables per 100 words and the average number of words per sentence to assess the "readability" of a text. The legislative analyst's portion of the 2006 ballot pamphlet reads at a 12.9 grade level.[8] This is almost five full grades higher than the average Californian's reading level, leaving many Californians without a comprehensible, neutral source of voter information.

Readability Committee

There is little argument that the California ballot pamphlet reads at an advanced level, yet rewriting it to achieve a lower Flesch-Kincaid score is often not possible. Words such as *California* and *legislature* alone raise the score beyond what Flesch-Kincaid considers the average reader's ability. Furthermore, the legislative analyst's office applies two criteria to determine the language of its analyses: accuracy and simplicity—and accuracy is given higher priority. If simplified language affects the description's accuracy, it is rejected.

In compliance with California law, a readability committee helps the legislative analyst achieve readability in its portion of the ballot pamphlet.[9] It is composed of five members, none of whom receives payment other than reimbursement for expenses. One member must be a specialist in education, one must be bilingual and one must be a professional writer. The legislative analyst appoints all of these members. For each statewide election, the committee reviews the ballot measure analyses prepared by the legislative analyst.

Availability of Expedited Judicial Review

Although California has no expedited review process to challenge the accuracy of the official caption and summary during circulation, it does provide for quick judicial review of the ballot pamphlet after initiatives have qualified. The secretary of state makes a draft available for public inspection at least 20 days before the pamphlet goes to the printer. Any voter may seek a writ of mandate in Sacramento County ordering changes or deletions of obviously false or misleading material in any part of the pamphlet. The court can order amendments "only upon clear and convincing proof" of falsehoods. The court order will be valid only if it will not interfere with the printing and distribution of the pamphlet.[10]

Challenges are made almost every year to every section of the pamphlet, especially the argument portion. Some judges will alter the pamphlet, while others will let texts stand as

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[8] Based on a conversation with Mac Taylor, California Legislative Analyst Office, January 4, 2007.
[9] Cal. Elec. Code § 9087 (2007).
[10] Cal. Gov't Code § 9092 (2007).

they were originally written. When adjustments to the analyses are made, they typically involve nonsubstantive word or phrase changes.[11]

Pro and Con Arguments in the Ballot Pamphlet

The printed arguments for and against an initiative, which appear in the ballot pamphlet, are among the most readable and useful sources of information available to voters. They can provide insights that more neutral attorney general or legislative analyst summaries may avoid. For practical reasons, however, and to screen out frivolous arguments, other states have devised a variety of means to limit the number of pro and con arguments in their ballot pamphlets or state-sponsored newspaper advertisements. These include fees, selection procedures and outright prohibition of arguments.

Procedures for Selecting Ballot Arguments in California

Most states that publish pro and con arguments authorize an administrative agency or official—frequently the secretary of state—to determine which arguments to print. California's method of selecting arguments is typical of that used in other states. State law prioritizes who may write the arguments: legislators for measures that originated in the legislature, proponents who filed initiative petitions, bona fide associations of citizens and, finally, individual voters.[12] The primary proponent and opponent are each given 500 words to state their argument. If they choose, the allotted space can be subdivided among other persons wishing to print an argument. The secretary of state usually assembles a staff of four to six people to discuss the selection of arguments. The secretary of state is empowered to make the final determinations.

For ballot measures originating from the legislature, the selection rules are clear. The author of the measure and two persons appointed by the author have first priority in writing the argument in favor.[13] If the legislature did not adopt the measure unanimously, one member of each house who voted against it is appointed by the presiding officers to write the opposing argument.[14] In the absence of any argument, the secretary of state issues a press release notifying the public that applications for ballot arguments are being accepted. The secretary of state is free to select the final argument in accordance with the priority guidelines.

The process of selecting which ballot arguments for and against legislative measures will appear in the official voter information guide can be manipulated.

Although seemingly a fair system, the process of selecting ballot arguments for and against legislative measures can be manipulated. Such was the case in 2000 with Proposition 34, a controversial legislative measure presented to overturn much of Proposition 208, a 1996 reform package limiting political campaign contributions and expenditures. The legislature wrote Proposition 34 to loosen the restrictions on campaign financing and lessen penalties for campaign violations. Secretary of State Bill Jones refused to accept strong opposing

[11] Conversation with Mac Taylor, California Legislative Analyst Office, February 28, 2007.
[12] Cal. Elec. Code § 9041 (2007); Cal. Elec. Code § 9067 (2007).
[13] Cal. Elec. Code § 9041 (2007).
[14] Cal. Elec. Code §§ 9041, 9042 (2007).

arguments from politicians such as Senator Tom Hayden and nonpartisan groups such as the League of Women Voters and Common Cause. Without these arguments, the ballot pamphlet did not fairly represent the actual opposition present against the bill. A legal challenge failed, the opposition's strongest arguments remained absent from the ballot pamphlet, and Proposition 34 passed. Some feel the outcome might have been different had the opposition's arguments been included. This deliberate skewing of argumentation demonstrates the importance of balanced and unbiased information in the ballot pamphlet.

For initiative proposals, the sponsor who filed the petition has first priority in writing the argument in favor. If the proponent declines, the opportunity is open to the public following the same criteria used in selecting the opposing argument. Bona fide associations are given priority over individual voters. In choosing between competing arguments, the secretary of state does not examine the persuasiveness of the argument but rather the degree of public recognition enjoyed by the association or individual. Highly recognized organizations, such as the League of Women Voters, tend to be selected over lesser-known groups or individuals.

Charging Fees for Printing Arguments

Aside from the ballot argument selection process described here, California does not have a means for citizens and organizations to state publicly their support of or opposition to ballot measures in the pamphlet. Some other states, by contrast, charge proponents and opponents a fee to print their ballot arguments. Fees can range from as low as $100 to as high as $1,500. Idaho at one time charged high fees for printing ballot arguments, but after opponents of one measure were unable to afford the cost of printing an opposition argument in the pamphlet, the state ended its fee requirement and turned to other screening procedures. The possible chilling effect on free speech for those unable to pay is apparent and may pose serious constitutional questions.

Most states that assess a fee for publishing pro and con arguments also provide an alternative method of access. In Oregon, for instance, proponents and opponents may either purchase pamphlet space for a ballot argument or submit a petition with 1,000 signatures to obtain the space without paying a fee.[15] The secretary of state determines the amount of allotted space.

Federal constitutional law may mandate such a nonfinancial alternative for getting a ballot argument published in the pamphlet. Several states used to require candidates to pay a filing fee in order to run for office. The U.S. Supreme Court, however, ruled that candidates must be provided a free alternative means of access to the ballot, such as gathering signatures.[16] Following this logic, a California court in 1986 ruled that a San Francisco requirement of fees to publish arguments in the voters' handbook denied equal access to a limited public forum and therefore violated state and federal guarantees of equal protection.[17]

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[15] Or. Rev. Stats. § 251.255 (2005).

[16] *Lubin v. Panish,* 415 U.S. 709 (1974).

[17] *Gebert v. Patterson,* 186 Cal. App. 3d 868 (1986). The case involved the city and county of San Francisco.

In San Francisco, the principal proponent and opponent file an official argument and rebuttal that is published at no charge immediately after the ballot analysis. An unlimited number of additional arguments may be printed at the back of the pamphlet by any voter who pays $200 plus $2.00 per word or, alternatively, collects signatures of registered voters with each signature reducing the cost by $0.50.[18]

Oregon has no limit on how many ballot arguments may be published, making it unique among initiative states. Oregon has completely barred any administrative agency from selecting which arguments will be published and has instead turned entirely toward the fee/petition process to screen the arguments. An imbalance in the number of arguments for and against a measure is common. In 2006, for example, a proposal regarding the protection of private property from condemnation showed fourteen arguments in favor and only two in opposition. All purchased space to print their arguments.

THE CALIFORNIA SECRETARY OF STATE'S WEBSITE NEEDS TO BE IMPROVED

Content

The California Secretary of State's Website (www.ss.ca.gov) contains useful information to help the public make ballot decisions. A clear link exists on the "Welcome" page leading users to "Elections and Voter Information." Major links are denoted by a written explanation and a relevant image to increase understanding. The links include voter registration, voter services, ballot regulations, initiative information and campaign finance. A list of links on the side of the page leads to additional pages full of voter information. Other sections of the Website include information on the political candidates, the political process and links to further resources.

In the case of ballot initiatives, the Website offers a page that contains summaries and links to measures that have qualified for the next ballot, as well as a list of initiatives that recently failed to qualify for the ballot, were withdrawn from circulation, are currently in circulation or are pending at the attorney general's office. Recent updates are marked with a colorful "new" symbol. On other pages, the Website includes a history of initiatives, recent election results and reports from the previous ten years of ballot initiatives.

The "Voter Information" link leads to information about absentee voting, the online version of the current ballot pamphlet and an archive of all ballot pamphlets from the previous ten years. This section of the Website also includes information about voters' rights, multilingual services and explanations of some of the complicated or new elements of the political process, such as the Electoral College and voting systems.

Website Usability

The secretary of state's Website contains an enormous amount of information, but it is not all easily accessible—especially for voters whose primary language is not English.

[18] Department of Elections of the City and County of San Francisco, "Guide to Submitting City Ballot Arguments in Favor of or Against City Measures for Publication in the City and County of San Francisco Voter Information Pamphlet," for the consolidated general election on November 7, 2006.

Though the information is organized carefully by topic, date and relevance to the average voter, a user with a specific question may be unable to locate the answer due to the vast amount of information on the Website. For example, someone searching for information on a current ballot initiative might click on the "Initiatives" link, but this link leads to a history of ballot initiatives and the procedural process for submitting a new initiative proposal. To find the desired information, the user must click through two further links. Such navigation problems are compounded by the fact that the Website uses difficult language that may be hard for the average voter to understand. The Website needs further simplification to facilitate information gathering. The problem is even worse for non-English-speaking citizens who want official voter information, since they must somehow find their way through three different web pages—all in English—to arrive at a page that provides the ballot pamphlet in multiple languages.

The secretary of state's Website contains an enormous amount of information, but it is not all easily accessible—especially for voters whose primary language is not English.

Despite its problems, there are aspects of the Website that contribute to its relative usability. The color scheme is simple and straightforward. Very few visual stimuli are distracting to readers. The Website also allows users to contact the secretary of state's office through telephone, mail and an electronic form, providing the public with a way to ask questions about information found on the site.

SUGGESTED CHANGES TO IMPROVE THE SECRETARY OF STATE'S WEBSITE

Despite the abundance of information found on the secretary of state's Website, the navigation system is difficult to understand, and specific information is hard to find. The Website should be simplified to enhance the accessibility of certain information, which can be accomplished by consolidating links or adding a search function to the main "Voter Information" page. Links to non-English content should be provided on the home page so that non-English-speaking citizens can find the information they need without sorting through a Website in an unfamiliar language.

NONPARTISAN CIVIC-SPONSORED EASY VOTER GUIDE IS USEFUL TO VOTERS

In addition to the official ballot pamphlet released by the secretary of state's office, the public also has access to nonpartisan political information through independent publications such as the Easy Voter Guide, which is available in both print and online formats.[19] This guide provides detailed information in an easily accessible, comparative and straightforward way. The guide also encourages readers to vote on election day.

The Easy Voter Guide is simple to read. The first two pages provide an outline of key issues covered in the guide, important dates to remember in the election process and a

[19] The Easy Voter Guide is sponsored by the League of Women Voters, the California State Library, the James Irvine Foundation, the San Francisco Foundation and the Office of the California Secretary of State.

list of Internet links to other nonpartisan guides. The political information in the guide is user friendly. Simple language and formats encourage candidate and ballot measure comparisons. Each measure has its own page on the Website, which includes brief summaries of the current state of affairs and the changes that would occur if the initiative passed. Lastly, it includes a short description of what the proponents and opponents say about the measure.

Understanding ballot initiatives and propositions is often the most difficult part of the voting process for the public. The Easy Voter Guide addresses this problem with simple language and clear organization. The guide is easy to read because it is well designed. Its red, white and blue color scheme evokes a sense of patriotism, possibly making the user feel more included in the political process and more interested in voting. The use of color also provides visual interest and helps mark sections within the voter guide, aiding focus and minimizing confusion. The guide shows pictures of everyday Americans and the slogan, "It's your future. Vote for it!" This slogan suggests that one individual can make a difference, that political decisions affect everyone and that readers should partake in the political process.

ONLINE AND NEW TECHNOLOGY SOURCES OF NONPARTISAN CIVIC VOTER INFORMATION ARE THE LATEST WAYS TO REACH VOTERS

The growth of digital communications and the expansion of the Internet have changed how people communicate and seek information. The number of individuals using the Internet for voting information has increased with each election. In the 2006 midterm election, 15% of adults listed the Internet as their primary source of election information, doubling the number from the 2002 midterm election.[20] Researchers have found that the Internet meets the demand for information in a convenient and low-cost format, while also providing more information than traditional broadcast media.[21]

While voters can now easily access a great amount of information, many are not doing so.

While voters can now easily access a great amount of information, many are not doing so. Those who search for political information online are the same people who seek it through other media.[22] They are highly motivated, interested voters who use many resources to find their information. A greater effort must be made both to offer easily accessible information and to market it to voters who would not otherwise seek it out or know that it is available.

A few groups offer cutting edge nonpartisan voter information resources:

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[20] Lee Rainey and John Horrigan, "Election 2006 Online," Internet & American Life Project of the Pew Research Center, January 17, 2007.

[21] C. Tolbert and R. McNeal, "Unraveling the Effects of the Internet on Political Participation," *Political Research Quarterly* 56, no. 2 (2003): 183–184.

[22] According to the 2004 California Voter Foundation Participation Survey, the Internet was only moderately influential for 23% of infrequent voters, and only 14% of infrequent voters cite the Internet as a source of information regarding current events.

Video Voter

Video Voter (www.videovoter.org) is a CGS program designed to help states and communities produce nonpartisan voter information in television, video and on-demand formats. Although most people in the United States cite television as their primary source of political information, local channels often do not cover local elections extensively. When they do, they focus on candidates instead of ballot initiatives because running stories on personalities produces higher ratings. Unbiased information about ballot initiatives is often lacking. Additionally, television viewers are inundated with political advertisements that too often misconstrue or misrepresent issues and focus on character rather than substance.

Video Voter works with local governments, cable providers and television stations to provide free air time to candidates and ballot measures to present their views directly to the public. Videos can be produced in several formats, including candidate statements, interviews, roundtable forums and voter minutes. These formats allow voters to view issues in a number of different ways and ensure overall balanced media access for all candidates and ideas.

Video Voter candidate and ballot measure statements are also available through multiple media, including the Internet, cable TV, video on demand and public television. U.S. voters increasingly use television, video on demand and the Internet as sources of political information. Video Voter allows voters to access that information in convenient, familiar formats.

New York City successfully used Video Voter for its 2005 municipal elections. In California, cable TV systems gave all candidates for statewide office during the 2006 general election the opportunity to make statements and be interviewed about their candidacies. Some Video Voter projects are produced by local governments as in New York City, Los Angeles and Santa Monica. Others are produced independently, such as for the California Free Airtime Project for the 2006 statewide election, which was created by the California Channel in conjunction with the League of Women Voters and CGS.

Voter Minutes are another successful Video Voter Project. Voter Minutes are one- to two-minute videos on each ballot measure. Each video outlines the major points of a measure, identifies the official proponents and opponents and describes what a yes or no vote means. These short, easily-digestible and e-mail-able segments have succeeded by simplifying ballot measures and making them accessible to everyday Californians.

Smart Voter

Smart Voter (www.smartvoter.org), an online resource supported by the California League of Women Voters, provides nonpartisan state and community information for elections. In addition to summarizing the information provided on its Website, Smart Voter offers all state and local candidates and ballot measure committees free web space. This increases the amount of ballot initiative information available to the public. In an effort to maximize access to voter information, Smart Voter also provides Internet links through Internet search engines to other voter information Websites. Smart Voter contains all the information included in unofficial publications such as the Easy Voter Guide, thereby reaching voters who want up-to-the-minute updates and information presented in an accessible format.

HealthVote.org

The California HealthCare Foundation and CGS created HealthVote.org (www.healthvote.org) in 2004 to track California's health-related propositions, both past and present, on a single Website.[23] The site offers nonpartisan campaign finance analysis and independent reviews and spending estimates of television advertising. Originally launched as a resource for journalists covering statewide ballot measures in California, HealthVote.org also includes in-depth background information, official ballot summaries and links to news, editorials and statewide poll results.

CalVoter

The California Online Voter Guide (www.calvoter.org) is a clearinghouse of election information and Web links produced by the California Voter Foundation. The site offers engaging and easy-to-understand voter information, categorized into topics such as "Deadlines," "What's on the Ballot," "Sample Ballots" and "Additional Election Resources." CalVoter is known for its creativity in capturing audience attention. For the 2006 election CalVoter even produced "The Proposition Song," set to a traditional folk melody and written by CalVoter president Kim Alexander. The song and accompanying music video briefly explained the 13 initiatives on the 2006 California ballot in an amusing and entertaining way. The video of the song was featured on the CalVoter site and hosted on YouTube.com, where it was viewed over 8,800 times.

Democracy Network

The Democracy Network, or "DNet" (www.dnet.org), first launched in 1994, was an interactive Website designed to improve the quality and quantity of voter information and create a more educated and involved electorate. The site was created by CGS and was subsequently operated by the League of Women Voters Education Fund. It reached over 100 media outlets, including AOL, MSN, *USA Today*, Yahoo!, C-SPAN, the *New York Times* and the *Los Angeles Times*. From 2000 through 2002, DNet posted information on over 51,700 candidates in 16,180 elections, as well as information on 1,400 ballot measures. In the 2002 election, DNet covered 25,000 candidates and 630 ballot measures, received 68 million hits and 20 million page views and had average visitor sessions of over 17 minutes in length.

SPECIAL INTEREST GROUPS PROVIDE CUES TO VOTERS

Many community groups and organizations distribute voter pamphlets to inform and guide their members on how to vote on ballot initiatives and also to further their organizational objectives. An example of such a guide is the *Mobilize the Immigrant Vote 2006*

[23] For the 2006 election, HealthVote.org tracked Proposition 85 (waiting period & parental notification) and Proposition 86 (tobacco tax), both of which failed to pass.

California Campaign.[24] Such guides provide much of the same logistical voter information as their nonpartisan counterparts, including voting sites, dates and times for voting and summarized outlines of ballot initiatives, but they go a step further to outline the effects a proposition will have on the target community. The *Immigrant Voter* guide, for example, described Proposition 88 in 2006, which called for increased taxes to improve education, as falling short of helping immigrant communities. This kind of custom-made information is important to many voters. It is quicker and easier for members to rely on their recommendations as a shortcut to making complex decisions.

People use these recommendations to make sense of the often overwhelming process of voting.[25] By finding voter information from a community group aligned with their own interests and priorities, voters can participate in the electoral process without spending as much time to inform themselves and without concern that they are voting against their own interests.

ONLINE AND NEW TECHNOLOGY RESOURCES ARE EVOLVING

GRASSROOTS EFFORTS ON THE WEB

Groups that fuse grassroots campaigning and organizing strategies ("netroots") began using the Internet to empower campaigns beyond use of traditional Websites. Such new approaches provide modern and easily accessible ways to participate in the political process, allowing citizens to engage each other in conversation regarding ballot initiatives. MoveOn.org, for example, involves liberal Americans in the political process by facilitating civic engagement, political action and fund-raising. Meetup.com connects people who share their interests or causes in order to form lasting, influential community groups that meet face-to-face on a regular basis. Unlike most grassroots networking Websites, Meetup.com attracts liberals and conservatives alike. Searches in the New York and Los Angeles areas show that the Website hosts equivalent numbers of groups for Democrats and Republicans. These and other sites boast millions of participating members and wield tremendous influence in elections.

"Netroots" groups, such as MoveOn.org and Meetup.com, boast millions of participating members and wield tremendous influence in elections.

Netroots Websites all operate in similar ways. They outline current campaigns, describe previous success stories and delineate ways in which members of the public can get involved. As these sites hope to involve average Americans, their language is straightforward and easy to understand. Users can also readily forward featured articles and advertisements to friends. These sites bring people together through personal empowerment, interactive connections and political activism.

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[24] Funded by San Francisco Foundation, the Akonadi Foundation, the McKay Foundation, the Tides Foundation, the Color of Democracy Fund, the Firedoll Foundation, FACT and other organizational members.

[25] Michael X. Delli Carpini and Scott Keeter, *What Americans Know about Politics and Why It Matters* (New Haven, Conn.: Yale University Press, 1997).

While netroots Websites are generally used for partisan purposes, nonpartisan voter information sources can learn from these online political powerhouses. Netroots Websites generate interest and involvement in the political process by providing information and facilitating connections between people. The secretary of state's Website could expand its reach by offering tell-a-friend functionality and other opportunities for visitors to connect with one another. To ensure that the information exchange is relevant and factual, an informed member of state staff should carefully oversee these features.

BLOGS

Blogging allows users to present information, ideas and political commentary in a journal format. Blogs are primarily textual but can include photographs, videos and other media. Blogging servers, such as livejournal.com and blogspot.com, provide free web space to the public and connections to official Websites for political candidates and ballot measure campaigns. For example, the Republican National Committee maintains a blog on its Website (www.gop.com), which includes information and analysis written from a conservative perspective. Other private conservative blogs criticize liberal policies and liberal netroots movements and provide ideas and support for conservative candidates and ideals.

Blogs are easily accessible to the public and maintained on thousands of topics and perspectives. This variety makes blogging a powerful force in the dissemination of partisan information. Many candidates and presidential campaigns have incorporated blogs into their Websites. Senator John McCain's Website, for example, includes a blog answering questions and providing information about his activities in Washington, as well as listing links to other conservative blogs.

Blogs can provide information in an informal, easy-to-understand and frequently updated format. Bloggers create relationships with other bloggers and blog readers, extending the network of information for visitors. Blogs also allow the public to become involved in these online communities through comments, questions or blogs of their own.

FACE-TO-FACE EXCHANGES OF POLITICAL INFORMATION CONTINUE TO BE IMPORTANT

In light of declining trust in and reliance on the mainstream media and official political information, citizens turn to trusted friends and family for political information and conversation.

While media sources remain important, human interaction and word of mouth continue as essential means for distributing and interpreting political information. According to a 2004 California Voter Foundation survey, 65% of infrequent voters rate conversations with family as equal in influence to their local newspapers, and 59% list conversations with friends as important information sources. In light of the low level of trust in and reliance on the mainstream media and official political information—29% of infrequent voters indicated that election information is untrustworthy—citizens turn to trusted friends and family for political information and conversation. This trend is also apparent through the growth of netroots Websites and blogs.

RECOMMENDATIONS FOR IMPROVING THE STATE-SPONSORED BALLOT PAMPHLET

California has taken steps to improve the ballot pamphlet since the publication of the first edition of *Democracy by Initiative* in 1992. The secretary of state adopted the recommendation that the ballot pamphlet be printed in two colors. This has allowed readers to focus more easily on particular sections of text. Additionally, the ballot pamphlet now includes a tear-out ballot measure summary that briefly summarizes each ballot measure, pro and con arguments, the consequences of a yes or no vote and resources for more information. This improvement summarizes complicated information in a simple, digestible format and helps voters understand the more detailed version of the ballot measure.

Additional improvements would increase voter understanding of the ballot measure information provided by the state. A variety of changes should be made to the secretary of state's ballot pamphlet.

Group Conflicting Propositions in the Ballot Pamphlet and on the Ballot

Voters should be informed of the similarities and differences between competing initiatives. The discussions of these measures should be bundled together in the ballot pamphlet. A chart should be included to compare and contrast key aspects of competing initiatives. The chart should specifically identify opposing provisions and highlight their conflicting aspects in bold type or, preferably, in red ink.

Current state law governing the order in which initiatives appear on the ballot (and hence in the ballot pamphlet) should be amended to grant the secretary of state and attorney general some discretion in determining that order. To improve the clarity of the ballot pamphlet and the ballot, the secretary of state should be permitted to group together any measures that deal with similar subjects, including measures addressing similar subjects which do not substantially conflict.

The attorney general should be further empowered to determine which measures are sufficiently in conflict with each other that the courts might invalidate one or the other. The attorney general should be able to group such measures together in the ballot pamphlet and on the ballot and accompany them with a warning stating that, if voters approve the competing measures, only the measure receiving the most votes may go into effect. The attorney general should make this determination at an early enough date to allow for expedited court review of the decision and the appropriate organization and printing of the ballot pamphlet. To reduce the political considerations of the decision, the attorney general, rather than the legislature, should decide which ballot propositions—both initiatives and legislative measures—are so substantially in conflict as to invoke the "all-or-nothing" standard.

Two different types of warning labels for measures grouped together on the ballot may be necessary. One would state that, of two conflicting statutory propositions, the approved measure receiving the most affirmative votes may prevail in specified or in all aspects. A second warning would state that, if conflicting statutory and constitutional measures are both approved, the constitutional amendment will go into effect regardless of which measure received more votes.

KEEP TEXTS AT THE BACK OF THE PAMPHLET

Ballot measures are often written in legal language that many voters find intimidating. In addition, the texts of statutory changes or additions are often superimposed on the original statutes being amended, sections of existing statutes proposed for amendment or repeal are crossed out, and new provisions are printed in italic type. Readers may be less intimidated by these formidable texts if they are not printed next to the summaries and arguments but moved to the back of the pamphlet.[26] In 1990, the secretary of state adopted this reform and the legislature subsequently passed legislation mandating that the text be placed at the back of the pamphlet. This should be continued. Highlighting changes in existing laws with red ink rather than strikeout and italics would also add clarity to the ballot pamphlet.

Ballot measures are often written in legal language that many voters find intimidating.

ADD A SEPARATE SECTION FOR ENDORSEMENTS

The state should allow increased use of endorsements in the ballot pamphlet. This report recommends that the secretary of state reserve for proponents and opponents up to one-half of a page each in the ballot pamphlet in side-by-side vertical columns that could be used solely for endorsements—a listing of the names of the individuals and organizations supporting the proponents' and opponents' positions. This would enable voters to align themselves with others whose opinions they respect, or at least to receive cues as to which positions might be closest to their own.

Reliance on endorsements is an often-used and valuable practice in decision making, particularly on complicated questions. Decisions such as to which doctor or auto mechanic to choose, or even which household products to purchase, are often heavily influenced by the opinions of friends or others who have relevant experience and whose opinions the decision maker trusts. In the political arena, legislators are frequently unable to study carefully the texts of the thousands of bills on which they must vote. They therefore turn to the opinions of their staff and other legislators whose judgment they respect—authors of bills, committee chairs or individual legislators of valued perspective, political persuasion or judgment. Voters confronting ballot measures also turn to endorsements to help them decide how to vote, particularly when those measures are complex and have received little media attention. Because voters rely on and value endorsements, they should be encouraged as an aid to informed decision making.

Currently, spokespersons for and against individual ballot measures are given a limited amount of ballot pamphlet space to present their arguments. They can use this space to list the names of the supporters of their respective positions, but this reduces the space allotted to them for their substantive arguments. As a result, most proponents and opponents devote the bulk of their space to substantive arguments and list only two or three supporters, typically as signatories to their arguments. But the use of endorsements is so important, particularly in light of increasing numbers of complex initiatives, that additional space should be reserved for their inclusion. This space would not impinge on the

[26] Until 1974, ballot measure texts were printed as a separate appendix at the back of the voter pamphlet.

space available for substantive arguments. Endorsements should not be listed, however, unless the secretary of state has on file a signed statement from the endorsing individual or organization permitting the use of that person's or organization's name in the ballot pamphlet.

Target a Twelfth-Grade Reading Level

Although it may not be possible to simplify the language of the official ballot and ballot pamphlet to the 8th-grade level, it should be written in a less legalistic manner. If initiative proponents and opponents can state their case in relatively clear language, the state should be able to do the same in its caption and summary. At the very least, the 12th-grade readability goal that applies to the legislative analyst's summary should be extended to the attorney general's official description.

Improve Ballot Pamphlet Design

A number of design changes to the ballot pamphlet would enhance its readability. Design consultant Robert Herstek proposes several simple printing features that would help make the pamphlet easier to read and comprehend.[27] These recommendations include:

- *Using different type sizes to emphasize the text introducing the discussion of each ballot measure.* In much the same way as a newspaper article briefly summarizes a news story in its first paragraph to encourage readers to continue through the rest of the story for additional details, the official caption and summary of each measure should be printed in a larger type than the following analysis. Boldface type might also be useful in this regard. Currently, Herstek reports, the "page is just one giant blur with everything carrying the same weight."
- *Mixing typefaces.* The summary could be presented in a sans serif face like Universal or Helvetica and the text in a serif face as it presently is. This would allow readers to differentiate more easily between the summary and the text, thus increasing their ability to focus on the information at hand. Mixing typefaces may also help to differentiate the background discussion from the description of the proposal in the analysis section.
- *Increasing the use of charts and graphs in the pamphlet.* The secretary of state has the authority to permit the use of charts, diagrams, photographs and other graphic designs in the pamphlet. As a matter of practice, the secretary of state does not accept pictures, given the possibility that proponents and opponents might employ alarmist, shocking or misleading photographs to bolster an argument emotionally. Charts and graphs, however, are less likely to be abused in the same manner, and they can break up monotonous text and clarify points. These and other graphic designs have been included in ballot pamphlets for recent elections and should be further encouraged.

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[27] Robert Herstek, "Graphic Design Analysis and Recommendations for Initiative Statute" (unpublished report commissioned by the California Commission on Campaign Financing, March 1990).

Allow Voters to Receive the Ballot Pamphlet Via E-mail

Voters should be able to opt to receive the ballot pamphlet by e-mail. Next to the line where voters enter their e-mail address, voter registration forms should include a box that voters can check. The following notice should appear next to the check box:

> Check here to receive the Official Voter Information Guide by e-mail rather than by mail. Your e-mail address will remain confidential and will not be used for any reason other than to send you your Official Voter Information Guide.

A fairly easy change for the secretary of state's office to make, this recommendation makes sense for two reasons. First, many absentee voters do not receive a hard copy of the official voter guide in the mail until after they have cast their ballots. An electronic copy of the guide is available over a month before the hard copies are printed and delivered to registered voters and should be made available to the voters who will not receive the hard copy of the guide on time or prefer to read it online. Second, the state would save money if some California voters opted to receive their voter information guides via e-mail instead of mail. Printing and mailing the June 2006 pamphlet cost an estimated $5.9 million, and the November 2006 pamphlet cost about $13.5 million. Any reduction in these costs would be a welcome change—particularly if it means voters are getting their election information in their preferred format.

Notify Voters That Ballot Information Is Available Online

The cover of the printed Official Voter Information Guide should include a prominent notice that the pamphlet's content is available on the secretary of state's Website in English and six other languages. When the pamphlet becomes available in video on demand format, the notice should also mention that. Voters, particularly younger ones, may prefer to gather their election information online, so a greater number of voters might be more inclined to read at least some of the ballot pamphlet if they knew it was available online.

Obsolete Recommendations for the Ballot Pamphlet

While many of the recommendations from the first edition of *Democracy by Initiative* still merit adoption, some are now unnecessary.

Financial Disclosures

One outdated recommendation is to list the top two financial contributors to a ballot measure in the ballot pamphlet. While information on who supports and opposes an initiative financially is useful in providing voting cues, this information is now provided in real time, based on the campaign finance data submitted to the secretary of state, on the secretary of state's Cal-Access Website (cal-access.sos.ca.gov). Real-time disclosure of campaign finance information is superior to including it in the pamphlet, as campaign spending fluctuates greatly before an election and the information would be outdated as soon as it was printed. The ballot pamphlet should, however, include the Cal-Access web address and explain the different types of information available on the Website.

Record of Individual Legislators' Votes

The first edition of *Democracy by Initiative* recommended that each legislator's vote for or against each ballot initiative be included in the ballot pamphlet to give voters useful information and enhance the accountability of legislators to their constituencies. This report does not recommend this change for two reasons. First, legislative votes are now available in the ballot pamphlet and online for legislative measures. Second, in contrast to the first edition of *Democracy by Initiative*, this report does not recommend requiring a legislative vote. This vote would most likely be against each initiative, since the legislature had presumably refused to adopt the proposed measures in the first place. As a result, listing the votes would make the ballot pamphlet one-sided by default, and the information would not provide useful cues for voters.

RECOMMENDATIONS FOR IMPROVING THE SECRETARY OF STATE'S WEBSITE

Improve the Navigation System

The secretary of state's Website is a valuable resource, but by presenting a Website on which information is difficult to find, the secretary of state's office furthers the notion that voting is an intimidating prospect. The current navigation system is cumbersome because several links appear to lead to the same information but do not. For example, there are several links to voter information, but not all of these lead to the online version of the official ballot pamphlet. The secretary of state's office should improve its Website's navigation to allow the average user to easily obtain the vast amount of information available there, and links to non-English content should appear on the home page so that non-English-speaking citizens can easily find the information they need.

Add Video Content

Video content is important for voters because it provides information in multisensory formats that people are increasingly accustomed to using. Videos can also communicate some information more quickly and effectively than print can. Video on demand formats, such as VideoVoter.org, allow voters to exercise control over the information they consume, accessing it when they need it and using only the materials that interest them. These videos will allow residents to gain knowledge directly from the ballot initiative committees. Video information is also simpler than print because the medium only allows viewers to focus on what is being presented at the time. Understanding will increase because the cumbersome legal language used elsewhere will be absent.

Add Useful Links

While the secretary of state provides a large amount of nonpartisan voting information, some members of the public are reluctant to depend on one government source for voter information due to lack of trust in or familiarity with the source, as well as to comprehension problems. By providing links to other pertinent Websites, the state would support improved voter information and, in the long run, increase civic engagement.

Increase Civic Education in Schools

The recommendations set forth above should be implemented because good voter decisions can only be made if accurate voter information is available and accessible. However, even with these improvements, if the practice of voting is not started at a young age, California will continue to experience a decline in voter turnout.

Good voter decisions can only be made if accurate voter information is available and accessible.

Civic education in public schools should be strengthened to foster greater civic participation. Robert Dudley and Alan Gitelson, researchers from George Mason University and Loyola University, write, "Those most knowledgeable politically are mostly likely to participate in politics."[28] The state should implement a civic education program for high school seniors, in which students are informed of the democratic process, how to gather political information, how to participate constructively in the process and how to vote. Teaching citizens their capabilities would encourage greater civic participation by enabling voters to become more effective participants in California's political process.

CONCLUSION

Accessible and clear voter information is a critical element in a healthy political process. Stunning improvements in digital communications, including the Internet, the Web and video-on-demand, offer new opportunities to improve voter information. The secretary of state's office should seize these opportunities and redesign its website, offering video-on-demand voter information about ballot measures and augmenting the content and display of information in the state's official ballot pamphlet. These improvements will encourage more voters to participate, help them make more informed decisions and ultimately enhance the quality of California laws.

[28] Dudley and Gitelson, "Civic Education, Civic Engagement, and Youth Civic Development," *PS: Political Science and Politics* 36, no. 2 (2003): 263–267.

CHAPTER

7

News Media, the Internet and Advertising

The majority of ballot measures are decided by voters who cannot comprehend the printed description, who have only heard about the measure from a single source, and who are ignorant about the measure except at the highly emotional level of television advertising, the most prevalent source of information for those who have heard of the proposition before voting.

—David Magleby, Professor of Political Science,
Brigham Young University[1]

SUMMARY

Most California voters rely heavily, if not exclusively, on paid campaign advertisements for ballot measure information. These paid ads, crafted to influence voter opinion, are often misleading or deceptive. In the absence of the former fairness doctrine, initiative ad campaigns are also often imbalanced, skewed heavily toward the side with the most money. News coverage of initiatives is usually too scarce to offset deceptive, one-sided ad campaigns. Slate mailers that misleadingly imply that they are from genuine interest groups supporting a cause or party also compromise the integrity of voter information.

In an effort to mitigate these problems, a handful of media outlets and nonpartisan Websites produce "truth boxes" or "ad watches," articles that critique political ads. The burgeoning political blog world and other online communities also play a growing role in policing political ads and analyzing ballot measures. As required by law, slate mail organizations disclose their financial activities, and mailers disclose that they are not sent by an official political party.

This report recommends that slate mailers contain more prominent disclosures. The secretary of state should enhance the usefulness of campaign disclosures by tallying the

[1] David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (Baltimore,: Johns Hopkins University Press, 1984).

amounts contributed and spent for and against each ballot measure. The federal government should reinstate the fairness doctrine for ballot measures.

The integrity of the ballot initiative process depends on the quality and quantity of information on which voters base their choices. Ballot measure information comes from many sources, including family and friends. But while personal acquaintances may be among the most persuasive sources, the most efficient are those that reach a wide audience. These include the news media (delivered through broadcast and cable television, radio, newspapers and online), the Internet, political advertising (delivered through mass media, billboards, literature and direct mail) and state-sponsored information (such as the ballot pamphlet, discussed in detail in Chapter 6).[2]

The official state ballot pamphlet offers some of the most comprehensive information on initiatives, but news and political advertising reach larger audiences. Newscasts typically keep their coverage brief, focus on a ballot measure's controversial aspects and dramatize stories with pictures and sound, whereas political advertising is often fraught with emotionalism, exaggeration and innuendo. Despite the tendency of these media to compress, simplify and sensationalize, their ability to attract and hold audiences make them an effective force in informing and shaping voter opinion. This chapter examines the role of advertising and the media in influencing public opinion and voting behavior in initiative elections.

"MANAGED" INFORMATION DOMINATES INITIATIVE CAMPAIGNS

The greatest single factor differentiating ballot initiative from candidate elections is the lack of partisan or other familiar cues in initiative campaigns. In candidate elections, the candidates themselves represent a wide array of issues and symbolize the interests of a variety of demographic groups, whether spoken or unspoken, by virtue of party affiliation, race, gender and appearance. By contrast, initiatives are usually not tied to a particular political party (although slate mailers sometimes imply party endorsements for ballot measures), and personal traits, such as a candidate's character, race or gender, are not elements of decision making on ballot propositions. Without such cues, voters in initiative campaigns typically must decide how to cast their ballots based on knowledge of the issues. Consequently, accurate voter information is even more important in initiative elections than in candidate elections.

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California's November 2006 ballot, for example, included 13 statewide propositions, and voters would have had to invest inordinate time and effort to understand each of these thoroughly. When faced with such a daunting task, many people make decisions

[2] An additional source of voter information that is particularly useful in California is privately sponsored ballot pamphlets. The League of Women Voters, for example, publishes nonpartisan pamphlets that summarize and debate the pros and cons of each measure. These sponsored ballot pamphlets are also available on the respective Websites of their sponsors.

using cognitive heuristics or shortcuts.[3] With ballot initiatives lacking clear partisan associations, voters lean on cues such as endorsements and familiarity for their decision making.[4] The cues that citizens receive from the media, therefore, are vital in determining how and why political decisions are made.

Frequently, the "managed" information in campaign ads may be the only election information available to voters besides the ballot pamphlet, especially for initiatives that do not arouse independent news attention.

With parties and personalities playing less of a role, the news and paid political advertising have become the primary source of voter information about ballot measures. This creates a dilemma for the initiative process. While prudent decision making on initiatives requires greater voter information on the issues, voters have fewer cues available to them as compared to candidate races. Complicating matters further, the integrity of existing information sources is often questionable.[5]

In a world where the media play such a fundamental role in shaping voter awareness, professional campaign management firms exert a powerful influence over the direction of initiative campaigns. An effective campaign manager will stage favorable news events and carefully craft advertising appeals. Frequently this "managed" information may be the only election information available to voters besides the ballot pamphlet, especially for initiatives that do not arouse independent news attention. The accuracy and availability of reliable voter information about ballot measures therefore largely turns on the amount and impartiality of election news coverage and the existence of some balance between paid political advertisements for and against each measure.

PAID ADVERTISING PLAYS A CRUCIAL ROLE IN SWAYING VOTERS

Paid advertising comes in many forms. Newspapers, electronic media and the Internet are three of the most common, but purchased political advertisements also appear on billboards, lawn signs and a variety of other places, as well as in leaflets and mass mailings. Choosing the appropriate mix of advertising outlets depends on the target audience and the campaign's resources. Each outlet has a distinct audience, and each carries a different price tag.

Campaign advertising for initiatives had its origins in product advertising. In the 1930s, the first campaign management firm to specialize in initiatives was organized by two Californians, Clem Whitaker and Leone Baxter.[6] Campaigns, Inc., revolutionized political campaigning by adapting the techniques of product advertising to politics. By the 1950s, dozens of California campaign management firms handled initiatives. Today,

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[3] Brian Schaffner and Matthew Streb, "The Partisan Heuristic in Low Information Elections," *Public Opinion Quarterly* 66, no. 4 (Winter 2002): 559.

[4] Brian Schaffner, Matthew Streb and Gerald Wright, "Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections," *Political Research Quarterly* 54, no. 1 (March 2001): 7.

[5] "An election campaign does not lend itself to explanations but to simple fact statements or slogans. As a result, voters may be confused and make decisions, not on a factual or philosophical basis, but for emotional or political reasons." *St. Paul Citizens for Human Rights v. City Council*, 289 N.W.2d 402, 407 (1979).

[6] Walton Bean, *California: An Interpretive History* (New York: McGraw-Hill, 1973), 470–471.

these firms still borrow techniques from commercial advertising.[7] Many work interchangeably in both commercial and political markets.

INNUENDO AND DECEPTION

Initiative campaigns are issue campaigns, and this heightens the role of advertising in affecting vote choices. Advertising campaigns have considerable leverage in defining issues. Neither side has an inherent interest in providing a fair and balanced presentation of a ballot measure. Because victory, not education, is the primary objective of such efforts, a campaign only dispenses information that supports its case.[8] As a consequence, campaign advertising has developed a reputation for innuendo, deception and exaggeration.

Voters tend to have fewer filtering mechanisms for information in initiative campaigns than in candidate campaigns. The dearth of cues, such as party endorsements and candidate personalities, means that voters often lack key checks on deception in initiative advertising. Whereas a candidate might simply pledge to "get tough on crime," an anti-crime initiative must actually propose a concrete solution—something that candidates are warned to avoid. Initiative opponents find this an especially valuable tool to exploit in defeating ballot measures. Opponents often lock onto one minor provision of an initiative and exaggerate its potential negative implications, sometimes well beyond credulity. Their objective is to foster voter confusion and doubt as to whether the measure really furthers an otherwise favorable policy goal. In candidate elections, an uncertain voter often opts for the status quo by voting for the incumbent; in initiative elections, the uncertain, hesitant or confused voter typically opts for the status quo by voting no. Misleading or deceptive advertising exploits this tendency.

In initiative elections, the uncertain, hesitant or confused voter typically opts for the status quo by voting no.

Examples of such misleading ads are easy to find. During the November 2006 election season, for instance, the tobacco industry ran a series of 13 ads against Proposition 86 (tobacco tax). Ten of the ads made at least one debatable or misleading statement as if it were fact, and the three accurate ads all left out important details. Proponents aired eight ads, six of which were accurate, and two of which either omitted important details or made an overstatement.[9] Also in 2006, the oil industry used deceptive messages against a proposed fee for oil extraction in California (Proposition 87). The oil company's advertisements claimed that this proposition would result in an increase consumer costs for oil, although the measure specifically prohibited

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[7] Ballot measures are "packaged" for the public in much the same way an advertising firm attempts to sell a can of peas. "Voting is based on what we feel, not what we think," says consultant Robert Goodman of George Bush's 1980 presidential campaign. "Everything is image." Quoted in Leslie Phillips, "Image Men Package Our Candidates," *USA Today*, February 20, 1984.

