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## More D (Deliberation) for California's DD (Direct Democracy): Enhancing Voter Understanding and Promoting Deliberation Through Streamlined Notice-and-Comment Procedures

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## **MORE D (DELIBERATION) FOR CALIFORNIA'S DD (DIRECT DEMOCRACY): ENHANCING VOTER UNDERSTANDING AND PROMOTING DELIBERATION THROUGH STREAMLINED NOTICE-AND- COMMENT PROCEDURES**

GLENN C. SMITH\*

### INTRODUCTION

In an earlier article, I synthesized and critiqued previous scholarship in the legal community about “initiatory construction” (the play on “statutory construction” I used to encompass the distinct task judges face when construing legislation passed by voter initiative).<sup>1</sup> The article preliminarily explored several models for better registering the intent of initiative sponsors and promoting a deliberative process

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1. See Glenn C. Smith, *Solving the “Initiatory Construction” Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257, 260-86 (2007).

about the pros and cons of direct-democracy proposals.<sup>2</sup> I also promised to describe in a separate publication how current California direct-democracy procedures could be adapted for these purposes.<sup>3</sup>

This Article completes an unusual and circuitous route to fulfilling that promise. For a variety of reasons, including expressing the mission of California Western School of Law to “graduate creative problem solvers committed to the improvement of our legal system and society,”<sup>4</sup> it made sense to convene a working group of interested law-student volunteers (along with two similarly motivated undergraduates from the University of California, San Diego). The Working Group produced a report intended for circulation to “private individuals, public officials, and reform-minded organizations” to “cause a public conversation about the validity of tailoring California notice-and-comment rulemaking procedures to the initiative context.”<sup>5</sup>

Publication of the Working Group Report was delayed as we pursued a promising, but ultimately unavailing, possibility that a member of the California Legislature would introduce our initiative-reform proposal as a proposed bill. This delay became a happy accident, however, when the *California Western Law Review*’s “More Deliberation?” project emerged as the perfect forum for publishing the Report as a stand-alone document,<sup>6</sup> accompanied by the article I had always planned to write elaborating on the rationale and design choices behind the reforms the Report proposes.<sup>7</sup>

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2. *Id.* at 286-305.

3. *See id.* at 299 n.191.

4. *Our Mission*, CAL. W. SCH. OF LAW, [www.cwsl.edu/main/default.asp?nav=marketing.asp&body=marketing/our\\_mission.asp](http://www.cwsl.edu/main/default.asp?nav=marketing.asp&body=marketing/our_mission.asp) (last visited Apr. 20, 2011).

5. *See infra* Appendix II. p. 62. The 2007 article envisioned that its follow-up piece would pursue the option of adapting current California “legislative” procedures as one model for enhancing information and deliberation for California’s direct democracy. *See Smith, supra* note 1, at 299 n.191. However, this Article and the Working Group Report reflect the view that the *administrative-rulemaking* (and not the legislative) process generally is the more apt model for developing reforms. *See infra* Part II and Appendix II. pp. 93-95.

6. Because the Report speaks for itself, I have not extensively quoted from or cited it in this Article—except in Part IV, which is an annotated commentary on the Working Group’s proposal, and in the Conclusion.

7. The Working Group Report reflects a division of labors naturally geared to our different interests and expertise. The students focused on research and writing related to documenting current deficiencies in the quality and quantity of

Both this Article and the Working Group Report seek to enhance public consideration of the pros and cons of streamlining California's informal-administrative-rulemaking procedures for reforming the state's direct democracy. To provide a concrete focus for discussion and quick adoption, Appendix I includes proposed amendments to existing California statutory provisions. In essence, the proposed amendments would:

- require initiative sponsors to communicate more fully with the public about their legislative intent;
- establish a meaningful yet manageable structure by which interested parties can discuss the initiative proposals; and
- authorize courts to give appropriate consideration to the public record generated by proposals 1 & 2 in interpreting initiatives that have been adopted into law.

This Article provides a context for considering the proposed legislation by elaborating on five questions:

Why Deliberation? (Part I): In this Part, the Article makes the case, both on the substantive merits and on practical political grounds, for focusing on *deliberation-enhancement* as the best “next wave” of initiative reform.<sup>8</sup>

Why the Administrative Model? (Part II): This Part expands the arguments in the Working Group Report to defend an assertion that might seem initially counter-intuitive: even though orthodox direct-democracy rhetoric assumes that voters endorsing initiatives are like

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information and deliberation about proposed initiatives. *See infra* Appendix II. pp. 62-78. I wrote the section summarizing my 2007 article. *See infra* Appendix II. pp. 78-81. Additionally, as a longstanding teacher of legislation and administrative law and as a drafter and defender of federal legislation in a prior incarnation from 1979 through 1983 as a staff counsel to the United States Senate Committee on Governmental Affairs, I concentrated on writing and explaining our proposed reform legislation. *See infra* Appendix I. pp. 56-59 (draft of proposed legislation), Appendix II. pp. 87-95 (explaining proposal and its rationale). The Report was truly a collaboration, however, as all working group members edited each others' work and approved the final product.

8. The advantages attributed in Part I to deliberation promotion apply especially to the Working Group proposal. But, as noted at several points in that Part, some of the advantages could be realized to some extent from the adoption of other deliberation enhancing proposals.

legislators passing bills, in reality, the closer analogy is to the roles and dynamics common to administrative rulemaking.

*Why Streamlined Informal Rulemaking?* (Part III): Assuming the appropriateness of an administrative rulemaking model, an obvious next question arises because both my 2007 article and the Working Group Report propose a *substantially streamlined version* of the informal-notice-and-comment procedures California (like most other states and the federal government) uses to make administrative rules. A skeptic might ask: if the administrative rulemaking model is so appropriate in describing the relationship of voters to initiative proponents, why shouldn't the full panoply of notice-and-comment procedures (including multiple potential stages of judicial review) be transposed into the direct-democracy context? Part III presents answers grounded both in appropriate public policy and political practicality. Specifically, this Part identifies several "design specifications" for savvy selective borrowing.

*Why This Proposal's Specific Choices?* (Part IV): This Part relates the numerous design choices reflected in our reform proposal to the design specifications identified in Part III. The discussion explains which aspects of California's current administrative-rulemaking procedures the reform proposal borrows, adapts, and ignores—and why.

*What Strategic Questions Remain on the Way to Proposal Enactment?* (Part V): Getting a reform proposal from final formulation to actual adoption raises a number of strategic questions. This Part addresses four questions facing anyone considering how to adopt streamlined notice-and-comment procedures for direct democracy.

### I. WHY *DELIBERATION*?<sup>9</sup> THE SEVERAL ADVANTAGES OF DELIBERATION-BASED REFORM PROPOSALS

Legislators, special study commissions, good-government groups, and reform-minded individuals regularly spend substantial time and energy on serious proposals to improve California's initiative process. Unfortunately, enhancing quality information about initiative proposals and establishing meaningful opportunities to discuss their merits and implications are hardly the prime focus of these efforts.

In a recent edition of the *California Western Law Review*, co-author Brendan Bailey and I systematically analyzed the last fourteen years of initiative-reform proposals considered at some stage of the California legislative process.<sup>10</sup> This study revealed that only thirty-one (or 35%) of these eighty-seven reform proposals related to deliberation in any meaningful way.<sup>11</sup> Focusing on the thirty proposals passing both houses of the Legislature, only three (10%) of the proposals related primarily to deliberation, whereas five (fewer than 17%) related to deliberation secondarily.<sup>12</sup>

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9. This Article uses the phrase "deliberation" and its variations, such as "deliberation-enhancing," to refer to proposals that enhance the quality and extent of information available about initiative proposals, proposals that provide efficient, yet meaningful procedures by which that information can be debated and discussed, or proposals that *further both goals*. When deliberation in the narrower sense of debate, discussion, or consultation about initiative proposals is intended, those words, or variations of those words, are used.

10. Glenn C. Smith & Brendan Bailey, *Legislative Reform of California's Direct Democracy: A Field Guide to Recent Efforts*, 47 CAL. W. L. REV. 259 (2011).

11. *Id.* at 274 tbl.1, apps. A, B, C & D at 287-300 (summarizing basis for classification of individual proposal relationship to deliberation). Only ten (or 11.5%) of the proposals were "primarily" related to deliberation, in the sense that they would do one of the following: (1) prompt more deliberation between interested parties about initiative proposals, (2) provide additional information to voters (or opinion leaders in a position to provide information or "cues" to voters), or (3) enhance the quality of information already provided. *Id.* at 266. Another twenty-one (or 24%) were "secondarily" linked to deliberation, in that they either (1) enhanced the ability of voters to *make sense of* existing information, by making information more accessible or enhancing the ability of voters to evaluate the credibility of information provided by proponents or other opinion leaders, or (2) sought to change the initiative process in ways that, without intending it, would have information or discussion opportunities as an indirect byproduct. *Id.* at 266-67.

12. *See id.* at 274 tbl.1, apps. A & B at 287-90 (summarizing basis for classification of individual proposal relationship to deliberation).

Proposals by non-legislative institutions and individuals reveal a similar pattern. The Center for Governmental Studies' comprehensive and authoritative 2008 study of the initiative process proposes twenty-six reforms; four focus primarily on improving information and public discussion, and three would improve deliberation indirectly.<sup>13</sup> A predominance of focus on reforming the political dynamics surrounding, and substantive impact of, legislation by initiative can also be found in such sources as a 1999 League of Women Voters study,<sup>14</sup> the 2002 report issued by the Speaker's Commission on the California Initiative Process,<sup>15</sup> and a very recent critique with

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13. CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* app. A at 361-66 (2d ed. 2008) [hereinafter *DEMOCRACY BY INITIATIVE*], available at [http://www.cgs.org/images/publications/cgs\\_dbi\\_full\\_book\\_f.pdf](http://www.cgs.org/images/publications/cgs_dbi_full_book_f.pdf). Recommendations focusing primarily on improving deliberation are recommendation 1, *id.* at 361-62 (proposing a thirty-day public comment period and a legislative hearing for initiatives likely to qualify for the ballot), recommendation 15, *id.* at 364 (proposing user-friendly redesign of initiative-related information on the Secretary of State's website), and recommendation 16, *id.* (identifying ways to improve information in the ballot pamphlet provided to voters). Recommendations related to deliberation secondarily are recommendation 4, *id.* at 362 (moving up the timing of the "impartial analysis" the Legislative Analyst prepares for initiative proposals) and recommendation 17, *id.* at 365 (applying readability standards to officially provided information on initiative proposals).

14. J. Fred Silva, *The California Initiative Process: Background and Perspective*, PUB. POL'Y INST. CAL. 15-16 (Nov. 2000), [http://www.ppic.org/content/pubs/op/OP\\_1100FSOP.pdf](http://www.ppic.org/content/pubs/op/OP_1100FSOP.pdf) (summarizing recommendations of a 1999 "restudy" that "updated" the League's 1984 analysis; two out of twenty-two recommendations related to public hearings on initiative proposals and reading-level of ballot-pamphlet analyses).

15. THE SPEAKER'S COMM'N ON THE CAL. INITIATIVE PROCESS, *FINAL REPORT* (2002) [hereinafter *SPEAKER'S REPORT*]. Two of the Commission's nine recommendations focus specifically on improving the quality of voter information about initiative proposals. *See id.* at 9 (recommendation 5, providing ballot-pamphlet disclaimer that the constitutionality of initiative proposals have not been determined, and recommendation 6, requiring the Secretary of State to select the arguments against proposed initiatives). Three other recommendations seek to promote deliberation indirectly by improving voter cues about the sponsorship of initiatives before and during signature gathering, *see id.* (recommendations 2 & 3) or at the ballot-pamphlet stage, *see id.* (recommendation 4).

recommendations published by two veteran observers of California politics.<sup>16</sup>

The point is not that non-deliberation-focused proposals are misguided or wrongheaded. Most proposals are well-intentioned efforts to remedy perceived deficiencies. But the inescapable reality is that few of these proposals have succeeded.<sup>17</sup>

Reformers would do well to turn to deliberation-enhancing reforms, both to improve their batting average and to bring real improvements to direct democracy. As Subpart A below points out, even though California is ahead of most states in providing information and arguments in the *Official Voter Information Guide*, significant deficits in information and discussion still remain. Therefore, as Subpart B delineates, enhancing the quality and extent of information available about initiative proposals and providing efficient, yet meaningful procedures by which that information can be discussed and debated can advance five worthy goals. Finally, as Subpart C explains, the advantages of improved deliberation about initiative proposals, valid in its own right, brings with it political advantages often not found in other kinds of reform proposals.

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16. JOE MATHEWS & MARK PAUL, CALIFORNIA CRACKUP: HOW REFORM BROKE THE GOLDEN STATE AND HOW WE CAN FIX IT (2010). In one of the five chapters devoted to systematic reform of California's governmental system, Mathews and Paul recommend six ideas for initiative reform. *See id.* at 174-83. None of the six ideas relates to primarily improving the information about initiatives provided to voters or to enhancing deliberation among interested parties. However, the adoption of one idea, in which initiative proposals would be considered by the California Legislature and could offer amendments to proponents or place a "counterproposal" on the ballot, would as a byproduct generate more information and deliberation. *See id.* at 178-81 (discussing proposal and concluding that under it "a campaign is likely to be comparative, focusing attention and debate on the contents of the two measures").

17. For example, although eighty-seven initiative-reform proposals were introduced into the California Legislature in the fourteen-year period from 1997 to 2010, only five were enacted into law. *See* Smith & Bailey, *supra* note 10, at 274 tbl.1. This .070 batting average looks even worse, given that one of the five was a "mostly non-substantive . . . code cleanup" bill and that all of the remaining changes were relatively modest as well. *See id.* at 279-80.



### A. *Deliberation Deficits in California*

It is well documented that voters in California and other direct-democracy states face serious “informational deficits” when they are called upon to assume the duties of legislators by voting on important initiative proposals. This is the clear consensus of the extensive prior scholarship synthesized in my 2007 article.<sup>18</sup>

California leads the way in providing summaries and analyses of ballot propositions by two different state officials in the *Official Voter Information Guide*, usually referred to as the “ballot pamphlet,” which is mailed to all registered-voter households and posted on the California Secretary of State’s Internet webpage.<sup>19</sup> Despite this, important information gaps still plague consideration of initiatives in California. The analyses cited in, and original research done for, the Working Group Report attest to this.<sup>20</sup> Other analyses of California’s direct democracy are in accord.<sup>21</sup> And the handful of recent legislative proposals aimed at providing improved information about the merits

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18. See Smith, *supra* note 1, at 263-65 (discussing “substantial macro- and micro-level empirical evidence” from California and other states, which demonstrates voters lack adequate information, misunderstand the details of initiative proposals, and vote contrary to their stated intentions).

19. Under established practice, the California Attorney General provides the official title and an up-to-100-word summary (presented in a series of “bulleted” phrases) of each proposition on the ballot. CAL. ELEC. CODE § 9004 (West Supp. 2011). The California Legislative Analyst then provides an “analysis” containing information about the background, key features, and fiscal effects of each measure. CAL. ELEC. CODE § 9087 (West 2003). The Legislative Analyst’s analysis of fiscal effects on state and local governments is also summarized in the form of “bulleted” statements at the end of the Attorney General’s summary section. CAL. ELEC. CODE § 9051 (West Supp. 2012).

20. See *infra* Appendix II. pp. 67-73.

21. See, e.g., DEMOCRACY BY INITIATIVE, *supra* note 13, at 17; SPEAKER’S REPORT, *supra* note 15, at 11; Richard Frankel, Note, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL’Y REV. 431, 447 (2000) (citing evidence from opinion-poll questions and exit-poll extrapolations suggesting that many voters supporting Proposition 209 did not think it would “end . . . measures designed to help members of racial minorities,” even though that was the Proposition’s central purpose and effect).

and implications of initiative proposals assume that substantial room exists for making the process more educational.<sup>22</sup>

Another main deficiency in California's initiative process is the lack of meaningful opportunities for debate among supporters and opponents and discussion among interested parties. The ballot pamphlet provides a venue for the former by structuring a point/counterpoint exchange between an official group of supporters and one slate of opponents.<sup>23</sup> Still, this format often generates more heat than light<sup>24</sup> and can result in proponents and opponents talking

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22. See Smith & Bailey, *supra* note 10, at 271-72 & nn.30-33 (summarizing A.B. 1245, requiring thirty-day comment period on proposed initiatives prior to circulation; S.B. 384, requiring public hearing after proposal achieved minimum signature percentage; A.B. 677, generating "nonbinding advisory opinion" about proposal constitutionality from retired state judge panel; A.B. 1500, moving up deadline for legislative hearings on qualified initiatives; S.B. 1243, transferring authority to hold public hearings from legislature to Little Hoover Commission; and A.C.A. 18, in part transferring authority to prepare summary of proposals for ballot pamphlet); *id.* apps. B & C at 288-96 (summarizing, among other bills, S.B. 1208, making Legislative Analyst Office solely responsible for describing in ballot pamphlet fiscal implications of proposals; S.B. 2946 requiring proposals to be understandable to average voter; A.C.A. 14, limiting each election ballot to five proposals; A.B. 943, moving up deadline for legislative hearings on qualified initiatives; A.B. 1500, also moving up hearing deadline; and A.B. 1233, authorizing Attorney General to send pre-circulation initiative to Legislative Counsel for constitutional analysis). Of course, some of these proposals also seek to create forums for public discussion and debate about initiative proposals, thus recognizing the need for more deliberative venues stated in the next paragraph.

23. By law, one group of supporters and one coalition of opponents may include no-more-than-500-word "arguments" pro and con. CAL. ELEC. CODE § 9064 (West 2003). Each side may also respond to opposing arguments with shorter, no-more-than-250-word "rebuttals." CAL. ELEC. CODE § 9069 (West 2003).

24. See, e.g., *infra* Appendix II. pp. 65-66, 68-69 (analyzing deficiencies in 1996 and 2008 election information). The more recent ballot pamphlet issued for the November 2010 election confirms that the more-heat-than-light phenomenon is alive and well. To take just two examples, opponents of Proposition 20 (which would have taken the power to draw congressional districts from the California Legislature and given it to the fourteen-member commission previously established to draw state legislative boundaries) emphasized that the proposal was the "brainchild" of the son of a "multi-billionaire Wall Street tycoon," and urged voters not to let "OUR DEMOCRATIC REPUBLIC [become] A TOY TO BE PLAYED WITH FOR THE SELF-AGGRANDIZEMENT OF THE IDLE SECOND-GENERATION RICH." CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: NOVEMBER 2, 2010, GENERAL ELECTION 23 (2010) [hereinafter NOVEMBER 2010 VOTER GUIDE], available at <http://cdn.sos.ca.gov/vig2010/general/pdf/english/complete-vig.pdf>.

past each other.<sup>25</sup> Even when disputants provide seemingly objective information and there is joinder of rational debate, the space limitations and the format of allowing only one rebuttal exchange can leave attentive voter-readers with more questions than answers.<sup>26</sup> Of

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Proponents, in turn, characterized Proposition 20 as a method by which voters could “stand up to the politicians and special interests,” and “STOP THE BACKROOM DEALS” by which “legislators and their paid consultants draw districts behind closed doors to guarantee that their friends in Congress are reelected” instead of “voters choosing who will represent them.” *Id.* at 22. In similar fashion, opponents of Proposition 24 (which would have repealed business tax concessions negotiated as part of a California budget deal) called proponents people who “never met a tax they didn’t like” and “won’t reduce lavish public pensions, yet have no problem raising taxes on everyone else” in league with “Sacramento politicians.” *Id.* at 50. Proponents, in turn, characterized opponents as “some of the largest corporations in the nation, whose greed knows no end” and who employ “scare tactics and distortions . . . illustrat[ing] how desperate these multi-state corporations and their CEOs are to take advantage of these additional tax breaks while ordinary Californians foot the bill.” *Id.* at 51.

25. *See, e.g., infra* Appendix II. p. 70 (discussing how proponents of Proposition 92, a 2008 ballot initiative, were able to avoid responding to fiscal concerns raised by opponents in their ballot pamphlet argument). The more recent Proposition 20 example is also illustrative here. Beyond their vilification of the other side, proponents of congressional redistricting by non-legislator commission emphasized voter empowerment and breaking up overly cozy legislator-consultant-congressional incumbent relationships. NOVEMBER 2010 VOTER GUIDE, *supra* note 24, at 22. Opponents instead emphasized the “waste” of “taxpayer dollars” in funding the commission and the “non-accountab[ility] of the “14-person bureaucracy.” *Id.*

26. For example, voters trying to decide on the fiscal implications of Proposition 24’s proposed repeal of \$1.7 billion in business tax breaks confronted two very different accounts of how many businesses would benefit from the present tax breaks and what the fiscal implications of repealing them would be. Proponents claimed that only 2% of “the wealthiest, multi-state corporations” would benefit, while “98% of California’s businesses, especially small businesses, would get virtually no benefit.” *Id.* at 50. The “rebuttal” placed immediately below this argument called the proponent’s claim false and instead asserted that “State Franchise Tax Board records show Proposition 24 could impact 120,000 businesses” who “can’t survive more tax increases.” *Id.* Perhaps both statements are correct, and the key to reconciling them depends upon the difference between being able to “benefit” from the tax breaks versus being “impacted” by them; but the total exchange gave voters no way to decide which side was being more accurate.

Similarly, Proposition 24 proponents characterized it as benefitting the California economy by making it possible to “give[] tax incentives to California’s small businesses that actually create jobs for Californians” and “put \$1.7 billion back into the treasury to help our students, schools and public safety.” *Id.* (Although

course, the unofficial ways in which proponents and opponents present their positions to voters—primarily through saturation advertising in general media and mailers targeted to specific types of voters (called “slate mailers”)<sup>27</sup>—are even less likely to provide detailed and useful information.<sup>28</sup> In part this is because there is even

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the opponents didn’t make the point, an attentive reader would note that both of these alternatives can’t be pursued at the same time. Either the \$1.7 billion in budget savings could fund small-business tax breaks *or* it could be spent on worthy public-spending goals, but not both.) Opponents presented a very different picture of economic effects: “Proposition 24 penalizes job growth and encourages businesses to expand into OTHER states—taking good jobs and tax revenue with them.” *Id.* at 51. The impartial Legislative Analyst’s analysis *explained* with admirable sophistication (and through a highly readable figure 1) how the present tax law worked and how it would be changed by repealing the tax concessions. *See id.* at 46-49. But the Analyst provided no information by which voters could assess the validity of the competing claims summarized earlier in this paragraph.

Another example is Proposition 23, which would have suspended implementation of strict California air pollution control laws until unemployment dropped to 5.5% or less for a year. The byplay of point and counterpoint left voters no way to decide between contradictory assertions by proponents that adoption of the proposition would “save[] over one million California jobs,” and by opponents that adoption would “jeopardize nearly 500,000 jobs.” *Id.* at 44.

27. For a further discussion of the uses and abuses of initiative-campaign advertising and of targeted slate mailers, see DEMOCRACY BY INITIATIVE, *supra* note 13, at 253-63.

28. One representative slate mailer received by the author shortly before the November 2010 election said the following about Proposition 27, the alternative ballot measure offered by opponents of Proposition 20 (which would draw congressional boundaries by a fourteen-member non-legislator commission): “Proposition 27 – Yes. Stop Wasting \$\$\$Millions\$\$\$ on bureaucratic nonsense. Send the Sacramento politicians a Message! ‘Yes on Prop 27.’” VOTER INFORMATION GUIDE, VOTER INFORMATION GUIDE FOR INDEPENDENTS: NOVEMBER 2, 2010, GENERAL ELECTION (2010) (on file with author). The slate mailer’s discussion of Proposition 24 is a bit more substantive; it consists in its entirety of the following two paragraphs appearing in separate places on one side:

Yes on Prop 24. The Tax Fairness Act. Prop. 24 prevents \$1.3 billion in budget cuts to our schools and public safety. It saves thousands of jobs, with no tax increase. Stop corporate tax giveaways that don’t create jobs.

Proposition 24 – Yes. You can stop the corporate tax giveaway that came from a back room deal. Protect funding for schools and public safety with no tax increase.

*Id.* As noted earlier, the validity of these arguments about economic effect are debatable. *See supra* note 26.

less potential for “joinder” of opposing positions and give-and-take than in the ballot pamphlet.

Current deficiencies would be less problematic if an efficient and effective way existed for interested and knowledgeable individuals and organizations to discuss the merits and implications of proposed initiatives. Such discussions could generate useful information about initiative proposals even before the ballot pamphlet arrives in mailboxes and is posted on a webpage; the additional information flowing from such public discussion could help voters put the ballot-pamphlet analyses and arguments in context and resolve some unresolved questions. Alas, there is no venue, by legal requirement or tradition, for such discussion.

### *B. Five Substantive Benefits from Deliberation-Enhancing Reforms*

Any reform designed to enhance direct-democracy deliberation promises benefits to voters; depending upon its particular design, it could benefit other stakeholders in the initiative process. This Section examines five of these benefits, all of which would be furthered by the Working Group’s streamlined notice-and-comment proposal.

#### *1. Better Information Flowing Directly to Voters*

Even if many California voters do not make a sophisticated attempt to learn about the merits and implications of proposed initiatives,<sup>29</sup> a portion of California’s most politically aware and engaged voters likely do.<sup>30</sup> Providing more useful information—

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29. See, e.g., DEMOCRACY BY INITIATIVE, *supra* note 13, at 81 (noting view of “critics of the initiative process” that “voters have neither the time nor the interest to understand fully the wide range of complicated issues that are often involved” in initiative proposals); Smith, *supra* note 1, at 265 & n.36 (citing Christopher A. Coury, Note, *Direct Democracy Through Initiative and Referendum: Checking the Balance*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 573, 593 (1994) (suggesting that voters can understand “general policies” but not “details”)); Stephen H. Sutro, Comment, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 967 (1994) (doubting the ability of voters to make “advanced judgments”).

30. That a percentage of California voters are using secondary sources other than the ballot pamphlet in a relatively active effort to assess initiatives’ merits is likely reflected in 2000 survey data showing that twenty-five percent of likely voters find “websites about initiatives set up by government and independent sources” to

especially about sponsor intentions and especially in a forum enabling knowledgeable individuals and organizations to discuss the scope, implications, and wisdom of initiatives—could directly empower these voters.<sup>31</sup>

Close vote margins often determine whether initiatives pass or fail.<sup>32</sup> Thus, it matters both in terms of sound public policy and democratic legitimacy, if even a relatively small percentage of voters who make the difference in initiative outcomes cast more informed and meaningful votes. The information deficits in the current system likely lead to significant voter frustration and cynicism.<sup>33</sup> A more informed voting experience could help counteract this.

## 2. Better Information for “Cue Givers”

Observers of direct democracy have long noticed that the general phenomenon of “cue giving,” in which decision-makers look to more knowledgeable, trusted sources for cues about how to act, is strongly at work in the initiative process.<sup>34</sup> Many voters rely on the

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be “very useful.” Silva, *supra* note 14, at 25. Twenty-two percent find “news stories about the initiatives that appear in the media” very useful as well. *Id.*

31. Although this Article and the Working Group Report assert that the streamlined notice-and-comment process we propose would maximally benefit voters, other proposals could achieve similar benefits at least partially. For example, enactment of A.B. 1245 of 2003, former Assembly Member Laird’s proposal to subject initiative proposals to a thirty-day comment period—without requiring sponsors to provide any further information beyond their proposed text—would have set up a forum for discussion of initiative pros and cons and given substantial new information to voters (and, as explored immediately below, to individuals and organizations giving cues to voters) about how others view the sponsor’s handiwork. For a full discussion of the background and rationale behind A.B. 1245, see John Laird & Clyde MacDonald, *A.B. 1245 of 2003—An Attempt at Modest Reform of California’s Initiative Process*, 47 CAL. W. L. REV. 301 (2011).

32. For example, Proposition 11 of 2008, which stripped the State Legislature of the power to draw state electoral district boundaries, was approved by a margin of less than two percent. CAL. SEC’Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), available at [http://www.sos.ca.gov/elections/sov/2008\\_general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf).

33. See, e.g., DEMOCRACY BY INITIATIVE, *supra* note 13, at 54-55, 57 (reporting that forty-seven percent of California voters have little or no confidence in the ability of the electorate to make policy).

34. See, e.g., Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L.

organizational affiliation of supporters and opponents; voters support initiatives endorsed by interest groups and individuals with whom they feel an affinity of interests and oppose initiatives endorsed by groups and individuals standing for positions voters oppose.<sup>35</sup> The most relevant aspect of the ballot-pamphlet argument-and-rebuttal section for such voters is likely the identity and affiliation of those individuals and organizations quoted in, or signing, the arguments and rebuttals.<sup>36</sup> A similar view that endorsements or expressions of

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REV. 1141, 1149-51 (2003); John G. Matsusaka, *Subversion of the Many by the Few: Some Scientific Evidence on the Initiative Process*, 13 J. CONTEMP. LEGAL ISSUES 511, 530 (2004) (“[T]he evidence shows that voters are able to use information cues (such as endorsements by trusted sources) to make the right decisions in the voting booth.”).

35. See, e.g., DEMOCRACY BY INITIATIVE, *supra* note 13, at 242 (“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 . . . .”); Elizabeth Garrett, *The Promise and Perils of Hybrid Democracy*, 59 OKLA. L. REV. 227, 233 (2006) (“[In] initiative campaigns . . . [voters] work to determine which groups support or oppose the ballot measure, the intensity of their views, and how the groups’ preferences line up with those of voters.”); Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 957-58 (2005) (citing ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 54-59 (1998)) (noting that the existence of “common interests” between voter and endorser is one criterion by which voters gauge endorser-trustworthiness).