[8] Derrick Bell, The Referendum: Democracy's Barrier to Racial Equality, Washington Law Review 54, no. I (1978).

[9] See HealthVote.org for full analyses of the ads for and against Proposition 86, as well as the ads for and against all other health care-related ballot measures since November 2004. CGS and the California HealthCare Foundation, "Propopsition 86 (2006): Tobacco Tax – AdWatch," HealthVote.org, http://www.healthvote.org/index.php/adwatch/C37/ (accessed November 27, 2007).

that. Additionally, slate mailers used by the oil companies used images of politicians who did not support their cause, implying endorsement from these leaders.[10]

Unbalanced Campaign Spending

The temptation to use false or deceptive advertising arises whenever a gross unbalance in campaign resources renders one side incapable of challenging the advertising assertions of the other. Many of the highest-spending initiative campaigns in California history were caused by proposals to curtail the practices of a specific industry and the subsequent response by industry to defend its interests. Proponents of such initiative proposals frequently invest most of the money they are able to raise on qualifying for the ballot, leaving little with which to campaign. Well-funded opposition interests then spend vast sums of money on campaign advertising to defeat these measures.

In 2005, for example, Proposition 79 proposed prescription drug discounts for Californians, and the initiative faced extraordinary financial opposition from pharmaceutical companies. Proponents collected only $2.5 million, while drug companies contributed $38 million to oppose the measure. The pharmaceutical industry used some of these campaign funds to place a competing initiative, Proposition 78, on the same ballot. Compared to Proposition 79, Proposition 78 would have created less extensive prescription drug discounts and imposed fewer requirements on the pharmaceutical industry. Moreover, 13 commercials for Proposition 78 and against Proposition 79, many of which made misleading statements, went largely unchallenged because proponents lacked the necessary funding to rebut them.[11] The industry's ad campaign compounded voter confusion already generated by the competing ballot measure, thus increasing the likelihood that voters would opt for the status quo by voting against both measures—which they did.

When proponents are unable to respond to the campaign assertions of the opposition, even relatively popular initiative proposals are likely to go down in defeat.

Greater Doubts as Election Day Nears

Voters often form an opinion on individual ballot proposals early in a campaign, but their opinions tend not to be fixed and are subject to change during the campaign. Some voters initially like a policy proposal, but as the campaign wears on, uncertainty and fear of the application of a concrete policy program takes precedence over early intrigue with a new idea. Heavy opposition campaign spending compounds this uncertainty and plays on voters' fears, often resulting in rejection of the ballot proposition. When proponents are unable to respond to the campaign assertions of the opposition, even relatively popular

[10] Brooks Jackson, "$122 Million Worth of Hype; Both Sides Strain Facts about California's Most Expensive Ballot Measure in History," FactCheck.org, October 19, 2006, http://www.factcheck.org/politics/122_million_worth_of_hype.html (accessed May 2007).

[11] CGS and the California HealthCare Foundation, "Proposition 79: Prescription Drug Discounts: Facts & Analysis," 2005, http://www.healthvote.org/index.php/facts_analysis/C33/ (accessed February 16, 2007); and "Proposition 79: Prescription Drug Discounts—AdWatch," 2005, http://www.healthvote.org/index.php/adwatch/C33/ (accessed May 2007).

initiative proposals are likely to go down in defeat. Throughout the history of California's initiative process, voters have ultimately shown a reluctance to approve ballot issues;[12] between 1911 and 2006, 65% of all initiatives have been rejected.[13]

A recent California Field Research Corporation analysis confirmed this pattern of voter opinion. The analysis results showed that 40% of initiatives since 1996 that had statistically significant leads in public opinion polling were ultimately rejected on election day.[14] In most instances, the proportion of undecided voters increased over the course of the campaign and dropped precipitously as election day arrived. The most common pattern was a decline in yes votes, a midelection increase in undecided votes and eventually an increase in no votes.

Policing Political Ads

At one time, television stations as a policy refused to air campaign ads during newscasts, fearing that some viewers might misconstrue an ad as being part of the newscast. If a station presented a news segment on an environmental measure, for instance, using interviews with both environmentalists and business representatives, and that news segment was then followed by a paid commercial advocating one side of the issue, the commercial might well receive undeserved credibility in the minds of viewers by its association with the news, and the newscast might in turn lose credibility by association with the commercial.

Many stations and media conglomerates have changed this policy in apparent deference to economic considerations. Candidates and committees now seek to advertise during prime-time newscasts because their advertisements gain credibility and because they reach a demographically desirable audience segment—newscast viewers tend to be better informed about political events and more likely to vote. Any station that refuses to air political ads during its newscasts simply redirects political advertising revenues to competitors who will. Furthermore, prime advertising time outside news slots is generally more expensive because audiences are larger. Stations that restrict the amount of political advertising during newscasts lose advertising revenues, because some political campaigns cannot afford to purchase more expensive nonnews prime-time spots.

Television stations air four times as many political ads as they do campaign news stories, which may undermine the reliability of news programming as a source of balanced voter information.

In 2002, the Norman Lear Center, a project of the Annenberg School at the University of Southern California, and the University of Wisconsin found that television stations air four times as many political ads as they do news stories about political campaigns. Of those stations that covered political campaigns, 72% aired at least one political advertisement, and 52% ran at least

[12] Initiative and Referendum Institute, "Statewide Initiative Usage," 2000, www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/California.pdf (accessed May 2007).

[13] CGS data analysis.

[14] Field Research Corporation, "The Field Poll's Record in Measuring Statewide Ballot Propositions in California (1996–present)," 2006, http://www.field.com/fieldpoll/propositions.html (accessed May 2007).

two during their half-hour local news broadcasts.[15] This use of political ads, particularly in a context of minimal and superficial campaign coverage, may undermine the reliability of news programming as a source of balanced voter information.

Prior to the 1990 elections, the media displayed a hands-off approach to political advertising. In an ongoing struggle to maintain some semblance of objectivity, the media refrained from judging the accuracy of campaign messages, relaying the messages from opposing campaigns and letting audiences fend for themselves. The increase in political ads, however, along with the pervasiveness of misleading and unbalanced campaign messages, encouraged some news media to assume a more active role in commenting on the accuracy of political advertising.

One device used by the media is "truth boxes" or "ad watches." Truth boxes originated in March 1990 when Keith Love, a political reporter for the *Los Angeles Times*, persuaded the newspaper to critique political advertisements. He decided that offsetting political advertisements with a response was necessary after watching the California Democratic primary campaign of gubernatorial candidate John Van de Kamp, which he thought included misleading attacks against Van de Kamp's opponent, Dianne Feinstein. The *San Francisco Chronicle, Sacramento Bee* and KRON-TV in San Francisco soon followed suit. Newspapers and television stations across the country then began to run their own truth boxes. Alaska's *Anchorage Daily News* took the concept a step further. Instead of allowing candidates to define the campaign agenda, the newspaper surveyed voters to determine which issues they felt were most important and then pressed the candidates on these specific issues. Additionally, the Center for Media Literacy, a nonprofit educational organization, instituted a program in 1996 called Dissect-an-Ad. Information appeared on PBS and on the Internet, providing citizens with a step-by-step guide for questions to use when viewing political advertising.[16]

The use of truth boxes has spread from candidate campaigns to initiative campaigns in California. For example, HealthVote.org, maintained by the Center for Governmental Studies (CGS) and California Healthcare Foundation, provides an AdWatch feature for each health care-related ballot measure. The information includes videos of campaign ads, how much money was spent on the ads and which elements of the ads are misleading or incorrect. In addition, the Annenberg Public Policy Center at the University of Pennsylvania maintains a Website called FactCheck.org, directed by AdWatch pioneer Brooks Jackson. The Website highlights misleading claims and factual problems in political advertising, debates, interviews and news releases around the nation. In 2005, for example, FactCheck.org analyzed an advertisement broadcast by drug companies opposing Proposition 79. While the ad suggested that all patients would be negatively affected by the passing of the proposition, FactCheck.org pointed out that only a minority would be affected. Several newspapers have also printed ad watch articles about initiative campaign ads.

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[15] Steve Rabinowitz, "Political Ads Dominate Local TV News Coverage," Norman Lear Center, 2002, http://www.localnewsarchive.org/pdf/LCLNA110102.pdf (accessed June 2007).

[16] "Taking on the Kennedys: Dissect an Ad," PBS Online, 1996, http://www.pbs.org/pov/pov1996/takingonthekennedys/dissect.html (accessed June 2007).

Blogging plays an increasing role in enabling citizens to monitor and critique political claims and advertising. Although bloggers tend to write from a particular perspective instead of aiming for balance, the practice promotes democratic civic engagement by giving the public additional tools with which to assess political campaigns without relying on information provided by campaigns or the mainstream media. The California Notes blog, for example, criticized Governor Schwarzenegger's support of an education coalition. While the governor advertised that he supported this group, the blog disclosed that the group in fact originated as a collaboration between unions, administrators and teachers working against Schwarzenegger's education policies.[17] Before web-based citizen involvement, such nuances would have been overlooked if the mainstream media had not discussed them, leaving voters more susceptible to misleading statements in campaign advertisements.

Evaluations of political advertising for accuracy have not ended dishonest or misleading claims, but some campaigns have been responsive to them.

Evaluations of political advertising for accuracy have not ended dishonest or misleading claims, but some campaigns have been responsive to them. Several candidates have used media analyses of an opponent's misleading commercials as part of a rebuttal campaign strategy. In at least one instance, a candidate—Clayton Williams, Jr., a 1990 Republican gubernatorial candidate in Texas—removed his commercial from the airwaves after reporters identified the statistics cited in the ad as misleading.

Critiques of political ads are likely to spread in the traditional media and among citizens. A poll of political reporters and news directors around the country conducted by People for the American Way found that 80% believe the media should play a more active role in exposing false or misleading advertising.[18] According to Democracy in Action, a nonprofit organization that seeks to democratize online activism, by 2005 most campaigns released their ads with fact sheets to prove their accuracy.[19]

THE CONTINUED HEAVY USE OF SLATE MAILERS

Although the concept is old, in the early 1980s slate mailers matured into a powerful form of paid political advertising—one that can easily be used to transmit deceptive messages. In its simplest form, a slate mailer consists of a mass mailing that endorses a full slate of candidates and ballot measures, usually under the rubric of a common partisan or ideological theme, such as the "Democratic Voter Guide." Historically, political parties and other ideological organizations have prepared slates for distribution to their own members or to a targeted audience. Labor organizations, particularly the AFL-CIO, have made extensive use of slate mailers to alert the union membership about candidates and issues that could affect labor's interests. Smaller political groups, such as the Sierra Club,

[17] Randy Bayne, "Deceptive Advertising from Schwarzenegger," The Bayne of Blog's–California Notes, June 23, 2006, http://bayneofblog.blogspot.com/2006/06/deceptive-advertising-from.html (accessed June 2007).

[18] *Id.*

[19] Democracy in Action, "Media: Covering the Campaign," George Washington University, 2005, http://www.gwu.edu/~action/2008/media08.html (accessed April 2008).

have also distributed endorsement mailings within their memberships. In California and several other states, party organizations frequently send mass slate mailings in primary and general elections to their respective party loyalists.[20]

Much has changed in the nature and integrity of slate mailers in recent years. Instead of serving as a means for a like-minded group to inform voters of candidates and ballot issues that are in harmony with the organization's political philosophy, slate mailers have become a profitable business in which endorsements are frequently sold to the highest bidder or given to popular candidates, with or without their knowledge, in order to reap the benefit of association. In 1998, campaigns spent $18.8 million on slate mailers, more than double the $8.9 million in 1994.[21] As of 2006, there are more than 58 slate mail organizations registered in California.

Purpose of Slate Mailers

Slate mailers need to achieve four goals to persuade their readers. First, they must recommend candidates and ballot measures that at least appear to possess some common bond, ideology, party affiliation, membership or other trait. Without a theme linking the candidates and recommendations together in some way that appeals to recipient voters, slate mailers will have little persuasive impact.

Second, slate mailers must include a few obvious choices of top candidates that immediately signal a bond with the target audience. A Democratic mailer, for instance, should have the party's endorsed senatorial and gubernatorial candidates at the top of the list to persuade voters that the remaining endorsed candidates and recommendations fall within the "Democratic Party camp." It is so important that a mailer have these top candidates leading the list that the mailing entity may use their names without the permission of the candidates themselves. A mailing entity has a constitutional right of freedom of speech to endorse any candidate on its mailer, with or without the candidate's permission or even knowledge.

Third, mailers must offer endorsements for as many offices and ballot measures as possible. It is particularly important that a slate card provide recommendations for the full range of candidates and issues, even judicial contests and ballot measures. These are the races in which voters need the most assistance in deciding how to cast their ballots. A mailer that provides this assistance is more likely to be carried into the polling booth and

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[20] The practice of party slate mailings in California's primary elections was ended in 1963 when state law prohibited party involvement in nomination contests. Cal. Elec. Code § 11702 (1977). In a 1989 decision, the U.S. Supreme Court ruled that California's ban on party endorsements in primary elections constituted a violation of First Amendment free speech. The Court reasoned, "By preventing a party's governing body from stating whether a candidate adheres to the party's tenets or whether party officials believe that the candidate is qualified for the position sought, the ban directly hampers the party's ability to spread its message and hamstrings voters seeking to inform themselves about the candidates and issues, and thereby burdens the core right to free political speech by a party and its members." *Eu v. San Francisco County Democratic Central Comm.*, 109 S. Ct. 1013, 1015 (1989).

[21] Shanto Iyengar, Daniel Lowenstein and Seth Masket, "The Stealth Campaign: Experimental Studies of Slate Mail in California," Center for Research in Society and Politics, 1999, http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1007&context=crisp (accessed June 2007).

used as a voter's guide. Thus, slate cards will often resemble actual ballots and encourage voters to "TAKE THIS VOTER SLATE WITH YOU TO THE POLLS."

Fourth, slate mailers must secure early financial commitments from many endorsed candidates and ballot measure campaigns to defray costs, or even to make a profit. Early financial commitments are useful to cover initial start-up costs and establish the mailer's credibility in approaching other candidates and campaigns.

Charging for Placement on Slate Mailers

The process of deciding which candidates and campaigns to approach for placement on a mailer, how prominently to display each candidate and ballot proposition and what to charge for placement are some of the most controversial aspects of slate mailings. Generally, slate operators have a specific political objective in mind when compiling their endorsements. A Republican campaign management firm, for example, may be handling the campaigns of an assembly candidate and a ballot proposition. The firm's primary objective is to get that Republican assembly candidate elected and the ballot measure approved. A slate mailer will be designed to display both the candidate's name and the "vote yes" on the initiative campaign in bold type and in a prominent location on the card. Endorsements of top candidates, such as the Republican candidates for governor and U.S. Senate, will be placed on the mailer at no charge.

Having identified all the candidates and proposition campaigns it wishes to include in the mailing to give it credibility, the firm then seeks contributions for placement on the mailer from other candidates and campaigns that more or less fall within the Republican camp. Prices vary depending on the level of office, the location and size of the endorsement on the mailer, the difficulty of the candidate's race, the campaign's available financial resources, past associations with the candidate, the relative desirability of the candidate, the amount of start-up funds already secured and numerous other factors.

This complicated pricing scheme gives slate operators almost complete discretion over the selection of their candidates and initiatives. As a result, slate mailer organizations may charge candidates for the same office, such as candidates for two or more judicial seats in the same area, different prices for inclusion in the mailer. Occasionally, slate mailers ostensibly labeled as a guide for voters of one party will even sell an endorsement to a candidate of the opposing party if running for a nonpartisan office.

Integrity of Slate Mailers

Concerns have arisen that slate operators may be selling their endorsements to the highest bidder for contests in which the operator has little vested interest. Carol Federighi, mayor of Lafayette, California and longtime student of election campaigns, concludes that deception may be inherent in slate mailers that place prominent candidates (for example, a U.S. Senate candidate) at the top and then sell the remaining positions to the highest bidders.[22]

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[22] Carol Federighi, "Comment: Reregulating slate mailers: Consumer protection or First Amendment infringement?" *Hastings Communications and Entertainment Law Journal* 14, no. 4 (1992): 567–593, cited in Iyengar, Lowenstein and Masket, *supra* note 21.

In 2006, opponents of Proposition 82, a preschool initiative sponsored by liberal activist Rob Reiner, paid $60,000 to be represented on the Democratic Voters Choice Slate. In 2005, pharmaceutical companies opposing Propositions 78 and 79 distributed $1.5 million to 30 different slate mailers. Political consultant Merv Evans has put out his own slate card under the name "Californians Concerned About Crime." In at least one instance, Evans's preferred candidate for a judgeship position, Thomas Foye, refused to pay the asking price of $2,000, so Evans sold the slate endorsement to competitor Elana Sullivan. "Yeah, Foye wouldn't pay the price, so I gave it to Sullivan," confirmed Evans bluntly.[23]

Some slate mailers pressure or even coerce candidates into paying for their inclusion in slate mailers out of fear that if they do not, that opportunity will be sold to their competitor.

Ethical Questions

Some slate mailer organizations raise two ethical problems. First, they pressure or even coerce candidates into paying for their inclusion in slate mailers out of fear that if they do not, that opportunity will be sold to their competitor. Second, because slate mailers are essentially businesses, they may be less concerned with the qualifications of candidates and than with a financial bottom line. For example, in June 2006, Lynn Diane Olson unseated Judge Dzintra Janavs in a race that included more than $70,000 in expenditures on slate mailers. However, the Los Angeles County Bar Association had deemed Olson not qualified.[24] Slate mailers contributed to placing an arguably unqualified individual on the bench in place of a qualified judge.

Despite this atmosphere of coercion and commercial profit, many voters assume that slate mailers are based on altruism. Slate mailers, based on their content and design, reinforce the impression that they are the product of genuine interest groups supporting a cause or a party rather than profitable business enterprises willing to sell support to the highest bidder.

Implied Official Endorsements

Although not in violation of the law, slate mailers clearly mislead many voters who believe the mailers represent an official endorsement. The "top" names on a slate are selected to give the impression that the mailer represents a single partisan stance; the mailer is constructed in an official-looking format, frequently as a sample ballot; the mailer is labeled with a partisan name; and the committee behind the operation uses a pseudonym that sounds like an official party organ. One 2006 slate mailer, for example, was entitled the "Voter Information Guide for Democrats," but it did not support all the measures and candidates endorsed by the Democratic Party.[25]

The potential for slate deception can be particularly effective in low-level contests and ballot measures. In 2006, a Southern California slate mailer company distributed a

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[23] *Id.*

[24] Jessica Garrison, "Politics Creeps into Judge Races," *Los Angeles Times*, October 25, 2006.

[25] Zach Behrens, "The Sketchy Political Mailer," In the Oaks . . . [Sherman Oaks], blog posting November 2, 2006, http://shermanoaks.blogspot.com/2006/11/sketchy-political-mailer.html (accessed June 2007).

mailer that used U.S. Senator Dianne Feinstein's image to imply her opposition to Propositions 86 and 87, which proposed to increase tobacco and oil taxes respectively. In fact, the senator supported both propositions, and she demanded that the company cease the production and distribution of the mailer. While the fine print indicated that the image representation did not necessarily mean endorsement by all the officials listed, the overall effect was misleading to readers.[26]

Legal Constraints on Slate Mailers

Under protection of the First Amendment guarantee of freedom of speech, individuals, firms and businesses retain the right to endorse any candidate or any issue without the consent of the campaign, and to publicize that endorsement through legally acceptable means. Although certain disclosure requirements have been imposed on slate operators and their mailers, the courts have generally refrained from regulating the content of slate mailers or deceptive campaign practices.[27]

Two sections of California's Elections Code address the issue of payment in return for an endorsement by a political party, organization or club. These provisions prohibit paying or bribing party officials or delegates to obtain an official endorsement or other favorable treatment by the party. The prohibition on bribes for an endorsement is more encompassing, applicable to "any club, society, or association," or to "any political convention, committee, or political gathering of any kind."[28] It would appear that an outright bribe to a slate operator would be illegal, but the negotiation of payment for an endorsement is not. The line between the two acts is unclear.

Regulation of slate mail operations in California emphasizes disclosure. Each mailer must include the name and address of the publisher in at least two places. In addition, each mailer must also include the following notice in eight-point font and at the top or bottom of the front side or surface of at least one insert or at the top or bottom of one side or surface of a postcard or other self-mailer:

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[26] Josh Richman, "Possibly Because of the Senator's Intervention, Neither of These Measures Passed," *Oakland Tribune*, November 4, 2006.

[27] *California Republican Party v. Mercier*, 652 F. Supp. 928 (1986). The U.S. District Court, in responding to a challenge by the California Republican Party against a slate card organization that misled many voters into believing the for-profit mailer was an official party publication, resisted the invitation to intervene: "Despite the Party's contentions to the contrary, this is not a case involving an interference with the right to vote. This is a case involving allegedly deceptive campaign tactics. The Party does not claim that any of its members were denied their right to cast their ballots. Rather, it claims that some of its members may have been persuaded to vote against their true interests, or at least to vote differently than they otherwise would have. This claim of deceptive and unfair campaigning is similar to the claim of disruptive heckling which *Scott* indicated should not be actionable in federal court. . . ." *Id.* at 937. In a footnote to the decision, the court added: "As *Mercier* points out, for the federal courts to start evaluating campaign materials for deceptiveness would raise concerns close to the heart of the First Amendment, and this is an additional reason to decline the Party's invitation to chart a course which would require the courts to conduct such evaluations." *Id.* at 937.

[28] Cal. Elec. Code § 18311 (2007). See also Cal. Elec. Code § 18310 (2007), affecting payment of a party organization for endorsement.

NOTICE TO VOTERS

THIS DOCUMENT WAS PREPARED BY (name of slate mailer organization or committee primarily formed to support or oppose one or more ballot measures), NOT AN OFFICIAL POLITICAL PARTY ORGANIZATION. Appearance in this mailer does not necessarily imply endorsement of other appearing in this mailer, nor does it imply endorsement of, or opposition to, any issues set forth in this mailer. Appearance is paid for and authorized by each candidate and ballot measure which is designated by an *.[29]

From 2000 through 2004, Proposition 34 established that slate mailers also had to include a notice if there is an implied political party affiliation or endorsement that differs from a party's official position on an issue.[30] This provision was challenged and declared invalid by the court.[31]

Slate mail organizations must file regular reports on their financial activities with the secretary of state. Financial reports must disclose payments of $100 or more received for endorsing candidates or committees on any slate mailer, the name of each candidate or committee endorsed free of charge, and payments of $100 or more made by the slate mail organization for production and distribution of the mailer. They must also state the total amount of contributions received and expenditures made by the organization.[32]

Persuading Voters

When slate mailers first came into popular use in the early 1980s, only a few slate mail organizations existed, and they tried not to overlap their mailings. This monopolization considerably enhanced the persuasiveness of slate mailings among voters. From the beginning, many voters were led into thinking that the mailers were official party endorsements, rather than profit-oriented enterprises. A 1999 study, however, found that informed voters exposed to slate mailers, in addition to other voter information tools, were less influenced by voter guides and slate mailers.[33]

Today, a multitude of organizations send overlapping slate mailers to voters. Voters frequently receive three or four slate mailers, all touting their link to the same political party or interest groups, yet the mailers frequently endorse different or competing candidates, committees or ballot measures. Slate mailers may undermine their own efforts when two or more mailings claim to represent a similar group, such as a "Democratic Voter's Guide," but endorse opposing candidates. California's disclosure requirements may also help voters understand the profit-oriented nature of slate mailers.

Direct Mailings

Registered voters are inundated with slate mailers. Target or direct mailings, however, look to communicate with a certain segment of the electorate in order to raise money, maintain relationships with citizens or win votes. Some direct mail organizations use statistical analyses to target persuadable or undecided voters.

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[29] Cal. Gov't Code § 84305.5 (2007).
[30] Formerly Cal. Gov't Code § 84305.6 (2007).
[31] *Levine v. FPPC,* 222 F. Supp. 2d 1182 (E.D. Cal. 2002).
[32] Cal. Gov't Code § 84219 (2007).
[33] Iyengar, Lowenstein and Masket, *supra* note 21.

The Internet has expanded the ways in which ballot measure campaigns can reach the electorate. E-mail allows greater interaction between campaigns and voters.[34] Traditionally, much direct mail was unsolicited, but with the Internet, citizens can sign up to receive communications. And, as discussed earlier, the Internet provides limitless and inexpensive space where anyone can counteract statements in campaign advertisements or present issues that the mainstream media may not cover. Such advances in communication can increase political engagement.

THE RISE OF CABLE NEWS HAS CONTRIBUTED TO AN ATMOSPHERE OF BIASED INFORMATION

Inadequate News Coverage

Radio and television stations do not generally give high priority to ballot measures as newsworthy items. Even though ballot propositions directly enact many of the state's most important laws and policies, the broadcast media view a thorough discussion of most propositions as unsalable. News outlets tend to adhere to the mantra, "If it bleeds, it leads," meaning that tragedy, violence and scandal receive highest priority in newscasts.

Even though ballot propositions directly enact many of the state's most important laws and policies, the broadcast media view a thorough discussion of most propositions as unsalable.

Network news is an important source of voter information. According to the 2004 California Voter Participation Survey, 65% of respondents noted that network news was a primary source for election information.[35] However, studies undertaken by the Lear Center have illuminated that these sources provide little to no election coverage. In a 2004 study of evening network newscasts aired during October 2004, 64% of the newscasts contained at least one election story (most of these stories covered the presidential race, not state candidates or ballot issues). This means that 36% of the newscasts presented no information regarding the upcoming election. Additionally, a typical half hour contained less than three and a half minutes of election coverage. Candidate sound bites were featured in 28% of the stories and were an average of 12 seconds long. This research indicates that the information source frequently turned to by citizens is failing to provide adequate election coverage.[36]

Ballot measures stand even less chance of receiving news attention when pitted against more colorful candidate campaigns. As Vigo "Chip" Nielsen, counsel to many candidates and initiative committees, has observed:

> It is a real fact that candidates get more coverage than ballot measures. These ballot measures are terribly complex. . . . If we have Jerry Brown running against . . . Pete Wilson, it's a much

[34] Andrew Williams and Kaye Trammell, "Candidate Campaign E-Mail Messages in the Presidential Election 2004," *The American Behavioral Scientist* 49, no. 4 (2005).

[35] Cal Voter Foundation, *2004 Voter Participation Survey*, March 2005, http://www.calvoter.org/issues/votereng/votpart/voter_participation_web.pdf (accessed June 2007).

[36] Martin Kaplan, Ken Goldstein and Matthew Hale, "Local News Coverage of the 2004 Campaigns; An Analysis of Nightly Broadcasts in 11 Markets," Norman Lear Center Local News Archive, February 15, 2005.

> more exciting thing to talk to one or both of these people than to try to figure out what the lottery will really do if enacted. . . . I don't think there's much comparison on the quantity or quality.[37]

This emphasis on candidates rather than ballot measures may be changing in California. Some ballot propositions—almost always initiatives—have aroused such controversy and interest that only candidates for the highest offices of governor and U.S. Senate have received more media attention in recent years. It may be that many initiatives are increasingly perceived as having a greater impact on the life of state residents than such officeholders as the secretary of state. In several recent elections, more Californians have voted for initiatives than for all but the highest statewide candidates.

Impact of News on Election Outcomes

Measuring the impact of newscasts on voting behavior is a dubious art. The overarching problem is pinpointing causality. It is impossible to state definitively whether news content shapes voting behavior, or whether news content reflects the attitudes and norms of the electorate. Moreover, a host of intervening variables in the social environment also shape voter attitudes and behavior in ways that are independent of news coverage.

Although some scholars argue that the news media strongly affect voters' political attitudes by literally telling them what to think, most believe that the influence of the press lies somewhere between "minimal" and "agenda-setting." The "minimal effects" theory contends that the news media generally do not change preexisting political attitudes and beliefs; rather, they reinforce an individual's political orientation.[38] Individuals tend to pay more attention to the news messages with which they agree and less to those that conflict with their ideological predispositions.

Another school of thought, not necessarily at odds with the minimal effects theory, is that the news media serve an agenda-setting function[39]—not determining what we think, but affecting what we think *about*.[40] Under this view, news gatekeepers select those issues and candidates they feel are newsworthy and decide which aspects of these issues and candidates to cover in their newscasts.

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[37] Vigo "Chip" Nielsen, quoted in A. D. Ertukel, "Debating Initiative Reform: A Summary of the Second Annual Symposium on Elections at the Center for the Study of Law and Politics," *Journal of Law and Politics* 2, no. 322 (Fall 1985).

[38] Dan Nimmo and Charles Bonjean, *Political Attitudes and Public Opinion* (New York: David McKay, 1972), 173.

[39] The concept of an agenda-setting function for the news media is frequently portrayed as opposed to the minimal effects theory. Scholars in communications tend to favor the agenda-setting function concept, which they depict as highlighting the importance of communication mediums in American society, while political scientists generally side with the notion of minimal effects, which they suggest enhances the importance of political factors in composing the nation's policy agenda. The central themes of each theory, however, are not necessarily exclusive. Minimal effects posits that the media are not likely to change an individual's ideological predispositions; agenda-setting agrees with the idea that the media do not tell us what to think on any given issue. Their point of departure is how extensively the media determine what we think *about*, quite apart from other political factors.

[40] James Lemert, "Does Mass Communication Change Public Opinion After All?" (Chicago: Nelson-Hall, 1981), 40–42.

The agenda-setting function of the news can be critical in some initiative elections. Because voters historically tend to reject initiatives they know little about, the amount of information they receive can make a difference. Sometimes, for example, an initiative proposal can tap a public sentiment that had been previously unrecognized by the media. When that happens, the media's attention is focused on the issue, thereby setting the news agenda.

Growth of Cable Network News—and Bias

The growth of television, particularly cable television, has altered how Americans seek information. In 2007, more than 99% of households owned at least one television, and it was turned on close to seven hours per day.

For decades, Americans turned to the nightly news of the three major networks for information on the day's events. Now, however, there are hundreds of channels to watch, including several cable channels that offer 24-hour news programming. With the introduction of cable and the Internet, people are turning to alternative sources. According to the Pew Research Center, in 2000, 48% of people looked to local TV for political news, and 45% looked to network nightly news. In 2004, those numbers dropped to 42% and 35%, respectively. At the same time, the percentage of individuals looking at cable news has increased from 34 to 38%.[41]

Many cable television analysts provide news coverage along party lines.

Coverage on the 24-hour news channels, such as MSNBC and Fox News, have sparked questions of media bias. Although the Pew Research Center reports that 67% of citizens prefer to receive their news from unbiased sources, it also indicates that 39% of citizens believe party bias is evident in news media. An academic study regarding war coverage concluded that many cable television analysts provide coverage along party lines.[42]

Although 24-hour cable TV news coverage has created an opportunity to present, examine and discuss ballot measure issues in greater depth, cable TV has not seized it. While candidates, particularly for the presidency, are discussed at great length on cable channels such as C-SPAN, ballot measures are ignored because initiative campaigns are local, whereas these channels are national. When other issues are covered, cable TV often relies on news "snippets," attention-grabbing pieces of audio or video that generate interest and controversy. News is compressed and simplified, decreasing the quality of information and making it difficult for viewers to understand stories as a whole. Limits on information increase the likelihood that citizens will use proxies for decision making rather than consider options and issues themselves.[43]

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[41] Pew Research Center, "Cable and Internet Loom Large in Fragmented Political News Universe; Perceptions of Partisan Bias Seen as Growing, Especially by Democrats," survey report, January 11, 2004, http://people-press.org/reports/display.php3?ReportID=200 (accessed June 2007).

[42] Margie Reedy, "A Documentary Examines Cable News War Coverage," *Nieman Reports* 57, no. 4 (2003): 87.

[43] Daniel Kahneman, Amos Tversky and Paul Slovic, eds., *Judgment under Uncertainty: Heuristics & Biases* (New York: Cambridge University Press, 1982).

There are some cable news alternatives for local news and issues. The California Channel, modeled on the national C-SPAN channel, is a media outlet for state government. An eye into the legislature in Sacramento, it provides citizens with unmediated footage of ballot initiative hearings. A persistent problem with such broadcasting is viewer attrition due to boredom. The channel does not show ballot initiative information in an entertaining and accessible way, so people are not motivated to watch it.

TECHNOLOGY IS CREATING NEW SOURCES OF VOTER INFORMATION

Although paid advertising is typically the dominant source of voter information about initiatives, especially for less controversial ballot measures, alternative sources of voter information can occasionally equal the "managed messages" of paid advertising. The Internet and ordinary citizens are taking control of voter information and disseminating it in new and effective ways.

The increased speed, ease and cost-effectiveness with which ordinary citizens can use the Internet has created the citizen marketer, the passionate hobbyist who adopts brands and social causes as personal online crusades. This phenomenon has played an important role in the world of voter information. It has partially taken control of information from the hands of political leaders and the traditional media and placed it in the hands of ordinary citizens.

Blogs

Blogs (personal web logs) have become important in disseminating voter information across the Internet. Blogs originated as online journals but have blossomed into sites that feature political, cultural and social commentary. They can include photographs, video and audio pieces, and pertinent links to other blogs and web resources. Blogs are networked pieces of news coverage and conversation that allow visitors to become involved in the forum through comments and questions. Blogs are also increasingly popular. Thirty-nine percent of Internet users had read someone else's online journal or blog, and 8% had created their own blog by 2006—up from 27% and 7% in 2004.[44] Blogs can also raise issues that the mainstream media ignore.

Blogs can raise issues that the mainstream media ignore.

SFgate.com, a blog for the *San Francisco Chronicle*, maintains nearly daily updates on state and local politics. In 2005, for example, the blog provided coverage of the people, organizations and corporations that supported and opposed the Proposition 76 (limits on state spending). The blog also disseminated information on upcoming events, possible obstacles for the initiative and the battles over its acceptance.

[44] "Internet Activities" (Web page from the Pew Internet and American Life Project), http://www.pewinternet.org/trends/Internet_Activities_8.28.07.htm (accessed November 27, 2007); and Lee Rainie, "The State of Blogging" (data memorandum from the Pew Internet and American Life Project, January 2005), http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf (accessed June 2007).

Podcasts

Podcasts are radio programs that individuals can download to their computers, transfer to their iPods and MP3 players and carry with them wherever they go. The *Seattle Post-Intelligencer*, for example, podcasts discussions of political issues, including ballot initiatives. Podcasts allow news programs and citizen marketers to reach a larger audience with information in an "on-the-go" format. Since anyone with a microphone and computer can podcast, however, podcast information can be biased, misleading or incorrect. Additionally, not all citizens have access to podcasts, so this is not a universally accessible news outlet. According to the Pew Internet and American Life project, in November 2006 only 12% of Internet users had downloaded a podcast for future listening.[45] Podcasting is still in its infancy. But as podcasts begin to cover more issues, their audience reach will likely increase.

Firecracker Marketing

Some citizen marketers provide information through "firecracker" events.[46] These are videos, discussions or sound bites that stimulate a sudden surge in Internet activity and interest that can affect the public's perception of an important issue. In 2007, for example, a citizen posted on YouTube.com a remade version of Apple's 1984 Olympic advertisement that framed presidential hopeful Hillary Clinton as a formidable "Big Brother" figure and endorsed candidate Barack Obama as the symbol of freedom for the new generation. Within one month of release, it had been viewed more than 3 million times. This flurry of activity was accompanied by conversation regarding the candidates and the underlying explanations for such a portrayal. Such events expand the public's opportunities for political engagement and discussion.

Online Communities

Online communities, such as MoveOn.org, MySpace and Facebook, are also potent and growing sources of voter information and citizen engagement. While MoveOn.org originated as a politically oriented Website, social Websites like MySpace and Facebook increasingly feature political content and discussion. Such Websites can provide an Internet platform for interaction and a sense of movement and cohesion in an age when people feel alienated from others and their own government. While many online communities are party-oriented, they provide incentives for citizens to learn about the issues. MoveOn.org, for example, brings people together to bring about change, rather than simply conversing or obtaining political information. Any individual can take information from other sources, distribute it and act on it in unique ways.

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[45] Rainie, i*d*.

[46] Ben McConnell and Jackie Huba, *Citizen Marketers: When People Are the Message* (New York: Kaplan Publishing, 2007).

PRESS AND ELITE ENDORSEMENTS HAVE AN IMPORTANT IMPACT ON PUBLIC OPINION AND ELECTION OUTCOMES

Press and elite endorsements are significant sources of voter information. Press endorsements primarily include newspaper editorials, since radio and television stations rarely editorialize. Elite endorsements encompass recommendations by community and political leaders, organizations and celebrities. Although evidence as to the impact of endorsements on election outcomes is mixed, it appears that both press and elite endorsements occasionally influence vote choices under certain conditions.

Press Endorsements

Newspaper editorials undoubtedly had a greater impact prior to the rise of television. Nonetheless, newspaper editorials today are read by people with a higher level of education and a strong inclination to vote. Editorial cartoons are also widely disseminated.

Endorsements serve as heuristics, or mental shortcuts, which members of the public use to shape their opinions regarding ballot initiatives.

Studies indicate that press endorsements can shape voter attitudes about ballot measures. An early study in Ohio confirmed the significance of editorial endorsements by the *Toledo Blade* in securing voter approval for a poorly advertised local referendum.[47] Another established the value of marked ballots provided by newspapers for voters to take to the polls.[48] A 2004 study reaffirmed the effectiveness of press endorsements, particularly for local elections.[49] A 2004 University of Washington study posits that endorsements serve as heuristics, or mental shortcuts, which members of the public use to shape their opinions regarding ballot initiatives.[50] Recent Pew Research Center studies have indicated that people do not read, and may even dismiss, newspaper endorsements, but that they may still serve as an important source of information for local elections.[51]

The Fix, a political blog run by the *Washington Post*, concludes that endorsements have a positive effect but are unlikely to change the mind of voters whose positions are already decided. The benefits of newspaper endorsements are small and at the margins of the elections.[52] According to the *Seattle Times* blog, newspaper endorsements matter more with a larger readership, but they are not highly significant in political decision making.[53]

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[47] Reo Christiansen, "The Power of the Press: The Case of the "Toledo Blade," *Midwest Journal of Political Science* 3 (August 1959): 229–240.

[48] Herbert Baus and William Ross, *Politics Battle Plan* (New York: The Macmillan Company, 1968), 251.

[49] Ruthann Lariscy, Spencer Tinkham, Heidi Edwards and Karyn Jones, "The 'Ground War' of Political Campaigns: Nonpaid Activities in U.S. State Legislative Races," *Journalism and Mass Communication Quarterly* 81, no. 3 (2004).

[50] Mark Forehand, John Gasti and Mark Smith, "Endorsements as Voting Cues: Heuristic and Systematic Processing in Initiative Elections," *Journal of Applied Social Psychology* 24, no. 11 (2004).

[51] Pew Research Center, *supra* note 43.

[52] Chris Cillizza, "The Importance of Being Endorsed," *Washington Post* blog posting, November 1, 2006, http://blog.washingtonpost.com/thefix/2006/11/the_importance_of_being_endors.html (accessed June 2007).

[53] David Postman, "Do Newspaper Endorsements Make a Difference?" *Seattle Post* blog posting, November 2, 2006, http://blog.seattletimes.nwsource.com/cgi-bin/mt-comments.cgi?entry_id=12890 (accessed June 2007).

Press editorials may therefore exercise some influence on the vote for or against propositions, but only under limited conditions.[54] Editorial endorsements are most effective when voters lack other cues, such as partisan endorsements, and when voters have few other sources of information available to them. Newspaper editorials probably have little, if any, effect on controversial measures that are of keen interest to voters. Also limiting the effect of newspaper endorsement is the decline of newspaper readership in America. An estimated 57% of men and 52% of women read a newspaper daily and less than 50% of all people under the age of 44 read the newspaper daily.[55] Moreover, there has been a decline newspaper readership in America among every age group.[56] This contributes to the limited and diminishing role of newspaper endorsements.

Elite Endorsements

Community and political elites appear to have a greater impact on ballot initiative outcomes than press endorsements, although elite endorsements also have their limitations. Several times in California history, an endorsement by a member of the political elite has been instrumental in garnering voter approval for an initiative, even against well-financed opposition. Prime examples include Arnold Schwarzenegger's endorsement of the successful after school programs initiative, Proposition 49 in 2002, as well as Ralph Nader's endorsement of Proposition 103 and the American Lung, Heart, and Cancer societies' endorsements of Proposition 99, both successful 1988 initiatives that defied heavily financed opposition campaigns.

The significance of elite endorsements in affecting public opinion is well documented in both candidate and proposition elections. Political elites, as a group or as individuals, can help define issues for voters in much the same way that a political party endorsement does. A 2002 study found that endorsements or opposition from community planning boards and groups, such as the Sierra Club, have strong effects on public

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[54] Studies undertaken by Gregg in 1968 and Rystrom in the 1970s identified the direction editorial endorsements took on ballot propositions in various regions of the state, then compared voting results in those regions against average voting results statewide. If the bulk of newspapers in one region recommended a yes vote on Proposition 1, and voters in that region supported Proposition 1 in a higher proportion than the statewide average, the studies assumed an apparent positive editorial impact on vote choice. Both studies found positive relationships between editorial endorsements and vote choice. Kenneth Rystrom, "Measuring the Apparent Impact of Newspaper Endorsements in Statewide Elections in California, 1970–1980" (unpublished Ph.D. dissertation, Department of Political Science, University of Southern California, 1984); James Gregg, "California Newspaper Editorial Endorsements: Influence on Ballot Measures," *Journalism Quarterly* 42 (Autumn 1965): 532–538.

[55] Newspaper Association of America, "U.S. Daily and Sunday Newspaper Readership Demographics," *2004 Facts about Newspapers: A Statistical Summary of the Newspaper Industry*, 2004, http://www.naa.org/info/facts04/readership-demographics.html (accessed June 2007).

[56] Project for Excellence in Journalism and Rick Edmonds of the Poynter Institute, "Audience," *The State of the News Media: An Annual Report on American Journalism*, 2007, http://www.stateofthenewsmedia.com/2007/narrative_newspapers_audience.asp?cat=2&media=3 (accessed May 2007).

support for or against a measure.[57] Endorsements regarding issues related to the function of the endorsing organization are particularly persuasive. A Sierra Club endorsement of an environmental issue will result in more attitude changes than a Sierra Club endorsement regarding children or elderly issues.[58]

Candidates and issue advocates place a high priority on assembling an appropriate list of elite endorsements to help them define the issues for voters. Proponents of criminal justice reforms vigorously seek endorsements from police and law enforcement organizations to depict their measures as "anticrime." Environmental proponents prize endorsements from the Sierra Club and the Natural Resources Defense Council.

Conversely, endorsements or sponsorship by an unpopular individual or organization can be detrimental. The electoral success of the 1988 California tobacco tax initiative, for example, was probably aided as much by the fact that the unpopular tobacco industry opposed the measure as by the fact that the American Lung, Heart, and Cancer societies favored it. Assemblyman Tom Hayden's support of Proposition 128 ("Big Green") on the November 1990 ballot was apparently viewed by many as a negative factor.

Voters are quite interested in who supports a measure and who opposes it. A 2002 study indicates that persuasion through elite endorsements reflects a desire for group identification.[59] Voters search for those people and groups who represent their own beliefs and take attitude and voting cues from them. This is particularly true when an issue is difficult to understand, there is an inadequate dissemination of information, or the choices are complicated by an imbalance in campaign advertising. For this reason, the public strongly supports public disclosure of initiative sponsors and their major financial backers.[60]

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[57] Elisabeth Gerber and Justin Phillips, "Development Ballot Measures, Interest Group Endorsements, and the Political Geography of Growth Preferences," *American Journal of Political Science* 47 (2002).

[58] Forehand, Gastil and Smith, *supra* note 49.

[59] Frederick Boehmke and John Patty, "Voter Information and Cues in Direct Legislation Settings," Initiative and Referendum Institute, April 13, 2002, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/Boehmke%20and%20Patty%20-%20Voter%20Information%20and%20Cues%20in%20Direct%20Legislation%20Settings%20IRI.pdf (accessed June 2007).

[60] California voters in 1988 approved a disclosure initiative (Proposition 105) by a substantial majority (54.5% to 45.5%), despite the fact that the measure addressed everything from the disclosure of initiative sponsors, warnings on household products, disclosure of corporate investors, to disclosure of whether a company conducts business in South Africa.

The impetus for Proposition 105 came from two failed attempts by the state legislature to impose less encompassing disclosure requirements. The "Truth in Initiative Advertising Act" (SB 1904)—a bill requiring disclosure of the actual corporation, industry or union financing an initiative advertisement, rather than the use of ambiguous, good-government committee names—passed the state senate unanimously in 1986 but did not pass in the assembly.

Proposition 105 eventually was declared unconstitutional by an appellate court because it violated the single subject rule of the California Constitution. *Chemical Specialties Manufacturers Ass'n v. Deukmejian*, 227 Cal. App. 3d 663 (1991). A similar campaign disclosure measure (SB 116) sponsored by state Senator Quentin Kopp (I-San Francisco) was recently debated in the legislature.

THE FAIRNESS DOCTRINE HAS PLAYED A VALUABLE ROLE IN BALLOT MEASURE CAMPAIGNS

The History of the Fairness Doctrine

Broadcasting over the airwaves—whether in the form of paid advertising, news or editorials—is the single greatest source of public information on social issues. Nearly three-quarters of Americans cite television as their primary source of information.

In 1934, Congress established the Federal Communications Commission (FCC) to ensure that broadcast media served the "public interest, convenience and necessity" rather than the private wishes of broadcasters. The FCC formally introduced the fairness doctrine in 1949. It required broadcasters to devote a reasonable amount of time to the discussion of important and controversial public issues, and that they had to do so in a fair and balanced manner. Broadcasters were not forced to give equal attention to both sides of an issue, only to provide enough information as to create a reasonable public dialogue. In 1967, the FCC specifically applied the fairness doctrine to cigarette commercials.[61] In 1969, the U.S. Supreme Court upheld the fairness doctrine generally, asserting that broadcasters had a public interest and possibly even a First Amendment obligation to present all significant viewpoints on controversial issues of public importance.

Application to Ballot Initiatives When the Fairness Doctrine Was Enforced

The fairness doctrine's most effective application was for ballot measure campaigns. Because ballot measures are inherently "controversial" and of "public importance," the FCC said that broadcasters presenting one side of a ballot measure issue must also present information and views on the other side. Moreover, if one side is presented via paid political commercials, the FCC concluded that it would be "unreasonable" for the broadcaster to present the opposing side in newscasts or discussion shows. Instead, the broadcaster must present the opposing side via free commercials, supplied to it by the opposing organization when opponents lack the resources or desire to pay for their own messages.[62] As a result, for many elections in which one side purchased millions of dollars of advertising to support or oppose an initiative, broadcasters have aired commercials for the other side at no cost—usually at a ratio of one free ad for every three or four paid ads.

The fairness doctrine's most effective application was for ballot measure campaigns.

In California, this application of the fairness doctrine to initiative campaigns had a significant effect. During the 1988 cigarette tax campaign (Proposition 99), for example, the cigarette industry spent over $10 million on paid radio and television commercials opposing a proposed tax increase on cigarettes. The measure's proponents had virtually no money to spend on advertising. Relying on the fairness doctrine, however, they produced their own ads supporting the initiative, sent them to broadcast stations all over the state and asked these stations to air them free of charge at a ratio of one pro-tax commercial to every three antitax commercials. Most sta-

[61] See *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968).
[62] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

tions complied, giving proponents millions of dollars of free air time. The measures passed, even though proponents were outspent 20 to 1. Without the fairness doctrine in place, the election might have turned out differently.[63]

Significance of the FCC's Repeal of the Fairness Doctrine

In 1987, the FCC repealed the fairness doctrine as it applied to news broadcasts, stating that it chilled political dialogue in the media and did not promote the discussion of controversial ideas.[64] The FCC, however, left the fairness doctrine intact as it applied to ballot measures. In response to a letter of inquiry from Representative John Dingell (D-Mich.), chairman of the House Committee on Energy and Commerce, the FCC stated that its 1987 fairness repeal was confined to the facts of that case and that it had not yet addressed the question whether the fairness doctrine applied to ballot initiatives.[65] Five years later, the FCC ruled that the fairness doctrine no longer applied to ballot measures.[66] The agency concluded that licensed broadcast stations were sufficient in number to provide an adequate diversity of opinions and ideas on the airwaves without FCC regulation.

The repeal of the fairness doctrine increased the impact of one-sided spending and information in initiative campaigns.

Between 1987 and 1992, broadcast stations in California split in interpreting this chain of events. Some, such as ABC affiliates, continued to honor the fairness doctrine for initiative campaigns and gave the underfunded side free advertising time. Other stations, such as CBS affiliates, concluded that the FCC would ultimately repeal fairness for initiative campaigns and refused to honor requests for free rebuttal time.

This legal uncertainty increased the impact of one-sided spending and information in initiative campaigns. Ballot initiative supporters and opponents who lacked funding found it difficult to have their views aired via the electronic media. More and more stations refused to honor the free rebuttal time requirements of the fairness doctrine. Because application of the fairness doctrine in this area was unclear, the balance of views in many initiative campaigns began to suffer.

By 1990, broadcast stations began to encounter considerable industry pressure not to provide any free air time for initiative campaigns. In California's November 1990 election, the alcohol beverage industry sent a letter to many broadcasters indicating that it might withdraw its considerable paid political advertising from any station that gave opponents free time under the fairness doctrine.[67] The pro–alcohol tax ballot measure

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[63] See also, Randy Mastro et al., "Taking the Initiative: Control of the Referendum Process Through Media Spending and What to Do about It," *Federal Communications Law Journal* 32 (1980): 315–369.

[64] *Syracuse Peace Council (WVTH)*, 63 RR2d 542 (1987). The court of appeals affirmed this decision. *Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987).

[65] Letter from Hon. Dennis Patrick, chairman, Federal Communications Commission, to Hon. John Dingell, chairman, House Committee on Energy and Commerce, September 22, 1992.

[66] *Arkansas AFL-CIO v. FCC*, 980 F.2d 1190 (8th Cir. 1992).

[67] Virginia Ellis, "Pressure Increases to Deny Proponents Free Air Time," *Los Angeles Times*, August 29, 1990. A letter from Greenstripe Media, a consulting firm hired by the alcohol beverage industry, warned station managers that if they provided free air time to proponents of the alcohol tax measure (Proposition 134), such action "could force us into canceling our schedule on your facility and utilizing

campaign reported a number of instances in which stations resisted requests to provide free fairness doctrine airtime as a result of this letter.[68]

On January 6, 1992, the FCC released a new opinion in which it held explicitly, and for the first time, that it would no longer apply the fairness doctrine to ballot measures.[69] It concluded, incorrectly in the view of this report, that the fairness doctrine "chilled" broadcast speech by "reducing" the discussion of controversial issues via broadcasting.

The New Debate on Reinstatement

In the years following the dissolution of the fairness doctrine, cable news networks appear to have become more partisan. This trend has sparked efforts to reinstate the fairness doctrine. The high level of media consolidation following the Telecommunications Act of 1996 has increased legislators' concerns that the interests of the people in balanced news coverage are no longer being served.

The high level of media consolidation following the Telecommunications Act of 1996 has increased legislators' concerns that the interests of the people in balanced news coverage are no longer being served.

In 2006, Representative Louise Slaughter (D-New York) introduced the Media Act (HR 4710) in an attempt to reinstate the fairness doctrine. She expressed concern that media consolidation reduces the diversity of voices in public.[70] That same year, Representative Maurice Hinchey (D-New York) introduced the Media Ownership Reform Act (MORA) in an effort to diminish media consolidation and reinstate the fairness doctrine. He argued that the suspension of the fairness doctrine was "a blow to journalistic integrity, forcing the general public to lose trust in media outlets from which they receive news and information each day."[71]

Most recently, Representative Dennis Kucinich (D-Ohio) has pushed for the reinstatement of the fairness doctrine, arguing that "the media have become a servant of very narrow corporate interests."[72] Kucinich argues that the FCC is no longer serving its original purpose of ensuring that broadcasters work in the public interest, and therefore steps need to be taken to guarantee that fair public discussion is encouraged.

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other stations or media that do not provide free air time." The letter was attached to the industry's current contracts with the respective stations for campaign advertising purchases. In a separate letter to broadcasters, the influential American Association of Advertising Agencies argued that free air time raises the prices for advertising for everyone else as stations tried to recoup their losses and advertising time became more limited.

[68] Telephone interview with Leo McElroy, media consultant to the campaign for Proposition 134, January 27, 1992.

[69] *Arkansas AFL-CIO*, ___ F.C.C. 2d ___ (FCC 91-434) (January 6, 1992).

[70] Bill Moyers, "What Happened to Fairness?" PBS, December 17, 2004, http://www.pbs.org/now/politics/slaughter.html (accessed June 2007).

[71] Representative Maurice Hinchey, "Media Ownership Reform Act" (issue brief, 2005), http://www.house.gov/hinchey/issues/Media%20Ownership%20Reform%20Act%20of%202005.pdf (accessed June 2007).

[72] Ira Teinowitz, "Kucinich Could Revive Fairness Doctrine," *TV Week*, January 18, 2007, http://www.freepress.net/news/20422 (accessed June 2007).

Unbalanced Spending in Ballot Initiative Campaigns and the Subsequent Outcomes

Since the repeal of the fairness doctrine, spending on ballot measure campaigns has increased dramatically. More important, however, is the success of those campaigns that have been able to outspend their opponents. Of the 13 most expensive California ballot measure campaigns in the last 20 years, only 2 that have been outspent have succeeded, and one of those campaigns occurred when the fairness doctrine was still in effect (see Table 8.5 in the next chapter). Campaigns with more funding have a greater ability to purchase more media advertising.

In 2005, Proposition 79 sought to offer prescription drugs discounts to low-income Californians. As discussed earlier, the pharmaceutical industry spent nearly $40 million opposing the measure, while proponents spent only $2.5 million—most of which was used to qualify the measure for the ballot. Proposition 79 failed to pass. Had the fairness doctrine been applied, such uneven spending would have been partially offset by the broadcast media being required to cover both sides of the issue fairly.

INITIATIVE DISCLOSURE LAWS VARY FROM STATE TO STATE

By far the most prevalent government regulation of ballot measure campaigns is a requirement that proponents and opponents publicly disclose their campaign contributions and expenditures, and that they identify campaign advertisement sponsors. Almost every state that employs the initiative process requires some form of disclosure of contributions and/or expenditures. Most states have implemented, or are in the process of implementing, online access to ballot measure disclosures so that the public may have easy access to them.

Almost every state that employs the initiative process requires some form of disclosure of either contributions and/or expenditures.

Generally, initiative campaign committees must disclose the names of donors who have contributed more than a given threshold amount. The triggering threshold ranges from a low of any contribution in Florida, Ohio and Wyoming, to a high of $500 in Nevada.

Special Reporting Requirements

Most states further require identification of the sponsor and/or payer of paid political advertisements in the ad itself. The identification requirement usually applies to all printed matter and promotional materials as well as broadcast ads. The state of Washington exempts bumper stickers, pins, buttons and pens, among other items, from having to bear the name of the payer because it is inconvenient to print on such items. Washington adds to its itemized list of exemptions any type of advertising in which it would be "impractical" to identify the sponsor, such as "skywriting."[73]

Only four states, Idaho, Illinois, Nevada and North Dakota, do not mandate that the sponsoring committee be identified in every ad. Nevertheless, all states are subject to

[73] Wash. Admin. Code § 390-18-030 (2007).

broadcast policies established by the Federal Communications Commission. A series of FCC rules stipulate that paid political advertisements on radio and television must identify their sponsors at the time of broadcast.[74]

TRUE SPONSORSHIP

One disclosure problem is obfuscation of the true identities of sponsors through misleading committee names. Disclosing that a given advertisement was paid for by the "Committee for Good Government," for example, provides no clue as to underlying financial interests.

Both California and Montana have developed regulatory schemes that seek to identify true sponsorship in political advertisements. California passed Proposition 208 in 1996, requiring the names of top contributors to be included on campaign advertisements. Any advertisement for a ballot measure must disclose the two largest sources of any contributions over $50,000.[75] Montana's disclosure law requires that political committees use names that connote the economic interest behind the committee or the common employer of the majority of its contributors.[76] This name is then posted on any paid advertisements.

RECOMMENDATION: VOTER INFORMATION SHOULD BE ENHANCED THROUGH IMPROVED DISCLOSURE

Voter information through paid advertising can be improved through better disclosure of sponsorship. Voter information from nonpaid sources can be improved by encouraging the news media and broadcasters to provide fair coverage of both sides of pressing election issues.

ENHANCING DISCLOSURE OF LAST-MINUTE CONTRIBUTIONS

The last time the public sees the total amount of contributions received by a campaign committee is two weeks before an election, when committees are required to file their final full preelection disclosure report. However, donors often continue to contribute to campaign committees between this two-week cutoff and the election. These late contributions are never aggregated into a total sum so that the public can see the full amount of contributions a committee has received. Instead, current law requires campaign committees to file all "late" contribution filings with the secretary of state (listing donations of $1,000 or more made within the last two weeks before the election) electronically within 24 hours of its receipt.

This arrangement makes the campaign disclosure process unnecessarily opaque. Those wanting to know the *total* contributions given to a particular campaign committee have only two choices: they can either wait until the committee's final report is filed long

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[74] 47 C.F.R. § 73.1212 (2007); see 69 F.C.C.2d 1129 (1978).
[75] Cal. Gov't Code § 84503 (2007).
[76] Mont. Code Ann. § 13-37-210 (2003).

after the election has passed, or they can do the math themselves, adding of all late contributions together and then adding that total to the total amount disclosed in the last regular campaign statement.

To improve the usefulness of last-minute disclosures, campaigns should be required to tally all previous late contributions made to the ballot measure so that voters can see the exact amount of contributions received for a particular ballot measure. This requirement would not be unnecessarily burdensome to the filer, but it will provide useful information to the press and others reading the filings.

Encouraging Responsible Journalism

Journalists and the news media should participate more actively in providing voters with balanced, accurate and useful information. The press should not merely serve as a conduit for heavily financed campaigns to distribute one-sided advertising information. Critical reports of inaccuracy in campaign ads, such as truth boxes, are an important service for a better-informed electorate. Broadcasters should make every reasonable effort to keep the fairness doctrine alive in practice. It is important that the press rightfully accept an obligation to the public to provide voters with reasonable access to balanced and accurate election information about specific ballot measures.

In 1990, Century Communications, a cable television company, developed a format using hour-long videos to explain statewide and local ballot measures. In 2003, the California secretary of state introduced a program of public service announcements to promote voter information on television and radio. These PSAs, however, primarily served to inform citizens where and when to vote, rather than to give them information about the issues.

Long-format informational videos, such as those used by Century Communications, may not appeal to people who lack the interest or time to watch such programming. Video Voter, a CGS project, is an effort to provide free air time to candidates and ballot measure campaigns via television and new technologies, cable television, video on demand, digital video recorders and podcasting, in various formats to effectively inform and engage the electorate. Short formats such as voter minutes, candidate statements and interviews provide viewers a reasonable amount of unbiased information in a short amount of time, suiting the busy schedules of many citizens. Voter minutes are particularly important for ballot initiatives. They explain the initiative and the consequences of a yes or no vote. By adopting Video Voter or similar projects of their own, television stations have the opportunity to provide citizens with balanced election information in a format that fits viewers' busy lives.

Reestablishing the Fairness Doctrine

Until the early 1990s, the fairness doctrine partially ameliorated gross disparities in campaign spending. Voters were exposed to both sides of controversial and important issues instead of only the side that possessed the most money. The FCC's repeal of the fairness doctrine has resulted in the reappearance of gross spending differentials in elections. The fairness doctrine should be reinstated as applied to ballot measure campaigns.

California ballot initiative campaigns are frequently characterized by enormously one-sided media advertising battles, in which one side spends tens of millions of dollars on radio and television messages while the other side is able to spend virtually nothing. In 2004, for example, proponents of Proposition 71 for stem cell research had gathered over $25 million in support, with less than $500,000 spent against the measure. The fairness doctrine would have alleviated this massive differential and allowed voters to hear a more balanced media portrayal of the facts of the measures.

Congress and the FCC should seriously consider reinstating the fairness doctrine, or some reasonable equivalent, as it applies to ballot measures. The report recommends that California government petition Congress and the FCC to accomplish this goal.

SOME PROPOSED REFORMS MAY BE BEYOND THE REACH OF STATE JURISDICTION, AND OTHERS ARE NOT RECOMMENDED

Extending Tax Credits for Broadcast Information

One potential reform to help balance campaign messages between opposing sides would be to establish a program of tax credits for broadcasters who provide free air time for underfunded campaigns. California has no jurisdiction over federal communications law and cannot itself reinstate the fairness doctrine. But any state so choosing could encourage broadcasters to offer free air time to ballot measure committees by offering them state tax credits for doing so. In effect, tax dollars would partially subsidize advertising time for badly outspent campaigns.

The extent to which a tax credit system would partially redress the imbalance in voter information between highly funded and underfunded initiative campaigns is a function of how much burden taxpayers are willing to accept. Given the multimillion dollar imbalances in California between many of today's initiative campaigns, this could be a significant addition to the state's budgetary problems. Taxpayers may resist accepting such a burden. (See also the discussion of a voter information fund in Chapter 8.)

Improving Disclosures on Slate Mailings

Today, slate mailers are subject to some disclosure rules, but they often find ways to conceal critical facts. California law currently requires each mailer to disclose the name of the group distributing the literature. Mailers must also contain a notice that the group does not represent an official party organization, and they must indicate whether each endorsed campaign paid for and consented to the endorsement. These disclosures, however, tend to be well hidden in footnotes and made all the more obscure by deceptive titles, such as "YOUR DEMOCRATIC BALLOT GUIDE," displayed prominently in large type on the cover of the mailer.

The state has taken three additional—but unsuccessful—steps toward greater disclosure on slate mailers. First, Californians passed Proposition 208 in 1996, which called for more extensive disclosure on slate mailings, including a requirement that slate mailings include a "$" sign next to campaign contributors and disclosure of all contributors who

gave $50,000 or more. A 1998 court case found this requirement unconstitutional and prohibited its enforcement.[77] This injunction was later made moot by the passage of Proposition 34 in 2000, which nullified many provisions of Proposition 208 (see Table 9.1 in Chapter 9 for a list of Proposition 208 provisions superseded by Proposition 34). Second, California law previously required that the two largest contributors of $50,000 or more for ballot initiatives must be named on the front of the slate mailer, but on March 1, 2001, the court permanently enjoined this provision as applied to slate mailers.[78] Third, Proposition 34 required that any mailer including views against the view of the party it claims to represent needs to state "THIS IS NOT THE OFFICIAL POSITION OF THE _____ PARTY." Much like the "$" sign provision, the court issued a preliminary injunction prohibiting the FPPC from enforcing this provision, and it was repealed in 2004.[79]

In light of these events, this report concludes that California is currently doing as much as it reasonably can to ensure that slate mailer organizations provide adequate campaign finance disclosure and adhere to ethical campaign practices. Current disclosure requirements are fairly extensive, and stronger requirements might place a disproportionate burden on slate mailer organizations.

Creating Truth-in-Advertising Regulations for Campaigns

The state of Washington once prohibited deliberately false statements in ads for and against initiatives. Until the Washington State Supreme Court declared the law unconstitutional in October 2007, the state prohibited political advertising "that contains a false statement of material fact."[80] The problems in defining what is false and what is true—let alone determining whether the dissemination of "false" information was deliberate—render such laws of little use and gives them a dangerous potential for abuse. Courts generally have taken a narrow view in the application of these restrictions and, consequently, few legal actions contesting false statements and deceptive advertising have arisen. Rather than relying on explicit legal sanctions in this area, it seems preferable to leave questions of truth to the free market of ideas—in debate among proponents, opponents, the press and the public.

Campaigns also occasionally give their initiatives deceptive unofficial titles that obscure the real objectives of their proposal, or they give the campaign committee a name that disguises its sponsors' identities. For example, both Propositions 78 and 79 in 2005 bore the name "Discounts on Prescription Drugs," yet Proposition 78 was created by and supported the interests of pharmaceutical companies, allowing participation to be

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[77] California Fair Political Practices Commission, "FPPC decides not to appeal latest ruling on Prop. 208 litigation," Press release (May 29, 2001).

[78] Cal. Gov't Code § 84503 (2007).

[79] Cal. Gov't Code § 84305.6 (2007).

[80] Mary M. Janicki, "Litigation of Fair Campaign Practice Codes" (memorandum to the Connecticut General Assembly, October 23, 2005); *Rickert v. State of Washington*, No. 77769-1 (October 4, 2007), http://search.cga.state.ct.us/dtsearch_lpa.asp?cmd=getdoc&DocId=17146&Index=I%3A%5Cindex%5C1995&HitCount=0&hits=&hc=0&req=&Item=399 (accessed June 2007). At the time of this writing, the state had not yet decided whether to appeal to the U.S. Supreme Court.

optional and not requiring punishment or sanction for insufficient rate reductions. By disguising these facts through a title that implied the initiative had the interest of the public, citizens could have been confused.

The practical and constitutional problems involved in prohibiting deceptive initiative titles and committee names are formidable. Titles written by proponents are rarely adopted by the attorney general in titling an initiative for the petition and the ballot, so any proposed remedial action would provide little benefit. Misleading campaign committee names are best dealt with through frequent disclosure of the campaign's principal contributors and the "true sponsorship" recommendation given earlier for initiative petitions and campaign advertisements.

CONCLUSION

Voters rely heavily on election information received from the news media, campaign advertisements and the Internet in deciding how to vote, especially for ballot propositions in which many of the traditional voting cues are not available. Political advertising in today's media market is exorbitantly expensive, giving well-financed special interest groups an important advantage in dominating the election information transmitted to voters. The importance of political advertising in initiative campaigns has contributed to the proliferation of professional campaign services that strive to "manage" election information for their own benefit. While the news media has recently developed some novel means of scrutinizing the accuracy of campaign messages, it has shied away from providing a well-rounded discussion of election issues. The Internet, by contrast, has created a forum in which citizens can counteract statements in campaign advertisements or present issues that the mainstream media may not cover.

Civic leaders should call on the media to uphold their obligation to facilitate dialogue on public policy and initiative proposals. The federal government could assist by reapplying the fairness doctrine to initiative campaigns. In the meantime, the state can play a useful role in nurturing the quality of voter information by mandating the greater disclosure of the sponsors of political advertisements in initiative campaigns.

CHAPTER

8

The Influence of Money on California's Initiative Process

[The initiative process] has become the favored tool of millionaires and interest groups that use their wealth to achieve their own policy goals.

—David Broder[1]

Money didn't just talk in [the November 2006 general] election. It screamed.

—Dan Morain[2]

SUMMARY

The Progressives of the early 20th century designed California's initiative process to bypass the influence of moneyed interests on state policy. Today, however, money dominates the initiative process as much as it does the legislature. Enough money can always qualify an initiative for the ballot, and in sufficient quantities, it can usually defeat an initiative. High qualification costs encourage proponents to accept early financial support in exchange for adding provisions to their initiative proposals. Large contributions from industry and labor groups, wealthy individuals and other well-funded interests drown out broad-based civic efforts in many initiative campaigns—and the high cost of qualification and campaigning has disabled groups with less money from pursuing their policy agendas equally through the initiative process.

Most campaign finance regulations for ballot measures raise First Amendment issues, but some reforms should still be enacted to address the problems enumerated here. Contributions to ballot measure committees should be limited to $100,000, and contributions to candidate-controlled ballot measure committees should be limited to $10,000. Expenditure limits on ballot measure committees should be considered. Proponents should

[1] David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (New York: Harcourt, 2000), 1.
[2] Dan Morain, "Deep Pockets Carry the Day," *Los Angeles Times*, November 9, 2006.

have to list their names next to the committee treasurer's name on the committee's statement of organization and on the first campaign financial statement. The secretary of state should post preelection and postelection summaries of campaign finance data for ballot measures.

In 1911, frustrated by the spectacle of wealthy special interests using money to bribe legislators and influence legislation, California citizens enacted a system of direct democracy, allowing them to bypass altogether the legislature and its moneyed interests. The Progressive reformers who backed the initiative process believed it would allow the public to enact laws directly without the distorting effects of money. Voters could evaluate proposals on their merits, unencumbered and uncorrupted by special interest advocacy and influence. The initiative process would provide a "safeguard [by] which the people should retain for themselves" the power to pass laws that would "reflect the will and wish of the people,"[3] not the powerful interests of money.

In an ironic twist of fate, what was once a tool of regular citizens to circumvent the influence of money has become a tool for special interests to try to buy favorable policy at the ballot box.

Today, some 96 years later, money often dominates the initiative process as much as it does the legislative process. In an ironic twist of fate, what was once a tool of regular citizens to circumvent the influence of money has become a tool of special interests to try to buy favorable policy at the ballot box.[4] Money alone and in sufficient quantities can *qualify* virtually any measure for the ballot; and money usually, but not always, defeats most measures. While money does not always prevail in initiative fights, "it is almost always a major—even dominant—factor."[5]

California's initiative process has become an expensive battleground in which the most sophisticated and successful media weaponry is available to those with enormous sums of money. From 2000 through 2006, special interests spent over $1.3 billion passing or defeating ballot measures (see Table 8.1). The median initiative campaign spent $4.3 million in 2000, and median expenditures rose steadily since then to $15.7 million in 2006—with the extreme exception of the November 2005 election, when the median campaign spent $36.7 million (see Table 8.2).

The dominance of money in the ballot initiative process reached new heights in the 2005 special and 2006 general elections. Frustrated by the legislative stalemate with the Democratic legislature, Republican Governor Arnold Schwarzenegger called a special election for November 2005 and then helped qualify and campaign for four of the eight initiatives (Propositions 74, 75, 76 and 77) on the ballot. Combined spending for and against the eight ballot measures amounted to over $300 million.[6] The November 2005

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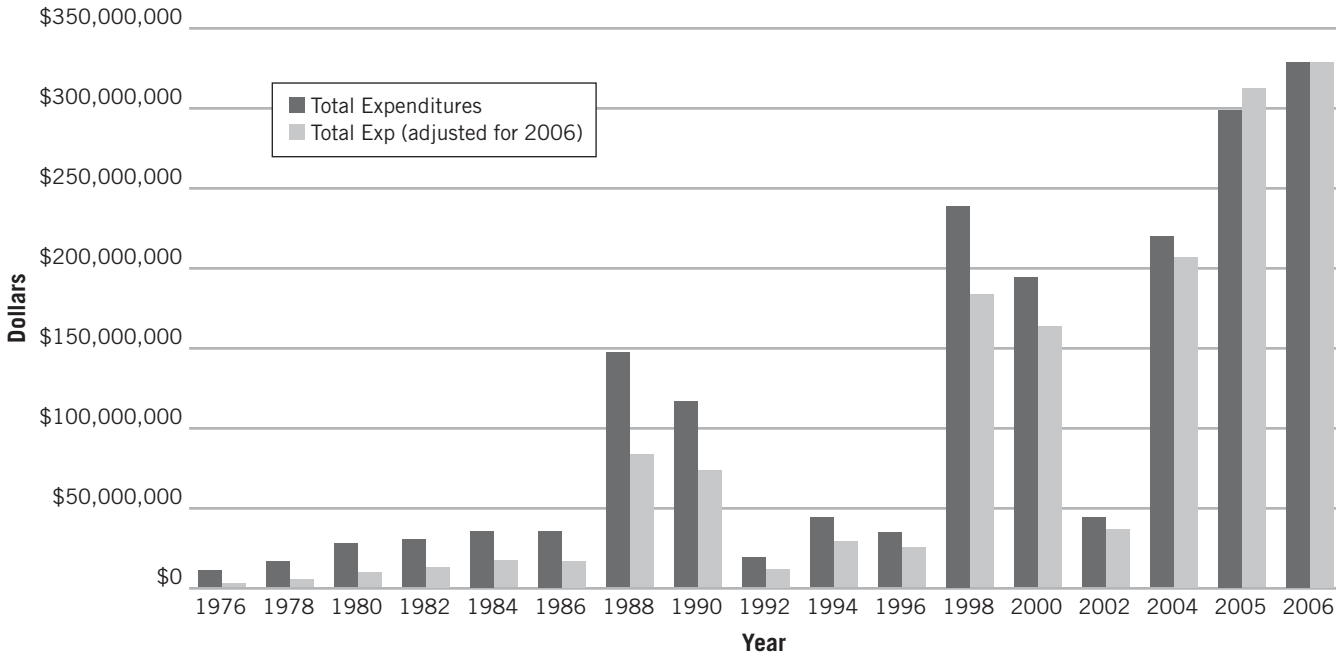
[3] "Arguments in Favor of SCA 22," *California Ballot Pamphlet*, Special Election, October 10, 1911.

[4] See Elizabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* (Princeton: Princeton University Press, 1999), 5.

[5] Broder, *supra* note 1, at 163.

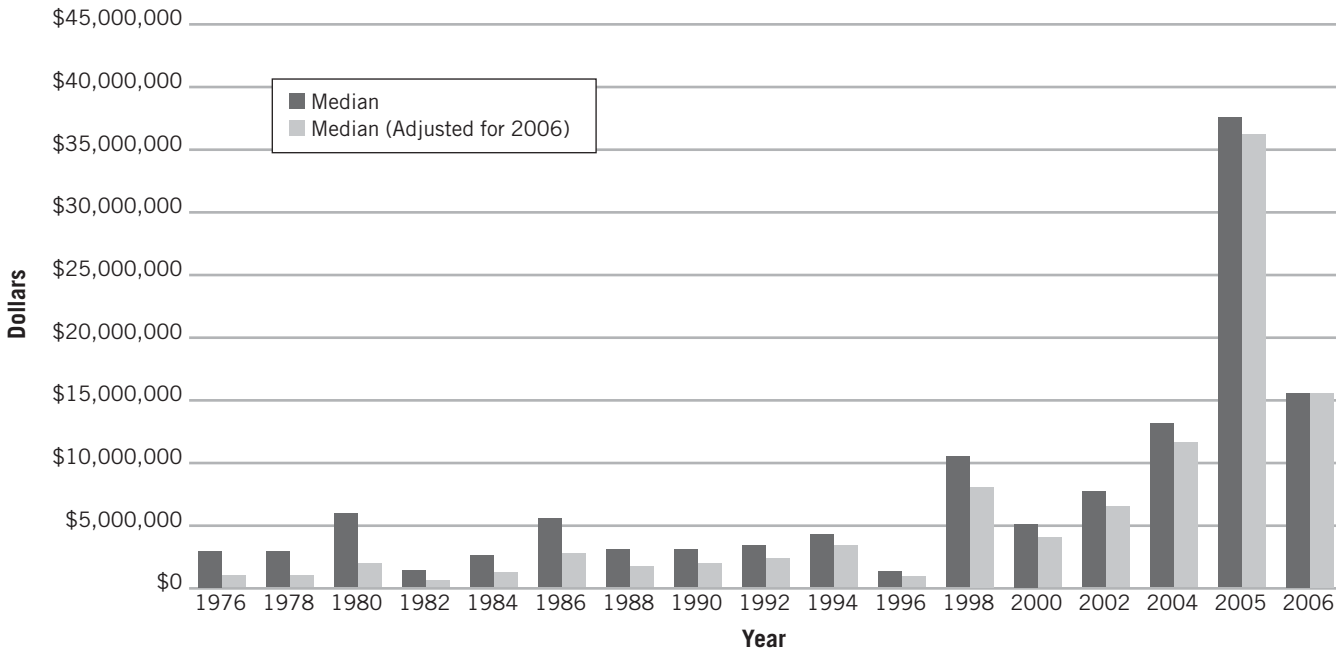
[6] See John Wildermuth, "$300 Million Price Tag on Initiative Battles," *San Francisco Chronicle*, November 2, 2005; see also Steve Lawrence, "Spending on Special Election Campaigns Tops $300 Million," *San Diego Union Tribune*, February 1, 2006.

TABLE 8.1 Total Spending in California Ballot Initiative Campaigns, 1976–2006



Source: A complete description of the methodology for compiling this data are available on file with the Center for Governmental Studies.

TABLE 8.2 Median Spending per Measure (Yes and No Combined) in California Ballot Initiative Campaigns, 1976–2006



Source: A complete description of the methodology for compiling this data are available on file with the Center for Governmental Studies.

The 2006 general election became the most expensive in state history. Spending for and against measures on that ballot exceeded $330 million.

election saw the emergence of candidate-controlled ballot measure committees[7] and large-scale union involvement. In the end, all eight measures on the ballot went down in defeat.

A year later, with 8 initiatives on the ballot, the 2006 general election became the most expensive in state history. Spending for and against measures on that ballot exceeded $330 million.[8] Two initiatives in particular, Propositions 86 and 87, dominated the election. Proposition 86 would have raised roughly $2.1 billion per year through taxes on cigarettes to pay for medical services and programs. Proposition 87 would have created an oil severance tax to pay for alternative energy projects. Both measures suffered defeat after receiving heavy spending on both sides of the campaigns. In all, voters approved only 2 of 8 initiatives, plus 5 bond measures.

The Center for Governmental Studies (CGS) has analyzed the effects of large contributions and heavy spending in ballot measure campaigns over the past 50 years. This report concludes that the rising influence of money in the ballot measure process has the potential to affect election outcomes, exclude entire groups of people from the process, and leave voters skeptical of ballot initiatives as open to manipulation.

Spending on initiatives falls into two main categories: the cost of qualifying a measure for the ballot, and the cost of mounting an effective campaign for or against a ballot measure. Today, qualifying a measure on the ballot can cost between $500,000 and $3 million, while the cost of campaigning for or against a measure (depending on the issue) can cost $20 to $30 million and skyrocket as high as $60 million.

THE QUALIFICATION OF INITIATIVES DEPENDS LARGELY ON MONEY

Professional signature-gathering firms claim they can qualify any measure for the ballot if paid enough money for cadres of signature gatherers. Any individual, corporation or organization with approximately $1.5 million to spend can now place any issue on the ballot and at least have a chance of enacting a state law. Says Fred Kimball of the signature-gathering firm Kimball Petition Management, "If you want to have your kid's birthday as a holiday, give me a million and half dollars and I'll at least get it on the ballot for people to vote on."[9]

Qualifying an initiative for the statewide ballot is no longer a measure of general citizen interest as it is a test of fund-raising ability. The last truly volunteer qualification efforts occurred in 1982, when volunteers qualified Propositions 12 (water resources conservation) and 13 (nuclear weapons freeze). Today, instead of waging volunteer peti-

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[7] For an insightful analysis of the emergence of candidate-controlled ballot measure committees in California, see Hank Dempsey, "The 'Overlooked Hermaphrodite' of Campaign Finance: Candidate-Controlled Ballot Measure Committees in California Politics," *California Law Review* 95 (February 2007): 123–168.

[8] See Kevin Yamamura, "Huge Election Spending," *Sacramento Bee*, February 1, 2007.

[9] Telephone interview with Fred Kimball, president, Kimball Petition Management, July 25, 2006.

tion campaigns to obtain broad-based grassroots support, initiative proponents ask a relatively small number of large contributors to fund expensive paid circulation drives. Finding a small number of funding sources has proven to be more efficient than organizing thousands of volunteers to obtain hundreds of thousands of signatures.

Grassroots and Volunteer Qualification Replaced by Paid Signature Gatherers

For much of the history of the initiative process, petition circulation served as both a measure of broad-based voter interest as well as a "test of seriousness" for campaign contributors. Initiative proponents would typically raise small amounts of seed money to fund volunteer-based petition circulation drives. Once the measure qualified, more significant contributions would flow into the campaign. Proponents of 1976 anti–nuclear power Proposition 15, for example, raised just 1% ($33,000) of their total contributions ($1.1 million) during the qualification period, more than half of which was raised in amounts less than $100. The measure still lost, however.

In more recent elections, however, initiative campaigns have "front-loaded" their overall fund-raising efforts, raising large contributions from a few donors to fund costly paid circulation efforts. Today, single individuals or entities or a small group of individuals and entities are able to qualify measures for the ballot. In 2005, for example, a small group of pharmaceutical companies paid petition gatherers to qualify Proposition 78, a counter-initiative to the consumer-driven Proposition 79.

Though qualification of a ballot measure does not guarantee success on election day, it can bring an issue to the legislative forefront and give its proponents significant leverage to persuade the legislature to enact legislation on issues it would rather avoid.[10] Often the very threat of qualifying an initiative for the ballot is enough to make the legislature take action, as was the case in 2004, when Governor Schwarzenegger threatened to qualify a workers' compensation ballot measure—thereby prompting the state legislature to enact a law of its own on the issue. In 1998, businessman Reed Hastings forced the legislature to expand the number of charter schools in exchange for his not submitting signatures for qualification.

Escalating Qualification Expenditures

The amount of money devoted to paid circulation has increased considerably. In 1976, the median proponent petition circulation expenditure was below $45,000; by 2006, circulation expenditures had risen to between $1 million and $3 million.

The use of paid circulators and signature-gathering firms by most serious initiative proponents has greatly increased qualification costs. Because the number of initiatives paying for qualification has increased, competition for signature gatherers has driven up

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[10] See Elizabeth Garrett and Elizabeth R. Gerber, "Money in the Initiative and Referendum Process: Evidence of Its Effect and Prospects for Reform," in *The Battle Over Citizen Lawmaking*, ed. M. Dane Waters (Durham, N.C.: Carolina Academic Press, 2001), 77.

their price. In 1988, Ken Masterton of the signature-gathering firm Masterton & Wright paid petition circulators approximately 33 cents per signature; by 2006, Fred Kimball of Kimball Petition Management was paying up to $1 to $2 per signature, which includes 35 cents for the coordinator.[11] Paid circulators can now make in excess of $100 an hour.[12]

The cost of qualifying a measure for the ballot rises or falls depending on several factors, including the popularity and complexity of the issue being addressed, the presence of wealthy opponents and/or counter-initiatives and the timing of the qualification drive. It is, for example, easier to qualify a straightforward, popular ballot measure dealing with safety issues (for example, protection against sex-offenders and gun control) and environmental issues (for example, "save the whales") than it is to qualify complex issues like government reform.

Counter-initiatives have also driven up qualification costs. Industry groups wait to see which issues may qualify for the ballot and then quickly draft countermeasures to negate specific provisions in those initiatives they deem unfavorable. Because such tactics often leave little time for petition circulation, industry groups pay top dollar for massive, rapid and last-minute petition circulation drives. The pool of circulators is thus diminished, and the remaining signature gatherers obtain higher rates.

The recent trend of proponents waiting until the last minute to collect signatures has also driven up qualification costs. Today it is not uncommon for proponents to qualify initiatives in 60 or fewer days. In 1998, Indian tribes used a combination of direct mail, standard signature-gathering activities and supportive television advertising to garner more than a million signatures in just 28 days.[13]

The need to raise large contributions has encouraged some initiative proponents to trade provisions in their proposed measures for major financial support (so-called "logrolling").

"Logrolling" for Contributions

The need to secure large contributions has encouraged some initiative proponents to trade provisions in their proposed measures for major financial support (so-called logrolling). In the June 1988 ballot, Planning and Conservation League Executive Director Gerald Meral constructed park bond Proposition 70 in this manner. Ken Masterton of Masterton & Wright worked with Meral on the initiative. "It was Jerry's genius," Masterton said. "He auctioned off half of the initiative. We'd go to a meeting in L.A. and he'd say, 'You want to save the Santa Monica mountains? OK—how many signatures will you produce?' He'd balance this against the areas we'd include even if there weren't going to be circulators, like Baldwin Hills."[14]

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[11] Telephone interview with Ken Masterton, owner, Masterton & Wright, September 5, 1990; telephone interview with Kimball, *supra* note 9.

[12] Telephone interview with Michael Arno, Arno Political Consultants, September 29, 2006.

[13] See Richard Maullin, "Passing California's Proposition 5; Indian Gaming Initiative," *Campaigns & Elections*, February 1999.

[14] Quoted in Harold Meyerson, "The Year of the Initiative," *LA Weekly*, May 11–17, 1990.

LARGE CONTRIBUTIONS DOMINATE INITIATIVE CAMPAIGNS

While the costs of qualifying a measure for the ballot are hardly insubstantial, they often pale in comparison to the costs of mounting an effective campaign for or against a measure once it qualifies. Effective campaigns for or against a ballot measure can easily cost several million dollars and some have almost reached $100 million on one side. Fierce competition between rival interests and the resulting escalation in initiative campaign costs have created heavy pressures to raise money. Proponents now seek larger contributions from fewer contributors. Grassroots fund-raising is modest, and small contributors play little part.