36. Compare, e.g., NOVEMBER 2010 VOTER GUIDE, *supra* note 24, at 36 (“Argument in Favor of Proposition 22” claiming support “by a BROAD COALITION” including “California Fire Chiefs Association, Peace Officers Research Association of California . . . , [l]ocal paramedics and 9-1-1 dispatch operators, California Police Chiefs Association, California Library Association . . . , California Transit Association, League of California Cities, California Alliance for Jobs, California Chamber of Commerce, More than 50 local chambers of commerce [and] More than 300 cities and towns”), *with id.* at 36-37 (“Rebuttal to Argument in Favor of Proposition 22” and “Argument Against Proposition 22” citing opposition from Silicon Valley Taxpayers Association, Fullerton Association for Concerned Taxpayers, President of the National Taxpayer Limitation Committee, and claiming “that’s why the California Teachers Association, joined by school principals and parents across the state, say strongly: Vote NO”).

Unsurprisingly, the signatories of arguments and rebuttals both favoring and opposing Proposition 24’s proposed repeal of tax breaks for businesses included individuals whose organizational affiliations suggested roots in the business community, those advocating for taxpayers, and representatives of sympathetic social groups such as teachers and seniors. Compare *id.* at 50-51 (proponent ballot-

opposition matter to many voters is implicit in their emphasis in campaign advertisements and slate mailers.<sup>37</sup>

The extent to which print and broadcast media take editorial positions on initiatives also indicates a belief that the media provide relevant “cues” to voters. That supportive or opposing media evaluations are prominently featured in initiative campaign ads and voter-guide mailers<sup>38</sup> further underlines the perceived significance of the media as cue givers.

Reforms enhancing deliberation in California’s direct democracy are thus important even for the (presumably larger) group of voters who will not access and use enhanced information directly. Improving the ability of cue givers to more accurately understand the intent of initiative sponsors and learn through enhanced discussion what other experts think will lead to more informed cue giving. Many voters will benefit indirectly.

### *3. Better Assurance to Initiative Sponsors that Their Intent Will Be Realized*

To state the obvious, the individuals and organizations spending millions to draft, qualify for the ballot, and enact initiative proposals presumably want to achieve their strategic goals. One way sponsor goals are frustrated is when adopted initiatives are construed contrary to the intent of initiative sponsors during judicial review.<sup>39</sup> Strategic

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pamphlet signers associated with North Sacramento Chamber of Commerce, California Tax Reform Association, Congress of California Seniors, California Teachers Association, California Federation of Teachers, and League of Women Voters), *with id.* (opponent ballot-pamphlet signers associated with California Small Business Alliance, California Hispanic Chamber of Commerce, California Taxpayers’ Association, The Seniors Coalition, California State Board of Education and California Secretary of Education).

37. For example, the two-page *Voter Information Guide* references the endorsements of the following organizations and interests: the League of Women Voters, the Lung Association, the National Wildlife Federation, and “police [and] firefighters” generally. VOTER INFORMATION GUIDE, *supra* note 28.

38. For example, the *Voter Information Guide* enhances its encouragement to vote “No on Prop 22” with a statement that “Los Angeles Times, San Francisco Chronicle and Sacramento Bee all say Vote NO!” *Id.*

39. To take just one example, the California Supreme Court likely interpreted Proposition 8, the “Victims’ Bill of Rights” initiative adopted in 1982 in a manner inconsistent with the intention of its sponsors and the voters who endorsed the



sponsor goals could also be thwarted any time their intent is distorted by overly simplistic or even demagogic opposition arguments and those arguments “stick” because sponsors lack venues in which to counteract them.

Any deliberation-enhancing reforms giving sponsors greater opportunities to clarify their intent or position could benefit “good-faith” sponsors—that is, sponsors who honestly think that their idea and intent will attract majority support if only they can communicate them effectively.<sup>40</sup> Along the way, providing enhanced opportunities for sponsor intentions to be more fully recorded would likely counteract the anomaly that California courts tend to give the characterizations of initiatives by *opponents* a weight equal to the interpretations placed on initiatives by their *proponents*.<sup>41</sup> (This is contrary to the “long accepted assumption that statements by legislation supporters (especially sponsors!) are entitled to greater weight than statements by opponents.”)<sup>42</sup>

#### 4. *Better Information for Courts Construing Initiatives*

State courts in direct-democracy states—and especially California courts—are regularly put in the difficult situation of deciding how initiatives apply to complicated situations not definitively addressed

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measure. See Cathy R. Silak, *The People Act, the Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1, 51-52 (1995) (criticizing majority opinion in *People v. Castro*, 696 P.2d 111 (Cal. 1985) for retaining trial-court discretion to exclude evidence of defendant’s prior felony convictions despite Proposition 8’s strong victims-rights intent).

40. Of course, some critics of direct democracy in general or specific initiatives in particular would say that at times *sponsors* are the ones banking on simplistic appeals or demagoguery to advance their goals. See, e.g., Smith, *supra* note 1, at 288 (noting that “direct-democracy literature regularly portrays initiative sponsors as hiding their true intent behind disingenuously titled texts of inordinate length and impenetrable content, engaging in deceptive and simplistic campaigns for voter approval, and even opposing the initiatives of others with ‘Trojan House’ alternative initiatives”). Happily, enhanced-deliberation proposals would not—and do not seek to—help a “bad-faith” sponsor seeking to “sell” an idea that will not stand up to deliberation or scrutiny.

41. *Id.* at 269 (noting how “California courts routinely discuss the views of initiative sponsors and opponents as a package, as though they are of equal significance”).

42. *Id.*

by the text the voters adopted or the ballot-pamphlet information accompanying the initiative.<sup>43</sup> Typical of the tack taken by their sister-state colleagues, California jurists have adopted an ironic and illusory approach. They spend great effort searching for an unrealistically detailed “voter intent,” often in the process citing arcane presumptions and rules of construction obviously beyond the contemplation of any voter who is not a lawyer specializing in statutory interpretation.<sup>44</sup> At the same time, California judges generally ignore detailed indicators from the direct-democracy participants most likely to have a specific intent, the sponsors of initiatives.<sup>45</sup>

Deliberation enhancing reforms could solve this initiatory-construction puzzle. Any proposal generating more information about sponsor intent—and especially the Working Group’s notice-and-comment proposal, which would enhance the clarity of sponsors’ intent both in their initial notice of intent and in the response they

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43. For example, *People v. Thomas*, 109 P.3d 564, 565 (Cal. 2005) required the California Supreme Court to determine whether “the trial court’s discretionary authority under Penal Code section 1170.19, subdivision (a), to commit a minor to the Youth Authority applies only when the minor meets the eligibility requirements of Welfare and Institutions Code section 1732.6.” In answering in the affirmative despite the lack of clear guidance from the initiative text or the ballot-pamphlet information, the court had to “interpret[] and cross-referenc[e] five statutes from two different codes.” *Id.* at 568.

44. See, e.g., *id.* (assuming voters cross-referenced five statutes to arrive at a definitive intent); Smith, *supra* note 1, at 266 (discussing two other recent California Supreme Court cases attributing highly sophisticated legal distinctions to voters).

45. Judges will, of course, consult intent indicators that make it into the ballot-pamphlet argument and rebuttal—or draw meaning from the absence of such indicators. See, e.g., *Robert L. v. Superior Court*, 69 P.3d 951, 959-60 (Cal. 2003) (finding voters were aware that proposition would enhance punishment for gang-related misdemeanors because of statements in opponents’ ballot-pamphlet argument); *Hodges v. Superior Court*, 980 P.2d 433, 438 (Cal. 1999) (referencing ballot-pamphlet “arguments for and against” the proposition at issue). But, as noted earlier, ballot-pamphlet space is limited and arguments are pitched at a more general level and are focused more on political sloganeering than the kind of rational discourse likely to establish detailed intent about an initiative’s scope and intended application, including issues that typically have arisen in litigation. See *infra* Appendix II, pp. 82-84 tbl.1 (listing several dozen post-enactment judicial decisions about how initiatives interact with constitutional and statutory provisions, prior judicial decisions, and other ballot pamphlets; whether initiatives apply retroactively; and how criminal and civil-law changes intend to affect typical parties in litigation).

would make to comments from interested parties—would give courts more adequate bases for initiatory construction. Judges are particularly likely to rely on additional sponsor-intent information (whether they actually reference such reliance or not) if the process in which it is generated is transparent, reliable, and likely to be consulted by attentive voters and persons giving cues to voters.

Better judicial decisionmaking about initiatory construction would have a number of corollary beneficiaries—even beyond the initiative sponsors who would benefit from decisions more fully achieving their intentions. First, this would derivatively benefit all who support the sponsored initiatives, including every California voter knowledgeably favoring the policy changes the initiatives embody. Further, the California judiciary would benefit. Even if they rarely articulate it, California judges likely understand that their detailed voter-intent attributions are fanciful. Improved decisionmaking thus promises to enhance the judicial sense of intellectual honesty. At the same time it eases the difficult no-win political situation in which jurists are placed (especially in California, where they are periodically subject to electoral retaliation in retention and recall elections)<sup>46</sup> when having to render potentially unpopular rulings seeming to oppose the people's will.<sup>47</sup> Finally, authoritatively answering some of the interpretive questions now swirling around many initiatives after their enactment could eliminate the number of lawsuits filed (or at least simplify the legal issues that must be considered in these lawsuits).<sup>48</sup>

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46. California trial-court judges must run for reelection every six years; intermediate-appellate and Supreme Court justices must win a retention election every twelve years. *Selection of Judges*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=CA](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=CA) (last visited Nov. 16, 2011). California judges at all three levels are subject to recall elections. *Removal of Judges*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/methods/removal\\_of\\_judges.cfm?state=CA](http://www.judicialselection.us/judicial_selection/methods/removal_of_judges.cfm?state=CA) (last visited Nov. 16, 2011).

47. See Smith, *supra* note 1, at 272 & n.69.

48. Budget savings from taxpayer funds not spent on participation in initiatory construction litigation could be especially welcome in an era of acute state and local budget pressures.

### 5. *Better Initiatives*

Ultimately, bringing more deliberation to California's direct democracy should improve public-policy outputs. Sponsors would likely be more careful in drafting their proposals if they had to explain their intent (and also answer targeted queries about the scope and application of their proposed law changes) in an authoritative document that is subject to comment by a range of interested parties and is likely to be relied upon by voters, cue givers, and judges. If better information leads to better outcomes—a core assumption underlying representative democracy, lawmaking by legislative bodies, and rulemaking by administrative agencies<sup>49</sup>—more deliberation should bring more quality as well to lawmaking by initiative. The economic, social, political, and legal benefits flowing from adopting better-thought-out initiatives may not be quantifiable, but there is every reason to suspect they could be significant.<sup>50</sup>

#### C. *The “Political Plus” of Deliberation-Enhancing Reforms*

It is always advantageous when reformers can propose substantively valid changes that are also likely to finesse past practical political roadblocks. Luckily, this is the case with deliberation-enhancing reforms for direct democracy.

Past legislative efforts to reform California's initiative process have been marred by the perception that they are hostile to direct democracy or will compromise prerogatives of voters and other participants in its processes.<sup>51</sup> These perceptions should be

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49. See RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 62 (2008) (informal rulemaking promotes a “better quality of resulting rules” because, inter alia, “all interested members of the public participate, rather than only the parties to a particular dispute”).

50. Some who seek to reform California's direct democracy emphasize the current risk that ill-conceived proposals will be adopted. See, e.g., *DEMOCRACY BY INITIATIVE*, *supra* note 13, at 97-102; *MATHEWS & PAUL*, *supra* note 16, at 175 (proposing to “prevent drafting errors and unintended consequences” by requiring sponsors to submit initiative proposals to “nonpartisan staffers inside the capitol—at the legislative counsel's office, which would produce the actual legislative language of any measure that circulates”).

51. See Smith & Bailey, *supra* note 10, at 277-80 (summarizing bases for gubernatorial vetoes of reform proposals).

substantially easier to avoid with deliberation-enhancing reforms. Such reforms can be plausibly positioned as efforts to *empower* voters and initiative proponents, thus *reinforcing* the present system by making it work better.

This point is best shown by comparing deliberation-enhancing reforms with the wide variety of past legislative proposals that neither primarily nor secondarily related to deliberation. Some of the latter would have significantly altered the dynamics of direct democracy by raising the gradient for proposing initiatives<sup>52</sup> or qualifying them for the ballot.<sup>53</sup> Even relatively modest system changes—such as graduated increases in the fees proponents must pay to submit initiatives to the Attorney General<sup>54</sup> and requirements that petition signature gatherers tell voters whether they are being paid or are public-spirited volunteers<sup>55</sup>—have been perennially vetoed by several California governors because of a perception that the reforms seek to interfere with the prerogatives of initiative proponents.<sup>56</sup>

Deliberation-enhancing proposals can substantially avoid these traps. They take the core procedures of direct democracy as given and seek to make them work better. As shown in the previous section, these proposals can deliver real improvements in the way direct democracy serves voters (by giving them useful information directly or through cue givers), initiative proponents (by enhancing their ability to communicate, and secure judicial enforcement of, their intentions), and other direct-democracy supporters. Advocates of deliberation-enhancing reforms should be able to translate these real substantive advances into the language of practical politics, positioning their proposals as serving transparency, accessibility, and voter sovereignty. Advocates of deliberation enhancement might even acquire the political luxury of putting reform opponents in the posture,

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52. *See, e.g., id.* app. D.I.A at 297 (summarizing three proposals tightening application of the single-subject rule, thus limiting range of proposals).

53. *See, e.g., id.* app. D.II.C at 299 (summarizing four proposals raising the percentage of voter signatures required to qualify initiatives).

54. *See, e.g., id.* app. B at 289 (summarizing A.B. 436 and A.B. 1832).

55. *See, e.g., id.* app. B at 289-90 (summarizing S.B. 1598, S.B. 469, S.B. 725, S.B. 1219, and S.B. 1979).

56. *See id.* at 277-80.

as a state legislator memorably put it to the Working Group, of having to defend the value of keeping voters in the dark.<sup>57</sup>

In sum, direct-democracy reformers find themselves in the enviable position of being able to propose both worthwhile *and* politically advantaged changes when they focus on *deliberation-enhancing* reforms for California's direct democracy.

## II. WHY THE *ADMINISTRATIVE MODEL*?: THE APPROPRIATENESS OF THE ADMINISTRATIVE-RULEMAKING MODEL FOR DELIBERATION-ENHANCING REFORM OF DIRECT DEMOCRACY

The Working Group Report's proposal draws its inspiration from the informal notice-and-comment procedures long used by administrative agencies in California, most other states, and the federal government to issue legally binding administrative rules.

At first blush, this choice of models might seem odd. After all, under the traditional rhetoric surrounding direct democracy in California, the people's right to legislate by initiative is equated to (if not elevated above) the right of the California Legislature to pass statutes.<sup>58</sup>

Yet, as Section A of this Part will show, the legislative model is significantly inapt for conceptualizing the role of voters in California's direct democracy. The disconnect is especially true with regard to the relationship of voter-legislators to each other and to other

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57. Of course, a pessimist might argue that the momentum of direct-democracy reform inevitably and preclusively belongs to those opposing any change not liberalizing the current direct-democracy system. *See, e.g., id.* at 285-86. This pessimistic outlook would render pointless any reform proposal imposing additional requirements or procedures, even if those additional procedures enhanced the experience of process participants and made direct democracy work better. This Article and the Working Group Report reject this view, both because it is a prescription for resignation and because it is likely contradicted by poll data showing that, while largely supportive of direct democracy in the abstract, California voters express substantial sentiments that it can be improved. *See infra* Appendix II. pp. 62-64; DEMOCRACY BY INITIATIVE, *supra* note 13, at 17.