TABLE 8.3 Largest Initiative Campaign Contributors in the 2005 Special Election

Contributor	Support/Oppose	Amount Contributed
California Teachers Association	Oppose Propositions 74, 75, 76, 77	$56.6 million
California State Council of Service Employees	Oppose Propositions 74, 75, 76, 77	$16.1 million
Pfizer	Support Proposition 78, Oppose Proposition 79	$9.9 million
GlaxoSmithKline	Support Proposition 78, Oppose Proposition 79	$9.8 million
Johnson & Johnson	Support Proposition 78, Oppose Proposition 79	$9.8 million
Merck & Co.	Support Proposition 78, Oppose Proposition 79	$9.8 million
Arnold Schwarzenegger	Support Propositions 74, 75, 76, 77	$7.25 million
Amgen	Support Proposition 78, Oppose Proposition 79	$4.7 million
Abbott Laboratories	Support Proposition 78, Oppose Proposition 79	$4.6 million
Bristol-Myers Squibb	Support Proposition 78, Oppose Proposition 79	$4.5 million
Novartis Pharmaceuticals	Support Proposition 78, Oppose Proposition 79	$4.5 million
Aventis Pharmaceuticals	Support Proposition 78, Oppose Proposition 79	$4.5 million
Wyeth	Support Proposition 78, Oppose Proposition 79	$4.5 million
Eli Lilly	Support Proposition 78, Oppose Proposition 79	$4.5 million
Stephen Bing, producer	Oppose Proposition 77	$4.5 million
SEIU Local 1000	Oppose Propositions 74, 75, 76, 77	$4.1 million

continues

TABLE 8.3 continued

Contributor	Support/Oppose	Amount Contributed
William Robinson, former DHL owner	Support Propositions 74, 75, 76, 77	$3.75 million
California Federation of Teachers	Oppose Propositions 74, 75, 76, 77	$3.6 million
California Correctional Peace Officers Association	Oppose Propositions 74, 75, 76, 77	$3.5 million
Alex Spanos, Stockton developer	Support Propositions 74, 75, 76, 77	$3.25 million
Jerry Perenchio, Univision CEO	Support Propositions 74, 75, 76, 77	$3 million
PACE of California School Employees	Oppose Propositions 74, 75, 76, 77	$2.1 million
California Chamber of Commerce	Support Propositions 74, 75, 76, 77	$1.8 million
Constellation Energy Group	Oppose Proposition 80	$1.3 million
California Professional Firefighters	Oppose Propositions 74, 75, 76, 77	$1.3 million
Steve Poizner, Silicon Valley executive	Support Proposition 77	$1.25 million
Voter Registration and Education Fund	Oppose Proposition 77	$1.1 million
Wal-Mart Stores and family	Support Propositions 74, 75, 76, 77	$1 million
Small Business Action Committee	Support Proposition 76	$1 million
Association of California School Administrators	Oppose Propositions 74, 75, 76, 77	$1 million
TOTAL		**$188.6 million**

Sources: California Secretary of State; *San Francisco Chronicle.*

TABLE 8.4 Largest Initiative Campaign Contributors in 2006 (Primary and General Elections)

Contributor	Support/Oppose	Amount Contributed
Bing Stephen L., Shangri La Entertainment, producer	Support Proposition 87	$48,558,000
Chevron Corporation	Oppose Proposition 87	$37,160,000
Aera Energy, LLP	Oppose Proposition 87	$32,000,000
Philip Morris USA Inc.	Oppose Proposition 86	$29,664,000
R. J. Reynolds Tobacco Company	Oppose Proposition 86	$24,425,000
Occidental Oil and Gas Corporation	Oppose Proposition 87	$9,000,000
California Teachers Association Issues PAC	Support Proposition 1D	$6,800,000
CA Hospitals Committee on Issues, sponsored by CAHHS	Support Proposition 86	$5,250,000
Reed Hastings, Netflix CEO	Support Proposition 88	$4,974,000
Morongo Band of Mission Indians	Support Proposition 1A	$4,000,000

Contributor	Support/Oppose	Amount Contributed
Construction and Labor for 1A & 1B	Support Proposition 1A and 1B	$4,000,000
Rebuilding California—Yes On 1A, 1B, 1C, 1D and IE	Support Proposition 1A, 1B, 1C, 1D and 1E	$4,000,000
ConocoPhillips	Oppose Proposition 87	$3,000,000
The Nature Conservancy	Support Proposition 84	$3,000,000
BP America and Its Affiliated Entities	Oppose Proposition 87	$3,000,000
Plains Exploration & Production Company	Oppose Proposition 87	$2,050,000
CA Nurses Association	Support Proposition 89	$2,000,000
California Correctional Peace Officers Association	Oppose Proposition 90 (partial amount)	$2,000,000
Rumsey Rancheria PAC	Support Proposition 1A	$1,994,713
The Fund for Democracy	Support Proposition 90	$1,500,000
U.S. Smokeless Tobacco Co.	Oppose Proposition 86	$1,000,000
The Nature Conservancy	Oppose Proposition 90	$1,000,000
Page Lawrence E., Google, president of products	Support Proposition 87	$1,000,000
State Building & Construction Trades Council Labor-Management	Oppose Proposition 90	$1,000,000
Brin Sergey, Google, Inc. co-founder & president technology	Support Proposition 87	$1,000,000
CA State Council Of Service Employees Issues Committee	Support Proposition 82 (primary election)	$1,000,000
League of California Cities—Nonpublic Funds	Oppose Proposition 90	$1,000,000
Americans for Limited Government, Inc.	Support Proposition 90	$1,000,000
Bing Peter S., self, investments	Support Proposition 87	$1,000,000
TOTAL		**$237,375,713**

Source: California Secretary of State.

The Reliance on Larger Contributions

With large contributions coming from all sides, ballot measure campaigns have become battles between fewer and fewer major interests, while contributions from small donors have become insignificant. The following only partly describes how groups have bankrolled large campaigns:

- In 2005, 30 contributors bankrolled nearly two-thirds of the estimated $300 million spent on the special election.[15]

[15] See Wildermuth, *supra* note 6.

- A handful of pharmaceutical companies spent over $80 million on two ballot measures, Propositions 78 and 79.[16]
- Indian tribes spent over $65 million in the 1998 election trying to influence the outcome on Proposition 5.[17]
- Two oil companies contributed a combined $34 million to defeat Proposition 87 in the 2006.[18] Those contributions were matched on the opposing side by Hollywood movie producer Stephen Bing, who contributed $48.6 million of his own money—a record for an individual giving to a ballot measure campaign.[19]

TABLE 8.5 Most Expensive Ballot Measure Campaigns[20]

Prop.[21]	General Election Year	Subject	Expenditure	Expenditure For	Expenditure Against	Pass/Fail (Margin)
87	2006	Alternative Energy	$154,199,199	$61,251,188	$92,948,011	F (45/55)
5	1998	Indian Gaming	$114,012,698	$81,316,570	$32,696,128	P (62/38)
86	2006	Tobacco Tax	$82,748,301	$16,446,205	$66,302,096	F (48/52)
38	2000	School Vouchers	$76,428,996	$37,489,136	$38,939,860	F (29/71)
68[22]	2004	Indian Gaming	$75,509,183	$27,440,886	$48,068,298	F (16/84)
75	2005	Union Dues	$71,386,031	$17,162,431	$54,223,600	F(47/53)
104	1988	No-Fault Insurance	$64,746,851	$64,709,382	$37,469	F (25/75)
79	2005	Prescription Drugs	$52,444,407	$8,357,804	$44,086,603	F(39/61)
9	1998	Utility Rates	$50,888,534	$1,804,762	$49,083,721	F (27/73)
10	1998	Cigarette Tax	$49,931,314	$11,633,029	$38,298,285	P (51/49)
39	2000	School Facilities	$43,711,135	$37,807,217	$5,903,918	P (53/47)
134	1990	Alcohol Tax	$40,822,826	$2,957,760	$37,865,066	F (31/69)
99	1988	Tobacco Tax	$39,823,885	$3,124,143	$36,699,743	P (58/42)
4[23]	1956	Oil Refineries	$38,352,931	$28,671,450	$9,681,482	F (23/77)

Source: Center for Governmental Studies data analysis.

[16] See Lawrence, *supra* note 6.

[17] See Dan Morain, "Drug Makers Shatter Campaign Records," *Los Angeles Times*, October 28, 2005.

[18] See Harrison Sheppard, "Funding Shatters Election Records," *Los Angeles Daily News*, October 6, 2006; see also Kevin Yamamura, "Costly War to Sway Voters," *Sacramento Bee*, August 7, 2006.

[19] See Dan Morain, "Total Campaign Outlays Approach $400 million," *Los Angeles Times*, October 6, 2006.

[20] Values are adjusted to 2006 dollars (California CPI for April 2006).

[21] All data on propositions pre-1990 come from the book, *Democracy by Initiative*. Data on propositions from 1992–98 appear on the California Voter Foundation Website (http://www.calvoter.org/voter/elections/archive/index.html#money). Data on propositions from 2000–04 is from the Office of the California Secretary of State's Website (http://cal-access.ss.ca.gov).

[22] Proposition 68 figures are not exact. This is because data from the California Voter Foundation does not include late donations and the California secretary of state's Website has final information on donations from committees, but some of those committees were not solely dedicated to 68. Accordingly, the figures listed are the fully up-to-date figures from committees that were solely dedicated to 68. The actual number is marginally higher, but can not be ascertained with precision.

[23] Because data from 1956 elections are not audited, and therefore somewhat unreliable, amounts for Proposition 4 figures are rough.

The Principal Sources of Contributions

Contributions to ballot measure campaigns come from a variety of sources: businesses and corporations, individuals, officeholders and grassroots organizations. Initiative contribution patterns have always had a strong business presence, but recently other political players, including labor unions, Indian tribes, wealthy individuals and officeholders, have increased their presence. At the same time, funding of and participation by grassroots organizations has decreased. Funding from political parties continues to be modest.

Business Contributions

As more and more regulatory and taxation measures have reached the statewide ballot, major funding of initiative campaigns has become part of the corporate "cost of doing business" in California—as have campaign contributions to officeholders and expenditures to lobby state government.

In contrast with their broad-based organizational counterparts, such as labor unions and citizen groups, business interests have primarily opposed measures in order to preserve the status quo.[24] Since 1978, for example, the tobacco industry has spent almost $100 million on several campaigns opposing antitobacco initiatives (Proposition 5 in 1978, Proposition 10 in 1980, Proposition 99 in 1988, and Proposition 86 in 2006).[25] Tobacco companies funded a $22 million campaign to oppose Proposition 99 alone and spent more than $66 million to defeat Proposition 86.[26] As these examples show, tobacco companies are willing to spend substantial amounts of money to protect their future financial interests. "The stakes are high for the tobacco industry. Experts on both sides predict that a big tobacco tax increase would lower sales and lead to a spike of smuggling of counterfeit smokes from China, Mexico and elsewhere."[27]

As more and more regulatory and taxation measures have reached the statewide ballot, major funding of initiative campaigns has become part of the corporate "cost of doing business" in California.

Industry groups and businesses maintain that such immense contributions to initiative campaigns are essential to defend their livelihoods. Speaking about the large amount of money spent by tobacco companies against 2006's Proposition 86, an R. J. Reynolds spokesperson said: "It is in our best interest to fight the proposition. . . . The impact to our business of Prop. 86 passing is far greater than the amount of money we will spend opposing it."[28]

Even with their success in ballot campaigns, business leaders and representatives complain about the tremendous pressure to raise funds to support such costly campaigns. Bill

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[24] See generally, Elizabeth R. Gerber, "Interest Group Influence in the California Initiative Process" (Public Policy Institute of California background paper, September 1998).

[25] This figures includes $30 million documented in the first edition of *Democracy by Initiative*, plus over $66 million spent by tobacco companies on 2006's Proposition 86.

[26] See Kevin Yamamura, *supra* note 18.

[27] Evan Halper, "Tobacco Firms Light Up Airwaves to Battle Cigarette Tax," *Los Angeles Times*, October 5, 2006.

[28] Quoted in Lynda Gledhill and Matthew Yi, "Tobacco and Oil Ballot Issues Draw Big Money," *San Francisco Chronicle*, September 13, 2006.

Hauck, president of the California Business Roundtable, says, "the process of raising money is like pulling teeth," particularly given the fact that popular politicians exhaust the resources of initiative contributors by raising money for their candidate campaigns. As Hauck puts it: "[Governor Schwarzenegger] is like a vacuum in terms of raising money. The universe of contributors is not that big."[29]

In the late 1980s, industry groups added the counter-initiative—qualifying their own initiative to negate an antibusiness measure—to their arsenal of opposition campaign strategies. Using this strategy, business groups seek either to get more votes for a milder approach, or to confuse the voters so they vote no on both. Since that time, the use of counter-initiatives has been instrumental in the defeat of several initiatives. But this strategy has also proved to be expensive. In 2005, a consumer group called Alliance for a Better California qualified Proposition 79, a prescription drug plan. Later that year, the pharmaceutical industry spent millions of dollars to qualify a counter-initiative, Proposition 78. The pharmaceutical industry then spent over $80 million to support Proposition 78 and defeat Proposition 79. Both measures failed. By comparison, the pharmaceutical industry gave about $87 million to *all* federal candidates between 1997 and 2004.[30]

INDIVIDUALS—THE RISE OF THE MULTIMILLIONAIRE

Initiative campaigns in the past two decades witnessed heavy contributions by individuals in several campaigns. In 1998, Silicon Valley millionaire Ron Unz put up $650,000 of the $976,632 spent on Proposition 227, an initiative that terminated bilingual education programs.[31] In the 2005 election, businessman Steve Poizner gave over $1.25 million to support Proposition 77, an unsuccessful reapportionment initiative.[32]

In 2006, Hollywood producer Steven Bing set an individual ballot measure contribution record when he donated more than $48 million in support of Proposition 87, an unsuccessful alternative energy initiative on the November 2006 ballot.[33] Other wealthy individuals have contributed larger sums of money to political campaigns, but they have usually been for their own candidacies. Bing's contribution, the largest in ballot measure history, accounts for a large majority of all money raised in support of Proposition 87.[34]

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[29] Telephone interview with Bill Hauck, California Business Roundtable, September 14, 2006. This sentiment was shared by Jim Lannich of California Business for Education Excellence, who called fundraising a "painful process." Telephone interview with Jim Lannich, California Business for Education Excellence, September 28, 2006.

[30] See M. Asif Ismail, "Drug Lobby Second to None," Center for Public Integrity (2005), www.publicintegrity.org (accessed March 2007).

[31] See Broder, *supra* note 1, at 169–170.

[32] See Dan Morain, "Campaign Fund Raising Skyrockets," *Los Angeles Times*, September 30, 2005.

[33] See Laura Mecoy, "Prop. 87 Has a $40 Million Donor," *Sacramento Bee*, September 22, 2006.

[34] See *id.*; see also Gledhill and Yi, *supra* note 28.

Labor Involvement

In the 1980s and 1990s, labor participation in the ballot initiative process was relatively low. One exception to this trend was sizeable labor contributions to opposition campaigns at the request of the state's Democratic legislative leadership. These contributions were apparently made to defeat political reforms and help preserve the power of incumbent Democratic leaders, not because the initiatives directly affected labor's interests. In 1990, for example, labor groups contributed approximately $600,000 in opposition to campaign finance/term limits Proposition 131 and term limits Proposition 140.[35]

Over time, however, labor has increased its presence in the ballot initiative process. The 2005 special election saw the emergence of labor as a major power in ballot initiative politics. In total, labor spent over $80 million in an attempt to defeat three initiatives promoted by Governor Schwarzenegger, Propositions 74, 75 and 76.[36] The largest union contributor was the California Teachers Association ($56 million), followed by the California State Council of Service Employees ($16.1 million), the SEIU Local 1000 ($4.1 million) and eight other unions ($1 million apiece).[37]

In 2006, the California Nurses Association (CNA) joined the ranks of the major players in state ballot measure campaigns when it used a combination of nurse volunteers and paid signature gatherers to qualify Proposition 89, a campaign finance reform proposal. Among other things, this measure would have created a system of public financing for candidate elections using funds generated by a tax increase on corporations. Many viewed the CNA's actions as politically motivated retribution against Governor Schwarzenegger and businesses for their support of antilabor propositions in the 2005 special election. Corporations opposed Proposition 89, and it was defeated by a wide margin of 75 to 25 percent.

Indian Tribes

The past decade has witnessed a powerful newcomer to the California ballot initiative process: Indian tribes. "As Indian casinos grow and their political influence increases, the debate over limitations to Indian sovereignty has become a hot issue in California politics."[38] Indian tribes are now regular contributors to candidate campaigns as well as ballot measure campaigns—particularly on measures that affect their own well-being.

In record time and with record spending, the tribes qualified for the November 1998 ballot Proposition 5, which eased many restrictions on Indian gaming in California. The tribes and their opponents (including Nevada casinos and card clubs) spent over $100

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[35] Proposition 131's low contributions limits and public financing arguably would have helped the interests of labor's individual members, but at the same time it might have undercut the power of a union's ability to move around larger sums of money at the bequest of Democratic leaders.

[36] See Wildermuth, *supra* note 6.

[37] *Id.*

[38] For a brief and practical overview of Indian gaming in California, see Institute of Governmental Studies, University of California, "Hot Issue: Indian Gaming in California," http://www.igs.berkeley.edu/library/.

million on Proposition 5—the most expensive effort in history at the time. The measure passed by a margin of 63% to 37%, but the California Supreme Court eventually nullified it in 1999.

Indian tribes then negotiated an agreement with former Governor Gray Davis to expand gaming, but this agreement was contingent on the passage of 2000's Proposition 1A. The tribes spent an additional $30 million on that measure, which passed by a 65% margin. The latest episode in the Indian gaming saga came in 2004, when a coalition of card clubs and racetracks qualified an anti–Indian gaming initiative, Proposition 68 (the "Gambling Revenue Act of 2004"), for the November ballot. The tribes countered on two fronts, with several tribes spending $1.5 million each to defeat the measure, and another tribe, the Agua Caliente band, spending more than $27 million to qualify and support a countermeasure, Proposition 70.[39] With Governor Schwarzenegger negotiating separate pacts with leading tribes and announcing his opposition to both Proposition 68 and 70, voters ended up rejecting both measures.

Although the history of Indian tribes' involvement in the California ballot initiative process is relatively short, it is clear that their role will continue to grow. With such extensive gambling revenues at stake—estimated at more than $5 billion per year since 2000[40]—Indian tribes, like their corporate and union counterparts, will continue to support beneficial measures and oppose those that threaten their revenues.

The Decline of Broad-Based Civic Organizations

As corporations, wealthy individuals, labor unions and Indian tribes have increased their impact on the ballot measure process, the importance of broad-based civic organizations in the process has declined in recent years. While good government groups, taxpayer groups and health and antismoking organizations continue to use the ballot initiative to achieve their respective goals, they have not qualified ballot measures with pure volunteer support for decades. Just like business groups, broad-based organizations such as the League of Women Voters, Common Cause and Ted Costa's People's Advocate now employ signature gatherers to qualify measures, as evidenced most recently when People's Advocate used signature gatherers to qualify Proposition 77, a redistricting measure, for the 2005 special election. Once they qualify a measure, these groups rarely have sufficient resources to mount effective campaigns, particularly when a measure deals with a complex issue or faces corporate opposition.

Officeholders and Candidate-Controlled Ballot Measure Committees

For many years, officeholders generally limited their involvement in ballot measure campaigns to opposing government reform initiatives such as campaign finance and redistricting. However, officeholder participation in the initiative process has grown in recent years, with officeholders playing the roles of both sponsors and major contributors. Statewide,

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[39] See Marc Cooper, "Does California Really Need More Casinos?" *Los Angeles Times*, March 11, 2007.

[40] See Institute of Governmental Studies, *supra* note 38.

legislative and local officials have used ballot initiative sponsorship as an alternative platform to advance their ideas, enhance their statewide visibility, improve their electoral chances and circumvent opposition in the legislature.[41]

According to one estimate, elected officials have raised at least $84 million since 1990 through candidate-controlled ballot measure committees.[42] To fund initiative campaigns, officeholders have often transferred funds directly from their own campaign accounts. Because state law limits contributions to state-elected officials, many officeholders form "candidate-controlled ballot measure committees," which are exempt from the candidate funding restrictions, to raise money from contributors.[43]

In 2005, Governor Schwarzenegger contributed $7.25 million of his own money to support four ballot measures in the special election.[44] "As a popular governor facing a recalcitrant legislature dominated by members of the other party, Schwarzenegger has resorted to using (and sometimes threatening to use) the initiative process to further his legislative agenda and to block initiatives he opposes."[45] Governor Schwarzenegger also received several large contributions from wealthy individuals and businesses in the state. In all, Governor Schwarzenegger's two main campaign committees, the California Recovery Team and Citizens to Save California, spent nearly $56 million to persuade voters to approve Propositions 74, 75, 76 and 77.[46] Most of this money came in large, six-figure amounts from wealthy individuals and corporations.[47]

Candidates' use and control of ballot measure committees to further their legislative goals is not unique to Governor Schwarzenegger or to Republicans. In fact, the Fair Political Practices Commission (FPPC) brought an enforcement action against former Lieutenant Governor Cruz Bustamante—who was a candidate in the 2003 recall election—for raising millions of dollars to air ads against Proposition 54 (the so-called racial privacy initiative) in that election.[48] The case eventually settled with a large fine. In 2005, Senate President Pro Tem Don Perata and Assembly Speaker Fabian Nuñez raised over $8 million to fight Proposition 77 (the redistricting initiative), including several contributions over $50,000 from corporations and unions.[49] In 2006, gubernatorial candidate Phil Angelides formed a committee in support of Proposition 82, a measure which raised taxes on wealthy individuals to pay for preschool programs.[50]

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[41] A legislative tax increase requires a two-thirds vote, for example, but a bond measure funding the same law only requires a simple majority vote of the electorate.

[42] See Richard L. Hasen, "Money and Influence Flow Through a Ballot Measure Loophole," *Los Angeles Times*, January 4, 2005.

[43] Proposition 34, adopted in 2000, imposed contribution limitations on all state candidates.

[44] See Wildermuth, *supra* note 6.

[45] Richard L. Hasen, "Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns," *Southern California Law Review* 78 (2005): 899.

[46] See Lawrence, *supra* note 6.

[47] See Hasen, *supra* note 45, at 900–901.

[48] Margaret Talev, "Election Funding Limits Added," *Sacramento Bee*, June 26, 2004.

[49] See Morain, *supra* note 17.

[50] Dan Morain, "Angelides Mailers Use Preschool Issue to Skirt Campaign Contributions," *Los Angeles Times*, June 2, 2006.

In June 2004, the FPPC adopted a new regulation to limit the amount of money contributed to candidate-controlled ballot measure committees to the same amount that the candidate could raise for his or her campaign committee.[51] This provision was challenged and invalidated. The court ruled the FPPC did not have the authority to issue the regulation.[52]

Political Parties

Political parties traditionally do not get involved in statewide initiative campaigns. Their participation is generally limited to campaigns over reapportionment. Nevertheless, the California Democratic Party collected $10 million in the 2005 special election, while the California Republican Party received $13 million.[53] Of that money, the CDP spent $5.7 million in an effort to defeat four Schwarzenegger-backed initiatives, while the CRP spent $5.5 million, mostly in support of those measures.[54]

Out-of-State Contributors

A growing number of California initiatives have proved to be of national interest, and many attract contributions from out-of-state sources. Measures affecting California's tax levels and general economic climate seem to attract the highest levels of out-of-state contributions. Because of its size and progressive inclinations, California often serves as a bellwether for the rest of the nation. According to one estimate, out-of-state interests have poured more than $280 million into California political campaigns (including candidate campaigns) since 2001.[55] Of the almost $80 million that the top ten donors contributed to the Proposition 78 and 79 campaigns, 94% came from out-of-state pharmaceutical companies, and 6% came from Californian pharmaceutical manufacturer Amgen.[56] In 2006, the lion's share of $4 million raised in support of Proposition 90 (eminent domain) was donated by nonprofits associated with Manhattan real estate entrepreneur Howard S. Rich, an ideological advocate of smaller government.[57]

A growing number of California initiatives are of national interest, and many of these attract contributions from out-of-state sources.

[51] California Code of Regulations, Title 2, § 18530.9 (2004); see also Talev, *supra* note 48.

[52] *Citizens to Save California v. FPPC,* Case No. C049642 (Cal. Ct. of App., 3d App. Dist., December 12, 2006); see also Robert Salladay, "Gov.'s Fund Raising for Initiatives Upheld," *Los Angeles Times,* March 26, 2005.

[53] See Wildermuth, *supra* note 6.

[54] Dan Morain, "Generous Campaign Donors Showing No Signs of Fatigue," *Los Angeles Times,* November 8, 2005.

[55] John Wildermuth, "Donations From Out of State Fuel Races," *San Francisco Chronicle,* September 26, 2006.

[56] HealthVote.org, http://www.healthvote.org/index.php/moneywatch/year_charts/C30/#state.

[57] Tim Reiterman, "Outsiders Bankroll Prop. 90 Campaign," *Los Angeles Times,* October 12, 2006; see also California secretary of state's Website (http://cal-access.ss.ca.gov).

CAMPAIGN COSTS HAVE GROWN

With the plethora of issues and interests converging in the initiative process, total spending has increased since the mid-1970s—especially in the last two statewide elections. In 1976, total spending for the 4 initiatives on the ballot was approximately $9 million. In 1988, that number had climbed to $127 million for the 18 initiatives on the ballot. By 2006, initiative campaign costs were over $330 million for 9 initiatives.

By 1988, campaign costs had climbed to $127 million for the 18 initiatives on the primary and general election ballots. In 2006, costs were over $330 million for 9 initiatives.

The Shift to More Expensive Campaign Methods

A shift of campaign resources toward expensive and sophisticated media-based campaigns has accompanied the growth in initiative spending. In the past, ballot measure committees reached voters via a mix of newspaper advertising, broadcast advertising and campaign pamphlets.[58] By 2006, a majority of voter outreach strategies involved expensive electronic media; in fact, more than half of all campaign-period initiative dollars spent on voter contact expenses went to broadcast advertising.

Among the biggest beneficiaries of increased spending in the 2005 special election were broadcasters, who accounted for more than half the spending ($165 million). In addition, direct mail and slate mailer organizations ($23 million), petition gatherers ($17 million), political consultants ($16 million), as well as lawyers, radio broadcasters, phone banks and polling firms reaped the benefits of increased campaign expenditures.[59]

Broadcast Advertising

Television is by far the most expensive—but cost-effective—weapon of ballot measure campaigns. "Every election, it has become almost axiomatic to say that airing political ads is more expensive than ever before."[60] The cost of reaching a statewide audience via television ads skyrocketed to over $4 million per week in the November 2005 special election.[61] A single 30-second spot on a popular television show in a large market like Los Angeles cost up to $110,000 during the 2005 election.[62] Campaigns spent nearly $165 million on radio and television ads in that election.[63]

Broadcast advertising is particularly effective when a party is trying to defeat a particular ballot measure. The use of broadcast advertising by tobacco companies to defeat Proposition 86 (cigarette tax) in 2006 demonstrates how effective negative advertising

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[58] Voter contact expenditures include television and radio broadcast advertising, direct mail and campaign pamphlets, newspaper advertising, outdoor billboard advertising and signature gathering/survey expenditures.

[59] See *id.*; see also Lawrence, *supra* note 6.

[60] Shane Goldmacher, "As TV Spots Run Low, Prices Run Up," *Capitol Weekly*, September 28, 2006.

[61] See Morain, *supra* note 32.

[62] Kevin Yamamura, "Ad Rates Sky-High for Ballot Measures," *Sacramento Bee*, October 24, 2005.

[63] Andy Furillo, "For the Ballot, Money Matters," *Sacramento Bee*, February 4, 2006.

can be. By the end of the September before the election, opponents of the ballot measure had aired 10,370 ads in the state's five major media markets, compared to only 1,767 in favor of the measure. Public opinion polls in the months and weeks before the elections suggest that opposition's ad blitz was effective at weakening support for the measure: support for the measure dropped 10% to 53% of likely voters between July and September,[64] and the measure eventually went down in defeat by a margin of 48% to 52%. According to an article in the *San Jose Mercury News*, "Despite initial widespread voter backing of new taxes on cigarettes and oil producers, support for both measures significantly dwindled after weeks of heavy negative advertising by opponents."[65]

In past years, low-cost initiative campaigns have been aided by the Federal Communication Commission's fairness doctrine. In 1990, however, a growing number of stations, spurred by declining advertising revenues and uncertainty about the FCC's requirements, refused to provide "fairness" time.[66] In 1992, the FCC repealed the fairness regulations entirely as they applied to ballot measures. (For a full discussion of the fairness doctrine and the FCC decision, see Chapter 7.) As a result, voters are now often exposed to only one side of the issue on which they are asked to vote.

Direct Mail and Slate Mailers

Direct and slate mail used to be relatively economical ways for ballot measure campaign committees to communicate with voters, but they are growing in cost.[67] Heavy-spending initiative campaigns enlist sophisticated direct mail and slate strategies to reinforce their largely media-based efforts.

The slate mail component of ballot campaigns has grown in cost. Far removed from the ideologically based endeavors of the past, slate mail cards are now a big business in California. As of 2006, more than 58 slate mail organizations had registered with the state.[68] Placement on some slates frequently goes to the highest bidder. Opponents of Proposition 82 (preschool tax) in 2006, for example, paid $60,000 to appear on Demo-

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[64] See Halper, *supra* note 27.

[65] Julie Sevrens Lyons and Karen de Sa, "Ad Campaigns Moving Voters to 'No' Side, Latest Poll Shows," *San Jose Mercury News*, October 4, 2006.

[66] Attempting to encourage this trend, opponents of alcohol tax Proposition 134 threatened to withhold their substantial advertising dollars from broadcasters who gave opponents free air time. The American Association of Advertising Agencies backed their move, advocating that all broadcasters refuse to provide any no-cost broadcast time to underfunded initiative campaigns. "What the alcohol industry is really doing is blazing the trail for any industry organization that wants to influence public opinion by attempting to ensure that there will not be an evenhanded look at the issues in the broadcast arena," charged Proposition 134 media consultant Leo McElroy. Quoted in Virginia Ellis, "Pressure Increases to Deny Proponents Free Air Time," *Los Angeles Times*, August 29, 1990.

[67] Shanto Iyengar, Daniel Lowenstein and Seth Masket, "The Stealth Campaign: Experimental Studies of Slate Mail in California," *The Journal of Law & Politics* 17 (Spring 2001): 2. Bill Zimmerman of Zimmerman & Markman notes that the cost of reaching voters via television advertising is about 1 cent per voter, while the cost of reaching them by mail is at least the cost of the stamp. Telephone Interview with Bill Zimmerman, Zimmerman & Markman, October 4, 2006.

[68] Office of the California Secretary of State, Cal-Access, http://cal-access.ss.ca.gov/Campaign/Committees/list.aspx?view=slateMailers (accessed March 2007).

cratic Voters Choice slate (which was not associated with the Democratic Party) urging a no vote on the proposition, even though the California Democratic Party and most of the legislators in the state had endorsed the initiative.[69] Pharmaceutical companies spent $1.5 million in opposition to Propositions 78 and 79 on 30 different slate mailers sent to voters in the 2005 special election.[70]

HEAVY SPENDING IMPACTS INITIATIVES

Money's dominance in the initiative process produces several effects. First, because large sums of money can qualify measures for the ballot, those who have money can dictate which policy issues are presented to the voters, thereby rendering those who have less money—particularly ethnic and community groups—unable to equally pursue their policy agendas through the initiative process. Second, voters are overwhelmingly frustrated by the dominance of money in the initiative process, even though they still strongly approve of the initiative process itself. Finally, some critics contend that the large quantities of money in the initiative process can dictate outcomes on election day, giving special interest groups the ability not only to put their own policies on the ballot, but also to defeat unfavorable policies or enact favorable policies into law.[71]

MONEY AND ELECTION OUTCOMES

Large amounts of money can *qualify* a measure for the ballot, and some think that money can outright buy policy as well. But the relationship between money and electoral success is not as obvious as one might expect. Money does indeed "talk," but its impact may depend on the particular situation.

A wide body of scholarly work has examined and measured the relationship between campaign spending and election outcomes. The general consensus (although this has been challenged in recent years) is that negative spending against a proposition can defeat it, but that spending in support does not ensure the proposition's victory. Professor Thomas Stratmann notes that it is difficult to identify a causal effect of interest groups' financial activities on political outcomes because "interest groups act strategically when they attempt to influence the defeat or passage of ballot measures. . . ."[72]

The following list summarizes the findings of a few major studies on the issue:

- In one of the first studies to examine the role of money in ballot campaigns, UCLA professor Daniel Lowenstein found that the side that spent more on campaigns won the election 64% of the time and lost 36% of the time. Without further investigation, this would have suggested that money exerts only some influence

[69] Jordan Rau, "Giving a False Stamp of Approval with Mailers," *Los Angeles Times*, June 13, 2006.

[70] Shane Goldmacher, "Slate Mailers Leave Even Savvy Voters Scratching Their Heads," *Capitol Weekly*, November 10, 2005.

[71] Garrett and Gerber, *supra* note 10, at 75.

[72] Thomas Stratmann, "The Effectiveness of Money in Ballot Measure Campaigns," *Southern California Law Review* 78 (2005: 1041–1064.

over voter choice. However, when Lowenstein separated the cases into two groups—one-sided spending in *support* of an initiative versus one-sided spending in *opposition* to an initiative—a different picture emerged. Among the initiatives *supported* by big money, only 46% were successful and 54% were defeated. Conversely, among the ten measures *opposed* by big money, nine were defeated and only one was approved. In other words, while money may not have been a significant factor in winning voter approval of an initiative, *money was an overwhelming factor in defeating ballot measures*.[73]

- Professors Todd Donovan and Shaun Bowler reach a similar conclusion in their study, concluding that spending "plays a fairly conservative role in direct democracy. Well-financed interests are typically unable to 'buy' public policy via the initiative process. Spending by the *no* side can often protect the status quo, but it is difficult to spend in favor of a measure and win."[74]
- Professor Elizabeth Gerber also found that different groups achieve different results by spending on ballot measure campaigns. Economic interest groups are limited in their ability to pass new laws by initiative but have considerable success in blocking initiatives proposed by others and exerting pressure on politicians. By contrast, citizen interest groups with broad-based support and significant organizational resources have proved to be extremely effective in using direct legislation to pass new laws.[75]
- Professors Elizabeth Garrett and Elizabeth Gerber conclude that the dominance of money in ballot measure campaigns has a limited effect on election outcomes and that resources do not necessarily determine outcomes. They found that the side with the most money often fails to enact an initiative, but that money spent to defeat an initiative is more effective than money spent to pass a measure. Finally, they found that not all money is equal: Money spent by broad-based citizen groups is more effective than money spent by economic groups.[76]
- Professors John de Figueiredo, Chang Ho Ji and Thad Kousser found that when one accounts for citizen initiatives, qualifications expenses and diminishing marginal returns, the conventional finding that initiative backers waste their money disappears.[77]
- Finally, Professor Stratmann found that "opposition and advocacy spending in initiative campaigns have statistically significant and quantitatively important effects in ballot campaigns."[78]

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[73] Daniel Lowenstein, "Campaign Spending and Ballot Propositions: Recent Experience, Public Choice and the First Amendment," *UCLA Law Review* 29 (1982): 505–641.

[74] Shaun Bowler and Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy,* (Ann Arbor: University of Michigan Press, 1998), 163.

[75] Gerber, *supra* note 24.

[76] Garrett and Gerber, *supra* note 10, at 76.

[77] John M. de Figueiredo, Chang Ho Ji and Thad Kousser, "Do Initiative Backers Waste Their Money? Revisiting the Research on Campaign Spending and Direct Democracy" (presented at Direct Democracy in the American West: Historical Roots and Political Realities, Stanford University, April 2005).

[78] Stratmann, *supra* note 72, at 124.

Opposition expenditures are effective at chipping away popular support for initiatives and defeating measures at the polls, especially if opponents significantly outspend proponents. Expenditures made in support of initiatives have not shown the same pattern of effectiveness over time. It is important to note, however, these are general tendencies that have occurred over an aggregate data base; they may or may not apply in any specific case. A multitude of other factors that affect voter choice can intervene under certain circumstances and create exceptions to the rule.

KEEPING GROUPS OUT OF THE PROCESS

Not only does money's dominance in the initiative process raise the possibility of determining election outcomes, it also has the effect of keeping certain groups—especially underfunded ethnic and community groups—out of the process. "As money becomes the only certain route to ballot access, observers of direct democracy worry that the character of the process is determined disproportionately by those with financial interests."[79]

In recent interviews about the ballot initiative process, community-based and grassroots groups overwhelmingly expressed two general concerns. First, they cite a lack of useful and adequate voter information about who is funding the campaigns. Second, they feel that wealthy special interests have captured the ballot initiative process, much to their detriment. "The financial reality is that this is an avenue that has not been accessible to our constituencies," said Nicholas Espiritu of the Lawyers' Committee for Civil Rights.[80]

Community-based and grassroots groups feel that the initiative process has been captured by wealthy special interests.

Community groups also complained that the ballot initiative process has put their constituencies on the defensive rather than allow them to pursue their policy goals. Jimmy Valentine, executive director of the African American Voter Education and Representation Project, echoed his frustration with the initiative process, saying, "We do not look fondly on initiatives because they have been used to target our communities."[81] A February 2002 paper by the Public Policy Institute of California concludes that considering the outcomes of all initiatives between 1978 and 2000, "one sees little evidence of bias against any racial or ethnic group. . . . However, when race or ethnicity itself was an important part of the initiative, nonwhite voters fared poorly compared to whites."[82]

Because they are forced to spend their limited resources against attacks such as Proposition 187 (illegal immigrant social services), Proposition 209 (affirmative action), Proposition 54 (racial privacy) and Proposition 227 (bilingual education), community groups do not have sufficient resources to pursue positive measures that they deem important to their constituencies. When asked what kinds of issues they would like to address if they had sufficient resources to qualify an initiative and mount a campaign,

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[79] Garrett and Gerber, *supra* note 10, at 77.

[80] Telephone interview with Nicholas Espiritu, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, July 12, 2006.

[81] Telephone interview with Jimmy Valentine, African American Voter Education and Representation Project (AAVREP), July 12, 2006.

[82] Public Policy Institute of California, "The California Initiative Process—How Democratic Is It?" (Occasional Paper, February 2002), 4.

community leaders mentioned a wide variety of issues: minimum wage, affordable housing, predatory lending, pension protection, separate funding for community colleges and three strikes reform.[83] While some of these issues may have a relatively small chance of passing with voters, community groups think that they should at least have the opportunity to raise the points and contribute to the state's policy-making discussions.

Impact on the Public

Heavy spending on ballot initiative campaigns also affects voter attitudes toward governance. A survey of California voters found that while 57% of respondents expressed satisfaction with the initiative process, 73% of them perceived the ballot initiative process as dominated by big-money interests. Said one respondent: "The initiative process is driven by special interests, financed by secret means and usually not in the public's good. It serves to distract voters from the truly important issues."[84]

This somewhat paradoxical result—that voters like the ballot initiative process, but don't like how it works—is not surprising. According to the pollsters, voters often hold contradictory points of view.

REFORM MEASURES FACE LEGAL CHALLENGES

Although various state and local governments have tried to limit contributions to or impose spending ceilings on initiative campaigns, the courts have declared these laws unconstitutional in violation of the First Amendment's freedom of speech protections. Today, no jurisdiction anywhere in the country restricts the flow of dollars into ballot measure campaigns.

A state invariably triggers First Amendment concerns whenever it restricts campaign contributions and expenditures.

Disclosure is the sole form of campaign finance regulation for ballot initiative campaigns that the courts have upheld. Existing laws require initiative campaign committees to disclose the sources of their contributions and how they spend their funds.

A state invariably triggers First Amendment concerns whenever it puts restrictions on campaign contributions and expenditures. The U.S. Supreme Court and most federal and state courts have consistently held that restrictions on political money equate to restrictions on speech and therefore must pass strict constitutional scrutiny.

Early Supreme Court Case Law and General Campaign Finance Framework

Any analysis of campaign finance regulation begins with the seminal 1976 U.S. Supreme Court case, *Buckley v. Valeo*.[85] Although *Buckley* dealt specifically with the 1974 amendments

[83] Telephone interviews with Jimmy Valentine, AAVREP; John Jackson and Marina Delgado, Association of Community Organizations for Reform Now (ACORN); Greg Akili (SEIU).

[84] Center for Governmental Studies (CGS), *Random Digital Dial Survey and ARS Study*, conducted by Fairbank, Maslin, Maullin & Associates and Winner & Associates, June 2006.

[85] 424 U.S. 1 (1976).

to the Federal Election Campaign Act (FECA) as they related to *candidates*, it created the legal framework for handling subsequent campaign finance cases, including ballot measure cases. In *Buckley*, the Court equated campaign money with political speech, which meant that it could only be restricted to serve a compelling government interest.

The Court distinguished campaign contributions from expenditures. It found that FECA's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."[86] The Court found that the prevention of corruption or the appearance of corruption was a sufficiently compelling government interest to impose restrictions on political contributions. "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."[87]

With regard to expenditure limits, the Court rejected the "ancillary governmental interest in equalizing the relative ability of individuals and groups [through spending] to influence the outcome of elections."[88] The Court stated: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ."[89] In short, the Court upheld reasonable limits on contributions but struck down any limits on expenditures.

A few years after deciding *Buckley*, the Court considered two cases dealing with campaign finance laws in ballot measure elections. In *First National Bank v. Bellotti*,[90] the Court invalidated a Massachusetts statute that prohibited corporations from making contributions or expenditures for the purpose of influencing ballot measure campaigns. It ruled that the First Amendment protects corporate speech and the publication of a corporation's views on proposed state constitutional amendments. The Court held that the Constitution does not support the argument that expression of views on issues of public importance loses First Amendment protection simply because the speaker is a corporation, even though the corporation cannot prove the issues materially affect the corporation's business. Instead, corporate speech on ballot measures is protected because the voters have a right to hear ideas expressed in corporate speakers' views.[91]

In *Citizens Against Rent Control v. City of Berkeley* (*CARC*), the Court struck down a city ordinance that restricted all contributions to ballot measure committees to a maximum of $250.[92] The Court repeated its finding in *Bellotti* that "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."[93] Money can corrupt a candidate, but it cannot corrupt the text of an initiative.

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[86] 424 U.S. at 23.

[87] *Id.* at 26.

[88] *Id.* at 48.

[89] *Id.* at 48–49.

[90] 433 U.S. 765 (1978). In 1976, a California district court of appeal invalidated a similar Berkeley city ordinance that prohibited corporate contributions to ballot measure committees. The court held that the ordinance violated the First Amendment. See *PG&E v. City of Berkeley*, 60 Cal.App.3d 123 (1976).

[91] 433 U.S. at 765.

[92] 454 U.S. 290 (1982).

[93] *Id.* at 298, quoting *Bellotti*, 454 U.S. at 790.

RECENT SUPREME COURT CASE LAW

For a brief period between 2000 and 2003, the Supreme Court decided a number of cases upholding various campaign finance regulations in candidate campaigns. Professor Richard Hasen commented in 2005 that this "seismic shift" in the Court "markedly lowered the bar for upholding the constitutionality of campaign finance regulations in *candidate* campaigns" that "could well portend a rethinking of the logic of *Bellotti* and *CARC*."[94] These cases include:

- *Nixon v. Shrink Missouri Government PAC*,[95] which upheld a low contribution limits for state offices in a Missouri law
- *FEC v. Colorado Republican Federal Campaign Committee*,[96] which upheld the FECA provision treating party expenditures coordinated with a candidate as contributions to that candidate and limiting the amount of the party expenditure
- *FEC v. Beaumont*,[97] which upheld a federal ban on campaign contributions made by corporations organized solely for ideological purposes
- *McConnell v. FEC*,[98] which upheld the federal limits on contributions to federal candidates and officeholders found in Bipartisan Campaign Reform Act (BCRA)

While the Court might have been more receptive to ballot measure campaign finance regulation during this apparent window of opportunity from 2000 to 2003, this no longer appears to be the case. In late 2005 and early 2006, the composition of the Court changed with the additions of Chief Justice John Roberts (who replaced former Chief Justice William Rehnquist) and Justice Samuel Alito (who replaced Justice Sandra Day O'Connor). Whereas Justice O'Connor often represented the swing vote on a number of campaign finance cases, Justices Roberts and Alito, as evidenced by their decisions in two recent cases—one dealing with a state campaign finance law and one dealing with the federal electioneering communications law—appear to be leaning toward deregulation.

In the 2006 case *Randall v. Sorrell*,[99] the Court invalidated a Vermont statute that imposed contribution limits of $200 to legislators and $400 to candidates for statewide office. The Court did so because it viewed the contribution limits at issue as unreasonably low. The Court was particularly concerned that the regulation stifled electoral competition, and it listed several factors (for example, whether the regulation was adjusted for inflation) to make such a determination. In a highly fractured decision, the plurality opinion kept the *Buckley* framework for analyzing campaign finance cases and distinguished rather than overruled the aforementioned cases upholding contribution limits.