58. *See Rossi v. Brown*, 889 P.2d 557, 574 (Cal. 1995) (noting that "[t]he people's reserved power of initiative is greater than the power of the legislative body," in that constitutional changes adopted by initiative can bind future legislatures, unlike prior legislative enactments); Smith, *supra* note 1, at 261 & nn.15-16 (noting that California courts use same interpretive rules for initiatives that they apply to legislator-passed statutes).

political actors, the nature of informational resources available to voters, and the deliberative processes in which they engage (or, more accurately, do not engage). Rather, as Section B will explain, voters in the initiative process are much more like legislators delegating power to expert administrative rulemakers, while reserving the authority to “veto” the rulemakers’ work product.

*A. The Inappropriateness of the Legislative Model in Describing the Real Role and Authority of California Initiative Voters*

Whatever its symbolic value, the orthodox description of California initiative voters as twice-yearly versions of elected legislators is significantly inaccurate in three different senses. First, in contrast to California legislators, who are organized along political-party lines and relate in multiple and ongoing ways, California initiative voters have at best a random *relationship* to each other. They “convene” (albeit only metaphorically) twice a year to cast a series of votes without any sense of shared political fate or responsibility; unlike legislators, they are under few, if any, constraints to vote in a consistent manner (on partisan, ideological, or self-serving grounds) across the range of initiatives on a particular ballot or across time.

These seemingly obvious observations have less banal implications. For one thing, California voter-legislators lack the voting cues elected legislators receive from legislative colleagues to whom they are related by partisanship or personal experience and trust. Citizen-legislators are not organized into committees whose members develop a particular substantive expertise they can then share with their less expert colleagues, either in the form of presumptively credible legislative proposals or voting patterns to emulate. This robs individual voters of the sources of information, policy ideas, and trust that develop in legislative bodies; voters are correspondingly more dependent upon cues from others they might trust less.<sup>59</sup>

Nor, compared to elected legislators, are voter-legislators connected in any meaningful way to the “others” upon whom they must depend for information, expertise, and legislative alternatives. When elected legislators rely on executive-branch staffers or interest-

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59. Even if legislator interrelationships and opportunities for specialization and expertise development have declined in the California Legislature in the era of term limits, major differences in degree still remain.

group representatives for information, expert judgment, and even concepts and language for proposed legislation, mutual dependence and the need to preserve a minimum of trust over time can enhance good faith and truthfulness. The lobbyist tempted for short-term gain to provide legislators with incomplete or inaccurate information or mislead them into taking a position against their interests knows that this is a highly dangerous maneuver; the lobbyist may be back before that legislator again, and preserving the legislator's trust is important. By contrast, most voters will have no ongoing relationship with the individuals or organizations proposing initiatives and providing information to encourage them to vote yes. Nor, generally, will voters have ongoing relationships assuring good faith and truthful dealings with other individuals and organizations providing information and expertise while supporting or opposing initiative proposals.<sup>60</sup>

A second main difference between voter-legislators and elected legislators is the fundamentally different *information* resources they can command. As any California voter can attest, the privilege of serving as unpaid legislator twice a year is not accompanied by a professional staff of consultants, researchers, and other advisors. Voter-legislators have no subpoena power, no specialized committee reports or memoranda to guide their understanding of relevant issues, and cannot convene hearings.<sup>61</sup>

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60. The exception to this observation is when voters have political affiliations with particular political leaders or are members of particular organizations opining about the scope or implications of initiative proposals. Even here, though, the bonds between politicians proposing or opining about initiatives and millions of voters (or organizations serving as "cue-givers" for those voters) are distinct from the close bonds between a small group of legislators and the relatively discreet set of non-legislators participating actively in the legislative process.

61. As Nora Kashani and Robert Stern of the Center for Governmental Studies put it in a recent article:

The legislature is designed to hold hearings, hear experts detail pertinent facts, receive expert staff research and analysis, discuss the issue with people who have opposing opinions and diverse viewpoints, and hear the views of the general public. Furthermore, legislators get paid to spend time deliberating. The opposite is true for the voters. Even among citizens who spend an above-average amount of time deliberating initiatives, the time the voters devote to studying the measures may still not rise to the level of deliberation at the legislative level.

Nora Kashani & Robert Stern, *Making California's Initiative Process More Deliberative*, 47 CAL. W. L. REV. 311, 317 (2011).



A third difference between elected and unpaid legislators is in *discussion and debate* modes. California legislators can negotiate and offer amendments at various legislative stages to remedy perceived deficiencies in proposed legislation. They can engage in strategic delaying tactics to wrangle concessions from proponents and supporters. Voter-legislators, of course, only cast one yes-or-no vote on an entire initiative proposal; they cannot engage in strategic delay and are called upon to vote by election day whether they are sufficiently informed or not. There is no formal process for deliberating with their fellow “legislators,” and they cannot bargain with initiative sponsors in any case.

*B. The Substantially Better “Fit” of the  
Administrative-Rulemaking Model*

If voter-legislators were really in the position of elected officials, but simply without the information resources available to their “counterparts,” one promising direction for reform would be to make voter information more like that available to elected legislators. Indeed, reformers in the California Legislature have introduced several proposals in the last decade to strengthen the current legal requirement for legislative hearings once initiatives qualify for the ballot.<sup>62</sup>

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Interestingly, current law seeks to ease this last deficiency by requiring legislative committees to hold hearings on every initiative proposal once it qualifies for an upcoming ballot. CAL. ELEC. CODE § 9034 (West Supp. 2011). Unfortunately, selective research done for the Working Group Report several years ago suggests that these hearings are generally perfunctory, come relatively late in the election cycle, and are not uniformly easy to access. *See infra* Appendix II, pp. 76-78. In any event, the hearings prompted by section 9034 hardly afford voter-legislators the same ability as elected legislators to influence the questions asked or witnesses heard at legislative hearings.

62. *See, e.g.*, A.B. 943, 2007-2008 Leg., Reg. Sess. (Cal. 2007) (deadline for legislative hearings moved up to thirty days before initiative placed on ballot); S.B. 1243, 2005-2006 Leg., Reg. Sess. (Cal. 2006) (transferring responsibility for holding hearings to Little Hoover Commission); A.B. 1500, 2001-2002 Leg., Reg. Sess. (Cal. 2001) (deadline for legislative hearings moved to forty-five days after receipt of measure); S.B. 384, 1999-2000 Leg., Reg. Sess. (Cal. 1999) (Legislature would hold hearing thirty days after petition receives fifteen percent of the necessary voter signatures).

The Working Group Report and this Article respectfully suggest, however, that reformers would do well to look at another equally familiar, yet distinct, analogy: administrative rulemaking.<sup>63</sup> With one major difference (explored in the last paragraph in this subsection), voters and initiative sponsors seem to be in an even more exaggeratedly one-sided version of the dependent relationship that elected legislators have with administrative lawmakers.

The reasons for the rise of the modern administrative state are numerous. One central explanation, however, is that because elected legislators lack the time and expertise to research and craft detailed laws to serve highly complex policy goals, they delegate their legislative power to unelected agency rulemakers.<sup>64</sup> With even more serious time and expertise gaps, California voters make a *de facto* delegation of their legislative authority to initiative proponents. In both cases, the principal “legislators” rely upon the judgment, knowledge, and public spiritedness of their agents. Indeed, voters are substantially more reliant; unlike elected legislators, voters are unable to control initiative sponsors directly on the front end, by setting limits on the delegated authority they grant in enabling legislation, or indirectly on the back end, through budgetary, oversight, and other restraints. And in reacting to their work product, both elected legislators and voters depend significantly upon *information* provided by those to whom they have delegated legislative power. (Here, too, voter-legislators would appear to be worse off than elected legislators. As noted earlier, they have even fewer independent informational resources on which to call.)

Finally, regarding *discussion and debate*, voter-legislators are in a fundamentally similar position with respect to initiative sponsors as

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63. Professor Glen Staszewski initially noticed the promise of incorporating administrative deliberative mechanisms into the initiative process. See Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 449 (2003).

64. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power [to administrative agencies] under broad general directives.”); DONALD D. BARRY & HOWARD R. WHITCOMB, *THE LEGAL FOUNDATIONS OF PUBLIC ADMINISTRATION* 54 (Rowman & Littlefield Publishers, Inc. 3d ed. 2005) (Congress delegates broad powers to administrative agencies “because the questions that it is dealing with are too complex or new”).

elected legislators are to administrative rulemakers. Neither type of legislator has any special process for meaningful consultation with those who will develop proposed law changes. Actually, elected legislators can at least participate in the period for public comment California's administrative-rulemaking procedures now provide to any "interested person."<sup>65</sup> At present, voters cannot provide input or comments to initiative proponents.

In sum, direct democracy seems substantially more analogous to administrative lawmaking than legislative lawmaking. Direct-democracy reformers would be more appropriately guided, then, by how California rulemaking procedures structure the provision of relevant information and the facilitation of appropriate public discussion.

Admittedly, voter-legislators have one major power advantage over elected legislators who delegate rulemaking authority to administrative decisionmakers. Administrative rulemakers can adopt binding rules with "the force and effect of law" without legislative approval;<sup>66</sup> elected legislators must take affirmative steps to counteract the work done by their delegates.<sup>67</sup> Voter-legislators, by

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65. See CAL. GOV'T CODE § 11346.8 (West 2005).

66. See, e.g., *Yamaha Corp. of Am. v. State Bd. of Equalization*, 960 P.2d 1031, 1036 (Cal. 1998) ("Because agencies granted . . . substantive rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes.").

67. In addition to the power any legislative body has to amend or rescind regulations through newly enacted legislation, California legislators have one further option available for causing the revision or demise of regulations indirectly. Section 11349.7 of the California Government Code establishes a process by which "any standing, select, or joint committee of the Legislature" can force review of "any regulation, group of regulations, or series of regulations that the committee believes does not meet the standards set forth in Section 11349.1 of the Government Code." (Section 11349.1 requires that adopted regulations meet defined standards of (1) necessity, (2) authority, (3) clarity, (4) consistency, (5) reference (i.e., whether the regulation spells out "the statutes, court decisions, or other provisions of law" the agencies rule is implementing), and (6) nonduplication.) This legislator-initiated review is conducted by the California Office of Administrative Law, the executive-branch entity with primary authority to review "all regulations adopted, amended, or repealed pursuant to" California rulemaking procedures. CAL. GOV'T CODE § 11349.1 (West 2005). See generally CAL. GOV'T CODE § 11349 (West 2005) (establishing standards and procedures for return or approval of regulations, gubernatorial review of disputed OAL decisions, etc.).

contrast, can merely stop initiative proponents' plans by refusing to give their assent.<sup>68</sup> This key power difference hardly compensates for the information and discussion deficits voter-legislators now face in dealing with the initiative proponents who are the voters' equivalent of administrative rulemakers; the right to "just say no" at the end of the process is more of a sledgehammer than a scalpel when the process fails to provide adequate bases for knowing whether or not to wield the tool. But, as discussed below in Part III, the ultimate voter power of negation (and the greater sovereignty it implies) justifies a cautious approach to *which aspects* of administrative notice-and-comment procedures should be imported into the direct democracy context.

### III. WHY *STREAMLINED* INFORMAL RULEMAKING?: THE SUBSTANTIVE AND POLITICAL RATIONALES FOR SELECTIVITY, AND DESIGN SPECIFICATIONS FOR ACHIEVING IT

The main conclusion of the previous Part—that administrative rulemaking is the more accurate model for direct democracy—suggests at first blush that the informal notice-and-comment procedures California now uses for such rulemaking should be transferred feature-by-feature to the initiative context. In fact, the legal scholar who deserves credit for first writing about the analogous qualities of direct democracy and administrative rulemaking leaped to a variation of this suggestion.<sup>69</sup>

The Working Group and this Article propose, however, that only a significantly *streamlined* version of California's informal rulemaking procedures be transferred to the direct-democracy context. For reasons of both substance and politics, as developed in Part III.A, reformers should be leery of transferring to the initiative context all of the extensive analysis requirements, consultation options, and multiple judicial-review opportunities current administrative-rulemaking

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68. See CAL. CONST. art. II, § 10(a) (initiative statutes are not effective until "approved by a majority of voters"); *id.* at art. XVIII, § 4 (same for initiative amending state constitution).

69. See Smith, *supra* note 1, at 296-99 (criticizing Professor Staszewski for endorsing "an over-elaborate deliberative approach" incorporating all federal administrative procedures, including "potential multiple rounds of judicial review").

procedures provide. The wiser course would be selective borrowing under the “design specifications” outlined in Part III.B.

*A. Substantive and Political Reasons Why Discretion is the Better Part of Valor*

*1. The Substantive Case for Selective Borrowing from Administrative Notice-and-Comment Procedures*

Part II’s analysis suggests that California’s initiative process is mostly, but not completely, like the administrative-rulemaking process. For all phases leading up to final voting—that is, from developing proposals through amassing information and discussing proposals—the initiative process resembles administrative rulemaking; the legislative “principals” (voters) are, if anything, more reliant on the judgment, expertise, and goodwill of their de facto agents (initiative proponents). At the stage of giving final binding assent, however, the initiative process shifts to resemble lawmaking by elected legislators; in both processes, proposals to change the status quo do not become law until affirmatively approved by majority vote. The best model for representing the initiative process, therefore, seems to be a “hybrid” based mainly on administrative rulemaking, but recognizing the one key similarity to lawmaking by elected legislators.

This hybrid model suggests that the best mix of procedures for bringing more deliberation to California’s direct democracy is somewhere toward the middle of the procedural continuum between administrative rulemaking and lawmaking by elected legislators. The most apt candidates for borrowing are administrative-rulemaking procedures most directly affording useful information and opportunities for discussion about proposed law changes; these are the rulemaking procedures most empowering for voters when they ultimately act like elected legislators voting on legislation.

Recognizing the one way voters are like legislators adopting legislation, rather than legislators deferring to administrative rulemakers—that is, recognizing voters’ ultimate sovereignty to cast final yes or no votes on initiatives—suggests, however, that reformers should not transfer other aspects of California’s current rulemaking process to the initiative process. Specifically:

*a. Reformers should avoid carrying over into the initiative context information-gathering and analysis requirements designed to constrain the substantive discretion of administrative rulemakers. Current California rulemaking procedures include a number of analytical requirements designed to prevent, or at least dissuade, administrative rulemakers from proposing or adopting certain kinds of rules. For example, current law requires an agency rule proponent to explain why alternative approaches would not “be more effective in carrying out” the agency’s purpose or “as effective and less burdensome.”*<sup>70</sup>

Information-gathering and analytical requirements make sense for a system in which an administrative agency’s assent usually substitutes for ultimate approval by legislators. For example, if elected legislators will not themselves be considering the costs and benefits of proposed rules and the alternatives—or legislators will only do this later in a very different context—it makes sense to require that the substitute (administrative) decision-makers perform the desired analysis and defend its validity. On the other hand, because the initiative process assumes that voters will ultimately weigh costs and benefits (or rely on cues from those who have done this analysis), requiring proponents to conclusively determine that benefits outweigh costs is substantively presumptuous.