In the 2007 case *Wisconsin Right to Life v. FEC*,[100] the Court struck down as unconstitutional provisions in BCRA requiring corporations and unions to pay for television and

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[94] Hasen, *supra* note 45, at 891.
[95] 528 U.S. 377 (2000).
[96] 533 U.S. 431 (2001).
[97] 539 U.S. 146 (2003).
[98] 540 U.S. 93 (2003).
[99] 548 U.S. ___ (June 26, 2006).
[100] No. 06–969, (June 25, 2007).

radio ads run close to the election featuring a federal candidate with funds from their political action committees, and to disclose where the money came from. Plaintiff Wisconsin Right to Life argued to the Court that ads it had run in 2004 about certain senators filibustering court nominations—some of whom were up for election that year—were genuine ads and that BCRA could not constitutionally be applied against it. The Supreme Court, with Justices Roberts and Alito casting the deciding votes, went even further, ruling that the corporation and union PAC requirement ran afoul of the First Amendment, except when applied to advertising that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[101]

Because the U.S. Supreme Court apparently believes contributions cannot corrupt a ballot measure, it has been unwilling to uphold limits on contributions to ballot measure committees.

Although future Supreme Court decisions in this area are difficult to predict, it seems a majority of the Court is still willing to distinguish between limits on expenditures and contributions. Because contributions are an "indirect" form of speech, signifying the contributor's support for the candidate's positions and not directly expressing the contributor's own views, the government can reasonably restrict contribution amounts to candidates. However, because the Court apparently believes contributions cannot "corrupt" a ballot measure, it has been unwilling to uphold limits on contributions to ballot measure committees. It is possible that some future litigant might establish that very large contributions may in fact "corrupt" the ballot initiative process by directly purchasing provisions in that measure or by ensuring that the public will not hear both sides of an issue equally.

RECOMMENDATIONS

This chapter's recommendations fall into several categories: limiting the role of money in ballot measure campaigns (either through contribution and/or expenditure limits),[102] improving disclosure of ballot measure campaign finance information and reinstating the fairness doctrine so that the underfunded side of a ballot measure campaign can still be heard. Some of these reforms are controversial and pose constitutional questions. On a sliding scale, some reforms (for example, improved disclosure) stand a better chance of passing constitutional muster than others (for example, creating expenditure limits on ballot measure campaigns). Nevertheless, most of these reforms are tremendously popular and would go a long way toward improving the ballot measure process.

Limiting Contributions to Ballot Measure Campaigns

Large contributions taint the initiative process, particularly when they are made disproportionately to one side. They enable well-heeled interests to place their measures on the ballot while lesser-funded, often grassroots, organizations are unable to place equally deserving measures before the voters. More significantly, the use of money from very

[101] *See id.* at 16.

[102] For a thoughtful discussion of limiting the role of money in the ballot initiative process, see Hasen, *supra* note 45.

large contributors to fund expensive media campaigns can have a significant impact on voter preferences. Considering these trends, a well-crafted analysis might convince the Supreme Court to reconsider its past opinions striking down contribution limits in initiative campaigns.

Justifications for Limiting Contributions in Ballot Measure Campaigns

Contribution limits have several potential legal justifications. First, they can help create balanced campaigns in terms of voter information.[103] They would prevent a small number of large contributors from having a disproportionate or lopsided impact on a campaign. Proponents and opponents of a measure would have roughly equal opportunities to present their arguments to voters. There would be a better chance that the money spent on a measure would reflect public support for each side instead of the views of a few wealthy interests. Though *Buckley*, *Bellotti* and *CARC* all rejected "equality" as a sufficiently compelling government interest to limit campaign contributions, some recent cases have used the rationale to justify certain campaign finance limits. In *Austin v. Michigan State Chamber of Commerce*[104] (hereafter *Austin*), the Court used what amounted to an equality rationale to uphold a Michigan law that banned corporations from using general treasury funds for independent expenditures in state election campaigns:

Contribution limits can help create balanced campaigns in terms of voter information.

> Regardless of whether [the] danger of "financial quid pro quo" corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.

Although the law in *Austin* dealt with independent expenditure limits rather than contribution limits, and candidate campaigns rather than ballot measure campaigns, one could easily use the language in the decision to justify contribution limits in the ballot measure context. Professor Hasen writes:

> To be sure, [*Austin* and other cases] do not endorse the equality rationale explicitly, and it would be surprising to see the current Court go so far as to accept equality as a basis to limit expenditures outside the corporate and union contexts. It would be somewhat less surprising, however, to see the Court uphold contribution limits in ballot measure campaigns as a means of promoting greater political equality.[105]

Second, a voter confidence rationale could also justify limits on contributions to ballot measure campaigns. Under this line of reasoning, large accumulations of wealth "exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government."[106]

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[103] Hasen, *supra* note 45, at 908.
[104] 494 U.S. 652 (1990).
[105] Hasen, *supra* note 45, at 909.
[106] *Bellotti*, 433 U.S. at 789.

The Court rejected the notion of banning corporate contributions to ballot initiative campaigns in the *Bellotti* decision, but maintained:

> Preserving the integrity of the electoral process, preventing corruption, and "sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important.[107]

Much has changed since *Bellotti* and *CARC* were decided. Many of the studies mentioned earlier, which were not available to the Court when those cases were decided, document how large amounts of money can buy access to the ballot, and in some cases can play a role in election outcomes—particularly in defeating a measure. Furthermore, numerous polls, including one sponsored by CGS, show widespread voter frustration with the levels of money in the ballot initiative process—a strong indicator of declining voter confidence in the system. One could use these studies and polls to reopen the Court's debate about whether declining voter confidence is a sufficiently compelling government interest to justify campaign finance restrictions in the ballot measure process.

Third, limiting contributions to ballot measure committees is arguably necessary to prevent circumvention of candidate contribution limits by candidates who control their own ballot measure committees. Under this line of argument, creating limits on contributions to candidate-controlled ballot measure committees prevents the corruption or appearance of corruption by candidates. Of the three arguments, this one might be the most persuasive, yet it would have the least impact. As Professor Hasen notes, only a small percentage of ballot measure committees from 1990 to 2004 were candidate-controlled.[108]

It may be time to reopen the question of whether large contributions can corrupt the initiative process.

Finally, it may be time to reopen the question of whether large contributions can "corrupt" the initiative process. The Court has ruled that candidates can be corrupted by large contributions (that is, their positions on issues can be changed to attract financial support), but that initiatives cannot (because the text of an initiative is not influenceable). This, however, is no longer the case. Some proponents have inserted provisions in the texts of initiatives in order to obtain large contributions. Moreover, the concept of corruption might be expanded to include corruption of the electoral process itself—which would occur when a few large contributions directly influence the outcome of elections.

Specific Limits on Contributions to Ballot Measure Committees

This report recommends placing a $100,000 limit on all contributions to ballot measure committees. The enactment of a $100,000 per donor contribution limitation could achieve certain desirable results. First, such a limit would reduce the ability of interest groups to overwhelm the initiative process with campaign money. Second, such a limit applied to qualification period donations makes it less likely that single corporations,

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[107] *Bellotti*, 433 U.S. at 788-89.

[108] Hasen, *supra* note 45, at 908.

unions or individuals could buy their way onto the ballot. Third, the original intentions of the qualification process—to act as a threshold for broad-based support—may again be realized; initiative proponents would be forced to seek smaller contributions from a wider spectrum of supporters.

The Supreme Court issued its decisions in *Bellotti* and *CARC* at a time when the impact of the unrestrained flow of cash into the public policy arena of ballot initiatives was not fully understood. Ruling that a $250 contribution limit from individuals or corporations to initiative campaigns in the city of Berkeley was unconstitutional, the Court's opinion implied that *any* contribution limitation on initiative donations would be unconstitutional. Today's initiative process is marked by the influx of vast sums of money into campaigns. In light of recent developments, the time may be ripe to seek new rulings.

LIMITING CONTRIBUTIONS TO CANDIDATE-CONTROLLED BALLOT MEASURE COMMITTEES

California law currently limits contributions to candidates but not to candidate-controlled ballot measure committees. This creates an easily manipulated loophole. It allows candidates to form a committee to support or oppose a ballot measure and use the committee to raise unlimited sums. The candidate may end up overly indebted to ballot measure contributors, which could in turn affect subsequent legislation.

CGS recommends creating limits on contributions to candidate-controlled ballot measure committees to close this loophole.

> The constitutional argument in favor of a limit on contributions to candidate-controlled ballot measure committees is easy to frame. If it is constitutional to limit a candidate . . . to accepting [a specified amount of money] from an individual donor . . . so as to prevent corruption and the appearance of corruption, it should similarly be constitutional to limit large contributions to candidate-controlled ballot measure committees whose activities may inure—even if somewhat less directly—to the candidate's benefit.[109]

The threat of real or apparent corruption associated with large contributions to candidates is entirely dependent on a candidate's *receipt* of a contribution, not on the candidate's *use* of the contribution.

The California State Legislature should enact a law—much like the regulation adopted by the California FPPC in Section 18530.9—limiting contributions to candidate-controlled ballot measure committees to $10,000.

CONSIDERING EXPENDITURE LIMITS ON BALLOT MEASURE COMMITTEES

Expenditure limits in ballot measure campaigns would have great difficulty passing constitutional muster in court. Nevertheless, placing limitations on initiative campaign expenditures would be one of the strongest single measures to reduce the impact of escalating costs. Expenditure ceilings set at a reasonable level would have several positive impacts. The immense pressure to raise huge contributions would be reduced. A closer approximation to a "level playing field" would be created between well-funded and low-funded interests, reducing to some degree the vast disparities that occur in voter informa-

[109] *Id.* at 903.

tion. Initiative campaigns would be encouraged to use lower-cost grassroots methods of campaigning.

Limiting All Expenditures

For a brief time, California limited the flow of campaign money into the initiative process. With the approval of the 1974 Political Reform Act (Proposition 9) by 70% of the voters, California imposed expenditure ceilings on the qualification of petitions and on spending for and against ballot measures during the campaign. The Supreme Court's decision in *Buckley*, however, forced California to abandon these expenditure ceilings.

Proposals to impose expenditure ceilings still face significant hurdles. Unlike contribution limits, which the Supreme Court has accepted to eliminate corruption or the appearance of such, expenditure ceilings on candidates have been viewed as an abridgement of free speech and invalidated by the Court. As the Court has said, mandatory expenditure ceilings "place substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate."[110] Nonetheless, the *Austin* case invites the argument that, in California, excessive organizational contributions and one-sided campaign spending have jeopardized the integrity of elections and that voters are being either misled or left uninformed on some vital state issues.

Limiting Corporate and Union Expenditures

Given the Supreme Court's strong language against generic expenditure limits in *Buckley, Bellotti* and *CARC,* contrasted with its decision in *Austin* to uphold limits on corporate expenditures in state elections, some have concluded that expenditure limits only on corporations and their union counterparts might be upheld. In *Austin,* the Court expressed concern that large corporate treasuries, which have no direct correlation to the public's support for the corporation's political ideas, might unfairly be used to influence election outcomes. This suggests that some members of the Court might support a high contribution limit on organizational contributions to ballot measure committees.

In the November 2006 election, the California Nurses Association sponsored Proposition 89, which, among other things, would have imposed a $10,000 limit on expenditures by corporations—but not unions—in ballot measure campaigns. Had it passed, this provision of Proposition 89 almost certainly would have been challenged, giving the courts a new opportunity to consider such a limit. However, many criticized Proposition 89 as an attack on corporations because it did not contain a reciprocal expenditure limit on unions. Proposition 89 was soundly defeated and the opportunity for judicial review was lost.

IMPROVING DISCLOSURE

Disclosure is the principal campaign finance regulation for ballot measure campaigns upheld by the courts. Courts have generally cited three governmental interests to justify campaign disclosure laws:

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[110] 424 U.S. at 59.

1. Providing the electorate with information about where money comes from and how it is spent, to help voters support or oppose ballot measures
2. Deterring the reality and appearance of corruption by exposing large contributions and expenditures to the light of publicity, to help the electorate detect postelection special favors
3. Providing the data necessary to detect violations of contribution limits

California's disclosure laws fall into two basic categories: disclosure of contributions to and expenditures by ballot measure committees and slate mailer organizations to the secretary of state, and various disclosures to the public on campaign-related materials and advertisements. As to the first kind of disclosure, California law requires ballot measure committees and slate mailer organizations to file statements of organization as well as detailed semiannual and preelection reports.[111] Those entities are also required to report late contributions and independent expenditures within 24 hours in the weeks just prior to the election.[112]

Concerning the second kind of disclosure, a recent poll by the Public Policy Institute of California found that an overwhelming majority of adults (75%) and likely voters (82%) favor increasing public disclosure of funding sources for initiative campaigns and signature gathering.[113] These reforms are favored by solid majorities of Democrats (79%), Republicans (80%) and independents (76%), and across regions, age, education and income groups.

One simple proposal to improve disclosure would require the California secretary of state to put out at least one preelection and one postelection summary of campaign finance data for ballot measure campaigns (as well as candidate campaigns) for each election on which a ballot measure appears. Until 1998, the secretary of state regularly created summary reports; it should reinstitute this practice.

The following section analyzes the pros and cons of additional disclosure proposals.

Disclosure During Circulation

California currently requires very little disclosure of a ballot measure committee's finances during circulation.[114] CGS considered several proposals to improve disclosure during this period.

First, the proponent of a ballot measure should be required to list his or her name along with the committee treasurer's name on the committee's statement of organization

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[111] See generally Cal. Gov't Code § 84200 *et seq.* (2007).

[112] Ballot measure committees are also required to report electronically any contributions or independent expenditures of $5,000 or more within 10 days of making the contribution or independent expenditure. Cal. Gov't Code § 84204.5 (2007).

[113] Public Policy Institute of California, PPIC Statewide Survey, October 2006, at 20; see also CGS, *supra* note 84.

[114] For purposes of disclosure, a group becomes a ballot measure committee and must file a Statement of Organizations with the state once the issue becomes a "measure" under the act and the group has received contributions totaling $1,000 or more in a calendar year to support its qualification or passage. (FPPC advice letter to Peter A. Bagatelos, May 9, 2000.)

and first campaign statement, whether or not the proponent controls the committee. This will enable those viewing campaign reports to identify both the committee's treasurer and the person who is the "face" of the campaign for or against a given measure.

Some observers support a 2006 proposal by California state legislators to require petitions to include a list of top financial contributors to initiative committees.[115] To keep the list current, the proponents would provide the Web address for the secretary of state's most recent online campaign finance information. Proposals to require greater disclosure of ballot measure supporters proved enormously popular in polls and with community groups. One survey found that 85% of voters favored requiring initiative petitions to identify the names and affiliations of the proponent's three largest financial contributors at the top in bold type.[116]

However appealing this recommendation might at first appear, it raises several logistical problems which ultimately outweigh its benefits. First, ballot measure committees might try to "game" the system by listing innocuous contributors first, assuming that most voters will not go to the secretary of state's Website to check updated campaign finance information, which might later reveal less agreeable contributors. Second, proponents would constantly have to reprint petitions whenever top contributor information changes, which could prove time-consuming and costly. Some might even argue that this would hinder proponents' ability to collect signatures, thereby potentially infringing on their speech. Third, ballot petitions are already overly crowded with information, and most people do not read the text closely. Unless the top contributor information was printed in a bold font and extremely large type size, it most likely would get lost in the rest of the petition. Finally, some would argue that top contributor information simply is not relevant at such an early stage (i.e., before the petition has even qualified), and that the voters have a recourse to oppose circulation campaigns that are financed by unfavorable interests such as tobacco or oil industries: simply vote against the measure at the polls.

Rather than requiring disclosure of the ballot initiative committee's top financial contributors on the petition itself, this report recommends requiring initiative petitions to include the secretary of state's web address and indicate at the top and in bold type that the names and affiliations of major campaign contributors to the circulation drive may be found on the secretary of state's Website (see Chapter 4 for a complete discussion of this recommendation).

Disclosure During the Campaign

California law requires ads for or against a ballot measure to include a disclosure statement identifying persons whose cumulative contributions total $50,000 or more.[117] The law also requires ballot measure ads and mailings paid for by independent expenditures to include the same information.[118]

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[115] Jim Sanders, "Bowen's Ballot Battles," *Sacramento Bee*, September 7, 2006.
[116] CGS, *supra* note 84.
[117] Cal. Gov't Code § 84503.
[118] Cal. Gov't Code § 84506.

Some have proposed that a continuously scrolling "disclosure ticker" run at the bottom of television ads, much like a sports scoreboard or weather ticker on cable TV news networks. The ticker would disclose the top contributors who have helped pay for the advertisement. Moving tickers, however, pose problems. According to political consultant Bill Zimmerman, studies that show that people are unable to concentrate on one message when multiple messages run at the same time.

Others have proposed a black-and-white screen shot listing top contributors that would appear for three to five seconds before or after a television ad for a measure. This would focus attention on the ad's funders without distracting from the ad itself. Opponents of this proposal argue that this is compelled speech—that is, they are being forced to pay for content that does not further their goals.

This report recommends a compromise between a continuous ticker and a screen shot. It suggests that each television ad devote a specified portion (perhaps one quarter of the picture) at the bottom of the screen to list the top financial contributors for the duration of the ad. The ad would list this information in a specified format in white writing against a black background. This disclosure would allow the ad's funders to deliver their message on the larger part of the television screen, and at the same time inform voters about who is backing the ad.

OTHER PROPOSALS RELATED TO INITIATIVE CAMPAIGN SPENDING HAVE BEEN EXAMINED BUT REJECTED

Other ballot measure campaign finance reforms are unworkable or impractical, including public financing of ballot measure campaigns and reimbursement of the winning side for its expenses.

Public Financing to Support Voluntary Expenditure Ceilings

Public financing could be used to provide ballot measure committees with funding. Committees could be asked to limit their spending in exchange for public funding. Courts have upheld public financing premised on the contractual right of the state to provide public funds in exchange for a candidate's voluntary agreement to abide by a specified limit on expenditures.

Public financing of initiative campaigns, however, faces significant problems. The single greatest obstacle to establishment of a public financing scheme in direct democracy is political. In a time of severe cutbacks in government services and tremendous popular resentment toward raising taxes, a public financing program for initiative campaigns would be politically untenable in most jurisdictions. Moreover, among those who do favor public financing of candidate campaigns, its greatest selling points are that it may curtail the corrupting influence of private contributions from special interest groups and encourage candidates to run for office—dimensions not relevant to initiative campaigns.

Another major weakness of public financing for initiative campaigns is the amount of funding that it would require. The exorbitantly high level of spending on initiative campaigns, which is now commonplace, would render an offer of public funds in exchange for voluntary limits on expenditures an exceedingly unattractive proposition. Public fund-

ing could never match the total amount of campaign dollars available from private sources for most initiative campaigns in California; thus, little enticement would exist for well-funded campaigns to participate in a public financing program. In all likelihood, most business interests and well-financed special interest groups would opt out of public financing in order to spend unlimited private dollars on behalf of their cause.

REIMBURSING THE EXPENSES OF THE WINNING CAMPAIGN FROM PUBLIC FUNDS

Another proposed solution to the burden of an increasingly expensive initiative process is state reimbursement of the winning campaign's expenditures. Under this proposal, the state would reimburse proponents of a successful initiative for some or all of the qualification and campaign expenses.

Proponents of this idea suggest that the formulation of public policy should come at public and not private expense. While legislators have available legal assistance, staff and offices of legislative research to formulate laws, initiative proponents must raise large contributions to fund these expenses. Reimbursement would make policy creation through the initiative process a public responsibility.

This plan would be extremely problematic, however, and make poor public policy. The increasing frequency of multimillion dollar initiative campaigns would make reimbursements of proponent costs extremely expensive for the state. The method of reimbursement might also prove difficult, since proponents would have to act as agents in refunding campaign contributions to thousands of contributors. It may also encourage voters to vote against all ballot initiatives, as most Californians would likely oppose the idea of publicly funded campaigns.

THE POSSIBILITY OF A VOTER INFORMATION FUND TO REDRESS SPENDING IMBALANCES

Under this proposal, a fee (of 10%, for example) would be levied on all contributions to ballot initiative campaigns, regardless of size or source. The revenues would be placed in a voter information fund operated by the secretary of state or other state agency.[119] The revenues would be used to purchase informational radio and television advertisements concerning any ballot measure in which one side has outspent the other by at least $1 million. The ads would run in the last week to ten days of the campaign (when voters are most focused on the issues).

A 60-second spot might give the secretary of state 20 seconds to summarize the measure and then provide the proponent and opponent 20 additional seconds each to summarize their views. The proponent and opponent would have to follow a prescribed format, such as talking heads only and no video imagery.

The advantage of this plan is its attempt to address a critical problem: lopsided public information in the one-sided ballot measure campaigns generated by the severe spending

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[119] For a detailed discussion of a voter information fund proposal, see C. B. Holman and Matthew Stodder, "The Fairness Fund: Addressing Spending Imbalances in Ballot Initiative Campaigns" (paper presented to the annual meeting of the American Political Science Association, Washington, D.C., August 29, 1991).

imbalances of almost all recent campaigns. A voter information fund would give the underfunded side a minimal opportunity to communicate its views, and the format would seek to heighten the informational component of the messages.

This approach also has significant problems, however. Courts might deem the "fee" to be a "tax" on speech and thus constitutionally questionable. The measure does not address the problem of independent expenditures, and companies might spend their own money on a campaign rather than pay a fee. The voter information fund might not provide enough money to attain its objectives. Concerns might arise over the impartiality of the secretary of state's portion of the advertisements.

Ceilings on Broadcast Advertising Expenditures During Final Phase of Initiative Campaign

Placing a reasonable ceiling on all broadcast advertising expenditures during the final two or three weeks of an initiative campaign—when many voters make their decisions—may ameliorate the impact of last-minute one-sided broadcast media blitzes. Such a plan might supply two important benefits: making underfunded initiatives less susceptible to last-minute attacks that cannot be answered and providing a more balanced flow of information to voters who are attempting to sort out complicated issues.

Existing Supreme Court decisions, however, raise substantial constitutional barriers to the imposition of any campaign expenditure ceiling. In addition, initiative supporters or opponents might be able to circumvent such expenditure ceilings through independent expenditures. Furthermore, limiting broadcast spending during the final phase of the campaign could decrease the amount of information available to voters at a time when they are in greatest need of it. And such a limitation might drive initiative supporters or opponents to use equally misleading or one-sided print materials. Restricting the total amount any one side of an initiative campaign could spend over another on broadcast advertising but not limiting expenditures during the last two- or three-week period might be a more workable alternative. Campaign information could flow unabated through radio and television advertising so long as both sides maintained approximate broadcast spending parity.

Imposing Restrictions on Paid Signature Gatherers

Some observers have criticized paid signature gathering because it allows groups to purchase ballot access and it gives paid gatherers, who are generally paid on a per-signature basis, an incentive to commit fraud.[120] Efforts to restrain the use of paid signature gatherers have been challenged but invalidated in courts. In 1988, the U.S. Supreme Court struck down a Colorado law that prohibited the use of paid petition circulators. A unanimous Court found that the restriction violated the petitioners' freedom of speech under the First Amendment.[121] According to the Court, "[t]he State's interest in protecting the

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[120] Andrew M. Gloger, "Paid Petitioners After *Prete*," report for the Initiative and Referendum Institute, May 2006), 3.

[121] *Meyer v. Grant*, 486 U.S. 414 (1988).

integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns."[122]

As an alternative to banning paid signature gatherers, some states have prohibited per-signature "bounties," instead requiring that signature gatherers be paid an hourly wage.[123] In August 2006, for instance, the California State Legislature passed AB 2946, sponsored by Assemblyman Mark Leno, which, among other things, would have outlawed per-signature bounties. Governor Schwarzenegger vetoed AB 2946, calling it a "direct assault on the People's right to initiative, referendum and recall" which would "thwart the will of hundreds of thousands of Californians who choose to sign initiative petitions."[124] Federal courts in other states, including Idaho, Maine, Mississippi and Washington, have struck down similar bans on insufficient evidence of fraud; and, indeed, there is considerable debate about whether electoral fraud actually exists or is as widespread as critics claim.

In February 2006, however, the 9th Circuit Court of Appeals upheld Measure 26, a law approved by voters in Oregon in 2002 that prohibited per-signature bounties.[125] The court based its decision in part on evidence of signature gatherer fraud submitted by the Oregon Department of Justice[126]—thereby distinguishing it from the cases mentioned above. The court held that Oregon had "an important regulatory interest in preventing fraud and its appearances in the electoral process," and that Oregon "supported that interest with evidence that signature gatherers paid per signature actually engage in fraud and forgery."[127]

Oregon did not present evidence that signature gatherers paid per signature were any more likely to engage in fraud than signature gatherers paid by some other method (or not paid at all). However, as one commentator noted: "the critical distinguishing factor is not whether the state presented sufficient evidence of fraud . . . but instead whether the burden imposed on core political speech is deemed to be severe."[128] The parties challenging Measure 26 argued that the law imposed a burden like the one struck down in *Meyer*, but the court held that the measure created only a "lesser burden" on First Amendment rights. According to the court, the Oregon law was clearly distinguishable from the Colorado ban because Oregon did not completely prohibit the payment of circulators, but only prohibited one method of payment.

While the idea of prohibiting per-signature bounties is appealing at first blush, in practice it raises serious problems. According to Fred Kimball of Kimball Petition Management and Michael Arno of Arno Political Consulting, banning per-signature bounties

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[122] 486 U.S. at 426.

[123] Brian Joseph, "Lawmakers Try to Reform Signature Gathering," *Orange County Register*, July 21, 2006; see also Jim Sanders, *supra* note 115.

[124] Veto statement of Governor Arnold Schwarzenegger, September 29, 2006.

[125] *Prete v. Bradbury*, 438 F.3d 949 (2006).

[126] Specifically, a criminal investigator from the department testified that paid signature gatherers had forged signatures on petitions, purchased signature sheets filled with signatures, and attended signature parties where circulators met to sign each other's petitions. *Prete*, at 1895.

[127] *Id.* at 1893 and 1897.

[128] Gloger, *supra* note 120, at 4.

would drive up the costs of gathering signatures, thereby putting paid circulation drives even more out of the reach of most grassroots and community groups.[129]

Finally, this report considered but rejected a proposal to require signature gatherers to wear a button disclosing that they were paid. Some in the ballot initiative industry doubt the efficacy of disclosure during circulation. Among others, Fred Kimball does not think that disclosure or public notice makes much of a difference to voters.[130] Says Kimball: "Sooner or later they're going to have paid gatherers wearing dunce caps saying 'I'm a paid signature gatherer'—and that's not going to make a difference, either."[131]

CONCLUSION

Money's importance in the ballot initiative process is undeniable. It plays a dominant role not only in qualifying measures for the ballot but also in the campaigns that ultimately determine whether measures pass or fail. While efforts to increase disclosure of financial contributors to ballot measure campaigns have been both popular with voters and successful, other efforts to limit contributions and expenditures in ballot measure campaigns have faced court challenges and political resistance. Although the current Supreme Court appears unlikely to uphold most restrictions on contributions and limitations in ballot measure campaigns, political developments and shifts in the composition of the Court could one day open the door for reasonable campaign finance regulations in the ballot measure arena.

This chapter's recommendations are aimed at improving the information available to voters about ballot measure campaigns through increased disclosure. Reasonable limits on contributions and expenditures would mitigate the effects of heavy-spending, one-sided campaigns that dominate and distort the electoral process.

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[129] Telephone Interview with Fred Kimball, *supra* note 9; see also telephone interview with Michael Arno, Arno Political Consulting, September 29, 2006.

[130] See, e.g., telephone interview with Josh Trevino, Pacific Research Institute, October 4, 2006.

[131] Kimball, *supra* note 9.

CHAPTER

9

Judicial Review of Ballot Initiatives

A nation that traces power to the people's will does not easily digest the practice of unelected and unaccountable judges denying the populace what most of them appear to want. . . . A judicial decision striking down a voter effort also risks engendering a perception by the public itself that its will has been subverted.

—Professor Julian Eule[1]

SUMMARY

Courts across the United States have shown deference toward the initiative process, although they have scrutinized them closely. In California, they have partially or entirely invalidated 20 out of the 65 initiatives approved by voters since 1964, usually on constitutional grounds. The "single subject" rule, which requires initiatives to deal only with one subject, has been the most common ground for challenging California initiatives; it has also been one of the most controversial constitutional restrictions on initiatives.

Competing ballot measures present special problems for judicial review of initiatives. The courts have ruled that, when two measures on the same ballot conflict substantially and voters approve them both, the one with the most votes goes into effect, while the other does not. This decision apparently conflicts with the state constitution's plain wording, and it appears to encourage the use of counter-initiatives as a strategy to block other initiatives from enactment.

To offset problems created by the court's interpretation of the single subject rule, the ballot pamphlet and ballot should notify voters when potential conflicts between two or more initiatives on the same ballot arise and clarify that if both pass, only the one with the most votes will go into effect. Also, the courts should return to earlier judicial standards and invalidate only individual *provisions* of measures that conflict with provisions in other initiatives receiving more votes at the same election. The courts should retain its current definition of a "single subject" (involving provisions that are reasonably germane to each other).

[1] Julian Eule, "Judicial Review of Direct Democracy," *Yale Law Journal* 99 (1989): 1506.

Litigation is often a final yet critical stage in the initiative process. Opponents of a measure, having been defeated at the ballot box, frequently ask the courts to declare the measures they oppose invalid on constitutional or other grounds. Their recourse to litigation is thus, to paraphrase the German military historian Carl von Clausewitz, the continuation of political warfare against the initiative by other means. In this often lengthy struggle, the judiciary is reluctantly thrust into the role of final arbiter over the meaning and validity of many ballot initiatives.

The courts have not questioned the legitimacy of the initiative process since a 1912 U.S. Supreme Court decision that the process was constitutional.

In 1912, the U.S. Supreme Court addressed the fundamental question of whether the initiative process itself (a system of *direct* democracy) violated the federal Constitution's guarantee of a "republican form of government" (a system of *representative* democracy). In *Pacific States Telephone and Telegraph Co. v. Oregon*,[2] the Court concluded that the initiative process was simply an additional form of government, not one that eliminated or superseded the republican form of government and the representative processes thought to be central to it. Since then, the courts have not questioned the legitimacy of the initiative process.

Judicial attention has instead focused on the standard of legal review to be used in assessing the legitimacy of individual ballot initiatives. Usually, the courts have concluded that both initiatives and legislation should be examined by similar standards of judicial review. In the courts' view, it is irrelevant whether a law is enacted by a legislative body or by the people. Voters have no more right to violate the Constitution than does a legislative body.[3]

Despite this general principle, courts in some states, including California, give ballot initiatives great deference and express reluctance to overturn them. A few states have in the past even stripped their judiciaries of the power to review initiatives at all.[4] At one time, Colorado refused to allow its lower courts to invalidate initiatives, and Nevada's state constitution once prohibited judicial review of initiatives altogether, although the Nevada courts did not consider themselves bound by this prohibition.

CALIFORNIA COURTS HAVE GENERALLY SHOWN RESTRAINT WHEN URGED TO INVALIDATE INITIATIVES

Although California courts have been asked to review a significant number of controversial initiatives, they have rarely invalidated them entirely. Anticipating legal challenges, proponents routinely insert severability clauses in their initiatives to ensure that major sections not declared invalid remain in effect.[5] As a result, the courts have struck down

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[2] *Pacific States Telephone and Telegraph Co. v. State of Oregon*, 223 U.S. 118, 151 (1912).

[3] *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981).

[4] See Eule, *supra* note 1, at 1546.

[5] Former Senate President Pro Tem David Roberti, however, tried to negate the use of severability clauses in initiatives. He introduced a constitutional amendment that, among other things, prohibited severability clauses in initiatives (SCA 9, 1991). This proposal would have meant that if any part of an initiative were declared unconstitutional by the courts, the entire initiative would be invalid. Roberti dropped this provision from the measure.

specific provisions in some initiatives but allowed the remainder of their provisions to become operative.

When the courts do overturn specific initiative provisions, they act on one of several grounds. First and foremost, state and federal courts will strike down statutory or constitutional initiatives whenever they violate free speech, due process, equal protection or other rights guaranteed under the U.S. Constitution.[6] Second, the courts will invoke the doctrine of "federal preemption" to invalidate statutory and constitutional initiatives that conflict with federal law, even though these initiatives are enacted by a majority vote of the people.[7] Third, the courts will invalidate statutory initiatives that conflict with any higher law in the state constitution.[8] Fourth, the courts will enforce certain restrictions on the subject matter of initiatives that are contained in the state constitution. California's constitution provides, for example, that statutory initiatives cannot appoint any individual to public office and cannot require a particular corporation to perform any function or have any power or duty.[9] Fifth, the courts will enforce constitutional provisions that prevent initiatives from *revising* the constitution as opposed to amending it.[10] (This has created problems that are discussed later in this chapter.) And sixth, the courts will enforce state constitutional provisions, including California's, that prohibit statutory and constitutional initiatives from containing more than a "single subject."[11] (See discussion of the "single subject rule" later in this chapter.)

Since 1964, California voters have approved 65 initiatives. Of these, the California courts have completely invalidated 9 and partially invalidated another 11, for a total of 31%. Thus, 69% of the initiatives approved by the electorate have either survived court challenges altogether or have not been challenged at all. (See Table 9.1 at the end of this chapter for a list of initiatives declared partially invalid.)

From 1964 to 1972, the courts invalidated in their entirety three of the six initiatives adopted by the public: Proposition 14 (fair housing),[12] Proposition 15 (pay television),[13] both enacted in 1964, and Proposition 21 (school busing),[14] passed in 1972. All these initiatives were declared unconstitutional for violating provisions of the federal constitution.

Since 1974, however, the courts have completely invalidated only 6 of 61 voter-approved initiatives. These include Proposition 6 (1982; inheritance tax repeal),[15] Proposition 68 (1988; campaign finance reform),[16] Proposition 105 (1988; disclosures in a number of unrelated areas),[17] Proposition 164 (1992; state legislative term limits),[18]

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[6] *Weaver v. Jordan,* 64 Cal. 2d 235 (1966).
[7] U.S. Const. amend. IX.
[8] Cal. Const. art. I, § 26.
[9] Cal. Const. art. II, § 12.
[10] Cal. Const. art. XVIII.
[11] Cal. Const. art. II, § 8.
[12] *Reitman v. Mulkey,* 387 U.S. 369 (1967).
[13] *Weaver v. Jordan,* 64 Cal. 2d 235 (1966).
[14] *Santa Barbara School District v. Superior Court,* 13 Cal. 3d 315 (1975).
[15] *Estate of Gibson v. Bird,* 139 Cal. App. 3d 733 (1983).
[16] *Taxpayers to Limit Campaign Spending v. FPPC,* 51 Cal. 3d 744, 745 (1990).
[17] *Chemical Specialties Manufacturers Ass'n v. Deukmejian,* 227 Cal. App. 3d 663 (1991).
[18] *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779 (1995).

Proposition 198 (1996; blanket primaries)[19] and Proposition 225 (1998; candidate disclosure of position on congressional term limits).[20] In most of these cases, the courts ruled that the single subject rule had been violated (Proposition 105), that federal law preempted the initiative in question (Propositions 164 and 225) or that the initiative violated the First Amendment (Proposition 198). In two cases, instead of ruling that the challenged measures were flawed, the court ruled that a competing initiative receiving more votes superseded the initiative (Propositions 6 and 68).

In addition to these fully invalidated initiatives, the courts have partially invalidated 11 initiatives. These included Proposition 9 (1974; Political Reform Act), Proposition 7 (1978; death penalty), Proposition 24 (1984; legislative rules), Proposition 62 (1986; limits on local taxation), Proposition 73 (1988; campaign finance reform), Proposition 103 (1988; auto insurance rate rollbacks), Proposition 115 (1990; criminal laws), Proposition 140 (1990; legislative term limits), Proposition 187 (1994; denial of public services for undocumented immigrants), Proposition 208 (1996; campaign contribution and spending limits); and Proposition 5 (1998; tribal gaming).

One of these initiatives, Proposition 208, was partially superseded by a subsequent voter-approved legislative measure in addition to being mostly overturned by the courts. In 1998, a federal district court halted implementation of Proposition 208 with a preliminary injunction.[21] While the appeals court was considering the case, Proposition 34, a 2000 measure also addressing campaign contribution and spending limits, superseded the parts of Proposition 208 under scrutiny before the court issued its ruling. (Table 9.1 at the end of this chapter lists which parts of Proposition 208 were either overturned by the courts or superseded by Proposition 34.)

One 1991 case, in which an appellate court invalidated an initiative (Proposition 105) for violating the single subject rule, seemed to signal an increased willingness by the courts to subject initiatives to stricter constitutional scrutiny,[22] Since then, however, the courts have generally retained their traditionally respectful view of the initiative process as articulated in the 1978 California Supreme Court decision upholding the constitutionality of Proposition 13 (property tax relief): "It is our solemn duty to 'jealously guard' the initiative process, it being 'one of the precious rights of our democratic process.'"[23]

Critics and supporters of the initiative process divide themselves into two opposing positions. Some believe that the judiciary should aggressively review and strike down initiatives whenever possible. According to this view, initiatives too often enact laws that are arbitrary, ill-conceived, illegal, unconstitutional or otherwise harmful. The judiciary thus bears a special obligation to scrutinize them closely.[24]

Professor Julian Eule of the UCLA School of Law, for example, has argued that the courts should scrutinize popularly enacted initiatives more carefully than legislation. In Eule's view, the initiative process lacks the normal checks and balances built into tradi-

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[19] *California Democratic Party v. Jones* 120 S. Ct. 2402 (2000).

[20] *Bramberg v. Jones* 20 Cal.4th 1045 (1999).

[21] *California Prolife Action Council Political Action Committee v. Scully*, 989 F.Supp. 1282 (U.S.D.C. E.D. Cal., 1998).

[22] *Chemical Specialties Manufacturers Ass'n v. Deukmejian*, 227 Cal. App. 3d 663 (1991).

[23] *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208, 259 (1978).

[24] See, e.g., Eule, *supra* note 1, at 1558–1573.

tional forms of representative government—such as the existence of a bicameral legislature, political parties, an executive veto and a legislative committee system that empower minorities and require bargaining for a bill to move through the legislative process.[25] For this reason, careful judicial review must substitute for the checks and balances lacking in a system that permits voters to enact laws directly. Eule argues that the "the judiciary stands alone in guarding against the evils incident to transient, impassioned majorities that the constitution seeks to dissipate."[26] Federal courts especially should be vigilant to prevent initiatives from curtailing civil or individual liberties protected by the U.S. Constitution. State courts should give initiatives a "close look" whenever there is evidence that the electorate acted capriciously, without adequate information or scrutiny.

Although Eule raised important issues, he seemed to base his views on a somewhat idealized view of the legislative process rarely attained in practice. In the California State Legislature, for example, the theoretical checks and balances are frequently nonexistent. Important legislation is sometimes drafted in the final days of the session, and few legislators have any idea of what is being proposed in each of the thousands of bills they must consider in the waning hours of the session. Initiative campaigns, in contrast, take place over a number of months. Opinion leaders and interested voters can read the exact text of an initiative at least four months before election day. It is difficult to hide anything in an initiative subject to so many analyses from so many different sources.

Others argue that because judges are typically appointed to office and are rarely scrutinized by the voters at the polls, their judgments should not trump the expressed will of the people.

Other commentators argue that because judges are typically appointed to office and are rarely scrutinized by the voters at the polls, their judgments should not trump the expressed will of the people. In this view, the courts should give ballot initiatives the utmost respect, seek to uphold them whenever possible and invalidate them only under the narrowest of circumstances.[27]

Professor Donald S. Greenberg of California State University Northridge, for example, having observed the ballot initiative process in the 1960s, argues that the courts should take care in reviewing initiatives. "While the initiative and referendum may not fit into a given philosopher's model, and while these powers may, like any others, be misused from time to time, one would hope that the courts will not fall prey to the elitist argument that the people do not know what is best for them and therefore need someone else to tell them. Pragmatically, these institutions work; like the representatives, the people may sometimes approve mischievous or unconstitutional measures, but by and large, as studies show, they are good legislators. . . . If an occasional 'bad' measure is passed, let those who urge less democracy instead use the tools of democracy to convince the people of the 'rightness' of their view."[28]

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[25] Eule notes, however, that bicameralism is missing in the unicameral state of Nebraska (although he fails to point out that Nebraska's legislature is nonpartisan) and an executive veto is missing in many local governments. Eule, *supra* note 1, at 1557.

[26] *Id.* at 1525 (emphasis in original).

[27] See, e.g., *Legislature of the State of California v. Deukmejian*, 34 Cal. 3d 658, 683 (1983) (Richardson, J., dissenting) initiatives entitled to "*very* special and *very* favored treatment" (emphasis in original); *James v. Valiterra*, 402 U.S. 137, 141 (1971) (provisions for referenda demonstrate "devotion to democracy").

[28] Donald S. Greenberg, "The Scope of the Initiative and Referendum in California," *California Law Review* 54 (1966): 1747–1748.

Judges themselves are undoubtedly aware of the political sensitivity of their role. To refuse to invalidate a measure may be seen as shirking their judicial role as defender of the rights enshrined in the state or federal constitutions. To annul a measure, however, is to risk opposition at the polls when a judge must next run for reelection. After the California Supreme Court struck down a controversial initiative repealing fair housing legislation, Chief Justice Roger Traynor, who was on the ballot for reconfirmation, reportedly had his bags packed expecting to be removed by an angry electorate.[29] Former California Supreme Court Justice Joseph Grodin has acknowledged that ballot initiatives are "political hot potatoes."[30] And former California Supreme Court Justice Otto Kaus has noted that ignoring the impact of a highly politicized decision is tantamount to "ignoring a crocodile in your bathtub."[31]

RECOMMENDATION: THE CALIFORNIA SUPREME COURT SHOULD RECONSIDER ITS TEST FOR INVALIDATING CONFLICTING INITIATIVES

Until about 20 years ago, California voters were rarely confronted with more than one initiative on the same subject in the same election. By 1988, however, this had changed. The general election that year presented the California electorate with 12 initiative measures, 5 of which were competing insurance initiatives. Voters approved only one, Proposition 103 (regulation of insurance rates). Conflicting initiatives have since appeared on the ballot in several elections.

California's 1990 primary and general elections asked voters to consider the most competing measures in state history: of 18 initiatives, 11 conflicted with or contradicted at least one other measure on the same ballot.

The 1990 primary and general elections asked voters to consider the most conflicting and contradictory measures in California history. In the June primary, the electorate was offered two reapportionment measures, Propositions 118 and 119, both supported by the Republican Party and opposed by the Democratic Party. The people rejected both of them by decisive margins. In the November election, the voters were presented with two proposed term limit initiatives (Propositions 131 and 140), two conflicting initiatives addressing pesticide usage (Propositions 128 and 135), two forest practices initiatives (Propositions 130 and 138) and two alcohol tax increase measures—one an initiative (Proposition 134) and the other a constitutional amendment sponsored by the alcohol industry and placed on the ballot by the legislature (Proposition 126). Another November ballot initiative (Proposition 136), nicknamed the "poison pill measure," would have required a two-thirds vote on any tax increase contained in any initiative. Since it was written to become effective the *day of* the election, it sought to invalidate other measures on the same ballot that raised taxes but that were written to go into effect the *day after* the election. Voters approved only one of these nine propositions, Proposition 140, which limited terms for state elected officials.

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[29] Joseph Grodin, *In Pursuit of Justice* (Berkeley: University of California Press, 1989), 105.
[30] *Id.*
[31] Quoted in Paul Reidinger, "The Politics of Judging," *ABA Journal* 73 (April 1987): 58.