*b. Reformers should avoid carrying over into the initiative context onerous requirements for judicial review (including ancillary information-gathering and record-developing procedures to support judicial review). California provides multiple opportunities for judicial review at several phases of administrative rulemaking; the state’s courts may be called upon to determine:*

- whether administrative rulemakers “substantially failed” to comply with any of the several notice-and-comment procedures the California Government Code requires for rulemaking;

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70. CAL. GOV’T CODE § 11346.5(a)(13) (West 2005); see *infra* text accompanying note 89. Current administrative-rulemaking procedures also impose other information-gathering and analysis requirements relating to required technology or equipment; rejected reasonable alternatives; and economic impacts on business generally, small business specifically, employment, housing, state and local governmental units, and school districts. See *infra* text accompanying notes 90-96.

- whether administrative rulemakers have “substantial evidence” to back up their determinations that regulations are “reasonably necessary to effectuate the purpose of the provision[s] of law being implemented”; and
- whether administrative rulemaker declarations that regulations “will not have a significant adverse economic impact on business enterprises” fly in the face of “substantial evidence in the record.”<sup>71</sup>

In general, it is not substantively appropriate to impose these judicial-review provisions on the initiative process.<sup>72</sup> First, as with the information-gathering and analysis requirements discussed above, judicial review generally compensates for the reality that rulemaking proposals become law without affirmative legislator assent. Judicial oversight seeks to make up for the general inability of legislators to notice and react to departures from required procedures or minimal rationality. Just as it did for many requirements for information gathering and analysis, the ultimate role of voter-legislators in granting or withholding final assent makes it inappropriate to graft extensive judicial-review requirements onto the initiative process.<sup>73</sup>

A second reason for caution in importing judicial review into reforms designed to promote initiative-process deliberation is that in the administrative context it has shown a tendency to substantially slow the process, delaying regulation and imposing costs on system participants.<sup>74</sup> Delaying the adoption of administrative regulations by

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71. 9 WITKIN, CALIFORNIA PROCEDURE ADMINISTRATIVE PROCEEDINGS § 144 (5th ed. 2010).

72. Thus, although litigation over the *adequacy* of compliance with notice-and-comment procedures would not be judicially enforceable, the Working Group Report proposal does provide that minimal compliance with notice-and-comment procedures would be a judicially enforceable prerequisite to public officials taking further actions to prepare an initiative proposal for voter signature. *See infra* text accompanying notes 125-31.

73. *See* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 55 (4th ed. 2010) (judicial review of rulemaking was the “substitute for the accountability fostered by the ballot box”).

74. *See, e.g.*, LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW 168 (2d ed. 2008) (“The APA’s basic rulemaking procedure . . . was intended to be a simple and flexible process, although in practice it is often unwieldy and cumbersome.”); RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 341 (5th ed.

administrative agents, especially when existing laws already provide a measure of public protection, is quite different from delaying the consideration and adoption of laws by legislative principals themselves (i.e., voters considering initiative proposals). This is especially true given that judicial review is generally not available for alleged failures to follow internal procedures of the California Legislature.<sup>75</sup>

## 2. *The Political Reasons for Selectivity*

Even if there weren't persuasive substantive reasons for it, selectivity would be justified on important political grounds. As noted earlier,<sup>76</sup> reform proposals have a real leg up if they can be validly portrayed as not undermining—and better yet, as actually enhancing—the initiative process. Proposals too easily characterized as imposing time-consuming and vexatious barriers run a real risk of being perceived as anti-initiative overkill.<sup>77</sup> Ambitious judicial review seems especially problematic; it too easily raises the specter of litigation tying up the sacred right of the people in judicial courtrooms.

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2009) (“Excessively demanding judicial review has slowed the pace of rulemaking at all agencies . . . and even caused some major agencies to abandon rulemaking entirely.”).

75. See, e.g., CAL. CONST. art. IV, § 7(a) (“Each house shall . . . adopt rules for its own proceedings.”); *People’s Advocate, Inc. v. Superior Court*, 226 Cal. Rptr. 640, 642-43 (Ct. App. 1986) (construing CAL. CONST. art. IV, § 7 and stating the “deeply rooted” principle that “the power of a legislative body to *govern its own internal workings* has been viewed as essential to its functioning except as it may have been expressly constrained by [other constitutional provisions]” (emphasis added)). But see WITKIN, *supra* note 71, § 9(5) (summarizing section 9031 of the California Government Code, which empowers any “interested person [to] commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of [California legislative open-meeting laws] by members of the Legislature”).

76. See *supra* Part I.C.

77. See, e.g., Smith & Bailey, *supra* note 10, at 268-70.



*B. Design Specifications for a Streamlined Version of Notice-and-Comment Procedures for the California Initiative Process*

This discussion of substantive and political reasons for selectivity suggests that initiative reform is truly an area in which “less is more.” This, in turn, points to three “design specifications” (with two “corollaries” for one of the specifications) that should guide deliberation-focused reform of the California initiative process:

*Specification 1: Impose the Minimum Procedures Necessary to Achieve Meaningful Information and Discussion.* This specification flows directly from the considerations discussed in Subpart A. There are both substantive and political advantages in being selective in borrowing from California’s existing provisions for notice-and-comment. Specifically, the needed selectivity should fulfill these two important corollaries:

*Corollary 1A: Focus on Current Notice-and-Comment Procedures Most Directly Providing Useful Information and Opportunities for Public Discussion, While Avoiding Inappropriate Information-Gathering and Analysis Requirements.*

*Corollary 1B: Avoid Inappropriate Judicial-Review Provisions.*

Specification 1 also recognizes that adoption of any real deliberative reform for California’s initiative process would be an unprecedented development. As with most “first efforts,” initial caution may be warranted. Especially where, as in the initiative-reform context, reformers and their suggested changes may be greeted with substantial skepticism, it may be prudent to take partial steps initially. The initial changes can then be expanded as experience indicates and as system participants become comfortable with the new system.

*Specification 2: Hew as Closely as Possible to Existing Statutory Language and “Precedents.”* As a general matter, reformers who can copy existing statutory formulations and time-tested approaches to achieve their intended improvements are strategically ahead of the game. This eases concerns about the workability of reforms and any unintended consequences.

The current iteration of California rulemaking procedures has been around for over thirty years.<sup>78</sup> They have a well-established track record of workability. They are highly familiar to legislators, other public officials, and other participants in the California legal and political systems considering rulemaking-based reform proposals.

*Specification 3: Only Add New Requirements When Necessary to Solve Clearly Identified Problems Plaguing the Initiative Process (Including, Especially, Subsequent Initiatory Construction).* Limiting innovations to those clearly aimed at solving demonstrated problems will keep reforms focused on substantively necessary improvements and defuse political concerns. Eliminating past problems with initiatory construction can garner support among initiative proponents by offering them greater confidence that their strategic intent will be more likely to prevail in court.

#### IV. WHY *THIS PROPOSAL*'S SPECIFIC CHOICES? HOW THE WORKING GROUP PROPOSAL ENHANCES DELIBERATION IN A SELECTIVE MANNER CONSISTENT WITH THE DESIGN PRINCIPLES

The previous Parts established a context for appreciating the major design choices reflected in the proposed reform legislation endorsed by the Working Group.<sup>79</sup> This Part comments on key features, explaining how the proposed legislation follows the specifications just identified as it would (a) require initiative proponents to draft an initial notice explaining key proposal features and implications; (b) create an orderly and efficient process for public comment on the proposal; (c) obligate proponents to respond efficiently but meaningfully in a final notice to issues raised during the comment period; and (d) signal to California courts that they should not review the details of compliance with the new requirements, but should make appropriate use of the legislative history created when engaging in subsequent “initiatory construction.”

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78. See WITKIN, *supra* note 71, § 38(1) (current rulemaking provisions, “which are much broader in scope” than procedures originally adopted in 1945, were adopted in 1979).

79. See *infra* Appendix I. pp. 56-59 (providing the full text of the Working Group’s proposed legislation).

*A. Notice of Proposed Initiative Lawmaking*

Subsection (a) of proposed legislation endorsed by the Working Group would require initiative proponents, as a prerequisite to commencing the present process for submitting an initiative proposal for voter-petition signatures, to submit to the California Secretary of State a “notice of proposed initiative lawmaking.” Implementing Design Specification 2 (the guideline to follow existing law as closely as possible), our proposal would adopt verbatim or only slightly modify the existing statutory language guiding administrative agency notices of proposed rulemaking. Implementing Design Specification 1, the proposed section focuses on the core information voters and their cue givers need.

A brief description of how the proposal would do this is as follows:

- Subsection (a)(1) would require initiative proponents to include “the express terms of the proposed measure, including an addendum using underline, italics, or strikeout to indicate how the measure would add to, or delete from, current provisions in the Constitution or laws of this state.” This language adapts a provision requiring administrative rule proponents to explain how they would change their relevant level of current law—the California Code of Regulations.<sup>80</sup>
- Subsection (a)(2) would require proponents to provide “[a]n informative digest drafted in plain English in a format similar to the Legislative Counsel’s digest on legislative bills.”<sup>81</sup> This verbatim lifting of Government Code section 11346.5(a)(3) draws a direct parallel between voter-legislators and elected legislators, which as noted earlier is justified substantively and politically.
- Subsection (a)(2)(A) would obligate proponents to provide a “concise and clear summary of existing constitutional provisions, laws, regulations, and judicial decisions, if any, related directly to the proposed action” and its “effect” on those sources of law. This slight adaptation of a current

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80. See CAL. GOV’T CODE § 11346.2(a)(3) (West Supp. 2011).

81. CAL. GOV’T CODE § 11346.5(a)(3) (West 2005).

rulemaking notice requirement<sup>82</sup> reflects the broader legal canvas on which initiative proponents paint. This proposed Subpart also implements Design Specification 3 (which limits innovations to those necessary to solve clearly identified problems, especially those plaguing initiatory construction). The subsection addresses the leading cause of difficulty when adopted initiatives are construed in later litigation—how initiatives interact with the existing legal status quo.<sup>83</sup>

- Subsection (a)(2)(B) mirrors the way California law causes rulemaking proponents to explain the intent behind their proposals. The proposed subsection would require proponents to provide a “policy statement overview explaining the broad objectives of the proposed measure and, if appropriate, the specific objectives.”<sup>84</sup>
- Subsection (a)(2)(C) implements Design Specification 3 by adding language directly addressing another cause of confusion in initiatory construction.<sup>85</sup> Again using the “concise and clear summary” term of art in current rulemaking provisions, this subsection would prompt disclosure of “how the particular sections, subsections, and provisions of the proposed measure are intended to operate together, including the intended effect of any provisos, exceptions, or other modifying clauses.”
- Subsection (a)(2)(D) would encourage proponents to include “any other information which in the[ir] judgment . . . could

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82. *Id.* § 11346.5(a)(3)(A) (“A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.”).

83. *See infra* Appendix II, pp. 82-84 tbl.1 (collecting California cases and showing that five addressed how initiatives interacted with California constitutional provisions, twenty-three dealt with initiative interaction with other California statutes, six required squaring adopted initiatives with prior California judicial decisions, and five probed the effect of the initiative at issue on other ballot propositions).

84. GOV’T § 11346.5(a)(3)(C).

85. Many of the several dozen California cases addressing how adopted initiatives affect criminal and civil litigants, *see infra* Appendix II, pp. 83-84 tbl.1 (last two categories of collected cases), turned in part on the interaction of different provisions in the initiative at issue.

assist interested persons in understanding the justification for, and intended effect of, the proposed measure.” This provision has no exact counterpart in current rulemaking-notice requirements.<sup>86</sup> Its inclusion, however, reflects the strategic focus on Design Specification 1 (to focus on facilitating useful information in a minimalist way). The catchall phrase encouraging further information compensates for many of the specific information and analysis requirements California law requires of administrative rulemaking proponents, which (as explained immediately below) we omit.

- Besides a disclosure to facilitate the public-comment period we also propose,<sup>87</sup> the only other requirement for the initial notice (included in proposed subsection (a)(4)) would be a slight adaptation of a current rulemaking provision ensuring that readers of the notice have the “name and telephone number” of a representative to contact for follow-up inquiries.<sup>88</sup>

Our proposed adaptation of current rulemaking-notice requirements is as important for what it does not borrow. Consistent with Corollary 1A (focusing on current rulemaking procedures “most directly” enhancing information and promoting later public discussion), we would not impose on initiative proponents the current legal requirement that agency rule advocates state affirmatively that “no reasonable alternative considered by the agency or that has been otherwise identified . . . would be more effective in carrying out the purpose [of the proposal] or would be as effective and less burdensome to affected private persons than the proposed action.”<sup>89</sup> This provision attempts to hold proponents to a cheapest-effective-alternative standard, thus restricting the substantive discretion of proponents in a manner inappropriate for the initiative context.

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86. Proposed subsection (a)(2)(D) does have a passing resemblance to section 11346.5(a)(4) of the California Government Code, which requires notice of proposed rulemaking to discuss “[a]ny other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.”

87. Proposed subsection (a)(3). *See infra* Appendix I. p. 57.

88. GOV’T § 11346.5(a)(14).

89. *Id.* § 11346.5(a)(13).

Corollary 1A also requires us to leave on the cutting room floor a number of less overtly directive mandates, such as requirements to study and disclose why “specific technologies or equipment” are required;<sup>90</sup> why “reasonable alternatives” have been rejected;<sup>91</sup> what “facts, evidence, documents, testimony, or other evidence” convinced the agency that the proposed rule “will not have a significant adverse economic impact on business” generally,<sup>92</sup> on small business particularly,<sup>93</sup> and on job availability, business creation, and expansion;<sup>94</sup> how the proposal would affect housing costs;<sup>95</sup> and what its fiscal implications would be on state and local governmental units and school districts.<sup>96</sup> All of these requirements could be interesting and useful in considering particular initiative proposals, but it would be substantively illegitimate and politically unwise to impose them generically, for the reasons identified in Part III.

Corollary 1B (which generally urges the avoidance of administrative-law-style judicial review) inspires us to omit disclosures seemingly imposed on administrators to assist when their rules end up in court. For example, we would eschew requirements apparently designed to facilitate judicial review of a rule’s substantive validity—such as obligations to disclose “each technological, theoretical, and empirical study” relied on by rule proponents in drafting their proposal or after initially disclosing it.<sup>97</sup> Corollary 1B also recommends that we not carry forward a complicated statutory section requiring the maintenance of an extensive official “file” cataloguing all relevant documents.<sup>98</sup>

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90. CAL. GOV’T CODE § 11346.2(b)(1) (West Supp. 2011).

91. *Id.* § 11346.2(b)(3)(A).

92. *Id.* § 11346.2(b)(4).

93. *Id.* § 11346.2(b)(3)(B).

94. CAL. GOV’T CODE § 11346.3(b) (West 2005). *See generally id.* § 11346.3 (requiring study of other business costs and economic impacts). Other disclosures designed to prompt agencies to quantify and minimize impacts on businesses, which we omitted, are included at section 11346.5(a)(7)-(9) of the California Government Code.

95. GOV’T § 11346.5(a)(12).

96. *Id.* § 11346.5(a)(5)-(6).

97. CAL. GOV’T CODE §§ 11346.2(b), 11347.1 (West 2005).

98. CAL. GOV’T CODE § 11347.3 (West 2005).

As to the methods by which the initial notice is provided (as we address in subsection (b) of our proposal), we honor Design Specification 2 (that is, the recommendation to stick closely to existing statutory language) by hewing closely to the major methods California currently uses for initial notices of proposed rules. Specifically, each subsection of our proposal mimics a particular aspect of the statute governing California rulemaking:

- Subsection (b)(1)(A): Notice would be posted on the relevant state agency's website.<sup>99</sup> (In the initiative context, this is the Secretary of State's website, which already is a source of useful information about the initiative process generally and specific proposals submitted for voter signature or qualified for the ballot.)<sup>100</sup>
- Subsection (b)(1)(B): Notice would be mailed (or, as an added gesture to current technology, emailed) to any person filing a request for notices generally, or for notice from particular proponents or concerning particular subject areas.<sup>101</sup>
- Subsection (b)(1)(C): The relevant governmental official (here, again, the Secretary of State) could, when judged

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99. See CAL. GOV'T CODE § 11346.4(a)(6) (West 2005).

100. The "Ballot Measures" subsection of the "Elections" section of Secretary of State's website provides extensive and readily accessible information on qualified ballot measures; initiative proposals at varying stages of the circulation process; initiative proposals pending at the Attorney General's Office, awaiting official titles and summaries; a "How-To" guide for qualifying an initiative; a resources-and-historical-information guide pointing searchers to initiative-databases maintained by other institutions; and a collection of past ballot pamphlets (in .pdf file form). See CAL. SEC'Y OF STATE, [http://www.sos.ca.gov/elections/elections\\_j.htm](http://www.sos.ca.gov/elections/elections_j.htm) (last visited Nov. 14, 2011).

101. The current rulemaking provision requires that notice be "[m]ailed to every person who has filed a request for notice of regulatory actions with the state agency." GOV'T § 11346.4(a)(1). We logically make the Secretary of State the agency for fielding such requests. Just as current rulemaking provisions allow the requestor to choose "all proposed regulatory actions" of an agency or "one or more" of its "particular programs," *id.*, we allow a choice between all proposals "authored by particular proponents" or proposals "concerning particular subject matter areas." We also allow gluttons for punishment to choose to receive notices of all proposed initiatives. See *id.*

“appropriate,” mail or email notices to “any person or group of persons” believed to be “interested” in the proposal.<sup>102</sup>

The proposal endorsed by the Working Group also includes (in proposed subsection (b)(1)(D)) a catchall provision that would allow the Secretary to “[t]ake other actions which in the judgment of the Secretary will ensure appropriate notice for interested persons.”<sup>103</sup>

### *B. An Informal Public Comment Period*

To establish a “meaningful yet manageable structure by which interested parties can discuss the initiative proposals”<sup>104</sup>—and to follow Design Specification 2—subsection (c) of our proposal is closely modeled after the current provisions governing public comments and hearings on rulemaking proposals. Specifically:

- Subsection (c)(1) would describe the minimum public-comment opportunity as the option to submit “statements, arguments, or contentions in writing.”<sup>105</sup>

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102. *Id.* § 11346.4(a)(4).

103. This is in lieu of other more specific and extensive requirements to give notice to specialized audiences, such as directors of governmental departments, *see id.* § 11346.4(a)(2), or representatives of small businesses likely to be affected, *see id.* § 11346.4(a)(3), and to engage in consultations with regulated parties before issuing notices for proposals that “involve complex proposals,” CAL GOV’T CODE § 11346.45 (West 2005). We omitted these provisions per Design Specification 1 because they seemed to respond to specialized administrative-rulemaking problems or to go further than the minimal notice requirements necessary to achieve the Working Group’s intention to cause “initiative sponsors to communicate more fully with the public about their legislative intent.” *See infra* Appendix II. p. 61. (We omitted several other sections transparently irrelevant to the initiative process, such as a requirement to publish notices in the California Regulatory Notice Register and a requirement that notices be reissued after the passage of one year. GOV’T § 11346.4(a)(5), (b).)

As the Working Group Report notes, “it is likely that many initiative sponsors and other organizations interested in voter education would place the notice (or links to the Secretary of State’s website) on their own websites.” *See infra* Appendix II. p. 89. Thus, others outside government may end up, as a practical matter, helping with the goal of our proposed subsection (b)(1)(D) to “ensure appropriate notice for interested persons.” *See infra* Appendix I. p. 57.

104. *See infra* Appendix II. p. 61.

105. *See infra* Appendix I. p. 57.



- The comment period provided by subsection (c)(1) would be a forty-five-day comment period.<sup>106</sup>
- Subsection (c)(2) would leave the decision about whether to have a public hearing, or to rely merely on written comments, to the discretion of the proponent.<sup>107</sup>
- Subsection (c)(2) would also give the official convener of any public hearing the standard authority to “impose reasonable limitations on oral presentations.”<sup>108</sup>

Departing from the administrative rulemaking process, in which the proponent of a law change also runs the comment process, we propose to make the Secretary of State, rather than initiative proponents, responsible for administering the comment and (if requested) hearing processes for initiatives. This would mean that the Secretary, as part of distributing initial notices of proposed initiative lawmaking,<sup>109</sup> would “notif[y] recipients of the time, place, and nature” of comment opportunities for proposed initiatives.<sup>110</sup> The Secretary would also be responsible for “promptly” and “prominently” posting and “appropriately indexing” the public comments on the official website,<sup>111</sup> and for “arrang[ing] for, and promptly post[ing] on

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106. Current rulemaking provisions describe a public comment period of “[a]t least 45 days.” See GOV’T §§ 11346.4(a), 11346.8(a) (referencing forty-five day period of section 11346.4(a) in setting forth agency public comment responsibilities). But, unlike the administrative rulemaking context, the party running the comment period for proposed initiatives (i.e., the Secretary of State) is not the proponent; it is therefore inappropriate to give the Secretary the option of extending the comment period or “continuing or postponing” the hearing, as section 11346.8(b) permits agencies proposing rules to do.

107. The analogous rulemaking provision is section 11346.8(a). Under subsection (a)(3) of the proposed legislation endorsed by the Working Group, a proponent would indicate in the notice of proposed initiative lawmaking whether it “requests that a public hearing be held on the proposed measure.” See *infra* Appendix I. p. 57.

108. GOV’T § 11346.8(a).

109. See *supra* text accompanying notes 99-103.

110. Subsection (b)(2) of the Working Group proposal includes this duty. See *infra* Appendix I. p. 57.

111. This obligation is imposed by our proposed subsection (c)(1). See *infra* Appendix I. p. 57. The proposed Secretary of State role is similar to, but much narrower than, the obligation California rulemaking requirements place on administrative agencies to include “[a]n index or table of contents that identifies

the Secretary's official website, a transcript or recording of [any] public hearing."<sup>112</sup>

Proposing to involve the Secretary of State in these ways seems appropriate to the Secretary's official role as a neutral supervisor of the initiative process;<sup>113</sup> it also avoids imposing additional expense and bother on initiative proponents.<sup>114</sup>

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each item contained" in a comprehensive "rulemaking file." CAL. GOV'T CODE § 11347.3(b)(12) (West 2005). Current rulemaking provisions require this rulemaking file to include twelve categories of information. *See id.* § 11347.3(b).

112. We state this responsibility in our proposed subsection (c)(2). *See infra* Appendix I. pp. 57-58.

113. California election law assigns these official duties related to the initiative process to the Secretary of State: supervising signature-gatherer compliance with relevant deadlines; conducting a raw count of signatures to determine whether the number of valid voter signatures has met the statutory minimum (or whether random-sample verification should be conducted by county election officials); certifying initiative proposals for the ballot, including sending copies of the text of ballot-qualified initiatives to the California State Senate and California Assembly, triggering statutory requirements to conduct legislative hearings on the proposals; compiling initiative-proposal texts, Legislative Analyst summaries and explanations, and proponent and opponent statements for the ballot pamphlet; and supervising voting on initiatives and certifying results. *See Statewide Initiative Guide*, CAL. SEC'Y OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/initiative-guide.htm> (last visited Nov. 17, 2011). In addition, as already noted, the Secretary of State's website includes several sections designed to enhance public knowledge about the initiative process and particular initiative proposals. *See supra* note 100.

The Working Group's reform proposal would not be the first to place obligations on the Secretary of State. *See, e.g.*, S.B. 1764, 1997-1998 Leg., Reg. Sess. (Cal. 1998) (changed California law to require the Secretary of State to make ballot initiatives and voter pamphlets available online); A.B. 2584, 2007-2008 Leg., Reg. Sess. (Cal. 2008) (would have made the Secretary of State a real-party-in-interest in litigation over ballots or ballot pamphlets related to initiatives); A.B. 677, 1997-1998 Leg., Reg. Sess. (Cal. 1997) (would have authorized the Secretary of State to choose a panel of three retired appellate state judges to give non-binding advisory opinions, to appear in the ballot pamphlet, on whether ballot-qualified initiatives are consistent with state and federal constitutional requirements).

114. To further advance the overall effort to present a *streamlined* version of a comment period and avoid a politically adverse perception of overkill, we omit provisions allowing participants at public hearings to be placed under oath. *See* CAL. GOV'T CODE § 11346.8(b) (West 2005).

*C. A Final Notice Responding to Public Comments*

The last major phase in California's informal notice-and-comment rulemaking procedures is a requirement that an agency issue a "final notice" to *update* information it provided in the initial notice of proposed rulemaking and *respond* to the information and positions received during the comment period. The update requirement provides interested persons with the latest version of the agency's planned changes in the legal status quo and its most definitive thinking about the impact of and rationale for the change. The requirement to respond to comments seeks to ensure that the agency has considered the merits of the comments; this assures an authentic deliberative give-and-take, rather than a one-way flow of information followed by agency proponents responding with the equivalent of "Thank you for sharing. Now we'll just do what we planned anyway."

The Working Group proposal seeks to prompt initiative proponents to perform these update and response functions in an appropriately streamlined way. Our proposed subsection (d) would prompt a "final notice of proposed initiative lawmaking" with three components:

- Subsection (d)(1) would require proponents to provide "the most recent version of the express terms" of their proposal, using the same method they used in the initial notice to indicate how they now propose to change current California Constitution and statutory provisions.<sup>115</sup>
- Subsection (d)(2) adapts with minor changes a current California rulemaking provision requiring that proponents provide "[a]n update of the information contained in the initial [justification for the proposal]."<sup>116</sup>
- Subsection (d)(3) copies, with only minimal word changes, a current rulemaking requirement that the proponent summarize "each objection or recommendation made" about the initial proposal and explain how the proposal "has been changed to

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115. If the proposed initiative has not changed since the initial notice, the proponent will simply copy and paste the text and explanation from that initial notice.

116. CAL. GOV'T CODE § 11346.9(a)(1) (West 2005).

accommodate each objection or recommendation.”<sup>117</sup> In so doing, subsection (d)(3) also carries forward in virtually identical verbiage current procedures making the summarization and explanation requirement more manageable; our proposed subsection would allow proponents to “aggregate repetitive comments” and respond to them “as a group,” and to do the same for “irrelevant” or non-specific comments (or even “dismiss them” as a group).<sup>118</sup>

Admittedly, the requirements of this last subsection are the most ambitious requirements of our proposal—in terms of the effort and potential expense they would require from proponents. However, there seems to be no other time-tested procedure for structuring proponent response; these requirements appear to be the minimum prerequisites for promoting meaningful discussion, thus meeting Design Specification 1. At least the proposal avoids other more onerous requirements—including a prohibition effectively requiring agencies substantially changing rulemaking proposals in response to public comments to seek additional public comment,<sup>119</sup> and requirements that final notices justify mandates on local agencies or school districts,<sup>120</sup> explain selection of any alternatives other than the most cost-effective ones,<sup>121</sup> and defend rejection of any alternatives with lesser impacts on small businesses.<sup>122</sup>

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117. *Id.* § 11346.9(a)(3).

118. *Id.*

119. GOV'T § 11346.8(c) (“No state agency may adopt, amend, or repeal a regulation which has been changed from [the original proposal], unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the [changed proposal], with the change clearly indicated, shall be made available to the public for at least 15 days . . . . Any written comments received regarding the change must be responded to in the final statement [on the rule].”).

120. *See* GOV'T § 11346.9(a)(2).

121. *See id.* § 11346.9(a)(4).

122. *See id.* § 11346.9(a)(5).

*D. Appropriately Modest Guidance to California Judges*

As explained earlier, the Working Group decided that it would be desirable to send two messages to California's courts. First, the proposal would instruct state jurists to ensure basic compliance with the new notice-and-comment requirements, while avoiding the onerous judicial review that can slow down and needlessly formalize administrative rulemaking.<sup>123</sup> Second, although courts would continue to use "the intention of the voters" as the basic touchstone for interpreting the scope and meaning of voter-passed initiatives, the proposal would require them to give "appropriate consideration" to relevant indicators developed during the new notice-and-comment process.<sup>124</sup>

In seeking to limit judicial review of the new notice-and-comment procedures it creates—thereby avoiding the substantive and political problems identified earlier<sup>125</sup>—new subsection (f)(1) would add to the Elections Code a statement that "[c]ompliance or noncompliance with the provisions of this section" is not generally reviewable in court.<sup>126</sup> Expanding a narrower judicial-review preclusion used for a portion of the California rulemaking process,<sup>127</sup> subsection (f)(1) would provide that no provision of the Working Group proposal "shall . . . be construed in any manner that results in the invalidation of an initiative lawmaking measure because of the alleged inadequacy of the content of the initial or final notices."<sup>128</sup>

Thus, as long as proponents submitted the required notices and the Secretary follows her statutory duty to provide a forty-five day

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123. See *infra* Appendix II. pp. 91-92.

124. See *infra* Appendix II. pp. 92-93.

125. See *supra* text accompanying notes 72-77.

126. See *infra* Appendix I. p. 59.

127. See CAL. GOV'T CODE § 11346.5(c) (West 2005) (providing that requirements for the notice of proposed rulemaking "shall not be construed in any manner that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary of cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, *if there has been substantial compliance with those requirements*" (emphasis added)). The Working Group's hesitancy to impose even a "substantial compliance" or similar threshold for precluding judicial review reflects Design Specification 1's warning to "impose the minimum procedures necessary" while avoiding "inappropriate" judicial review.