More competing initiatives have emerged since 1990, but 1996 was the only year that came close to 1990 levels. The 1996 primary ballot included two different proposals to regulate attorney's fees (Propositions 201 and 202). Two more attorneys' fees measures (Propositions 207 and 211) appeared on the 1996 general election ballot, as did two initiatives proposing different campaign contribution and spending limits (Propositions 208 and 212), and two proposing health care business regulations and consumer protections (Propositions 214 and 216). The most recent competing initiatives appeared in the 2005 special election, when voters rejected two competing prescription drug discount initiatives, Propositions 78 and 79.

The California Constitution anticipates that the electorate might approve more than one measure on the same subject. It states, "If provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."[32] A 1990 state supreme court decision interpreted the meaning of this provision (see discussion below).[33]

Court Rulings on Conflicting Initiatives

Of the six voter-approved initiatives invalidated entirely by California courts since 1974, two were competing against other initiatives on the same ballot. The first case involved two successful initiatives that both repealed the state's inheritance tax laws in 1982. One measure applied the repeal to laws enacted as of January 1, 1981; the other measure, which received more votes, declared that its provisions were operative on the date of passage, June 8, 1982. The appellate court ruled that because the second initiative received more votes, its effective date superseded the first measure's retroactivity section.[34] Apart from the different operative dates of the two measures, their provisions were essentially the same.

The second case dealt with conflicting campaign finance reform initiatives. The 1990 supreme court opinion examined Propositions 68 and 73, two campaign reform measures passed in the June 1988 primary election. Proposition 68 established a comprehensive campaign financing system for legislative candidates and officeholders. It imposed expenditure ceilings and contribution limits, restricted off-year contributions and provided partial public matching funds for legislative candidates who accepted limits on expenditures. By contrast, Proposition 73 prohibited the use of public funds for campaigns, did not limit expenditures and placed limits on contributions for all candidates running in any state or local election (but no limits on off-year contributions).

The litigants all agreed that Proposition 73's ban on public financing nullified the public financing provisions in Proposition 68 and that contribution limits were governed by Proposition 73. The parties also agreed that other provisions of Proposition 68, which called for detailed identification of intermediaries and committees, were not addressed in Proposition 73 and thus should become operative. Proposition 68's proponents argued, however, that three parts of Proposition 68 concerning limits on contributions

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[32] Cal. Const. art. II, § 10 (b).

[33] *Taxpayers to Limit Campaign Spending v. FPPC*, 51 Cal. 3d 744 (1990).

[34] *Estate of Gibson v. Bird*, 139 Cal. App. 3d 733 (1983).

should remain in effect: the ban on off-year contributions, the limit on how much a legislative candidate could receive from nonindividuals and the overall limit on how much an individual or group could give to all legislative candidates. Proponents argued that because no part of Proposition 73 conflicted with these three provisions, they should go into effect.

The legislative sponsors of Proposition 73 and *amici curiae* (third parties allowed by the court to file briefs) representing both political parties and the California Teachers Association argued that Proposition 73 occupied the entire field of campaign contribution limitations and thus superseded all of the limits in Proposition 68. They maintained that no one, not even the proponents of Proposition 68, argued in favor of a patchwork quilt combining the remaining portions of Propositions 68 and 73. To do so would subject candidates to some of the restrictive provisions of Proposition 68 (namely, the ban on off-year fund-raising, limits on nonindividual contributions and overall limits on how much a contributor could give to all legislative candidates) without the benefit of its partial public funding. The opponents claimed that the matching fund provisions were designed as an alternative source of funding to make up for money that would not have been allowed under the new restrictions, and that the Proposition 68 proponents would never had proposed such severe restrictions without matching funds. The sponsors of Proposition 68 denied this allegation, noting that the measure even applied to legislative candidates who declined to accept the voluntary matching funds.

Both Proposition 68 proponents and the Fair Political Practices Commission agreed that the courts should follow past case law, which tried to meld as much of two competing initiatives as possible. The California appellate courts had previously set forth three tests to determine whether language from competing measures should be adopted.[35] The first test was whether the language of the law that was invalid (e.g., the basic contribution limits in Proposition 68) could be mechanically separated, by paragraph, sentence, clause, phrase or even single words, from the part that was valid. The court called this the "grammatical test" in one case.[36] The second test looked at whether the sections that did not conflict with the other proposition could be applied independently of the other proposition. These sections had to be able to stand on their own and be capable of separate enforcement.[37] The third test asked whether the voters would have adopted the provisions not in conflict had they been given the opportunity to look at these provisions by themselves and had foreseen the partial invalidation of the statute. This test was the most subjective, requiring the court to read the public's mind; yet the courts had applied it in a number of cases.[38] Only the *amici*—the political parties and the California Teachers Association—claimed that the intent of the constitutional provision was to nullify entirely the measure that received fewer votes, including provisions not covered by Proposition 73.[39]

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[35] *Santa Barbara School District v. Superior Court,* 13 Cal. 3d 315 (1975); *Peoples Advocate, Inc. v. Superior Court,* 181 Cal. App. 3d 316 (1986).

[36] *Peoples Advocate, Inc. v. Superior Court,* 181 Cal. App. 3d 316 (1986).

[37] *Id.*

[38] See, e.g., *In re Bell,* 19 Cal. 2d 488 (1942), *Sonoma County Organization of Public Employees v. County of Sonoma,* 23 Cal. 3d 296 (1979); *Peoples Advocate, Inc. v. Superior Court,* 181 Cal. App. 3d 316 (1986).

[39] Brief for the California Teachers Association et al., at 4 in *Taxpayers to Limit Campaign Spending v. FPPC,* 51 Cal. 3d 744 (1990).

The supreme court's decision rejected the arguments of both Proposition 68 proponents and the FPPC. It agreed with *amici* that only one initiative could become effective if two successful initiatives dealt with the same subject. The court held that, "unless a contrary intent is apparent in the ballot measures, when two or more measures are competing initiatives, either because they are expressly offered as 'all-or-nothing' alternatives or because each creates a comprehensive regulatory scheme related to the same subject, section 10(b) [in the state constitution] mandates that only the provisions of the measure receiving the highest number of affirmative votes be enforced."[40]

The court also rejected the appellate court's reasoning that the voters wanted both measures to become effective to the greatest extent possible. The court stated, "That some voters would have been satisfied with the adoption of either proposition does not suggest that they wanted both, or *that the same voters cast a majority of the affirmative votes for each initiative*."[41] The court noted that the two propositions had been presented as alternative measures in the ballot pamphlet, and that the voters had been asked to choose between the two initiatives by the arguments from both camps. By giving Proposition 73 more votes, the electorate decided that none of the sections in Proposition 68 should go into effect. The court concluded that no one intended the parts of Proposition 68 to be grafted onto the provisions of Proposition 73. The various sections of Proposition 68 were all interwoven together. Because Proposition 68 received fewer votes, it was void in its entirety.

The majority opinion refused to consider what would happen to Proposition 68 if parts of Proposition 73 were later declared unconstitutional. (A federal district court had already issued such a ruling, and this opinion was affirmed by the 9th Circuit Court of Appeals.[42]) Justice Mosk, however, tackled this question directly in his concurrence and dissent. He concluded that if Proposition 73 was ultimately ruled invalid, then Proposition 68 should be put back into effect because "a dead horse cannot win a race."[43]

In her dissenting opinion, Justice Kennard argued that the majority had misread the provisions of the California Constitution. She agreed with the previous decisions of the California courts that required a court or agency trying to reconcile two conflicting statutes to compare each provision one by one to see if any provision could stand alone. In reconciling conflicting statutes, past court decisions had emphasized that the statutes must be harmonized so that both laws could be brought into effect to the maximum extent possible. Only if the two acts were so inconsistent that they could not have concurrent operation and were completely irreconcilable, would one not be operative.[44]

The court's new approach had two apparent advantages. First, it was simpler than the previous approach and would save the court time. Since then, the courts have not had to engage in detailed provision-by-provision analyses to ascertain voter intent. Second, the courts have not been placed in the position of having to stitch together remaining provisions from two or more competing initiatives to create one new law.

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[40] *Taxpayers*, 51 Cal. 3d at 745.

[41] *Id.* at 797 (emphasis in original).

[42] *Service Employees Int'l Union v. FPPC*, 747 F. Supp. 580 (1990), 955 F.2d 1319 (1992).

[43] *Taxpayers*, 51 Cal. 3d at 813.

[44] See *Penziner v. West American Finance Co.*, 10 Cal. 2d 160 (1937); *In re* White, 1 Cal. 3d 207 (1969).

Despite the arguments advanced in the majority opinion in *Taxpayers*, the supreme court's decision appears seriously flawed. First, the court's ruling seems directly to ignore the plain wording of the state constitution, which states, "If *provisions* of two or more measures . . . conflict, *those* of the measure receiving the highest affirmative vote shall prevail" (emphasis added). For years the appellate courts have interpreted this language as invalidating only those *provisions* in conflict with each other, not the entire measure containing the provisions in conflict. The supreme court in essence redrafted the state constitution to read, "If two or more measures approved at the same election conflict, the *entire measure* receiving the highest affirmative vote shall prevail." The supreme court's interpretation thus creates a sharp break with prior interpretations and with the apparent plain wording of the constitution itself.

The court's majority opinion in *Taxpayers v. FPPC*, which completely invalidated voter-approved Proposition 68, appears seriously flawed.

A second and possibly more serious objection to the court's interpretation is that it created a new incentive for the drafters of counter-initiatives to seek to wipe out competing initiatives. The drafter of a counter-initiative simply has to add a provision that will conflict with a major part of the first initiative and then hold out the counter-initiative as a comprehensive scheme related to the same subject. Under the court's ruling, the first initiative can receive a majority vote and still be invalidated—even though the voters may have wanted the provisions of both to go into effect, may not have been aware of the conflict in provisions and may not have understood that a conflict between provisions would invalidate one of the measures in its entirety.

A third deficiency in the court's opinion is that it risked stimulating additional competing initiatives in the future. With this decision in place, initiative opponents do not have to defeat popular measures. Instead, they can simply draft a counter-initiative, add to it a few provisions designed to attract more votes (such as a tax cut) and insert provisions into that measure that conflict with sections in the first measure. Counter-initiatives may thus become Trojan horses, holding themselves out as gifts to the voters while concealing secret surprises. One commentator has even warned that initiative opponents may deliberately draft unconstitutional counterproposals designed to attract more votes. After these initiatives are successful, the courts will declare them invalid, leaving the voters with no reform at all.[45] Voter frustration over the initiative process will mount if these strategies are implemented.

A fourth deficiency is suggested in Justice Kennard's dissent. She indicates that the court was attempting to lighten the burden on itself, other courts and administrative agencies.[46] No longer would courts or agencies have to analyze each provision of two conflicting initiatives, determine whether the provisions in conflict could be mechanically separated from the initiative receiving fewer votes, decide whether the sections not in conflict could be enforced on their own and ascertain whether the voters would have adopted the remaining provisions if they had known they would have been severed from the provisions in conflict. Instead, when two or more successful initiatives have at least one conflicting provision, the courts would merely have to determine whether the competing

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[45] Michael Baker, "Confounding Reform with the Counter-Initiative" (article submitted to the *U.S.C. Law Review*, 1992).

[46] *Taxpayers*, 51 Cal. 3d at 774.

initiatives were either offered as "all-or-nothing alternatives" to each other or designed as "comprehensive regulatory schemes." If so, then the initiative receiving fewer votes would be invalid in its entirety.

Sometimes the courts are still asked to resolve conflicts between two or more competing initiatives—although not often because voters do not usually approve competing measures. In 1992, the court considered whether Proposition 114, which amended the section of the Penal Code that designates the murder of a peace officer as a "special circumstance" that can justify the death penalty, superseded Proposition 115, a broader measure that also amended the same section of penal code.[47] Both initiatives passed in the June 1990 election, but Proposition 114 received more affirmative votes. The court ruled that both measures could take effect and invalidated only the provisions of Proposition 115 that conflicted directly with Proposition 114. The court ruled this way because, unlike in the *Taxpayers* decision where the court held that the measures were *competing*, the court in this case determined that Propositions 114 and 115 had been presented to the voters as *complementary* measures and therefore should be examined provision by provision for any competing language.

In cases where the court determines that the initiatives in question are competing, however, the courts have to determine, among other things, whether each initiative held itself out to the voters as a comprehensive scheme. This is not a simple determination. At the same time, the courts have to confront the political pressures that arise when the public sees the judiciary striking down popularly enacted initiative measures.

Approaches in Other States

Fifteen other states have constitutional provisions that resolve conflicts if competing measures are both adopted in the same election. In eight states, only one measure can become law if two initiatives pass on the same subject: Arkansas, Michigan, Missouri, Nevada, North Dakota, Ohio, Utah and Washington.[48] In these states, unlike in California, the law is extremely clear: if two or more measures on the same subject are enacted, then "the one" or "the measure" or "that" entire initiative receiving the highest number of affirmative votes prevails.

Six states have laws similar to the California Constitution: Arizona, Colorado, Idaho, Massachusetts, Nebraska and Oklahoma.[49] Constitutional provisions in these states declare that if two or more initiatives dealing with the same subject pass, then the *provisions* of the one receiving the fewer votes are void if they conflict with specific *provisions* in the measure receiving more votes. Language in these state constitutions typically provides that if two or more measures are adopted, then the one that receives the greatest number of votes shall be adopted "in all particulars as to which there is a conflict" or "as to all conflicting provisions."

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[47] *Yoshisato v. Superior Court*, 2 Cal. 4th 978 (1992).

[48] Ark. Const. amend. 7; Mich. Const. art. 2, § 9; Mo. Const. art. 3, § 51; Neb. Const. art. III, § 2; Nev. Const. art. 19, § 2, para. 3; N. D. Const. art. III, § 8; Ohio Const. art. II, § 1(b); Utah Code Ann. § 20-11-20 (1987); Wash. State Const. art. II, § 1.

[49] Ariz. Const. art. 4, pt. 1, § 12; Colo. Rev. Stat. § 1-40-116 (3) (Bradford Supp. 1991); Idaho Code § 34-1811 (1981); Mass. Const. art. 48, pt. 6, § VI; Neb. Const. art. III, § 2; Okla. Code § 34-21.

Two states, Massachusetts and Washington, have enacted provisions that specify how conflicting measures should be presented to the voter. In Massachusetts, the legislature must group measures together on the ballot and instruct voters to vote only for one measure. In Washington, the legislature may put a competing measure on the ballot as an alternative to an initiative. The voters are told that only one measure can become law, even if both receive more affirmative than negative votes. The ballot offers two questions. First, voters are asked to indicate whether they wish to vote for either of the measures or neither of them. Second, voters must then select which measure they prefer. If a majority of the voters approves the first question, then the measure receiving the most votes on the second question is the one that becomes law. In 1988, for instance, the Washington State Legislature presented an alternative to a toxics initiative. It failed, however, to poll as many votes as the initiative.

Arizona, where the single subject law is nearly identical to California's, experienced a similar controversy. In 1968, two propositions put on the ballot by the legislature were approved by the voters. One measure, approved by 266,035 votes, increased the term of all statewide officials, including the state auditor. The other measure, approved by fewer votes—206,432, abolished the office of state auditor. A deeply split court found that the measure receiving fewer votes could still go into effect. The court found that, "where two provisions of the constitution are in conflict, it is the duty of the court to harmonize both so that the constitution is a consistent workable whole."[50] The court thus held that the office was abolished and that the terms for all the other statewide officers were increased. Had the California Supreme Court's reasoning been adopted by the Arizona court, the public's desire to abolish the office of state auditor would have been thwarted.

Standards Applied in Local Jurisdictions

Prior to the *Taxpayers* decision, the standards for judicial review of competing initiatives in local elections varied between jurisdictions. For city, county and district initiatives, the ordinance obtaining the highest number of votes prevailed in its entirety, and any other ordinance on the same subject did not become effective.[51] For charter amendments adopted by a city or a county, however, the state constitution applied the same rules as those in effect for state measures—which, prior to the California Supreme Court decision in *Taxpayers*, had meant that only the provisions directly in conflict would fail.[52] Now, according to the California Supreme Court, the rules are the same for every state and local proposition.

Specific Recommendations

The supreme court's decision in *Taxpayers* altered the initiative landscape. Because of that decision, opponents can insert conflicting provisions into competing initiatives in an attempt to invalidate the principal initiative in its entirety. The following section outlines

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[50] *State ex rel. Nelson v. Jordan*, 104 Ariz. 193 (1969).
[51] Cal. Elec. Code §§ 3717, 4016, and 5160 (West 1977).
[52] Cal. Const. art. XI, § 3(d).

a package of recommendations that would help offset the negative consequences of this decision.

Because of *Taxpayers*, opponents of an initiative can insert conflicting provisions into another initiative in an attempt to invalidate the principal initiative in its entirety.

Notify Voters of Potential Conflicts

At the very least, the effect of the *Taxpayers* decision should be made clear to voters when they confront competing initiatives. This report recommends that voters be told in advance whenever only one of two or more competing measures can become law. The attorney general should first ascertain whether two or more initiatives conflict with each other according to the supreme court's decision in *Taxpayers*. If so, the initiatives should be placed next to each other in the ballot pamphlet and compared with each other in the summary and analyses of the attorney general and legislative analyst (see Chapter 6).

In addition, the voters should be warned that only one of the measures may become effective if more than one is approved. This warning will advise voters to choose one of the initiatives rather than vote for more than one. The attorney general's ruling should be exclusively reviewable by the Sacramento County Superior Court on an expedited basis, although the court's decision should not be binding on future courts if conflicts are litigated after the election.

Return to Earlier Court Rulings That Invalidate Only Conflicting Provisions

The court's reluctance to follow the literal wording of the California Constitution in *Taxpayers* may be based on an understandable concern that the judiciary should not involve itself in piecing together laws based on the provisions of two or more conflicting initiatives. The court's conclusion, however, is deficient for two essential reasons. First, the court's view is at odds with the undoubted intent of most voters who cast their ballots in favor of conflicting initiatives—which was not to focus on the details of the competing measures but to vote for reform by approving both measures that might accomplish those reforms. Voters seeing two campaign finance reform measures (Propositions 68 and 73) on the June 1988 ballot, for example, may be presumed to have voted for both in the hope that at least one would pass and on the assumption that if both passed the details would be resolved. Although the analogy is not exact, such voter decisions are not unlike those of legislators who vote for a measure knowing that it may later be changed significantly in conference committee, in the other legislative house or by the courts. Second, the California Supreme Court's decision in the *Taxpayers* case encourages the use of counter-initiatives, making the ballot even more confusing than it is without such measures.

It would have been preferable for the court to follow the actual language of the constitution, giving effect to the constitutional provision that states that when two or more initiatives are enacted on the same subject, only the conflicting "provisions" of the measure with fewer votes should not go into effect.

The three-pronged test used in earlier court of appeals decisions to determine which provisions were in conflict should be reinstated. This test better reflects actual voter

intentions than does throwing out an entire initiative when certain key provisions conflict with those of another initiative on the same ballot. The language in the state constitution should be modified to ensure that individual provisions of initiatives that do not conflict will still be valid. And finally, Justice Mosk's views expressed in *Taxpayers* should be implemented—if one initiative is declared invalid, then another successful but conflicting initiative on the ballot receiving fewer votes should take effect.[53]

RECOMMENDATION: THE SUPREME COURT'S CURRENT DEFINITION OF "SINGLE SUBJECT" SHOULD REMAIN UNCHANGED

The California Constitution, like that of 13 other states,[54] requires initiatives to address only a "single subject." These provisions parallel constitutional sections in a number of states, including California, that prevent legislatures from adopting bills containing more than a "single subject." The meaning of the term *single subject*, however, varies widely from state to state and is a matter of considerable debate among courts, legislatures, legal scholars and persons who draft, study and ultimately vote on the measures.

Originally, California's constitution did not contain a single subject rule for initiatives, although bills enacted by the legislature were subject to the requirement. In 1948, California voters enacted the single subject rule for initiatives after a group of citizens unsuccessfully attempted to place on the ballot a measure containing an astonishing potpourri of different items, including pensions, taxes, rights to vote for Indians, gambling, oleomargarine, health, reapportionment of the state senate, fish and game, cross-filing for primary elections and surface mining. Although the measure qualified for the ballot, the supreme court removed it on the ground that the measure was a *revision* of the constitution rather than a mere *amendment*.[55] (In California, the constitution may be "amended" but not "revised" by an initiative.[56]) But even before the court removed the measure from the ballot, the legislature placed on the ballot a constitutional amendment prohibiting initiatives from addressing more than a "single subject." The amendment passed.

The state constitution now provides that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect."[57] In contrast, the constitutional provision concerning *statutory* measures enacted by the legislature declares that a statute passed by the legislature that contains more than one subject is not invalid in its entirety; only the parts not expressed in the title of the statute are void.[58] Thus, the consequences of the legislature enacting a bill containing more than one sub-

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[53] *Taxpayers*, 51 Cal. 3d at 774. Otherwise, the public might vote for two campaign finance reform measures and end up receiving neither.

[54] Alaska, Arizona, Colorado, Florida, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Washington and Wyoming.

[55] *McFadden v. Jordan*, 32 Cal. 2d 330 (1948).

[56] Cal. Const. art. XVIII.

[57] Cal. Const. art. II, § 8 (d).

[58] "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the *part* not expressed is void" (emphasis added). Cal. Const. art. IV, § 9.

ject are far less drastic than for a proponent who drafts the same measure as an initiative. If a legislative provision is voided, the legislature can, if it wishes, quickly reenact that provision. If an initiative violates the single subject rule, however, no part of the initiative can appear on the ballot. If it does appear on the ballot and is then successfully challenged, the initiative is void in its entirety.

The definition of a "single subject" has been a controversial matter. As the number of initiatives has increased, critics of the initiative process, including many legislators who dislike all initiatives, have pushed for a definition of the single subject rule that would require initiatives to be more narrowly focused, hoping that the judicial branch would invalidate more initiatives. Others who defend the initiative process in general but decry the growing tendency of initiatives to be long and complex, have also argued for a narrower definition of single subject—hoping that judicial invalidation of complex initiatives will encourage proponents to draft simpler measures that are more easily understood by voters.

The consequences of the legislature enacting a bill containing more than one subject are far less drastic than for an initiative proponent who drafts the same measure as an initiative.

Although single subject violations are routinely alleged as a first ground of attack by a measure's opponents (principally because a successful attack would invalidate the measure in its entirety), these attacks have almost invariably failed. Until 1988, the courts had never struck down an initiative on single subject grounds. Then, in 1991 and 1999, the courts declared two other initiatives unconstitutional.[59]

For some initiative critics, the 1988 and 1991 decisions on single-subject grounds raised the hope that the courts would begin to strike down offending initiatives more aggressively—although with the next such decision eight years later, these hopes were not realized. In an attempt to seize the moment, critics of the rule proposed stricter definitions of "single-subject," hoping either that the courts would adopt them or that the legislature would place a measure enacting them on the ballot. Defenders of the initiative process, on the other hand, saw these moves as poorly disguised attempts to gut the initiative process under the guise of tightening an otherwise obscure legal definition.

As discussed below, however, most proposed alternatives to the single subject rule are less desirable than the courts' existing formulation; indeed, the courts' increased use of the existing single subject definition is a strong argument for allowing them to continue their exploration of this definition without legislative intervention.

RATIONALE FOR THE SINGLE SUBJECT RULE

The single subject rule was added to the state constitution for two reasons. The first was to prevent voter confusion. Voters should not be presented with a variety of complex issues in a single proposition. But as UCLA law professor Daniel Lowenstein observes, a measure could violate the single subject rule even though the voters are not confused. A

[59] *California Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351 (1988); *Chemical Specialties Manufacturers Ass'n v. Deukmejian*, 227 Cal. App. 3d 663 (1991); *Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1442 (1999).

measure changing the date of the primary election and increasing the penalties for rape, for example, might be perfectly clear to voters but still violate the single subject rule. By contrast, a measure containing thousands of provisions on one subject might be complex and confusing but still comply with the single subject rule.[60]

The single subject rule was added to the state constitution to prevent voter confusion and "logrolling."

The second rationale for the single subject rule was to prevent "logrolling."[61] Logrolling involves combining a number of measures that would not pass on their own but when added together might have a chance to accumulate a majority because enough voters care about one provision to support the entire package. Legislators will often logroll a bill so that their individual projects will be approved along with other legislators' pet projects. It seems apparent, however, that the single subject rule cannot prohibit all forms of logrolling. An initiative to reduce crime, for example, might address multiple topics yet not violate the single subject rule because all the topics deal with reducing crime. Proposition 21 in 2000, for example, dealt with gang violence, juvenile crime and sentencing. Although logrolling was involved, the measure addressed a single subject (crime) and was not invalid.

The California Supreme Court addressed the question of logrolling directly in a case challenging Proposition 99 on single subject grounds. Proposition 99 increased cigarette taxes by 25 cents a pack and allocated its revenues to a number of unrelated spending programs, such as wildlife habitat and parks conservation. Reportedly, sponsors of the proposition told potential supporters they would receive a share of the revenues if they agreed to help finance the initiative's circulation. The court concluded that, "Because Proposition 99 satisfies the single-subject rule, there is no constitutional basis for a separate claim of 'logrolling.' The single-subject rule is the method by which the state constitution guards against that hazard."[62] The court noted that the single subject rule does not require a showing that each provision of an initiative is "capable of gaining voter approval independently of the remaining provisions."[63] Indeed, the court pointed out that any initiative containing more than one sentence is subject to the charge that voters might approve part but not all of the measure, but that alone is not a reason for the courts to invalidate the measure.

CASE LAW ATTEMPTING TO DEFINE "SINGLE SUBJECT"

In 1949, a year after the single subject rule was added to the state constitution, the supreme court concluded that the rule should apply identically to legislative matters and initiatives. It then announced its first definition of "single subject": In order to meet the test, a "reasonable relationship" must exist among an initiative's various provisions.[64] Further refining this principle, the court declared that the provisions of a measure must be

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[60] Daniel Lowenstein, "California Initiatives and the Single-Subject Rule," *UCLA Law Review* 30 (1983).

[61] *Brosnahan v. Brown,* 32 Cal. 3d 236, 267-68 (1982) (Bird, C. J., dissenting).

[62] *Kennedy Wholesale v. State Board of Equalization,* 53 Cal. 3d 245 (1991). The court apparently concluded that logrolling within the confines of the single subject rule was acceptable. Logrolling dealing with more than one subject was not.

[63] *Id.* at 255.

[64] *Perry v. Jordan,* 34 Cal. 2d 87 (1949).

"reasonably germane" to each other. In other words, an initiative addresses a single subject if its provisions share a common conceptual link—for example, political reform or environmental protection.[65]

In some decisions, a minority of supreme court members have suggested a second definition of single subject: the provisions of an initiative address a single subject if they are "functionally related" to each other.[66] This test means that each provision has to be interrelated—for example, an initiative could contain a series of "campaign finance reforms" but not include both campaign finance reforms and ballot pamphlet reforms under the general rubric of "political reform."

Justice Mosk, for example, has urged that the court should change its definition of the single subject rule and adopt the functionally related test, requiring that all the provisions of the measure be interdependent, interrelated or necessary to form an interlocking package.[67] But Professor Lowenstein has pointed out difficulties with this test. A measure that called for the creation of parks in different parts of the state, for example, would not meet the functionally related standard, even though most people would agree that such a measure would involve a single subject. The functionally related standard would presumably require each new park somehow to be dependent on all the other parks established by the proposal.[68]

To date, the courts have not adopted the functionally related test. Proposition 9 (the Political Reform Act of 1974), for example, would probably have failed this test. Its provisions included lobbyist restrictions, campaign finance limits and disclosures and conflict of interest disclosures and prohibitions. The first court to review Proposition 9 (a Los Angeles County superior court) declared it unconstitutional on single subject grounds. Yet the supreme court overruled this decision, despite an argument by Justice Wily Manual that the initiative failed to meet the single subject standard. Manual maintained that the court should have applied the functionally related test, but he also contended that the measure failed the reasonably germane standard. In his view, the regulation of the campaign finance process had nothing to do with the regulation of lobbyists, and these two subjects did not relate to conflicts of interest by state and local employees.[69]

Other complex initiatives have survived single subject challenges. The Schmitz initiative contained a prohibition on school busing related to race, a prohibition on teachers' organizations making campaign contributions and a prohibition on teachers' right to strike. The California Supreme Court allowed the petition for this initiative to be circulated, prohibiting the attorney general from ruling that the proposed initiative violated

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[65] Ironically, the court may have chosen this somewhat liberal standard because if the court had ruled that the initiative which was about to be circulated was unconstitutional, it might have had to rule that the original earlier proposition placed on the ballot by the legislature and passed by the voters was also unconstitutional. The initiative proposed to repeal a legislative measure involving pensions for the needy, aged and blind.

[66] *FPPC v. Superior Court*, 25 Cal. 3d 33, 55 (1979) (Manuel, J., dissenting); *Brosnahan v Brown*, 32 Cal. 3d 236 (1982) (Bird, C. J., Broussard, J., and Mosk, J., dissenting).

[67] *Brosnahan v. Eu*, 31 Cal. 3d 1 (1982).

[68] Lowenstein, *supra* note 60.

[69] *FPPC v. Superior Court*, 25 Cal. 3d 33, 57 (1979) (Manuel, J., dissenting).

the single subject rule.[70] Proposition 13, the 1978 property tax relief measure, lowered property taxes for both businesses and individuals. It was upheld by the supreme court six months after its passage. No supreme court justice felt it violated the single subject rule.[71]

Proposition 8, the Victims' Bill of Rights Act in 1982, was narrowly upheld on single subject grounds by a vote of four to three. Although its title indicated that it was drafted to assist victims, the measure also changed the right to bail, altered the use of prior convictions for sentence enhancement and stated that students and staff of schools had the inalienable right to attend campuses that are safe, secure and peaceful. Using the reasonably germane standard, the majority upheld the proposition, finding that the provisions of the measure all worked to enhance the "rights of criminal victims."[72]

Proposition 21, which voters approved in March 2000, made three changes in three separate areas of the law: it increased the punishment for gang-related felonies; allowed prosecutors to move certain juvenile cases to adult court; and designated additional crimes as violent and serious felonies. The state court of appeal determined that the measure violated the single subject provision and invalidated the parts of the measure involving juvenile cases.[73] The California Supreme Court reversed, ruling that the parts of the measure were "reasonably germane" to each other.[74]

As noted earlier, courts in three cases have used the single subject rule to strike down initiatives. These are the only cases to invalidate initiatives on single subject grounds since adoption of the rule in 1948. The first case nullified a 1988 no-fault insurance measure. While the measure was being circulated, the 3rd District Court of Appeal ruled that it violated the single subject rule because one of its provisions, which regulated campaign contributions, was neither reasonably germane nor functionally related to the rest of the initiative, which dealt with insurance.[75] The section stated that no law restricting campaign contributions could be stricter or easier on insurance companies, consumer groups or trade associations than on citizens as a whole. It also stated that no elected state official could be disqualified from participating in a decision affecting a campaign contributor that was an insurance company, a consumer organization or a trade association.[76] The court ruled that the inclusion of this one section in the initiative invalidated the entire measure. Immediately after the decision was issued, insurance companies circulated another measure identical to the one kept off the ballot except for deletion of the section

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[70] *Schmitz v. Younger,* 21 Cal. 3d 90 (1978). Schmitz successfully challenged the attorney general's refusal to title the measure because the attorney general felt that the proposed measure violated the single subject rule. The court ordered the attorney general to title the measure but refused to rule on whether it violated the single subject rule. The proponent failed to receive enough signatures to qualify the measure for the ballot.

[71] *Amador Valley Joint Union High School District v. State Board of Equalization,* 22 Cal. 3d 208 (1978).

[72] *Brosnahan v. Brown,* 32 Cal. 3d 236 (1982).

[73] *Manduley v. Superior Court,* 104 Cal. Rptr. 2d 140 (4th App. Dist. 2001).

[74] *Manduley v. Superior Court,* 27 Cal. 4th 537 (2002).

[75] Although the stricter functionally related standard has been advocated in dissenting opinions, it has never been accepted as the sole standard by any California court. The two recent decisions striking down measures on single subject grounds used both the reasonably germane and functionally related tests in their decisions, saying that the initiatives in question failed to meet either one of them.

[76] *See California Trial Lawyers Ass'n v. Eu,* 200 Cal. App. 3d 351 (1988).

on campaign contributions. The new initiative qualified for the ballot in less than 48 days (one of the shortest times ever for qualification of an initiative), but it was defeated in the November 1988 election.

The second case invalidating an initiative for single subject rule violations involved Proposition 105, enacted in 1988. Called the "Public's Right to Know Act," the measure required disclosures of information in such diverse areas as household toxic products, seniors' nursing homes, seniors' health insurance, initiative campaigns and companies investing in South Africa. An intermediate appellate court ruled that the proposition clearly violated both the "reasonably germane" and "functionally related" tests.[77]

In the third case, the California Supreme Court ordered that Proposition 24 be removed from the March 2000 ballot before the election. The measure would have required that the power to reapportion state legislative, congressional and board of equalization districts be transferred from the legislature to the state supreme court, and it would also have changed compensation of state legislators and other state officers.[78] The court ruled that these provisions were not reasonably germane to one single subject, as required by previous court interpretations of the single subject rule. Proposition 24 is the only California initiative to have qualified for the ballot and then been removed prior to the election for single subject reasons.

The courts have invalidated legislation for single subject rule violations even less often than they have initiatives. A 1987 California Supreme Court decision illustrates the court's reluctance to overturn legislation on this basis. As was so often the case, the legislature had enacted a cleanup bill to the state budget.[79] The bill contained 150 sections covering more than 20 different codes. Many of the sections in the cleanup bill, however, were substantive provisions that should have been included in separate bills. The legislation, for example, allowed concession contracts for state parks to exceed 20 years, permitted veteran homes to be appointed guardians of the estates of veterans and mandated that reports of agencies in the department of consumer affairs be given to the director before being sent to the legislature.

The supreme court noted that if this legislation were upheld in the face of the single subject rule, a substantial portion of the many thousand statutes adopted during each legislative session could be combined in a single measure, even though their provisions had no relationship to one another or to any single subject (other than impacting state expenditures in the budget bill). Despite this conclusion, the court upheld the legislation. It merely warned the legislature not to use this shotgun approach to legislation in the future and allowed the bill to become law. In effect, the court applied the single subject rule—but only prospectively. The court explained that applying its ruling retroactively would open the door to dozens of lawsuits on other sections of this cleanup bill and perhaps other similar bills adopted since 1979.[80]

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[77] *Chemical Specialties Manufacturers Ass'n v. Deukmejian*, 227 Cal. App. 3d 663 (1991).

[78] *Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1442 (1999).

[79] A "cleanup bill" proposes additional legislation to make corrections to a previously passed bill which contains flaws or typographical errors. When complex legislation (such as the budget bill) is enacted, a cleanup bill is almost always necessary.

[80] *Harbor v. Deukmejian*, 43 Cal. 3d 1078 (1987).

Additional legislation was challenged successfully on single subject grounds in 2004. The legislature voted to place a measure (Proposition 60) dealing with both primary elections and surplus property purchases by the state on that year's November ballot. Opponents challenged the measure, arguing that it blatantly violated the single subject rule and should be removed from the ballot.[81] The court agreed and forced the legislature to move the surplus property provisions into a separate new measure (Proposition 60A). Both measures were allowed onto the ballot, and both passed.

RETAIN THE COURT'S CURRENT SINGLE SUBJECT TEST

The California Supreme Court has interpreted the constitutional single subject rule to mean that an initiative or legislative measure meets the test and is valid if its provisions are "reasonably germane."[82] This test is a slight modification of the standard set down in 1987 for measures put on the ballot by the legislature. That test states that a measure meets the single subject standard if the provisions in the measure are either "reasonably germane" or "functionally related" to each other.[83]

For much of the history of California's initiative process, persons who were frustrated by the scope and breadth of initiatives expressed concern that the courts were upholding too many initiatives against single subject attack. They argued that a tightening of the rule would reduce the size and complexity of ballot propositions. In an apparent response to this frustration, the courts have invalidated a handful of measures on single subject grounds, as just discussed.

During the 60-year history of the single subject rule, courts and commentators have offered several different definitions of a "single subject." All of these alternatives have unacceptable difficulties. Accordingly, this report does not recommend that the present judicial interpretation of the phrase *single subject* be changed, either by the courts or by vote of the people.

The current definition of the rule—that the provisions of an initiative will meet the single subject test if its provisions are reasonably germane—has been used by the courts both to invalidate three initiatives on single subject grounds and to uphold several initiatives against single subject attack.[84] Hence, it appears that the present interpretation is neither too tolerant of initiatives nor too vague for adequate enforcement by the courts. Although the definition of single subject lacks precision, none of the alternatives discussed below would increase precision.

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[81] *Californians for an Open Primary v. Shelley*, 121 Cal. App. 4th 222 (2004).

[82] *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990).

[83] *Harbor v. Deukmejian*, 43 Cal. 3d 1078 (1987)

[84] *Kennedy Wholesale v. State Board of Equalization*, 53 Cal. 3d 245 (1991), upheld Proposition 99; *Cal Farm Insurance Co. v. Deukmejian*, 48 Cal. 3d 805 (1989), partly invalidated Proposition 103 but ruled that it did not violate the single subject rule; *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990), partly invalidated Proposition 115 but ruled that it did not violate the single subject rule; *California Gillnetters Ass'n. v. Dept. of Fish and Game*, 39 Cal. App. 4th 1145 (1995), upheld Proposition 132; *Legislature of the State of California v. Eu*, 54 Cal. 3d 492 (1992), partly invalidated Proposition 140 but held that it did not violate the single subject rule; *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972 (1997), upheld Proposition 213; *Quackenbush v. Superior Court*, 60 Cal. App. 4th 454 (1997), upheld Proposition 213; *California Ass'n. of Tobacconists v. Davis*, 109 Cal. App. 4th 792 (2003), upheld Proposition 10.

Functionally Related or Interdependent Test

Former Justice Stanley Mosk was the leading proponent of a stricter test than the California Supreme Court now applies. He suggested that the court abandon the reasonably germane test altogether and apply the more stringent test that a measure's provisions be "functionally related or interdependent" with each other. Mosk argued that the reasonably germane test was too vague and allowed sweeping initiatives to be enacted. He said that almost any measure could meet the test that its provisions be reasonably germane.[85]

Commentator Steven W. Ray has also argued for adoption of the functionally related test. He suggests that the courts use stricter tests for initiatives and retain the looser reasonably germane test for legislative ballot measures.[86] He reasons that legislative measures are subject to many more checks and balances—legislative hearings, bill analyses by committee staff, amendments to improve the bill, debates in two houses and final review by the governor—and that as a result the courts can tolerate a greater degree of imprecision in them. In contrast, initiative measures are subject to no gubernatorial or legislative review, cannot be amended and must be voted up or down in their entirety.[87] Ray also recommends that the court encourage more preelection challenges, making it possible for them to declare initiatives invalid before their enactment by voters. In his view, prior judicial review will make it politically easier for the courts to declare initiatives unconstitutional.[88]

A constitutional amendment introduced by former Senate Minority Leader Ken Maddy (R-Fresno) in 1991 would have required that initiatives simultaneously meet both the current and Justice Mosk's proposed test: that each provision must be reasonably germane to the general objective or purpose of the measure (the current court test) and all provisions of an initiative must be functionally related or interdependent (the Mosk test).[89]

This report recommends that the courts not apply two different tests to ballot measures—a more stringent one for citizen-sponsored initiatives and a less restrictive one for measures placed on the ballot by the legislature. This could give too much power to

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[85] *Raven*, 52 Cal. 3d at 356 (Mosk, J., dissenting).

[86] Steven W. Ray, "The California Initiative Process: The Demise of the Single-Subject Rule," *Pacific Law Journal* 14 (1983).

[87] Although Ray is correct that the legislative process offers more expertise in drafting and amending than the initiative process, in reality the legislative process is not as good as the ideal and the ballot measure process is not as bad as some allege. Veteran legislative observers decry the end-of-session marathons in which a bill can be completely rewritten in conference committee (in one case, on a cocktail napkin in Frank Fat's Restaurant), rushed to the floor, debated for less than a few minutes and passed. The legislature then adjourns and the governor must either sign or veto the bill in its entirety. By contrast, initiatives are debated for months, editorial boards are wooed by both sides and voters are allowed to read the arguments for and against (and even the text of the measure which is printed in the back of the ballot pamphlet).

[88] If the supreme court decides to change the standard of what constitutes a single subject, it should do so in the same way it ruled on the 1987 legislative budget. It should apply its new criteria prospectively, not retroactively, so that initiative proponents can craft their proposals in ways that will meet the new standard.

[89] SCA 3. SCA 47, introduced by Senator Maddy in 1990, passed the senate and reached the floor of the assembly, where it died for reasons unrelated to the merits of the proposal.

the legislature and legislative ballot measures. In 1990, for example, the legislature placed an alcohol tax measure on the ballot (Proposition 126) as an alternative to an *initiative* that imposed higher alcohol taxes (Proposition 134). Under the Ray and Maddy proposals, the legislative ballot measure would have been subject to a less stringent single subject standard than the citizen-sponsored initiative. In addition, the test proposed by Justice Mosk and endorsed by Senator Maddy narrows the scope of the single subject rule too drastically. Such a test could mean that initiatives that most people believe are within a single subject (such as the Political Reform Act) would be ruled invalid.

Public Understanding Test

Professor Lowenstein has suggested a different test to define the single subject rule: an initiative would meet the test if it encompassed only a single subject in the "public's understanding" of that phrase. Courts would be required to conduct "a reading of the public mind" to determine whether the public thought the proposal contained a single subject.[90] The courts would look not just to the text of the measure but also to articles, books, television and radio programs and past legislation to see if the items in the initiative were thought of as addressing the same subject. The courts would not consider the debate on the initiative itself, since all the provisions of the initiative naturally would be discussed together. Instead, the courts would determine whether the issues in the measure had been linked together or were considered separate *prior* to the initiative going on the ballot. Using this test, Lowenstein concludes that the 1974 Political Reform Act (Proposition 9) and the 1982 Victims' Bill of Rights (Proposition 8) would both meet the single subject standard. The Schmitz measure on school busing and teachers' right to strike, on the other hand, might not have complied.

The Lowenstein approach, however, appears as vague as the other standards being considered. It would place a burden on the courts to try to determine whether the topics covered in a measure had been linked prior to the time the measure made it to the ballot. It is unclear how the courts could do this—a poll could be one approach. Moreover, both proponents and opponents could attempt to manipulate the public discussion prior to the time the measure was placed on the ballot.

Overall Conceptual Coherence Test

A third possible definition of the single subject rule that merits further study would attempt to clarify the meaning and scope of the rule by focusing attention on the objectives it seeks to encompass. Under this test, the courts would review three factors when applying the single subject rule: (1) whether voters are likely to be confused by multiple topics in the initiative; (2) whether the initiative has fallen prey to logrolling; and (3) whether the initiative lacks overall conceptual coherence.[91] If an initiative failed on

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[90] Lowenstein, *supra* note 60, at 971.

[91] An alternative version of this last factor might be to determine whether a reasonable voter would have been surprised to learn that the specific provisions being challenged were included in the initiative under question.

any of these three factors, it would not meet the single subject rule. The advantage of this approach is that it spells out the actual concerns the courts have used in reviewing single subject appeals. Its disadvantage is that its three factors are still somewhat subjective and might simply complicate the courts' task in applying the present interpretation of the rule.