128. See *infra* Appendix I. p. 59.

comment period to interested persons, proponents and their supporters would not have to worry that opponents could bring vexatious lawsuits disputing the *adequacy* of compliance to tie proponents' hands. The intention here is not to permit wholesale flouting of statutory requirements. Indeed, new subsection (f)(1) would specifically make submission of notices and affording of the comment period prerequisites to later stages of initiative qualification.<sup>129</sup> And as the Working Group Report notes, we envision that "appropriate legal authorities," such as the Secretary of State and the California Attorney General would not further process initiative proposals if proponents flatly failed to file required notices.<sup>130</sup> The Report notes: "As with all failures of governmental authorities to follow statutory requirements, the failure of governmental authorities to withhold cooperation from non-participating initiative proponents would to this limited extent be subject to judicial correction."<sup>131</sup>

Still, the Working Group found it substantively and politically preferable to rely mainly on "natural incentives" of a non-judicial nature.<sup>132</sup> For example, "[p]roactive sponsors would naturally seek to listen to interested parties and engage with them in real discussions about eventual consequences of initiatives; sponsors would have a natural incentive to respond to comments and refine initiatives in an effort to get voter support."<sup>133</sup> By contrast, "[s]ponsors who ignored valid public comments would worry that they would be admitting the truth of the comments and that this could affect them adversely in the court of public opinion and in courts of law (when the meaning and application of initiatives are at issue)."<sup>134</sup> The presence of cue givers, including the media, to call attention to sponsors failing to engage in

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129. The specific language would read: "A proposed initiative measure may not be submitted to the Attorney General pursuant to Section 9002 or subsequently circulated for voter signatures under the provisions of this Code until the initial and final notices required by subsections (a) and (d) are submitted to the Secretary and until the comment period required by subsection (c) is provided." *See infra* Appendix I. p. 59.

130. *See infra* Appendix II. p. 91 n.90.

131. *See infra* Appendix II. p. 91 n.90.

132. *See infra* Appendix II. p. 90.

133. *See infra* Appendix II. p. 90.

134. *See infra* Appendix II. p. 90.

good faith in notice-and-comment processes should provide substantial compliance incentives even without judicial enforcers.

In prompting judicial initiatory construers to give “appropriate consideration” to the fruits of the notice-and-comment process, the proposal would add a new paragraph to section 1859 of the California Code of Civil Procedure, which addresses “[c]onstruction of statutes or instruments.”<sup>135</sup> Mimicking exactly how that section commands that statutory construction effect “the intention of the Legislature,” our proposed section 1859.1 would provide that “[i]n the construction of a law enacted by voter initiative, the intention of the voters is to be pursued, if possible.”<sup>136</sup> Recognizing the essential truth, however, that voters place significant reliance on the authoritative intentions of initiative proponents, proposed section 1859.1 goes on to provide that

in ascertaining such intent appropriate consideration shall be given to the intentions of proponents as expressed in the initial and final notices of proposed initiative lawmaking . . . , including how final notices respond or fail to respond to statements, arguments or contentions made by interested persons during the [forty-five-day] comment period.<sup>137</sup>

This proposed new paragraph would achieve Design Specification 3 by adding a new requirement “necessary to solve clearly identified problems plaguing the initiative process (including, especially, the subsequent initiatory construction).”<sup>138</sup> My previous article, the various scholarly works it commented upon, and the Working Group Report all noted the high degree of artificiality in the current judicial approach to initiatory construction.<sup>139</sup> Courts too often naively attribute a sophisticated and nuanced intent to voters; primarily they unrealistically assume their familiarity with sophisticated canons of statutory construction and consult a limited and generally unenlightening range of official ballot-pamphlet materials. Because the Working Group proposal would create an authoritative, transparent, and reliable record of sponsor intentions—intentions

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135. CAL. CIV. PROC. § 1859 (West 2003).

136. *See infra* Appendix I. p. 59.

137. *See infra* Appendix I. p. 59.

138. *See supra* pp. 32-33.

139. *See Smith, supra* note 1, at 263-67; *see infra* Appendix II. pp. 79-80.

perfected in the crucible of a public-comment process—it makes abundant sense to require courts to give it “appropriate consideration.” Specifically, proposed section 1859.1 is written to remedy the clearly identified problem of initiatory-construction courts treating statements of supporters and opponents equally (in contrast to the standard practice in statutory construction of giving greater weight to views of supporters, and especially sponsors).<sup>140</sup> Comments made by interested persons during the official comment period would be relevant to fathoming initiative application not in their own right, but in light of how proponents “respond or fail to respond” to them.

#### V. WHAT *STRATEGIC QUESTIONS* REMAIN ON THE WAY TO PROPOSAL ENACTMENT? QUESTIONS OF SCOPE, TIMING, PHASE-IN, AND METHOD OF ADOPTION

The previous Part analyzed the final version of proposed legislation emerging from Working Group deliberations. As with any proposal, the deliberations leading up to it considered strategic questions and alternatives not fully reflected in the final product. Now, the passage of time and further consideration leads me to see several questions and alternatives as more worthy of comment than the original Working Group assumed.

It is fitting, then, to close analysis of the Working Group proposal by considering four strategic questions:

##### *1. Can the Major Aspects of the Proposal be Severed and Adopted One at a Time?*

For various practical reasons, reformers often have to ask whether a partial loaf is better than none. Thus, although the Working Group believes that its proposal provides an appropriately comprehensive and measured way to significantly enhance the deliberation of California’s direct democracy, the question remains whether adopting the proposal piecemeal would be better than doing nothing.

I believe the answer is an emphatic yes. If “all” the first round of reform did was spur initiative proponents to think more systematically about the rationale for and effect of their contemplated legal changes—and to provide better notice about that to voters, their cue

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140. See *supra* note 41 and accompanying text.



givers, and judicial construers—this would be a major advance. Alternatively, if reformers were reluctant on substantive (or, more likely, political) grounds to impose additional disclosure requirements on proponents, “merely” providing a forum for discussing proposed initiatives so that others could meaningfully consider their pros and cons and identify likely effects, to the enlightenment of voters and cue givers, would also be a real improvement over the present system. In fact, the 2003 passage of Representative Laird’s A.B. 1245 in both houses of the California Legislature<sup>141</sup> suggests the importance and viability under different political circumstances of a reform proposal providing a public-hearing opportunity alone.

Of course, neither adopting notice nor providing for comment by itself would be as satisfactory as adopting the entire proposal. As with the administrative-rulemaking process, the more the initial notice from proponents helpfully addresses key concerns, the higher is the quality of later discussion and comment.<sup>142</sup> Matters discussed by public commentators, in turn, identify gaps in proponent explanations or suggest ways to enhance understanding via elaborations in the final notice.<sup>143</sup>

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141. See Laird & MacDonald, *supra* note 31.

142. As Richard Pierce, Sidney Shapiro, and Paul Verkuil observe:

Notice is the core of the informal rulemaking procedure. The agency’s notice of proposed rulemaking starts the process of framing the issues in a rulemaking by giving interested members of the public a target for critical comments. The notice consists of two parts, the proposed rule itself (or its substance) and the agency’s stated basis for proposing the rule. Interested members of the public need both parts to make effective comments on the proposal.

PIERCE ET AL., *supra* note 74, at 333-34.

143. See, e.g., *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985). One “purpose of the notice-and-comment procedure is . . . ‘to allow the agency to benefit from the experience and input of the parties who file comments.’” *Id.* (quoting *Nat’l Tour Brokers Ass’n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978)). Notice-and-comment “educates the agency, thereby helping to ensure informed agency decisionmaking.” *Id.* (citing *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980) and *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)).

2. *Should the Proposal be Triggered Later in the Initiative Process, After a Proposed Initiative has Qualified for the Ballot?*

The Working Group proposal would apply to every initiative proposal filed with appropriate state officials as a prelude to acquiring petition signatures. The obvious disadvantage of this—one the Group considered at length—is that it would trigger notice-and-comment procedures for many initiative proposals that never achieve the required signature support and, therefore, never make it onto the ballot prompting a voter response.

The number of ultimately “moot” proposals that would be covered by our proposed legislation would be significant. Only a little more than ten percent of the initiative proposals moving to the initial stage of being titled by the California Attorney General between 2000 and 2011 qualified for the ballot.<sup>144</sup> That is why many reform proposals only apply to initiative proposals unofficially or officially reaching the threshold of qualification for the ballot.<sup>145</sup> The reality that many initiative proposals do not make it to the ballot may also explain why the current statutory requirement that appropriate legislative committees hold legislative hearings on initiative proposals only applies to ballot-qualified initiatives.<sup>146</sup>

Still, only applying deliberation-enhancing procedures to ballot-qualified initiatives has some obvious downsides. It runs the risk that initiative proponents would postpone a careful assessment of proposal implications, including the specific identification of existing laws and legal precedents affected.<sup>147</sup> (At a minimum, proponents might not

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144. See *Initiative Totals by Summary Year 1912-2010*, CAL. SEC’Y OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/pdf/initiative-totals-summary-year.pdf> (last visited Nov. 17, 2011). From 2000 to 2010, 63 of 589 proposals qualified, for a qualification percentage of 10.7%. See *id.* For the entire run of direct democracy from 1912 to 2010, 348 proposals out of 1657 qualified, for a qualification percentage of 21%. See *id.*

145. See, e.g., S.B. 348, 1999-2000 Leg., Reg. Sess. (Cal. 1999) (Legislature would hold hearing thirty days after petition receives fifteen percent of necessary vote signatures).

146. CAL. ELEC. CODE § 9034 (West Supp. 2011) (“Upon certification of an initiative measure for ballot . . . [t]he appropriate committees shall hold joint public hearings on the subject of such measure . . .”).

147. It is difficult to determine how serious a problem this would be, in part because there is no hard data on the extent to which ill-conceived initiative

commit the assessment to a final and fully reviewed writing until they knew this was necessary, and it might be only when the assessment is finalized that problems are fully realized.) This downside could impact the quality of proposal design. The Working Group thought it important to systematically require careful, written consideration for all initiatives before they are submitted for petition signatures.

We also thought it desirable that proposals be subjected to informed discussion before they are submitted for petition signatures. That way, proponents would at least have the option to revise their proposals before submitting them to voter approval;<sup>148</sup> this would respond to a perennial complaint about the California initiative process: the inability of proponents to revise proposals after they are submitted for voter signatures, even when serious deficiencies have come to light.<sup>149</sup>

We further sought to encourage public discussion of initiative pros and cons at a time when it could influence petition signers. This may not be a significant gain if critics are correct that signature decisions are largely reflexive and unthinking, and the success or failure of signature drives depends ultimately on the financial resources of proponents.<sup>150</sup> Still, the Working Group thought it better

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proposals reflect failure to anticipate implications. Certainly, there is a subjective impression among initiative-process analysts that the problem of insufficiently well-conceived proposals is a real one. *See supra* text accompanying note 50.

148. Representative Laird's public-hearing proposal, A.B. 1245, would have similarly allowed proponents the *option* of resubmitting a revised proposal based on information learned at the hearing. *See Laird & McDonald, supra* note 31, at 306. S.B. 384, 1999-2000 Leg., Reg. Sess. (Cal. 1999) would have offered a similar resubmission opportunity to proponents wishing to make substantive changes to their proposals after legislative hearings that would have been triggered when the number of signatures on petitions reached fifteen percent of the total number required.

149. *See, e.g., DEMOCRACY BY INITIATIVE, supra* note 13, at 111 ("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 eliminate errors."); Laird & McDonald, *supra* note 31, at 304 (initiatives "usually are written in secret, with no public comment or hearings—and no opportunity for amendment to correct errors or confusing provisions" before post-adoption judicial review).

150. *See, e.g., id.* at 11 ("Money, rather than breadth or intensity of popular support, has become the primary threshold for determining ballot qualification in most instances.").

to err on the side of creating at least the *possibility* that voters deciding whether to sign petitions would have access to helpful information and cues.

Finally, the Working Group thought it advantageous to assure that expert discussion and debate about proposals' merits would occur sooner than later in the process; voters would then have access to the fruits of the comment period during the entire "election season" for ballot-qualified initiative proposals.<sup>151</sup>

3. *Would it Be Possible to Offer the Proposal on a Pilot-Test Basis or Provide Incentives for Proponents to Engage in Streamlined Notice-and-Comment Voluntarily?*

A California legislator with whom we discussed the Working Group proposal floated an interesting idea: perhaps to ease passage of a potential reform bill and to allow experimentation with the notice-and-comment process before it is adopted system wide, it could be offered on a voluntary, experimental basis.<sup>152</sup>

Brief preliminary brainstorming about the idea suggested that some proponents might undertake a pilot program of notice-and-comment out of a combination of public-spiritedness and self-interest. The latter attraction could relate both to the greater assurance our proposal would provide that sponsor intent would be faithfully followed in post-enactment judicial review and to the air of greater

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151. This aligns the Working Group proposal with former Assembly Member John Laird's proposal to hold a thirty-day public hearing on initiative proposals before they are submitted for signature gathering, *see* A.B. 1245, 2003-2004 Leg., Reg. Sess. (Cal. 2003), and reform proposals designed to move up the time frame in which current legislative hearings are held on ballot-qualified initiative proposals, *see supra* note 62 (summarizing A.B. 943, A.B. 1500, and S.B. 384); *see also* DEMOCRACY BY INITIATIVE, *supra* note 13, at 132 (Legislature should hold hearing on initiatives within twenty days after the Secretary of State determines that initiative qualifies for ballot).

It seems unlikely that voters and those cuing them would waste significant time under our notice-and-comment reform on initiative proposals with little chance of qualifying for the ballot. Savvy voters and system participants—that is, those most likely to pay attention to initial notices of proposed initiatory lawmaking or those who choose to participate in comment periods—could probably separate likely proposals from unlikely ones.

152. This suggestion is typical of the debt the Working Group owes to former Assembly member Lori Saldana (D-San Diego) and her staff.

credibility proposals run through notice-and-comment might acquire. (This credibility could be enhanced by, for example, according a special place on the ballot or a special designation in the ballot pamphlet, indicating that the proposal had undergone special public vetting.)<sup>153</sup>

Willing proponents could even be offered tangible “benefits”—such as a reduced signature requirement for qualifying their proposal—for voluntarily complying with notice-and-comment procedures. Allowing a proposal to qualify with a smaller percentage of voter signatures could be based on the theory that more careful forethought by proponents and more upfront discussion by interested parties substitutes partly for the indirect screening function performed by voter-signature requirements.