The determination of whether an initiative violates the single subject rule is a complex one, requiring the courts to analyze a number of often conflicting considerations.

Ultimately, the determination whether an initiative violates the single subject rule is a complex one, requiring the courts to analyze a number of often conflicting considerations. Tightening up the test—for example, by adopting the "reasonably interdependent" standard as some legislators have proposed—would encourage the courts to invalidate measures that are perfectly acceptable to the public and that lack potential for voter confusion or logrolling. Since 1988, the courts have willingly applied the current definition of single subject (the provisions of an initiative must be reasonably germane). For this reason, the courts should be allowed to develop the current standard more precisely before legislative or initiative attempts are made to rewrite the constitution.

RECOMMENDATION: THE PROHIBITION ON CONSTITUTIONAL "REVISIONS" BY INITIATIVE SHOULD BE REVOKED

The California Constitution allows a constitutional initiative to *amend* the constitution but not to *revise* it. The constitution can only be *revised* in two ways: by the legislature placing a constitutional revision on the ballot, or by the legislature initiating a constitutional revision procedure.[92] The first technique allows the legislature by a two-thirds vote to put a measure revising the constitution on the ballot for voter approval. If the voters approve the proposed revision by a majority vote, it becomes effective. The second technique is more complicated. The legislature by a two-thirds vote must first place a measure on the ballot asking the voters to authorize the convening of a constitutional convention. If the people approve this measure by a majority vote, convention delegates are elected by district. If the convention agrees on a constitutional revision, it is put on a subsequent ballot and must be adopted by a majority vote.

Until 1990, only one court opinion had ever invalidated a ballot initiative on the ground that it was an impermissible constitutional revision.[93] This 1948 initiative, discussed earlier, added sections to the constitution on a wide range of subjects, from pensions, to voting rights for Indians, to surface mining. (Undoubtedly, the initiative would have violated the single subject rule had the constitution contained such a restriction at the time.) The court ruled that such an extensive amendment was actually a revision to the constitution. Passage of the proposal, in the court's view, "would [have

[92] Cal. Const. art. XVIII.

[93] *McFadden v. Jordan*, 32 Cal. 2d 330 (1948).

been] to substantially alter the purpose and to attain objectives beyond the lines of the constitution as now cast."[94] The court concluded that the scope of the proposed amendments in the initiative measure was actually more extensive than the major restructuring of the California constitution in 1879.

In late December of 1990 (for the first time since 1948), the supreme court ruled that another constitutional initiative measure (Proposition 115) comprised an improper "revision" of the California constitution. This initiative, adopted by the voters in June 1990, had enacted a number of provisions protecting crime victims, but one section required the California courts to define the rights of criminals in a manner consistent with court cases under the U.S. Constitution. This section was designed to prevent the California courts from giving criminals more protections than those granted by the federal courts. The California Supreme Court unanimously found this provision to be a curtailment of the ability of the lower courts to interpret state laws and constitutional provisions. By upsetting the balance of power between the judicial and other branches of California government, the initiative provision improperly "revised" the constitution.

While the supreme court's 1948 decision was based on the extensiveness of changes to the constitution (the initiative would have increased the length of the constitution by one-third), its 1990 ruling focused instead on qualitative changes to the constitution. The court said that the provisions of Proposition 115 "would substantially alter the substance and integrity of the state constitution as a document of independent force and effect"[95] and "significantly change the preexisting constitutional scheme or framework . . . extensively and repeatedly used by the courts. . . ."[96]

In 1991, the California Supreme Court addressed the constitutional revision question for a third time. At issue was Proposition 140, which in 1990 had imposed limits on the terms of legislative and statewide office. The legislature attacked these limits, arguing that they comprised an improper constitutional revision and citing the supreme court's decision in the Proposition 115 case. They hoped that the court would reaffirm its decision in the *Raven* case and apply the same reasoning to dramatic changes in the structure of the legislature. The court rejected the argument, noting that "Proposition 140 on its face does not affect either the structure or the foundational powers of the legislature, which remains free to enact whatever laws it deems appropriate," and that "[n]o legislative power is diminished or delegated to other persons or agencies."[97] The court also observed that the initiative process was the only practical way to impose term limits on the legislature, since the legislature would never impose term limits on itself.

If the court had struck down the measure as a constitutional revision, term limits could never have been enacted for a very simple reason: the legislature, unlike most voters, strenuously opposes the concept and would never have placed it on the ballot. If the court should ever expand the scope of constitutional revision beyond its reasoning in the *Raven* case, it will deny the people the right to fundamentally change the state constitution.

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[94] *Id.* at 350.

[95] *Raven v. Deukmejian,* 52 Cal. 3d 336, 352 (1990).

[96] *Id.* at 354.

[97] *Legislature of the State of California v. Eu,* 54 Cal. 3d 492, 286 Cal. Rptr. 283, 292 (1991).

Californians should be allowed to place constitutional revisions on the ballot (Chapter 5 discusses this recommendation in depth). There is no constitutional history to indicate why citizens can initiate constitutional amendments by initiative but not constitutional revisions. One possible justification may have been a perceived need to prevent wholesale constitutional revisions by a direct vote of the people without the checks and balances legislative input would provide. Nevertheless, if the people can vote on a constitutional revision placed on the ballot by the legislature, there is no obvious reason why they cannot propose revisions through the initiative process.

MANDATORY JUDICIAL REVIEW OF INITIATIVES BEFORE ELECTIONS IS NOT DESIRABLE OR PRACTICABLE

No significant changes should be made to the way the courts currently review initiatives—either before circulation, during circulation, after an initiative qualifies for the ballot or after its passage.

One potential reform involves the question of whether the courts should review *all* initiatives *before* they are circulated or placed on the ballot, either for single subject rule violations or other constitutional infirmities. Only one state, Florida, automatically requires its supreme court to review an initiative to determine if it complies with the single subject rule once the initiative has gathered 10% of the signatures necessary to place it on the ballot.

Early judicial review of initiatives in California is not practicable. Less than one-tenth of the measures titled by the attorney general ultimately qualify for the ballot in California, and since 1990, voters have enacted only 35% of the initiatives reaching the ballot. Thus, automatic court review at any stage prior to passage would increase court congestion substantially and needlessly. It would also increase the costs of circulating an initiative, since all proponents would have to hire attorneys to represent them in court. And it would place the courts under tremendous time pressure to make decisions within the deadlines imposed on them.

In California, the courts have generally handled review of initiatives prior to the time they qualify for the ballot in the same way they treat legislation before it has been approved by both houses of the legislature and signed by the governor. The courts will neither provide advisory opinions on legislation nor usually interfere with the initiative process until a measure is enacted into law. As the California Supreme Court said in 1982, "It is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election, rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity."[98]

Only eight statewide initiatives have been invalidated by California courts prior to the election. Three early supreme court rulings kept initiatives off the ballot on technical grounds—improper form or misleading titles.[99] A fourth case removed an initiative from

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[98] *Brosnahan v. Eu,* 31 Cal. 3d 1, 3 (1982).

[99] *Mersy v. Stringham,* 195 Cal. 672 (1925); *Boyd v. Jordan,* 1 Cal. 2d 468 (1934); *Clark v. Jordan,* 7 Cal. 2d 248 (1936).

Only eight statewide initiatives have been invalidated by California courts before voters had a chance to vote on them

the ballot because it attempted to enact, in the court's view, a constitutional "revision" rather than an "amendment."[100] A fifth supreme court case removed an initiative from the ballot because it did not attempt to adopt a "statute" and thus could not be presented to the voters.[101] A sixth supreme court decision dealt with the unusual question of whether a reapportionment plan enacted as an urgency measure by the legislature (thus preventing the electorate from considering a referendum to repeal it) could be superseded by a competing reapportionment plan subsequently adopted by initiative. In a highly controversial decision, the court ruled that since the state constitution permitted approval of only one reapportionment plan per decade, the people could not vote on a second one since the legislature had already enacted a plan.[102] A seventh appellate court decision blocked the circulation of an initiative by applying the single subject rule to an insurance initiative that also contained a campaign finance limitation.[103] And an eighth supreme court decision removed Proposition 24 from the ballot because it addressed both redistricting and legislative salaries and thus violated the single subject rule.[104]

Prevailing supreme court decisions allow an initiative opponent who believes that a measure violates the state or federal constitution to challenge it in court during the circulation period. Although the courts are reluctant to intervene at this early stage, they have been willing to do so in extreme cases. Initiatives such as the 1983 Sebastiani reapportionment initiative, the 1984 balanced budget initiative and the 1988 no-fault insurance measure have thus been removed from the ballot. The current system of judicial review, which allows but does not encourage lawsuits to block circulation during the initiative stage, appears preferable to a cumbersome system of mandatory prior judicial review.

CONCLUSION

Court decisions play a critical role in the initiative process. Although courts generally defer to ballot initiatives as expressions of the public's will, they periodically invalidate initiatives either altogether or in part. When this happens, voters become disillusioned and initiative proponents frustrated. The courts should thus return to a procedure in which they invalidate only the specific portions of competing ballot measures that conflict with each other, instead of invalidating entire measures that only have some provisions in conflict with others. The courts, however, should continue to enforce current interpretations of the single subject rule.

[100] *McFadden v. Jordan*, 32 Cal. 2d at 330 (1948).

[101] The initiative attempted to order the legislature to pass a resolution supporting the balanced budget constitutional amendment then pending before the U.S. Congress. The court ruled that an initiative could not order a legislature to act. *American Federation of Labor v. Eu*, 36 Cal 3d 687 (1984).

[102] *Legislature of the State of California v. Deukmejian*, 34 Cal. 3d 658 (1983). Former Justice Frank Richardson, who was also a member of the California Commission on Campaign Financing, was the lone dissenter.

[103] *California Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351 (1988).

[104] *Senate of the State of California v. Jones*, 21 Cal. 4th 1142 (1999).

TABLE 9.1 Initiatives Declared Partially Invalid

1. **Proposition 9 (Political Reform Act of 1974)**
   - ***a. Provisions Declared Invalid***
     - Expenditure ceilings for ballot measures and statewide candidates
     - Expenditure ceilings on qualification of ballot measures
     - Ban on lobbyist contributions
     - Disclosure of clients of attorneys at a different threshold than customers of other businesses
   - ***b. Provisions Still in Effect***
     - Campaign disclosure
     - Auditing of campaign statements
     - Lobbyist disclosure
     - Lobbyist gift limitation
     - Disclosure of economic interest
     - Disqualification for conflicts of interest
     - Establishment of Fair Political Practices Commission
     - Ballot pamphlet requirements
2. **Proposition 7 (1978 Death Penalty)**
   - ***a. Provisions Declared Invalid***
     - Provision requiring death penalty to be imposed "where the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity"
     - Provision requiring judge to inform jury that a life sentence without possibility of parole could be commuted or modified by the governor
   - ***b. Provisions Still in Effect***
     - All other death penalty sections
3. **Proposition 24 (1984 Legislative Reform Act)**
   - ***a. Provisions Declared Invalid***
     - Limitation on how much could be spent by the legislature
     - Rules on legislative appointments by the Speaker and Senate Rules Committee
   - ***b. Provisions Still in Effect***
     - Reports to the public concerning expenditures of the legislature
     - Requirement that the legislature meet and vote in public
4. **Proposition 62 (1986 Limitation on Imposition of Local Taxes)**
   - ***a. Provisions Declared Invalid***
     - Requirement of vote on each local general tax increase, such as utility tax and cable tax
     - Requirement that a tax imposed without voter approval would result in automatically reducing local government's share of property tax
     - Requirement that a tax imposed between 1985 and 1986 (before passage of the measure) had to be submitted to the voters within two years
   - ***b. Provisions Still in Effect***
     - Voter approval for special taxes by a two-thirds vote
     - Prohibition on ad valorem taxes, transaction taxes and sales taxes on real property
5. **Proposition 73 (1988 Campaign Financing)**
   - ***a. Provisions Declared Invalid***
     - Contribution limits
     - Prohibition on transfers from one committee controlled by a candidate to another committee controlled by the same candidate
   - ***b. Provisions Still in Effect***
     - Ban on public financing of campaigns
     - Ban on publicly financed newsletters
6. **Proposition 103 (1988 Automobile Insurance Reform)**
   - ***a. Provisions Declared Invalid***
     - Automatic rebate
     - Consumer Advocacy Corporation
   - ***b. Provisions Still in Effect***
     - Election of insurance commissioner
     - Prohibition on rate setting based on geography
     - Review of rates by insurance commissioner
     - Limitation on insurer's power to refuse to renew policies
7. **Proposition 115 (1990 Crime Victims' Justice Reform Act)**
   - ***a. Provisions Declared Invalid***
     - Requirement that state court decisions on criminal law be based on federal court decisions

continues

TABLE 9.1 continued

b. Provisions Still in Effect

- Increase in sentences for certain crimes
- Provision for additional participation in process by victims
- Reclassification of certain crimes
- Expanded definition of first-degree murder
- Expanded list of special circumstances that can result in death penalty
- Provision that 16- and 17-year-olds can be sentenced to life without possibility of parole
- Creation of the new crime of torture
- Prohibition on preliminary hearing when a felony is prosecuted by grand jury indictment
- Creation of a number of speedy trial provisions
- Provisions changing the rules on exchanging information between prosecutors and defense attorneys
- Provisions changing the hearsay evidence rule
- Provisions changing the way jurors are examined
- Provisions permitting the joining of criminal cases

8. Proposition 140 (1990 Term Limits and Legislative Budget)

a. Provisions Declared Invalid

- Ban on state pensions for incumbent legislators

b. Provisions Still in Effect

- Term limits for state officials
- Cut in legislature's budget
- Ban on pensions for newly elected legislators

9. Proposition 187 (1994 Undocumented Immigrants)

a. Provisions Declared Invalid

- Denial of public benefits to undocumented immigrants
- Requirement that state employees report suspected undocumented immigrants to federal immigration officials

b. Provisions Still in Effect

- Increase in penalties for making or using fraudulent identification

10. Proposition 208 (1996 Campaign Contribution and Spending Limits)

a. Provisions Declared Invalid

- Slate mailing disclosure requirements

b. Provisions Superseded by Proposition 34

- Basing contribution limits on whether the candidate agrees to expenditure limits
- Lower campaign contribution and expenditure limits
- Aggregate contribution limits
- Ban on contributions in nonelection years

c. Provisions Still in Effect

- Advertising disclosure requirements

11. Proposition 5 (1998 Tribal Gaming)

a. Provisions Declared Invalid

- Authorization of certain types of gambling in tribal casinos, including horse race wagering, a certain type of electronic slot machine, certain card games and any lottery game
- Establishment of a trust fund to be distributed to certain tribes and throughout the state
- Requirement that each tribe to establish a tribal gaming agency to regulate gambling facilities and operations
- Requirement that the state attorney general to regulate tribal gaming operations
- Requirement that the governor to negotiate with an Indian tribe for a compact that differs from the one defined in the measure if so requested by a tribe
- Provision for tribal reimbursement of all reasonable costs associated with state regulation of any compact

b. Provisions Still in Effect

- Waiver of immunity from suit in disputes arising out of negotiations for tribal-state compacts

Source: Center for Governmental Studies analysis.

CHAPTER

10

Enacting the Recommendations in This Report

While people recognize that they can be deceived and certain interests spend disproportionate amounts of money on initiatives, they still like the idea of having the opportunity to vote on issues [through the ballot initiative process].

—*Mervin Field*[1]

[T]he good sense of the people will always be found the best army. They may be led astray for the moment but will soon come to themselves.

—Thomas Jefferson[2]

SUMMARY

The recommendations in this report respond to criticisms from both initiative opponents and supporters and seek to improve the initiative process by making it a more responsible and effective part of California's governmental decision-making machinery. The recommendations embody a balanced package of reforms and ideally should be adopted together.

Most of the proposed reforms would require constitutional and statutory amendments, while others would require changes made directly by administrative agencies or actions by the federal government or the courts. Either a legislative or citizen-initiated ballot measure could enact most of the reforms all at once. This chapter outlines the recommendations that should be included in such a measure.

[1] Quoted in William Endicott, "A Tool for Reform Runs Amok," *Los Angeles Daily Journal*, July 18, 1990.
[2] Quoted in "Initiative Process Lets People Decide Issues," *Vacaville Reporter*, September 3, 1990.

Over its 97-year history, California's initiative process has acquired a semi-sacrosanct status. Even vigorous opponents of the initiative process hesitate to criticize it publicly for fear of being charged with undermining the people's right to put important state concerns to a popular vote. Reform proposals, no matter how well thought out, are thus likely to be met with some skepticism. Nevertheless, nearly all initiative process participants recognize that it can be improved.

Opinions vary sharply as to which improvements are necessary. Some supporters of the initiative process would make initiatives easier to qualify and pass. They argue that sizable increases in California's population now make it far more difficult to circulate and qualify initiatives than in 1911 when the initiative process was created, and that the emergence of heavy-spending campaigns has shifted control over initiatives to moneyed interests. The initiative process should be reformed, they believe, to make it easier once again for grassroots citizens groups and volunteers to enact direct legislation.

Some opponents of the initiative process, including legislators and business interests, would make initiatives much harder to circulate and enact. They contend that California's policy agenda is increasingly being set by ill-conceived ballot initiatives that undermine the power of elected representatives and confuse the average voter. The initiative process should be curtailed, they argue, to make it more difficult to formulate state policy directly through citizen-enacted measures.

Voters still strongly support the initiative process. A 2006 survey sponsored by the Center for Governmental Studies (CGS) indicates that 80% of voters believe it is a good idea to have ballot initiatives where voters decide on proposed laws.[3] Nevertheless, only 12% of California voters are very satisfied with the way the state's initiative process is working; 45% are somewhat satisfied and 37% are not satisfied. Also, 73% believe that the initiative process is easily manipulated by special interests and dominated by big-money interests; 66% feel that the process is often confusing; 60% feel that initiatives often result in unintended problems or consequences; 58% believe that initiatives often result in vague, ambiguous or contradictory laws; and 57% feel that there are too many initiatives on the ballot.[4] Given these concerns, 84% of voters support increasing financial disclosures for initiative campaigns, and 80% support longer signature-gathering periods and allowing for a period of time in which an initiative sponsor could attempt to forge a compromise with the legislature before the initiative appears on the ballot.[5] In addition, 73% support providing official voter information in video format, and 69% support prohibiting ballot measure campaign contributions over $100,000.[6]

After extensive deliberations, this report concludes that, although it requires considerable improvement, California's initiative process must be retained. Enacting any reforms to California's ballot initiative process may be difficult. Those with a vested interest in the status quo, those who feel this report's recommendations go too far and those who feel

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[3] Center for Governmental Studies (CGS), *Random Digit Dial Survey and ARS Study*, conducted by Fairbank, Maslin, Maullin & Associates and Winner & Associates, June 2006.

[4] *Id.*

[5] Mark Baldassare, *Californians and the Future*,survey conducted by the Public Policy Institute of California, November 2006.

[6] CGS, *supra* note 3.

they do not go far enough, may oppose them. But this report presents a comprehensive and interrelated package of reforms that, taken as a whole, can be implemented without significantly tilting the initiative process in favor of either its supporters or opponents. The reforms proposed in this report are balanced. Although individual reforms could be enacted separately, adopting the entire package is preferable.

THIS REPORT RECOMMENDS A COMPREHENSIVE AND BALANCED PACKAGE OF REFORMS

The recommendations in this report would significantly change the way that initiatives are drafted, circulated, debated and voted on by the public. At the same time, they address criticisms of the initiative process from both its supporters and its opponents. These criticisms indicate that a number of problems beset California's initiative process: initiatives are too inflexible once they have qualified for the ballot; the legislature plays an insignificant role in the initiative process; initiative qualification is too easy with paid circulators and too difficult with volunteers; too many initiatives amend the state constitution rather than the statutes; voters often find initiatives too complex and confusing; concise and accurate information about initiatives is not as readily available or well-organized as it should be; money plays too important a role in the process and the courts have invalidated successful initiatives in their entirety because some of their provisions conflicted with those of other initiatives.

The recommendations in this report seek to redress these problems and improve the initiative process by making it a more responsible and effective part of California's governmental decision-making machinery—but in a balanced way that responds to the legitimate criticisms from both initiative opponents and supporters. In some instances, this report's recommendations would benefit initiative proponents—enabling them, for example, to qualify initiatives somewhat more easily through a longer circulation period or to amend initiatives before placing them on the ballot. In each case, however, checks and safeguards counterbalance these proponent benefits—providing opponents, for example, with more time to analyze a measure or giving the legislature the power to amend initiatives after enactment. Under the recommendations proposed in this report, for example:

- Proponents could amend their initiatives shortly after qualification, allowing them to fine-tune their initiatives after circulation. But the legislature could also amend them after enactment. In both cases, the amendments would have to be consistent with the purposes and intent of the original initiative proposal.
- Proponents would be required to submit their initiatives for analysis at a legislative hearing before their measure is placed on the ballot. But they would always control the content of their initiatives and would not be required to accept suggested amendments.
- A mandatory legislative hearing would help proponents learn of potential problems with their proposal and resolve them. At the same time, the initiative's opponents would have a forum in which to present their objections to the measure before it appears on the ballot.

- A longer circulation period will better enable grassroots groups to circulate signature petitions with volunteer signature gatherers and help them avoid exorbitant fees for professional circulation firms. On the other hand, the proposals in this report will require proponents to submit their initiatives to review in a legislative hearing, provide signatories with more information and increase disclosure of the initiative's financial backers.

These recommendations will both improve the way laws are enacted and help to restore public confidence in the initiative and legislative processes.

SOME PROPOSED REFORMS WILL REQUIRE STATUTORY AND CONSTITUTIONAL AMENDMENTS

The rules for California's initiative process are contained in both the state constitution and the statutes (primarily in the elections code and the government code).[7] The rules enshrined in the constitution cannot be changed without a vote of the people. Statutory rules can be changed by the legislature. The constitution gives the legislature broad power to regulate the initiative process; it can determine how initiatives are circulated, presented to the public on the ballot and certified by the secretary of state.[8]

The constitution contains little language defining specific initiative procedures. It specifies how to calculate the number of signatures needed to qualify a constitutional or statutory initiative, when an initiative must qualify in order to be placed on the ballot, that only one subject may appear in an initiative, when an initiative may become effective, what happens if two or more initiatives are enacted at the same election, how the legislature may amend an initiative and who prepares the title and summary for the initiative. Many of the recommendations in this report can be put into place by statutory amendment. A few will require constitutional amendments.

Either a legislative measure or a citizen initiative could enact most of the proposals in this report. The legislature can place constitutional amendments on the ballot by a two-thirds vote of both houses and it can enact statutory amendments by a majority vote.[9] The legislature can also submit the reforms as a package of statutory and constitutional amendments that would be adopted contingent on voter approval.

Most of this report's proposals can be added to elections code or government code, while some sections must be included in the state constitution. Most of the other changes could be made directly by administrative agencies; a few would require action by the federal government or the courts. An initiative containing all of this report's recommendations could be presented to the voters as a combined constitutional and statutory amendment.

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[7] Cal. Elec. Code §§ 9000 *et seq.* (2007); the California Government Code has various provisions dealing with initiatives—particularly in Cal. Gov't Code §§ 81000 *et seq.* (2007).

[8] "The legislature shall provide the manner in which petitions shall be circulated, presented and certified, and measures submitted to the electors." Cal. Const., art. II, § 10.

[9] Some statutory changes proposed by this report, such as amendments to the Political Reform Act, require approval by a two-thirds vote of the legislature.

Constitutional Amendments

This report has proposed four reforms that require constitutional amendments for enactment: the recommendation that a supermajority vote of the electors is needed to enact any measure that itself mandates future supermajority votes; the requirement that citizens may propose constitutional revisions via the initiative process; the requirement that either a constitutional convention or revision commission be held every ten years; and the provision allowing the legislature to amend initiatives before and after enactment if the amendments further the initiatives' original purposes and intent.

Supermajority Vote Requirements

The constitution states that a measure is adopted when a majority of those voting on it approves it.[10] Proposition 136, defeated in the November 1990 election, would have required any initiative enacting a special tax to receive a two-thirds vote before it could be adopted. Although the measure barely lost, receiving 48% of the vote, its passage would have allowed a simple majority of Californians voting in 1990 to authorize a mere 34% of future Californians to block any special tax increase, even though an overwhelming, but less than two-thirds, majority might favor such a tax increase. This report proposes that any measure that requires a future supermajority vote must itself pass by at least the same supermajority.[11] Adopting this recommendation would require a constitutional amendment.

Allowing Constitutional Revisions by Initiative

Two problems with the initiative process could be addressed by making the constitution easier to revise. First, voters must currently vote on even the most minor changes to issues that were placed in the constitution years ago but that should really be in the statutes, such as gillnet fishing restrictions and chiropractic regulations. Placing statutory language in the constitution ties the legislature's hands by preventing legislative amendments and locking in provisions that should be reviewed and perhaps changed in future years. Second, voters lack a meaningful process for assessing the state constitution as a whole, since the constitution allows initiatives to amend both state statutes and the state constitution, but it bars initiatives from revising the constitution.[12]

This report recommends easing the state's constitutional revision process, in part by allowing Californians to propose constitutional revisions through the initiative process. California has entrusted its citizens with the authority to amend the constitution through the initiative process. It also allows them to vote on constitutional revisions proposed by the legislature. It therefore seems reasonable to enable them to at least initiate the process of revising the constitution by allowing them to place proposed constitutional revisions on the ballot. To do so would allow Californians to ensure that their state constitution

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[10] Cal. Const., art. II, § 10.

[11] See Chapter 5 for a discussion of this recommendation.

[12] Cal. Const., art. II, § 8.

reflects their needs and priorities. To enact this recommendation, the constitution would have to be amended to allow constitutional revisions by initiatives. Because allowing constitutional revisions by initiative may itself be a constitutional revision, as opposed to a constitutional amendment, this change would likely require enactment by the legislature rather than by initiative.[13]

Constitutional Conventions and Revision Commissions

The California Constitution currently authorizes only two methods of constitutional revision, both of which can be initiated only by the legislature.[14] First, with a two-thirds vote of the membership of each house, the legislature may place a constitutional revision on the ballot. Alternatively, the legislature may create a constitutional revision commission with a specific charge—for example, to eliminate redundant and unnecessary provisions. The commission must then report back to the legislature, and the legislature can, but is not required to, place the suggested revisions on the ballot for voter consideration.

Second, and also with a two-thirds vote of both houses, the legislature can submit to the voters at a general election the question of whether to call a constitutional convention. If the question receives a majority vote on the statewide ballot, the legislature must provide for the convention within six months. The constitutional convention can place its recommendations directly on the ballot without first submitting them to the legislature. In all instances, voters must approve constitutional amendments and revisions. To supplement these constitutional revision procedures, the state constitution would have to be amended.[15]

To further ease the process, a constitutional revision commission should convene automatically in every other decade, and a constitutional convention should be established in the alternate decades. Under this recommendation, California would have an opportunity to reassess its constitution once every ten years. A constitutional revision commission would be convened every 20 years, with members designated by the legislature. The commission would be instructed to suggest ways to purge the constitution of unnecessary, redundant and obsolete provisions. The commission might also be asked to recommend ways in which the constitution could be simplified—for example, by moving gillnet and chiropractor regulations from the constitution to the statutes. The legislature could then decide whether to place these recommendations on the ballot or ignore them.

A mandatory constitutional revision commission would provide an opportunity for comprehensive review of the state constitution—something that rarely occurs now. It would allow a commission of legal experts to suggest provisions that might no longer be needed. It would create a method by which to simplify and shorten the constitution by eliminating redundancies and moving language to the statutes. And it would trigger a process for considering larger constitutional revisions.

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[13] See Chapter 5 for further discussion of these recommendations.

[14] Cal. Const., art. XVIII, §§ 1-2.

[15] See Chapter 5 for a more detailed discussion of these recommendations.

Mandatory constitutional conventions every 20 years, in addition to mandatory constitutional revision commissions in the alternate 20 years, would allow representatives of the public to come together and discuss the constitution, suggest significant policy changes and debate important constitutional issues. Their recommendations, if any, would be placed directly on the ballot. Such a bi-decennial forum would attract wide attention, engage the public and provide opportunities for statewide dialogues on critical policy issues.

Legislative Amendments After Enactment of Initiatives

Although initiatives have become a vital—if not the dominant—element in the state's lawmaking process, the legislature plays a minor role during most initiative debates. Unlike cities and counties, which are required by law to consider and vote on all initiatives before they are placed on the ballot, the state legislature is not required to hold a hearing on an initiative *before* it is placed on the ballot. Its one responsibility is to conduct an informational hearing *after* a measure is placed on the ballot.[16] Because it has no power to amend initiatives, however, the legislature's conclusions are largely irrelevant to the process, and it has no incentive to participate.

This report recommends several ways to enhance the legislature's participation in the initiative process and encourage parties to compromise through the legislative process rather than by seeking a direct vote by the people. During a mandatory hearing on each initiative, the legislature should have the option of passing the measure as is or suggesting amendments that the proponent can accept or reject. If the legislature passes the measure without amendment, or if the initiative's proponents accept the legislature's amendments, the proponents could withdraw the measure from the ballot. The legislature would also be allowed to amend measures after enactment, so long as the amendments were consistent with the initiative's purposes and intent, in print for at least ten days and enacted by a two-thirds supermajority of both houses. The courts would be authorized to determine whether each legislative amendment furthers the purposes of the initiative being amended.[17]

The constitution must be amended to accomplish these recommendations because they change the constitutional provision that specifies how an initiative proposal may be enacted, as well as the provision that initiatives may only be amended by a vote of the people unless the initiative allows the legislature to amend it.[18]

STATUTORY AMENDMENTS

Aside from the four reforms discussed above, most recommendations in this report can be enacted by legislative statutory amendments, since the constitution empowers the legislature to establish many initiative procedures. Alternatively, the following proposed amendments could be adopted by a legislative measure or a statutory initiative rather than by constitutional amendment.

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[16] Cal. Elec. Code § 9034 (2007).

[17] See Chapter 3 for a full discussion of this proposal.

[18] Cal. Const., art. II, § 10.

Legislative Hearing After the Secretary of State Confirms That the Raw Count of Signatures Exceeds 100% of the Required Threshold

After the secretary of state determines that the raw count of signatures exceeds 100% of the required qualification threshold, the legislature should be required to hold committee hearings on the measure.[19] The legislature may hold either a combined hearing of both houses or separate hearings in each house. Such hearings would provide initiative proponents with an opportunity to convince the legislature to adopt the initiative, either with or without amendments. They would also give the legislature a chance to offer suggestions to the proponents. The League of Women Voters and various legislators have made similar proposals, but the legislature has never approved them.

Proponent-Sanctioned Legislative Amendments During a 30-Day Public Comment Period After the Secretary of State Confirms That the Raw Count of Signatures Exceeds 100% of the Required Threshold

Current state law makes the initiative process too inflexible. Once proponents draft statutory language and place a measure in circulation for signatures, they are barred from making even the most minor changes to the measure's wording unless another ballot measure is enacted to amend the language of the original proposal, or unless the initiative's proponents allow the legislature to amend its provisions after passage. Because initiative provisions cannot be amended after circulation begins, proponents must defend initiative provisions that they have discovered to be faulty during the election campaign.

This report recommends a package of review and amendability procedures that will reduce the probability of the public enacting defective initiatives. First, once the secretary of state confirms that the raw count of signatures has reached 100% of the required qualification threshold, a 30-day public comment period should take place. During this time, proponents can receive comments from interested parties and, ideally, either work with the legislature to enact an original or amended version of the initiative proposal into law instead of placing it on the ballot or amend the proposal to remove flaws before it appears on the ballot. All amendments should be consistent with the initiative's original purposes and intent. The legislative hearing discussed above should take place at some point during the first 20 days of this 30-day period. Each component of this proposal can be enacted with statutory changes.[20]

Proponent Amendments After the 30-Day Public Comment Period

In addition to allowing amendments during the 30-day public comment period, this report recommends allowing proponents to amend the text of an initiative within 7 days after the 30-day public comment period, so long as the amendments are consistent with the initiative's original purposes and intent. The attorney general should be required to review each amendment for consistency with the purposes and intent of the original

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[19] The "raw" count total is the tally of signatures before the validity of the signatures is verified. This proposal is discussed in Chapter 3.

[20] For a more extensive discussion of these proposals, see Chapter 3.

measure, and the Sacramento County Superior Court should be responsible for making the final decision if the attorney general's decision is challenged. If the electorate adopts the measure, then the legislature should be permitted to amend the initiative by a two-thirds supermajority, provided that the amendments further the purposes of the initiative and follow certain other procedures designed to ensure that the measure is not weakened in the closing hours of the legislative session. All of these proposals can be enacted through statutory changes—except allowing the legislature to amend initiatives.[21]

Drafting Assistance and Early Analysis by the Legislative Analyst

Until an initiative qualifies for the ballot, proponents generally lack feedback from sources outside their own campaign. State law requires the secretary of state's and legislative counsel's offices to provide drafting assistance to initiative proponents who request it.[22] This service is rarely used, and ballot initiatives frequently face court challenges as a result of poor drafting—a situation that could be ameliorated if proponents took advantage of drafting assistance. Moreover, some of the state's most valuable feedback on initiatives currently becomes available so late in the process that proponents cannot use it to improve their initiative proposals.[23]

Proponents should be informed of the experienced help available to them early in the initiative process, and neutral analyses of initiative proposals should be made available sooner than is currently the case. This report recommends that the secretary of state's office publicize the drafting assistance that it and the legislative counsel's office can provide to initiative proponents. Many proponents will not use the resource even when they know about it, either because they mistrust the secretary of state's office or because they prefer to hire their own legal advisers; but lack of awareness should not be a reason for proponents to bypass drafting assistance. In addition, the legislative analyst should provide its impartial analysis of each ballot measure 20 days after signatures are turned in to county officials for verification, rather than 30 days after the measure qualifies. In conjunction with the flexibility in drafting recommendations outlined below, this recommendation will allow proponents to improve their proposals before they reach the ballot. Simple statutory amendments can enact these recommendations.[24]

Longer Circulation Period—from 150 Days to 365 Days

The California Elections Code specifies that proponents have a maximum of 150 days to circulate their initiatives.[25] The emergence of professional circulators who purport to guarantee ballot initiative qualification has commercialized the circulation process and allowed anyone with enough money to place a measure before the voters, regardless of its merit or the breadth of its popular support. Moreover, petition circulation by grassroots

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[21] For a more extensive discussion of these proposals, see Chapter 3.
[22] Cal. Gov't Code § 10243 (2007).
[23] Cal. Elec. Code § 9087 (2007).
[24] Chapter 3 discusses this recommendation in more detail.
[25] Cal. Elec. Code § 9051 (2007).

volunteers, the qualification method envisioned by the creators of the initiative process, has disappeared, although some proponents still call on volunteers to circulate petitions but do not rely on them solely to qualify their measures.

Because the U.S. Supreme Court has ruled that banning the use of paid signature gatherers unconstitutionally abridges freedom of speech, this report proposes that the circulation period be extended from 150 to 365 days to help equalize the ability of unpaid and paid circulators to qualify measures. This recommendation can be achieved with a statutory change to the elections code.[26]

Required Notifications on Initiative Petitions

Any person who signs an initiative should be informed that the proponent may amend the proposal as long as the amendments further the purposes and intent of the measure. The notice should appear prominently at the top of the petition in red ink, so that a person considering signing the petition understands that the initiative may be changed.[27] A statutory change would enact this recommendation.

In addition, the identity of each measure's financial backers should be disclosed to voters and the press earlier in the process than is currently required, and interested voters and the press should have access to more frequent campaign financial statements. Money continues to play a dominant role in the initiative process. Anyone with $1 million to $2 million can qualify a measure simply by hiring a professional circulation firm. To help voters access information about initiative campaign funders, petitions should indicate at the top and in bold type that the names and affiliations of major campaign contributors to the circulation drive may be found on the secretary of state's Website.[28]

Improved Signature Verification Procedures

Counties are required to submit too many signatures to the verification process, when an equally accurate count can be made by examining fewer signatures. AB 2125, which the legislature passed in 1991, reduced the random verification from 5% to 3% of the signatures submitted.[29] This report recommends, however, that initiatives should qualify if the random sample verification of signatures indicates that proponents have gathered at least 105% (currently 110%) of the valid signatures needed for qualification. No county should have to count more than 1,500 signatures for any petition when it conducts its random count. An amendment to the elections code would enact these changes.[30]

Changes to Voter Information Sources

This report presents several recommendations to improve existing sources of voter information. Conflicting measures in the same election should be grouped together in the bal-

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[26] This proposal is discussed in Chapter 4.

[27] This recommendation is discussed in Chapter 4.

[28] For a discussion of this recommendation, see Chapter 4.

[29] Cal. Elec. Code § 9030 (2007).

[30] See discussion of this proposal in Chapter 4.

lot pamphlet and on the ballot. Voters should also be warned that if both measures pass, the one with the most votes will become law, and that if one of the measures is a constitutional amendment while the other is a statutory initiative, the constitutional initiative will become law regardless of which receives the most votes. The ballot pamphlet should list endorsements for each measure to allow voters to see whether groups aligned with their interests support or oppose the measure. The pamphlet should also include a notice on its cover that the information contained in the pamphlet is available online in text and, when it becomes available, video formats. These proposals would require changes to the Elections Code.[31]

Additional Campaign Statements During the Circulation Period

Initiative proponents currently do not have to disclose the source of their funds until well into the initiative petition drive. The Political Reform Act requires ballot measure committees to file campaign statements every three months during the circulation drive and campaign.[32] Initiative proponents should be required to disclose sources of funds within 30 days after the attorney general has titled the petition. Because this proposal would amend the Political Reform Act, it would require either a two-thirds legislative vote or a ballot initiative for implementation.[33]

Increased Disclosures in Advertisements

Paid advertising for or against initiatives is often deliberately misleading—and it is frequently the only information most voters ever see about any given initiative. Disclosing the top funders of campaign ads, as is currently required, provides a strong clue as to whose interests the initiative would serve, thus helping viewers to judge the ad's accuracy for themselves. However, in television ads, this information usually appears at the end of the spot in small print that is often obscured by background images. Moreover, the text is only onscreen for a few seconds, and the names given in the ad often do not give a clear indication of what type of company or organization is providing the funding. The poor presentation of this important information renders it nearly useless to viewers.

Campaign ads should be required to identify their top three funding sources by industry affiliation or occupation and employer, depending on which applies in each particular case. Television ads should display this disclosure on the bottom one-fourth of the screen in white letters against a black background for the duration of the ad.

Improved Campaign Financing Regulations

Campaign financing issues pose difficult problems for the initiative process. One-sided campaigns characterized by large contributions and heavy spending dominate the process.

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[31] Ballot order is addressed in Cal. Elec. Code § 13109 (2007), and requirements for the contents of the ballot pamphlet are set out in Cal. Elec. Code §§ 13300-13317 (2007).

[32] Cal. Gov't Code §§ 84200 and 84202.3 (2007).

[33] This recommendation is discussed in Chapter 4.

Anyone with enough money can place an initiative on the ballot, and enough spending on negative campaign ads can cause almost any initiative to fail at the polls. Fixing these problems is a complex endeavor, since any remedy would yield both positive and negative results. Additionally, the most obvious fix—campaign contribution restrictions—is not certain to pass constitutional muster, and the U.S. Supreme Court would likely find campaign expenditure restrictions to be impediments to the First Amendment right to free political speech.

Nevertheless, this report recommends various ways to improve campaign financing practices. Contributions to ballot measure committees should be limited to $100,000, and contributions to candidate-controlled ballot measure committees should be limited to $10,000. Ballot measure proponents should be required to disclose their names alongside the committee treasurer's name on the committee's statement of organization and first campaign statement. The secretary of state should be required to post at least one preelection and postelection summary of campaign finance data for each ballot measure campaign, including total contributions and expenditures for and against the measures. These proposals could be enacted through statutory changes.[34]

CONCLUSION

Most Californians express support for the basic initiative process but recognize that the current system needs substantial reform. The recommendations proposed in this report will significantly improve the initiative process and integrate it more effectively into California's system of state government.

[34] Chapter 8 discusses these proposals in more detail.

APPENDIX

A

Summary Checklist: Recommendations for Reform of California's Ballot Initiative Process

Below is a summary of the recommendations for reform of California's ballot initiative process made in this report. A complete understanding of the recommendations requires a careful reading of the full text of the chapter of the report in which they appear. Statutory language to implement these recommendations appears in Appendix B and is referenced to the chapters in which the recommendations are discussed. Appendix C contains a timetable to illustrate the application of this report's recommendations in practice.

INITIATIVE DRAFTING AND AMENDABILITY (SEE CHAPTER 3)

1. **Proponent-Sanctioned Legislative Enactment of the Proposal and Withdrawal of Initiative from Ballot**
   - Provide a 30-day public comment period for legislators and the public to analyze each initiative after the secretary of state determines that proponents have submitted at least 100% of the number of raw signatures required for qualification.
   - Require the legislature (each house or joint committee) to announce, hold and complete a public hearing on each initiative during the first 20 days of the public comment period.
   - Allow proponents, during the public comment period, to negotiate changes with the legislature and take any of the following actions:
     - — Withdraw the initiative from the ballot if the legislature enacts and the governor signs it as drafted or enacts an acceptable alternative, consistent with the initiative's original purposes and intent;
     - — Condition withdrawal of the initiative on the provision in new law that future legislative amendments must be approved by up to a two-thirds majority, be consistent with the law's purposes and intent and be printed and circulated three days before final vote; or

— Place the original initiative or a proponent-amended version of the initiative on the ballot, so long as it is consistent with the initiative's original purposes and intent, if the legislature does not enact the initiative, enacts an unacceptable amended version or places an unacceptable alternative measure on the ballot.

2. Amendments by Proponents Before Initiative Appears on Ballot

- If the legislature and governor do not adopt an acceptable version of the initiative, allow proponents, within seven working days after the public comment period, to amend their initiative before placing it on the ballot, provided that the amendments are consistent with the initiative's purposes and intent and are submitted in writing to attorney general.
- Require the attorney general to determine in writing within seven working days after receipt whether the amendments are consistent with initiative's purposes and intent; proponents may cure deficiencies indicated by the attorney general within seven working days.
- Grant the Sacramento County Superior Court exclusive, final and expedited jurisdiction to review attorney general's determination of legitimacy of proponents' amendments; the court has seven working days to conduct its review.

3. Legislative Amendments to Initiatives After Enactment

- Allow the legislature to amend any statutory initiative (but not constitutional amendment) after passage by a two-thirds vote (or less if initiative so specifies).
- Allow proponents to stipulate a lower amendment percentage.
- Require amendments to be consistent with the initiative's purposes and intent.
- Require amendments to be printed and circulated ten days before the final vote.
- Grant the courts jurisdiction to review whether the legislative amendments further the purposes and intent of the initiative.

4. Early Impartial Analysis Prepared by Legislative Analyst

- Require the legislative analyst to publicly release an impartial analysis of each ballot measure 20 days after signatures are *turned in* for verification to the secretary of state, unless the secretary of state notifies the legislative analyst that the ballot measure will not qualify (the legislative analyst currently releases an analysis 30 days after a measure *qualifies*).

5. Publicized Drafting Assistance

- Require the secretary of state's office to publicize the drafting assistance it and the legislative counsel's office are required by law to provide to any initiative proponent who requests it. Notice should appear in the *Statewide Ballot Initiative Handbook* and other materials made available to initiative proponents.

CIRCULATION AND QUALIFICATION (SEE CHAPTER 4)

6. **Longer Circulation Period**
   - Increase the circulation period from 150 to 365 days.

7. **Notice of Campaign Finance Disclosure Information Available Online During Circulation Drive**
   - Require ballot petitions to list the secretary of state's web address and indicate at the top and in bold type that the names and affiliations of major campaign contributors to the circulation drive may be found on the secretary of state's Website.

8. **Notification That Proponent May Amend the Initiative**
   - Require ballot petitions to contain the following notice in bold type: **"The proponent of this initiative may later amend this measure before it appears on the ballot, so long as the amendments are consistent with this initiative's original purposes and intent."**
   - Require proponents to include a statement of purposes and intent in the petition in order to exercise the option to amend.

9. **Improved Signature Verification Procedures**
   - Allow initiatives to qualify for ballot if the number of randomly sampled valid signatures shows that the proponent has gathered 105% of the number needed to qualify (reduced from 110%).
   - To conduct the random sample: If 500 or fewer signatures are submitted, counties must verify all of them; if more than 500 signatures are submitted, counties must verify 3% or 1,500 of them, whichever is less (currently set at 3% or 500, whichever is more), provided that a minimum of 500 are verified.

10. **Secretary of State to Implement Procedures Allowing for Submission of Petitions Downloaded from the Internet**
    - Encourage the secretary of state to make petitions in circulation available on the Internet and allow voters to download and print them for signature and submission by mail.

11. **Additional Campaign Statements Filed During Circulation Period**
    - Require proponents to file within 30 days after the attorney general's caption a statement with the secretary of state listing all contributions received up to seven days before the filing.

12. **Possible Use of Online Petition Circulation and Alternative Methods of Ballot Qualification**
    - Conduct further research into online petition circulation and alternative methods of ballot qualification to reduce the importance of money in the signature-gathering process.

- Conduct further research into possible verification of signatures at the statewide level (instead of county by county).

CONSTITUTIONAL REVISIONS AND VOTING REQUIREMENTS (SEE CHAPTER 5)

13. Constitutional Amendments and Revisions

- Allow citizens to propose constitutional revisions by initiative (currently only statutory and constitutional amendments may be proposed, and only the legislature may propose revisions).
- Establish a constitutional revision commission every other decade; call a constitutional convention in the alternate decade, so that the state constitution is reviewed once every ten years.

14. Special Vote Requirements for Future Measures

- Prohibit special vote requirements for passage of future statutory or constitutional measures unless they themselves are adopted by the same special vote requirement and go into effect the day after the election.

VOTER INFORMATION (SEE CHAPTER 6)

15. Redesign Secretary of State's Website for Ballot Initiatives and Voter Information

- Create more user-friendly, simplified navigation and search capabilities.
- Make audio and video voter information content about ballot measures available online, based on the print version of the ballot pamphlet and including video on demand statements by proponents and opponents.
- Add links from the secretary of state's Website to organizational supporters, opponents and outside sources of information.
- Use web technology to allow voters to discuss and share information about ballot initiatives.

16. Improved Information in Ballot Pamphlet

- Group competing initiatives together in the ballot pamphlet and on the ballot; use comparison charts.
- Require the attorney general to place a warning in the ballot pamphlet and on the ballot stating that if two conflicting initiatives are approved, only one may go into effect.
- Give supporters and opponents up to one-half page each in side-by-side vertical columns to list individual and organizational endorsements.
- Encourage increased use of charts and graphs in the pro and con argument section.

17. Simplified Petition and Ballot Descriptions

- Apply 12th-grade readability standards to all state-written materials, including the attorney general's caption and summary.

18. Allow Voters to Receive the Ballot Pamphlet by E-mail Instead of Mail

- Require voter registration forms to include a check box next to the e-mail line in the form, allowing voters to indicate that they wish to receive the pamphlet by e-mail instead of by mail.
- Print a prominent notice on the cover of the ballot pamphlet that the information contained in the pamphlet is also available online in text and, when it becomes available, video formats.

NEWS MEDIA AND PAID ADVERTISING (SEE CHAPTER 7)

19. Additional Disclosure on Late Contribution Reports

- Require late contribution reports to tally all previous contributions made by late contributors to the ballot measure.

20. Reinstatement of FCC's Fairness Doctrine

- Encourage the federal government to reinstate the Federal Communications Commission's fairness doctrine as it applies to ballot measures.

21. Enhanced Journalistic Coverage

- Encourage the news media to provide accurate information about ballot measures and voluntarily comply with obligations of the original fairness doctrine.

THE INFLUENCE OF MONEY (SEE CHAPTER 8)

22. Limit Campaign Contributions

- Limit contributions to ballot measure committees to $100,000.
- Limit contributions to candidate-controlled ballot measure committees to $10,000.

23. Improve Campaign Disclosure for Ballot Measure Committees

- Require each ballot measure proponent to list his or her name alongside the committee treasurer's name on the committee's statement of organization and first campaign statement, regardless of whether the proponent controls the committee.
- Require the secretary of state to post at least one preelection and one postelection summary of campaign finance data for ballot measure campaigns (and candidate campaigns) for each election in which a ballot measure appears.

24. Disclosure of Sponsorship in Advertisements

- Require disclosure for television advertisements for ballot measure committees to appear on the bottom one-fourth portion of the screen in white letters against a black background for the duration of the advertisement.

25. Consider Limiting Campaign Expenditures

- Consider setting reasonable ceilings on campaign expenditures.

JUDICIAL REVIEW (SEE CHAPTER 9)

26. Standards for Judicial Review

- Encourage the courts to return to earlier judicial standards and invalidate only individual *provisions* of measures that conflict with provisions in other initiatives receiving more votes at the same election.
- Encourage the courts to retain the current definition of a "single subject" (involving provisions that are reasonably germane to each other).

APPENDIX

B

Statutory Language for the Recommendations in This Report

This appendix provides the statutory language for the recommendations made in this report. It is organized by chapter so that the full discussion of each item can be easily referenced.

INITIATIVE DRAFTING AND AMENDABILITY (SEE CHAPTER 3)

1. Mandatory Legislative Hearing After Sufficient Signatures Submitted to Counties

Section 3525 shall be added to the Elections Code to read:

No later than 20 days after the Secretary of State certifies that an initiative has gathered at least 100% of the required signature threshold, the Legislature shall hold and complete a committee hearing which shall receive testimony on the initiative. The hearing may be held jointly by the Senate and the Assembly. The proponent of the initiative and any other person interested in the hearing shall be given at least three days notice of the hearing. Each committee or the joint committee shall recommend to the full Legislature whether or not it should enact the initiative into law with or without amendments.

2. Proponent-Controlled Option to Remove Measure from Ballot, Amend It, or Leave It As Is

Article II, Section 8 (c) of the State Constitution shall be amended to read:

Within a 30-day period following certification by the Secretary of State that an initiative has qualified for the ballot, the proponent of the initiative may take one of the following actions:

1. Withdraw the initiative from the ballot if the Legislature enacts and the Governor signs the measure as drafted or enacts an alternative that furthers the purposes of the measure and is acceptable to the proponent;
2. Withdraw the initiative from the ballot if the Legislature enacts and the Governor signs the initiative as drafted or enacts an alternative acceptable to the proponent, if the initiative contains a provision that the future legislative amendments to the

initiative must be approved by at least two-thirds of the Legislature, be consistent with the initiative's "purposes and intent" and be in print and available to the public at least 10 days before final vote on the amendments.

3. Place the original or proponent-amended version of the initiative on the ballot if the Legislature fails to enact the initiative, enacts an unacceptable version of the initiative or places an unacceptable version of the initiative on the ballot.

If the proposed initiative is not approved by the Legislature and the Governor, [T] the Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

3. Amendments by Proponents Permitted After Legislative Hearing

Section 9036 shall be added to the Elections Code to read:

Within 37 days of the date the initiative qualified for the ballot, the proponent may amend the initiative, provided that the amendments further the purposes and intent of the initiative. The proponent must immediately submit such amendments in writing to the Attorney General for review. The Attorney General shall determine, within seven working days, whether such amendments further the purposes and intent of the initiative and notify proponent and the Legislature in writing. The proponent shall have two days to cure any deficiencies. Final jurisdiction to review the Attorney General's determination on an expedited basis shall be with the Sacramento County Superior Court.

4. Legislative Amendments to Initiatives after Enactment

Article II, Section 10(c) shall be amended to read:

The Legislature may amend or repeal referendum statutes. [Next sentence deleted with the following sentences added]. Any statutory initiative adopted by the electorate or bill adopted by the Legislature pursuant to Article II. Section 8 (c) may only be amended by the Legislature so long as the amendments further the purposes and intent of the initiative, are in print at least 10 days before the final vote by the last house voting on it, are enacted by a two-thirds vote of the membership of the Assembly and two-thirds vote of the membership of the Senate, and are approved by the Governor. If the Governor vetoes such amendments, they may go into effect if the Legislature by a two-thirds vote in each house overrides the Governor's veto. Any initiative may reduce the number of legislators needed to enact future amendments to it to as little as a simple majority, or may reduce the number of days future amendments must be in print. The courts shall have jurisdiction to review whether or not the legislation furthers the purposes and intent of the initiative.

5. Early Impartial Analysis Prepared by Legislative Analyst

Section 9087 of the Elections Code and Section 88003 of the Government Code (identical sections) shall be amended to read:

Within 20 days of the time that signatures are submitted for an initiative (unless the Secretary of State indicates that the initiative will not qualify for the ballot), the Legislative Analyst shall prepare a preliminary impartial analysis of the measure describing the measure and including a fiscal analysis of the measure showing the amount of any increase or decrease in revenue or cost to state or local government. A final analysis shall be prepared after the Secretary of State certifies the measure to be on the ballot. (Rest of the section omitted for space reasons)

6. Publicizing Assistance by the Legislative Counsel and Secretary of State

Section 10243 of the Government Code shall be amended to read:

The Legislative Counsel shall cooperate with the proponents of an initiative measure in its preparation when:

(a) Requested in writing so to do by 25 or more electors proposing the measure; and

(b) In the judgment of the Legislative Counsel there is reasonable probability that the measure will be submitted to the voters of the State under the laws relating to the submission of initiatives.

The Secretary of State shall prominently feature the advice offered by the Legislative Counsel on its web site and in any handbook or publication describing the initiative process.

Section 12172 of the Government Code shall be amended to read:

The Secretary of State shall, upon the request of the proponents of an initiative measure which is to be submitted to the voters of the state, review the provisions of the initiative measure after it is prepared prior to its circulation. In conducting the review, the Secretary of State shall do both of the following:

(a) Analyze and comment on the provisions of the measure with respect to form and language clarity.

(b) Request and obtain a statement of fiscal impact from the Legislative Analyst.

The Legislative Analyst shall furnish the Secretary of State with a statement of fiscal impact with respect to the initiative measure within 25 working days after being requested to do so by the Secretary of State pursuant to subdivision (b).

In the preparation of the statement of fiscal impact, the Legislative Analyst may use the fiscal estimate or the opinion prepared pursuant to Section 9005 of the Elections Code.

The review performed pursuant to this section shall be for the purpose of suggestion only and shall not have any binding effect on the proponents of the initiative measure.

The Secretary of State shall prominently feature this service and the advice offered by the Legislative Counsel, pursuant to Section 10243 of the Government Code, on its web site and in any handbook or publication describing the initiative process.

Section 9015 of the Elections Code shall be amended to read:

The Secretary of State shall prepare and provide to any person, upon request, a pamphlet describing the procedures and requirements for preparing and circulating a

statewide initiative measure and for filing sections of the petition, and describing the procedure used in determining and verifying the number of qualified voters who have signed the petition. The pamphlet shall prominently mention that the Secretary of State and the Legislative Counsel may provide advice and counsel to those persons drafting state initiatives.

CIRCULATION AND QUALIFICATION (SEE CHAPTER 4)

7. Longer Circulation Period—from 150 Days to 365 Days and Different Qualification Period

Section 336 of the Elections Code shall be amended to read:

[First paragraph of this section retained but omitted here for reasons of space]

No petitions for a proposed initiative measure shall be circulated for signatures prior to the official summary date. Petitions with signatures on a proposed initiative measure shall be filed with the county elections official not later than ~~150~~ 365 days from the official summary date, and no county elections official shall accept petitions on the proposed initiative measure after that period.

8. Notice of Major Contributors to Circulation Drive

Section 9008.5 (a) shall be added to the Elections Code to read:

The proponent shall place at the top of each petition the following notice in at least 8-point bold type: **"The names and affiliations of major campaign contributors to this petition may be found on the secretary of state's website: www.sos.ca.gov."**

9. Notification That Proponent May Amend the Initiative

Section 9008.5 (b) shall be added to the Elections Code to read:

The proponent shall place at the top of each petition the following notice in at least 8-point bold type: **"The proponent may later amend the initiative measure set forth in this petition before it appears on the ballot if the amendments are consistent with this initiative's purposes and intent"**

10. Improved Signature Verification Procedure

Section 9030(g) of the Elections Code shall be amended to read:

If the certificates received from all election officials by the Secretary of State total more than ~~110~~ 105 percent of the number of qualified voters needed to find the petition sufficient, the petition shall be deemed to qualify as of the date of receipt by the Secretary of State of certificates showing the petition to have reached the ~~110~~ 105 percent, and the Secretary of State shall immediately so notify the proponents and the election officials.

11. Allowing for Submission of Petitions Downloaded from the Internet

Section 9016 shall be added to the Elections Code to read:

The Secretary of State shall implement procedures that permit initiative petitions to be downloaded from its website so that voters can sign such petitions and submit them by mail.

12. Additional Campaign Statements Filed During the Circulation Period

Section 84200.9 shall be added to the Government Code to read:

(a) Proponents of a state ballot measure who control a committee formed or existing primarily to support the qualification of a state ballot measure shall file a campaign statement 30 days after the Attorney General titles the measure. The closing date for the period covered by the statement shall be seven days prior to the deadline for filing the statement.

(b) Committees formed or existing primarily to support or oppose the qualification of a measure and proponents of such a measure who control a committee formed or existing primarily to support the qualification of a measure shall file a campaign statement 21 days after any petition is filed, or 21 days after the deadline for filing petitions, whichever is earlier. The closing date for the period covered by the statement shall be seven days prior to the deadline for filing the statement.

CONSTITUTIONAL REVISIONS AND VOTING REQUIREMENTS (SEE CHAPTER 5)

13. Constitutional Revisions

Section 3 of Article XVIII of the Constitution shall be amended to read:

The electors may amend or revise the Constitution by initiative.

14. Constitutional Revision Commission and Constitutional Conventions.

Section 1.5 of Article XVIII shall be added to the Constitution to read:

Every twenty years starting in 2015, the Legislature shall establish a Constitutional Revision Commission, which shall review provisions of the Constitution and recommend changes to the Legislature, which may or may not present such amendments to the voters.

Section 2 of Article XVIII of the Constitution shall be amended to read:

The Legislature by roll call 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 votes 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. Every twenty years, starting in 2025, there shall be a convention to revise the Constitution. Delegates to the convention shall be voters elected from districts as nearly equal in population as may be practicable.

15. Special Vote Requirement for Future Measures

Article II, Section 10 (g) shall be added to the Constitution to read:

(g) Any measure that would require a future vote of the electorate that is more than a majority of those voting in order to enact such a future measure shall itself receive at least the vote which it requires. Any measure that changes a vote requirement for ballot measures shall go into effect the day after the election on which it is approved.

VOTER INFORMATION (SEE CHAPTER 6)

16. User-Friendly Secretary of State's Web Site

Section 9097 shall be added to the Elections Code to read:

The Secretary of State shall also create a more user-friendly website to provide better information to the voters regarding the election. It shall provide a print version of the ballot pamphlet in a variety of electronic formats. It shall allow users to print, download and e-mail content directly from its website. It shall create multimedia (text, audio, and video among other formats) content about the ballot measures and allow proponents and opponents to include video statements on the website. It shall allow voters to link to organizational supporters, opponents and other sources of information. It shall use technology to allow voters to discuss and share information about ballot measures.

17. Grouping of Ballot Measures

Section 13115.5 shall be added to the Elections Code to read:

Notwithstanding Section 13115, the Attorney General shall determine which measures on the same ballot potentially conflict with each other and the Secretary of State shall group these measures together in the same part of the ballot. The ruling of the Attorney General as to whether measures conflict or not is reviewable in a final and expedited hearing in the Sacramento County Superior Court. Such measures shall be accompanied by a warning label stating that the Attorney General has concluded that the measures appear to conflict with each other and that it is therefore likely that only the provisions of the one receiving the most votes will become law, subject to a final court ruling.

18. Endorsements Listed in the Ballot Pamphlet

Section 88002.6 of the Government Code and Section 9086.5 of the Elections Code (identical sections) shall be added to read:

Immediately after the analysis prepared by the Legislative Analyst, the ballot pamphlet shall contain up to but no more than one full page of persons, with their organizations if applicable [person includes an organization], who have indicated their support or opposition to each measure. These persons shall be designated by the respective individuals or organizations responsible for the preparation of the pro and con ballot arguments.

19. Summary Written by the Attorney General in Simple Language

Section 88002 (a) (2) of the Government Code and Section 9086 (a) (2) of the Elections Code shall be amended to read:

(2) The official summary prepared by the Attorney General, which shall be written in clear and concise terms that would be understood by the average voter and avoids the use of technical terms wherever possible.

20. Ballot Pamphlets Available by E-mail Instead of Mail.

Section 2150 (a) (3) of the Elections Code shall be amended to read:

The affiant's place of residence, residence telephone number, if furnished, and e-mail address if furnished. The affiant shall be given the opportunity to check a box indicating that he or she wishes to receive the ballot pamphlet by e-mail, rather than mailed. No person shall be denied the right to register because of his or her failure to furnish a telephone number or e-mail address, and shall be so advised on the voter registration card.

NEWS MEDIA, THE INTERNET AND ADVERTISING (SEE CHAPTER 7)

21. Additional Disclosure on Late Contribution and Late Independent Expenditure Reports

Sections 84203 and 84204 of the Government Code shall be amended to read:

84203. (a) Each candidate or committee that makes or receives a late contribution, as defined in Section 82036, shall report the late contribution to each office with which the candidate or committee is required to file its next campaign statement pursuant to Section 84215. The candidate or committee that makes the late contribution shall report his or her full name and street address and the full name and street address of the person to whom the late contribution has been made, the office sought if the recipient is a candidate, or the ballot measure number or letter if the recipient is a committee primarily formed to support or oppose a ballot measure, and the date, ~~and~~ the amount and the cumulative amount of the late contribution. The recipient of the late contribution shall report his or her full name and street address, the date, ~~and~~ the amount and the cumulative amount of the late contribution, and whether the contribution was made in the form of a loan. The recipient shall also report the full name of the contributor, his or her street address, occupation, and the name of his or her employer, or if self-employed, the name of the business.

(Rest of the section omitted for space reasons)

84204. (a) A committee that makes a late independent expenditure, as defined in Section 82036.5, shall report the late independent expenditure by facsimile transmission, guaranteed overnight delivery, or personal delivery within 24 hours of the time it is made. A late independent expenditure shall be reported on subsequent campaign statements without regard to reports filed pursuant to this section.

(b) A committee that makes a late independent expenditure shall report its full name and street address, as well as the name, office, and district of the candidate if the report is related to a candidate, or if the report is related to a measure, the number or letter of the measure, the jurisdiction in which the measure is to be voted upon,

~~and~~ the amount and the cumulative amount, and the date, as well as a description of goods or services for which the late independent expenditure was made.

(Rest of the section omitted for space reasons)

THE INFLUENCE OF MONEY (SEE CHAPTER 8)

22. Campaign Contributions Limited to Ballot Measure Committees

Section 85800 shall be added to the Government Code to read:

A person may not make to any committee supporting or opposing a state ballot measure and a committee supporting or opposing a state ballot measure may not accept any contribution totaling more than one hundred thousand dollars ($100,000).

23. Campaign Contributions Limited to Candidate Controlled Ballot Measure Committees

Section 85801 shall be added to the Government Code to read:

A person may not make to any controlled committee of a state candidate or state elected officer supporting or opposing a state ballot measure and a controlled committee of a state candidate or state elected officer supporting or opposing a state ballot measure may not accept any contribution totaling more than ten thousand dollars ($10,000).

24. Identification of Proponent on Statement of Organization

Section 84102.5 shall be added to the Government Code to read:

A committee is that is circulating a ballot measure on behalf of a proponent shall list the proponent's name and address on its statement of organization.

25. Reports by Secretary of State

Section 84602.1 shall be added to the Government Code to read:

The Secretary of State, after each election in which a ballot measure is on the ballot, shall prepare a summary of all campaign finance data related to any ballot measure on the ballot.

26. Disclosure of Sponsorship in Advertisements

Section 84507 of the Government Code shall be amended to read:

Any disclosure statement required by this article shall be printed clearly and legibly in no less than 10-point type and in a conspicuous manner as defined by the commission or, if the communication is broadcast, the information shall be spoken so as to be clearly audible and understood by the intended public and otherwise appropriately conveyed for the hearing impaired. If the communication is broadcast on television, the information shall appear on the bottom one-fourth portion of the screen in white letters against a black background for the duration of the advertisement.

APPENDIX

C

Procedures and Timetables for Ballot Initiatives Under the Recommendations in This Report

This chart lists the maximum time periods that would be available for proponents to navigate the initiative process for the **November 4, 2008** ballot under the recommendations in this report if their measure qualifies after a random signature count.

	RANDOM SIGNATURE COUNT	
	Days Before Election	**Deadline for November 4, 2008 Election**
Proponent submits a proposed measure to the attorney general (AG) for title and summary if fiscal impact is required	607 days	March 8, 2007
Proponent submits a proposed measure to the AG for title and summary if fiscal impact is not required	574 days	April 12, 2007
AG returns title and summary; proponents begin 365-day circulation period (15 days after measure is submitted + 25 working days if fiscal impact is needed)	557 days	April 27, 2007
Proponents file disclosure statement listing contributions received and expenditures made up to 7 days before the filing	533 days	May 21, 2007
Semiannual campaign statements due (covering 1/1/07–6/30/07)	462 days	July 31, 2007
Semiannual campaign statements due (covering 10/21/07–12/31/07)	302 days	January 7, 2008
Proponents file all petitions with county elections officials (must file within 365 days of receiving the AG's title and summary)	190 days	April 28, 2008

	RANDOM SIGNATURE COUNT	
	Days Before Election	Deadline for November 4, 2008 Election
County elections officials complete raw count totals and certify raw numbers to the secretary of state (SOS) (8 working days after petitions filed; the "raw" count total is the tally of signatures before the validity of the signatures is verified)	180 days	May 8, 2008
SOS totals raw counts from each county to determine whether initiative petitions meet the minimum signature requirement, generates the random sample and notifies county officials of the results (2 working days after counties complete raw totals)	176 days	May 12, 2008
30-day public comment period begins; legislature has 20 days to complete a public hearing (1 working day after SOS totals raw counts)	175 days	May 13, 2008
Legislative Analyst's Office releases its analysis of the initiative (20 days after petitions filed)	169 days	May 19, 2008
Last day for the legislature to hold its mandatory public hearing on each initiative qualified for the ballot (20 working days after SOS totals raw counts)	151 days	June 6, 2008
30-day public comment period ends (30 days after SOS totals raw counts)	141 days	June 16, 2008
County elections officials verify and certify results of the random sampling of signatures to the SOS (30 working days after SOS totals raw counts)	133 days	June 24, 2008
Last day for proponents to amend their initiative proposals (7 working days after 30-day public comment period)	132 days	June 25, 2008
SOS must determine whether the initiative qualifies for the ballot or 100% signature verification is necessary (2 working days after county officials verify random sampling results; a full count adds about 46 days to the qualification process)	131 days	June 26, 2008
AG reviews any amendments made by proponents (7 working days after proponent amendments)	120 days	July 7, 2008
Last day for proponents to renegotiate amendments with the legislature (7 working days after AG review)	111 days	July 16, 2008
Ballot arguments must be submitted (4 days after proponents and AG renegotiate amendments, unless the amendments are challenged in court; if there is a court challenge, the number of days for writing arguments and rebuttals should be condensed)	106 days	July 21, 2008

	RANDOM SIGNATURE COUNT	
	Days Before Election	**Deadline for November 4, 2008 Election**
Ballot arguments selected by SOS (1 working day after arguments submitted)	105 days	July 22, 2008
Rebuttals, analyses, ballot titles and all other ballot pamphlet copy must be submitted (3 days after arguments selected)	102 days	July 25, 2008
Last day for court to review proponent amendments (7 working days after amendments renegotiated)	102 days	July 25, 2008
Ballot pamphlet copy available for public inspection (4 days after ballot pamphlet copy submitted)	98 days	July 29, 2008
Deadline for proponents withdraw an initiative from the ballot (2 working days after court review)	98 days	July 29, 2008
Semiannual campaign statements due (covering 1/1/08–6/30/08)	96 days	July 31, 2008
Last day to provide ballot pamphlet copy to state printer (10 days after public inspection begins)	88 days	August 8, 2008
Ballot pamphlets distributed to counties	53 days	September 12, 2008
Ballot pamphlet mailed to voters	46 days	September 19, 2008
Second preelection campaign statements due (covering 1/7/08–9/20/08)	30 days	October 5, 2008
Last day to mail ballot pamphlets to voters registering 60 days before the election	21 days	October 14, 2008
Summary ballot pamphlet mailed to voters	21 days	October 14, 2008
Proponents must begin filing late contributions or independent expenditures of $1,000 within 24 hours	15 days	October 20–November 4, 2008
Third preelection campaign statements due (covering 9/21/08–10/18/08)	12 days	October 23, 2008
Last day to mail ballot pamphlets to voters registering late	10 days	October 24, 2008
ELECTION DAY: NOVEMBER 4, 2008		

APPENDIX

D

Ballot Initiative Reform Consultants

The Center for Governmental Studies thanks a number of individuals, including opinion leaders, academics, politicians, business leaders and representatives of grassroots and community organizations, for providing feedback during the preparation of this report.

David Abel, Metropolitan Forum Project

Greg Akili, Service Employees' International Union, Local 1000

Vikram Amar, Hastings College of Law

Michael Arno, Arno Political Consultants

Walter Baer, Annenberg Research Network, University of Southern California

Mark Baldassare, Public Policy Institute of California

Lance Brisson, Winner & Associates

Tom Campbell, University of California Berkeley Haas School of Business

Chris Carson, California League of Women Voters

Ted Costa, People's Advocate

Crystal Crawford, California Black Women's Health Project

Marina Delgado, Association of Community Organizations for Reform Now (ACORN)

Nicholas Espiritu, Lawyers' Committee for Civil Rights

Francisco Estrada, Mexican American Legal Defense and Education Fund

Barry Fadem, Fadem & Associates

Kathay Feng, California Common Cause

Matt Fong, Sheppard, Mullin, Richter & Hampton

Joel Fox, Small Business Action Committee

Elizabeth Garrett, University of Southern California Gould School of Law

Karen Getman, formerly of the Fair Political Practices Commission

Rosalind Gold, National Association of Latino Elected and Appointed Officials

Marqueece Harris-Dawson, Community Coalition

R. William Hauck, California Business Roundtable

Robert Hertzberg, Mayer Brown

Elizabeth Hill, California Legislative Analyst

Steven Hill, New America Foundation

Jonathan Jackson, Association of Community Organizations for Reform Now (ACORN)

Douglas Johnson, Rose Institute of State and Local Government, Claremont McKenna College

Fred Kimball, Kimball Petition Management

Steve Kinney, Public Opinion Strategies

Jim Lanich, California Business for Education Excellence

Gary Larson, California Charter School Association

Eugene Lee, Asian Pacific American Legal Center

Bill Leonard, California State Board of Equalization

David Lesher, New America Foundation

Lou Lewis, Office of the Code Reviser

Ethan Lieb, University of California Hastings College of Law

Daniel Lowenstein, University of California, Los Angeles School of Law

Ken Masterton, Masterton & Wright

John Matsusaka, Initiative and Referendum Institute, University of Southern California

Richard Maullin, Fairbank, Maslin, Maullin & Associates

James Mayer, California Forward

Veronica Melvin, Alliance for a Better Community

Robert Naylor, Nielsen, Merksamer, Parrinello, Mueller & Naylor

Max Neiman, Public Policy Institute of California

Curt Pringle, Mayor of Anaheim

Keith Richman, Lakeside HealthCare, Inc.

Daniel Rodriguez, University of Texas School of Law

Sara Sadhwani, Asian Pacific American Legal Center

Trudy Schafer, California League of Women Voters

Peter Schrag, *Sacramento Bee*

Joanna Southard, California Secretary of State, Elections Division

Michele Steeb, California Chamber of Commerce

Mac Taylor, California Legislative Analyst's Office

James Thomas, formerly with Strategic Concepts in Organizing and Policy Education (SCOPE)

Joshua Treviño, Pacific Research Institute for Public Policy

Paul Turner, Southern California North & Central Regions Citibank

Roy Ulrich, California Tax Reform Association and California Common Cause

Jimmy Valentine, African American Voter Registration, Education, and Participation Program

Zabrae Valentine, California Forward

Chuck Winner, Winner & Associates

Justyn Winner, Winner & Associates

Bill Zimmerman, Zimmerman & Markman, Inc.

The following consultants contributed their insights for the 1992 edition of *Democracy by Initiative*.

Herbert E. Alexander, Director, Citizens' Research Foundation

Kim Alexander, Policy Analyst, California Common Cause

John Allswang, Department of History, California State University

Anthony Alperin, Deputy City Attorney, City of Los Angeles

Mike Arno, American Petition Consultants

Ed Arnold, Elections Division, California Secretary of State's Office

Ethel Baxter, Division of Elections, Florida Secretary of State's Office

Larry Berg, Unruh Institute of Politics and Government, University of Southern California

Larry Bevens, Manager, Elections Division, Oregon Secretary of State's Office

Leah Bishop, Attorney, O'Melveny & Myers

Paul Bloch, Deputy Secretary of State, Election Services, Missouri Secretary of State's Office

Bill Boyarksy, *Los Angeles Times*

Yvonne Brathwaite Burke, Jones, Day, Reavis & Pogue

Willie Brown, Assembly Speaker, State of California

Richard Bryant, Elections Division, Los Angeles County Registrar's Office

Norma Bucknell, Office Manager, Elections Division, Oregon Secretary of State's Office

Joseph Cerrell, Cerrell Associates

John Cloonan, Director, Elections Division, Massachusetts Secretary of State's Office

Dennis Cooper, Washington State Code Reviser

Geoffrey Cowan, Senior Lecturer, UCLA School of Law

Charlene Cruz, Elections Division, Los Angeles County Registrar's Office

Caren Daniels-Meade, Chief, Elections Division, California Secretary of State's Office

Donetta Davidson, Elections Officer, State of Colorado

Sallie Debolt, Elections Officer, Ohio Secretary of State's Office

Andy Demetriou, Attorney, Jones, Day, Reavis & Pogue

Jody Raines Dennis, Attorney, Arkansas Secretary of State's Office

Thayre Dennis, Senior Staff Assistant, Utah Lieutenant Governor's Office

Roger Diamond, Attorney

Phil Dubois, University of North Carolina

Linda Edgeworth, Elections Officer, Alaska Secretary of State's Office

Robert Elliott, Deputy Secretary of State, Nevada Secretary of State

Phil Ellison

Ralph Englert, Deputy Secretary of State, Nebraska Secretary of State's Office

Barry Fadem, Attorney, Bagatelos & Fadem

Floyd Feeney, Professor of Law, University of California, Davis Law School

Mervin Field, Director, The Field Institute

Lorraine Fleury, Director of Elections, State of Maine

Lisa Foster, Executive Director, California Common Cause

Joel Fox, President, Howard Jarvis Taxpayers Association

Toni Galloway, Public Information Officer, California Attorney General's Office

Dave Hansen, Deputy Lieutenant Governor, Utah

Julie Hansen, Voter Revolt

Gary Hart, Senator, State of California

Nancy Hart, Montana Elections Bureau Chief,

Craig Hendrickson, Tax Free America

Randall Henry, Consultant, Assemblyman Jim Costa's Office

Margaret Herman, Legislative Advocate, League of Women Voters of California

Robert Herstek, Graphic Designer and Lecturer

Toni Hinton, Election Assistant, California Secretary of State's Office

John H. Hodgson II, Attorney

Timothy A. Hodson, California State Senate Elections Committee

Allan Hoffenblum, Campaign Manager, Hoffenblum & Associates

Ruth Holton, Legislative Advocate, California Common Cause

Jack Horton, Chief Deputy, California Legislative Counsel's Office

Brian Huse, Associate Political Director, California League of Conservation Voters

Wayne Imberi, Technical Analyst, California Fair Political Practices Commission

Graham Johnson, Executive Director, Washington State Public Disclosure Commission

Ross Johnson, Assemblymember, California Assembly

William T. Jones, Professor, California Institute of Technology

Tom Kiley, Cosgrove, Eisenberg & Kiley

Kelly Kimball, Kimball Petition Management

Paul Kopiin, President, The California Channel

Joyce Koupal, Community Activist

Jacqueline Ladd, Supervisor of Election Information, Massachusetts Secretary of State's Office

Linda Lairson, Projects Programs Specialist, Elections Division, Arizona Secretary of State's Office

Leslie Laurance, California State Archives

Barbara Lee, Elections Assistant, California Secretary of State's Office

Eugene Lee, Professor, University of California, Berkeley

Daniel H. Lowenstein, Professor, UCLA School of Law

Donald E. Male, State Printer, State of California

Paul Mandabach, Winner, Wagner & Mandabach Campaigns

Angela Mansor, Projects Programs Specialist, Arizona Secretary of State's Office

Ken Masterton, Co-Director, Masterton & Wright

Peter McNamee, California Fair Political Practices Commission

Sue Merriwether, Elections Coordinator, Nevada Secretary of State's Office

Ronald Michaelson, Executive Director, Illinois State Board of Elections

Anthony Miller, Chief Deputy Secretary of State, California Secretary of State's Office

Barbara Milman, California Assembly Rules Committee

Cathy Mitchell, Elections Analyst, Elections Division, California Secretary of State's Office

Peter Montalto, Senior Elections Analyst, Elections Division, Massachusetts Secretary of State's Office

John Mott-Smith, Elections Specialist, California Secretary of State's Office

Chris Nelson, Elections Supervisor, South Dakota Secretary of State's Office

Jack Nicholl, Nicholl & Siegal

Alan Niederman, Coordinating Producer, Century Communications

Dave Peterson, Elections Specialist, Michigan Secretary of State's Office

Harry Petrucci, Assistant Director, Elections Division, Massachusetts Secretary of State's Office

John Phillips, Hall & Phillips

David Pitman, Assistant Chief, Elections Division, California Secretary of State's Office

James Platler, Ph.D.

Jamie Rogers, Administrative Assistant, Elections, Montana Secretary of State's Office

James M. Rogers, Attorney

Bill Rosendahl, Vice President of Operations, Century Communications

Harvey Rosenfield, Voter Revolt

Peg Rosenfield, Elections Division, Ohio Secretary of State's Office

Bob Schaible, Deputy Secretary of State, North Dakota Secretary of State's Office

David Schmidt, Author

Josephine Scott, Elections Officer, Michigan Secretary of State's Office

Deborah Seiler, Editor, *The Seiler Report*

Fred Silva, Chief Fiscal Advisor, Senator David Roberti's Office

David Sullivan, Chief Legal Counsel, Massachusetts Secretary of State's Office

Eric Taylor, Elections Division, Florida Attorney General's Office

Earl Thaxton, Principal Analyst, Colorado Legislative Council

Cathy Cole Thompson

Stuart Tobisman, Attorney, O'Melveny & Myers

David Townsend, Political Consultant, Townsend & Company

Betty Trotter, League of Women Voters

Roy Ulrich, Attorney

John Vickerman, Former Chief Deputy Analyst, California Office of the Legislative Analyst

Dan Walters, *Sacramento Bee*

Melissa Warren, Media Director, California Secretary of State's Office

Terry Whiteberg, Account Executive, Treasure Chest Advertising Co., Inc.

Don Whiting, Assistant Secretary of State, Washington

Kathy Williams, Staff Paralegal, Washington, D.C. Board of Elections and Ethics

Shari Williams, Executive Director, Americans Back in Charge

Pamela Wilmot, Director, Massachusetts Common Cause

Chuck Winner, Winner/Wagner Associates

Bradley Wittman, Director, Information and Voter Registration Division, Michigan Bureau of Elections

Jean Womer, Administrative Aide, Elections, Washington Secretary of State's Office

Frederic Woocher, Attorney, Strumwasser & Woocher

Ben Ysursa, Chief Deputy, Secretary of State, Idaho Secretary of State's Office

Penny Ysursa, Elections Office, Idaho Secretary of State's Office

Walter Zelman, Consultant, California Department of Insurance

Bill Zimmerman, Zimmerman, Galanty & Fiman

Betty Zisk, Professor, Boston University

APPENDIX

E

California Commission on Campaign Financing Members and Professional Staff as of 1992

The California Commission on Campaign Financing operated from 1983–1995 and produced the first edition of *Democracy by Initiative* in 1992. Below are the commission's members and staff and their professional backgrounds as of 1992.

Co-Chairs

Cornell C. Maier: Retired Chairman and CEO, Kaiser Aluminum & Chemical Corporation; Consultant, Kaiser Aluminum Corporation; Director, BankAmerica Corporation and Bank of America NT&SA; member, Educational Task Force, California Business Roundtable; Director, California Leadership; Director and member, Executive Committee, Bay Area Council, Inc.

Rocco C. Siciliano: President, The Dwight D. Eisenhower World Affairs Institute, Washington, D.C.; retired Chairman, Ticor, Los Angeles; former Chairman, California Business Roundtable; served as Under Secretary, U.S. Department of Commerce, Special Assistant to President Eisenhower and Assistant Secretary, U.S. Department of Labor.

Francis M. Wheat: Advisory partner and former senior partner in the firm of Gibson, Dunn & Crutcher, Los Angeles; former Commissioner, Securities and Exchange Commission and President, Los Angeles County Bar Association.

Members

Clair W. Burgener: Retired Member of Congress, U.S. House of Representatives, 1973–1983; member, Board of Regents, University of California; former Member, California State Senate and Assembly.

Warren Christopher: Chairman of the O'Melveny & Myers law firm, Los Angeles; former Deputy Secretary of State, Deputy Attorney General of the United States and President, Los Angeles County Bar Association; 1981 recipient of the Medal of Freedom, the nation's highest civilian award.

Robert R. Dockson: Chairman Emeritus of the Board of CalFed, Inc. Los Angeles; former Dean, Graduate School of Business Administration, USC; Chairman, Commission for the Future of California Courts.

Walter B. Gerken: Chairman of the Executive Committee, Pacific Mutual Life Insurance Company, Newport Beach; former Supervisor of Budget and Administrative Analysis for the State

of Wisconsin, former Chairman of the California Business Roundtable and Chairman, California Nature Conservancy.

Stafford R. Grady: Vice Chairman Emeritus, Sanwa Bank California, Los Angeles; retired Chairman of the Board of Lloyds Bank California; former Insurance Commissioner of California; Chairman, Board of Trustees, Occidental College and President, California Bankers Association.

Neil E. Harlan: Retired Chairman and CEO, McKesson Corporation, San Francisco; former Assistant Secretary of the Air Force and Professor at the Harvard Business School; current Vice Chairman, National Parks Foundation.

Philip M. Hawley: Chairman of the Board and CEO, Carter Hawley Hale Stores, Inc., Los Angeles; Trustee, University of Notre Dame and California Institute of Technology; senior member, The Conference Board.

Aileen C. Hernandez: President, Aileen C. Hernandez & Associates, San Francisco; former member, Equal Employment Opportunity Commission, appointed by President Johnson; Vice-Chair, National Advisory Council, American Civil Liberties Union; past President of the National Organization for Women.

Ivan J. Houston: Chairman, Golden State Mutual Life Insurance Company, Los Angeles; President, Golden State Minority Foundation; former Co-Chairman, National Conference of Christians and Jews and Chairman, Los Angeles Urban League.

Michael Kantor: Partner in the Los Angeles law firm of Manatt, Phelps, Phillips & Kantor; key strategist for several major political campaigns.

Donald Kennedy: President of Stanford University; former Commissioner, U.S. Food and Drug Administration.

Melvin B. Lane: Former Publisher, Sunset Magazine and Books, Menlo Park; former Chairman, California Coastal Commission, San Francisco Bay Conservation and Development Commission and Sierra Club National Advisory Commission.

Robert T. Monagan: Counselor; Past President, California Economic Development Corp., Sacramento; former President, California Manufacturers Association, Speaker of the California Assembly, 1969–1970, California Assemblyman and Assistant Secretary of the U.S. Department of Transportation.

Luis Nogales: General Partner, Nogales Partners, Los Angeles; former President, Univision, Los Angeles; former Chairman and CEO, United Press International; member, Board of Directors, Bank of California, San Francisco; member, Board of Trustees, Stanford University; former Chairman, Mexican American Legal Defense and Educational Fund.

Susan Westerberg Prager: Dean and Professor of Law, UCLA School of Law; member, Board of Trustees, Stanford University.

Frank K. Richardson: Retired Associate Justice, California Supreme Court, 1974–1983; Presiding Justice, Court of Appeal, Third Appellate District, 1971–1974; retired Solicitor, Department of the Interior; past President, Sacramento County Bar Association.

William R. Robertson: Executive Secretary-Treasurer, Los Angeles County Federation of Labor, AFL-CIO; former Vice President, California Labor Federation.

James M. Rosser: President, California State University, Los Angeles; member, American Council on Education; member, National Science Foundation, National Institutes of Health, SCE Board of Directors, Fedco Board of Directors, National Health Foundation and Los Angeles Urban League.

Peter F. Scott: Retired Chairman and CEO, DiGiorgio Corporation, San Francisco; former Chairman, California Chamber of Commerce; former Director, California Business Roundtable.

Jean R. Wente: Chairman, Wente Bros., Inc. Vineyards and Wineries; Chairman, Museum Trustee Association; Director, California State

Automobile Association; past Chairman, Oakland Museum Association and California College of Arts and Crafts.

Samuel L. Williams: Partner in the Los Angeles law firm of Hufstedler, Kaus & Ettinger; former President, State Bar of California and former President, Los Angeles Board of Police Commissioners.

Professional Staff

Tracy Westen: Executive Director of the Commission; Assistant Professor of Law, Annenberg School for Communication and The Law Center, USC; President, Center for Responsive Government; Vice-President, California Channel (Cal-SPAN); former Deputy Director, Federal Trade Commission, Washington, D.C.

Robert M. Stern: Co-Director and General Counsel to the Commission; former General Counsel, California Fair Political Practices Commission; principal co-author of the Political Reform Act of 1974 (Proposition 9).

Janice Lark: Office Administrator and graphic designer for the Commission; experienced office manager and legal secretary for law firms in Boston and Los Angeles.

Matthew T. Stodder: Senior Researcher and Data Analysis Project Manager for the Commission; former U.S. Senatorial aide for voter registration and get-out-the-vote effort; intern to the California State Legislature.

C.B. Holman: Senior Researcher for the Commission; former Senior Researcher, Jesse M. Unruh Institute of Politics at USC.

Susie Sugerman-Newman: Senior Researcher for the Commission; M.Ed., UCLA School of Education; teacher; freelance education consultant.

APPENDIX

F

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