4. *Can (and Should?) the Proposal be Adopted by Simple Legislation, as Opposed to Voter-Approved Initiative or Constitutional Amendment?*

As a matter of legal authority, overlaying a streamlined notice-and-comment process, modeled on California’s administrative-rulemaking process, onto the initiative process could be accomplished by simple legislation without voter approval. Only fundamental substitutions for the present initiative process (e.g., establishing an “indirect initiative” process in which proponents must first propose their desired laws to the legislature and can only put them on the ballot after the legislature has refused to act) or system changes making it significantly more difficult to qualify or adopt ballot measures (e.g., raising percentage requirements for petition

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153. This would not be the first instance of offering special ballot positioning or designations as a valid reform. *See, e.g.*, A.B. 1359, 1997-1998 Leg., Reg. Sess. (Cal. 1997) (initiative proposals on same election ballot and deemed by Attorney General to potentially conflict would be grouped together on ballot); A.B. 679, 1997-1998 Leg., Reg. Sess. (Cal. 1997) (ballot measures submitted for voter approval by Legislature would be more clearly distinguished from proposals submitted by initiative proponents); DEMOCRACY BY INITIATIVE, *supra* note 13, at 244 (justifying need to “group conflicting propositions in the ballot pamphlet and on the ballot”). Note that similar incentives could be offered to encourage proponents to choose to have a public hearing; under our proposal, this is their choice, *see supra* text accompanying note 107, and incentives might be useful in encouraging them to choose to provide an in-person discussion forum.

signatures) must be proposed as constitutional amendments and/or submitted for voter approval.<sup>154</sup> The pattern of adopted and proposed initiative-process reforms bears this out.<sup>155</sup>

Whether submitting a notice-and-comment-style reform to voter approval—either as a referendum proposed by the Legislature or as an initiative submitted only to voters—is desirable in the absence of a legal requirement to do so poses a difficult tradeoff. The greater sense of public legitimacy voter approval would confer must be weighed against the irony that the very deficiencies in the current initiative process the Working Group proposal seeks to remedy could complicate its consideration or, worse yet, lead to its defeat.<sup>156</sup> The Working Group concluded that reform through legislation passed by the California Legislature was the better option—a judgment reflected in the large number of reform proposals considered in the California Legislature.<sup>157</sup>

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154. See Laird & McDonald, *supra* note 31, at 305-06 (“The California Constitution established the major parts of the initiative process, leaving only procedural parts for the Legislature to determine. [Reformers] could propose a major change by proposing an amendment to the California Constitution, but that would require a two-thirds vote in each house of the Legislature followed by a public vote. . . . The second option would be to make a statutory change to the procedural parts, which would only require a majority vote in each house . . . .” (citing CAL. CONST. art II, §§ 8-11)).

155. Compare, e.g., S.B. 1202, 2009-2010 Leg., Reg. Sess. (Cal. 2010) (proposed as Senate Bill) (would have required ballot pamphlets to list total contributions of “the top 5 contributors of \$50,000 or more to each primarily formed committee supporting each [initiative] measure”), and A.B. 1245, 2003-2004 Leg., Reg. Sess. (Cal. 2003) (adopted by both houses as Assembly Bill) (would have required public hearings before initiative proposals are submitted for petition signatures), with, e.g., A.C.A. 13, 2009-2010 Leg., Reg. Sess. (Cal. 2009) (proposed as Assembly Constitutional Amendment) (would have established alternative for Legislature to adopt versions of qualified initiatives), and A.C.A. 18, 2005-2006 Leg., Reg. Sess. (Cal. 2005) (proposed as Assembly Constitutional Amendment) (would have doubled initiative-petition percentage requirements for constitutional amendments and initiative statutes).

156. Brendan Bailey and I made the same point in our joint article. Smith & Bailey, *supra* note 10, at 262.

157. *Id.* at 271 (identifying eighty-seven initiative-reform proposals considered in the California Legislature from 1997 to 2010); see also *id.* app. B at 288-90 (indicating that none of the reform bills passed by both houses of the Legislature, and ultimately vetoed, were designed to be submitted for voter approval).

## CONCLUSION

In October 2011, California's direct democracy celebrated its 100th anniversary. The initiative process was originally intended as a progressive safety valve for individual citizens and grassroots movements challenging an elected legislature and executive widely perceived as in the pocket of powerful industries. Although it has morphed into an expensive and sophisticated political process involving focus-group-developed proposals and ballot-pamphlet statements, paid-signature gatherers, and the like, supporters of the initiative process contend that it still allows reforms out of favor with the interests and viewpoints entrenched in Sacramento to bypass the political establishment and become enacted. Critics of direct democracy see it as an expensive and overly complicated process captured by the very special interests and public officials it originally sought to take on.

This and other debates about the overall merits of the initiative process are likely to rage on. But the reality is that California's direct democracy isn't going anywhere.<sup>158</sup> Even though they readily understand the deficiencies of the process, Californians consistently voice majority support for having an alternative to passing legislation by elected representatives. Widespread support for direct democracy at the generic (and even symbolic) level even complicates the passage of well-meaning reform measures, which can be too easily framed as attacks on the people's essential prerogatives.

Perhaps the best anniversary present to give to the initiative process and to the Californians significantly affected by it is to make the existing process work better. As this Article and the Working Group Report demonstrate, the improved voter information and opportunities for expanded deliberation sought by past reformers can be meaningfully achieved by looking in a new direction. Recognizing the important parallels between lawmaking by voter initiative and rulemaking by administrative regulation allows reformers to selectively borrow from the informal notice-and-comment procedures routinely and successively used by a wide variety of California

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158. See MATHEWS & PAUL, *supra* note 16, at 175 (“[S]crapping direct democracy entirely is not a politically viable option.”).

administrative agencies. Important substantive and political advantages flow from this unexplored route.<sup>159</sup>

Adopting a streamlined system of notice-and-comment for initiatory lawmaking would, as the Working Group Report puts it, “give voters and those to whom voters look for meaningful cues the high quality, publicly vetted information they need . . . to make intelligent and positive decisions about initiative propositions.”<sup>160</sup> Initiative sponsors “would gain added assurance that courts would actually implement the results they seek to achieve through great effort and expense”—which, in turn “would receive more reliable tools for faithfully achieving the intent of California voters.”<sup>161</sup> Especially interested individuals and organizations “would have a forum for engaging in meaningful discussion about initiative proposals.”<sup>162</sup> Ultimately, a meaningfully targeted notice-and-comment system for California’s direct democracy could “improve the quality of initiative drafting, promote the rationality of the ensuing public campaign, and give voters a more informed basis upon which to cast votes on election day.”<sup>163</sup>

In one sense, then, the effort to bring more deliberation to California’s direct democracy is about nothing less than freeing up the state’s voters to “fully express their democratic heritage.”<sup>164</sup>

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159. It is gratifying that fifty-nine percent of 300 diverse Californians participating in a “Deliberative Poll” weekend discussion of “What’s Next California” initially supported a proposal to “create a process of legislative hearings or formal notice, comment and administrative review to clarify the proponents’ intent and revise the text of an initiative after it has been filed with the Attorney General.” See *Deliberative Poll, June 24-26, 2011: Poll Results*, WHAT’S NEXT CAL. 4, 15 (Aug. 20, 2011), <http://www.nextca.org/results/entry/summary>. It is even more gratifying that, after discussion of the proposal, support rose to seventy-six percent. *Id.*

160. See *infra* Appendix II. p. 61.

161. See *infra* Appendix II. p. 61.

162. See *infra* Appendix II. p. 61.

163. See *infra* Appendix II. p. 61.

164. See *infra* Appendix II. p. 62; accord *Brosnahan v. Brown*, 651 P.2d 274, 277 (Cal. 1982) (citing past California Supreme Court cases to declare that the right of California voters to adopt initiatives is “one of the most precious rights of our democratic process”).



## APPENDIX I

### PROPOSED LEGISLATION TO IMPLEMENT WORKING GROUP RECOMMENDATIONS

#### A. NEW STATUTORY LANGUAGE TO ESTABLISH NOTICE-AND-COMMENT- TYPE PROCEDURES FOR INITIATIVE PROPOSALS

*Proposed new California Election Code section 9001.1 [to immediately precede Election Code section 9002, which covers preparation of an initiative title and summary by the Attorney General, as predicates to circulation of initiative petitions for signatures]:*

- (a) Before submitting a draft of a proposed initiative measure to the Attorney General pursuant to Section 9002, the proponent of the proposed measure shall submit to the Secretary of State an initial notice of proposed initiative lawmaking, which shall include the following:
  - (1) A copy of the express terms of the proposed measure, including an addendum using underline, italics or strikeout to indicate how the measure would add to, or delete from, current provisions in the Constitution or laws of this State.
  - (2) An informative digest drafted in plain English in a format similar to the Legislative Counsel's digest on legislative bills. The informative digest shall include the following:
    - (A) A concise and clear summary of existing constitutional provisions, laws, regulations, and judicial decisions, if any, related directly to the proposed action and of the effect of the proposed measure on such constitutional provisions, laws, regulations, or judicial decisions.
    - (B) A policy statement overview explaining the broad objectives of the proposed measure and, if appropriate, the specific objectives.
    - (C) A concise and clear summary of how the particular sections, subsections, and provisions of the proposed measure are intended to operate together, including the intended effect of any provisos, exceptions, or other modifying clauses.

- (D) Any other information which in the judgment of the proponent could assist interested persons in understanding the justification for, and intended effect of, the proposed measure.
- (3) A statement as to whether the proponent requests that a public hearing be held on the proposed measure pursuant to subsection (b).
- (4) The name, address, telephone number, and email address of the representative of the proponent to whom inquiries concerning the proposed measure may be directed.
- (b)(1) Within 15 days of receipt of an initial notice of proposed initiative lawmaking required by subsection (a), the Secretary of State shall do the following:
- (A) Post the notice in a prominent place on the Secretary's official website.
  - (B) Mail or, as appropriate, email the notice to every person who has filed a request for notices of proposed initiative lawmaking with the Secretary. The Secretary shall give a person filing a request for notice the option of being notified of all proposed notices or being notified of notices concerning particular subject matter areas.
  - (C) When appropriate in the judgment of the Secretary, mail or, as appropriate, email a notice to any person or groups of persons whom the Secretary believes to be interested in the proposed measure.
  - (D) Take other actions which in the judgment of the Secretary will ensure appropriate notice for interested persons.
- (2) The actions specified in subsection (1) shall include notifying recipients of the time, place, and nature of proceedings for commenting on the initial notice of proposed initiative lawmaking.
- (c)(1) For a period of 45 days following the posting of an initial notice of proposed initiative lawmaking pursuant to subsection (b)(1), the Secretary shall afford any interested person, or his or her duly authorized representative, the opportunity to submit written statements, arguments or contentions about matters included in the initial notice. Such comments shall be promptly posted and appropriately indexed at a prominent place on the Secretary's official website.

- (2) When requested by the proponent of a measure pursuant to subsection (a)(3), the Secretary shall promptly convene a public hearing for the receipt of oral and written statements, arguments, or contentions. The Secretary may impose reasonable limitations on oral presentations and take other actions to facilitate the effectiveness of the hearing. The Secretary shall arrange for, and promptly post on the Secretary's official website, a transcript or recording of the public hearing.
- (d) After completion of the opportunity for comment by interest persons pursuant to subsection (c), the proponent of the proposed measure shall submit to the Secretary of State a final notice of proposed initiative lawmaking. Such final notice shall include the following:
- (1) A copy of the most recent version of the express terms of the proposed measure, including an addendum using underline, italics or strikeout to indicate how the measure would add to, or delete from, current constitutional or statutory provisions.
  - (2) An update of the information contained in the initial notice of proposed initiative lawmaking (as specified in subsection (a)(2)).
  - (3) A summary of each objection or recommendation made regarding the initial proposal, together with an explanation of how the proposed measure has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the proposed measure or to other matters in the initial notice. The proponent may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is "irrelevant" if it is not specifically directed at the proposed measure or other matters included in the initial notice.
- (e) Within 15 days of receipt of the final notice of proposed initiative lawmaking required by subsection (d), the Secretary of State shall do the following:
- (1) Post the notice at a prominently place on the Secretary's official website.
  - (2) Mail or, as appropriate, email the notice to every person who has filed a request for notices of proposed initiative lawmaking with the Secretary.

- (3) Mail or, as appropriate, email the notice to all interested persons, or their duly authorized representatives, submitting oral or written comments pursuant to subsection (c).
  - (4) Take other actions which in the judgment of the Secretary shall ensure appropriate notice for interested persons.
- (f)(1) A proposed initiative measure may not be submitted to the Attorney General pursuant to Section 9002 or subsequently circulated for voter signatures under the provisions of this Code until the initial and final notices required by subsections (a) and (d) are submitted to the Secretary and until the comment period required by subsection (c) is provided. Compliance or noncompliance with the provisions of this section shall not otherwise be subject to judicial review, and this section shall not be construed in any manner that results in the invalidation of an initiative lawmaking measure because of the alleged inadequacy of the content of the initial or final notices.
- (2) The provisions of this section apply only to initiative measures, not to referendum measures.

**B. NEW STATUTORY PROVISIONS TO AUTHORIZE JUDICIAL CONSULTATION  
OF INFORMATION CREATED DURING  
NEW NOTICE-AND-COMMENT PROCEDURES**

*Proposed new California Code of Civil Procedure section 1859.1 [to immediately follow current CCP section 1859, "Construction of statutes or instruments; intent"]:*

**THE INTENTION OF THE VOTERS AND INITIATIVE PROPONENTS.** In the construction of a law enacted by voter initiative, the intention of the voters is to be pursued, if possible; and in ascertaining such intent appropriate consideration shall be given to the intentions of proponents as expressed in the initial and final notices of proposed initiative lawmaking submitted pursuant to Election Code subsections 9001.1(a) and (d), including how final notices respond or fail to respond to statements, arguments or contentions made by interested persons during the comment period afforded by Election Code subsection 9001.1(c).

## APPENDIX II

### THE TAKING THE INITIATIVE WORKING GROUP\* FINAL 2009 REPORT\*\*

#### I. INTRODUCTION

##### A. *What We Propose*

The California initiative process is rooted in the optimism that ordinary citizens can improve California's legal system and society. This Report seeks to continue in that tradition by stimulating public discussion and consideration of a novel avenue for meaningful reform.

Unfortunately, the present system for considering and adopting legislation through voter initiative has two main problems:

1. Voters only dimly perceive the implications of initiative proposals.

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\* The Working Group consisted of California Western School of Law Professor Glenn Smith; then-California Western students Scott McClain, Andrea Gable-Mower, Jeremy Snider, Wil Wenzel, and Patricia Zlaket; and then-University of California, San Diego, undergraduate students Brendan Bailey and Jordon Ferguson.

\*\* 2011 NOTE FROM PROFESSOR GLENN SMITH: With a few exceptions, the version of the Report appearing as this Appendix is the version approved in February 2009 after months of drafting and deliberation by the contributors identified in the previous note. To respect the original collaborative process (and because it is unrealistic to expect the Report's far-flung authors to come together years later for yet another revision), no general attempt has been made to "update" the Report. (However, in adopting the excellent suggestions of *California Western Law Review* editors, I made some editorial changes to the text and added some citations and explanations to footnotes. I also made a few changes and additions reflecting the different context in which the Report is being published. Last, I added several notes referencing helpful sources published since 2009.)

Specifically, the Report's discussion of initiative-campaign dynamics, the limitations of "section 9304" legislative hearings on initiative proposals, and the like, seek to accurately portray the situation as of early 2009. It is my perception that few, if any, of the informational and deliberative problems discussed in this Report have abated substantially. Although this is unfortunate for Californians, it does at least assure the continued utility of the Report's discussion and recommendations.

2. Courts frequently guess about voter intent and undervalue or ignore indicators of sponsor intent.

As a result, misinterpretations and other unintended consequences abound.

An initiative process with enhanced disclosure and deliberation would benefit voters, initiative sponsors, public policy stakeholders, and courts. We believe that all these well-intentioned participants would benefit from adopting new legislation that would

1. require initiative sponsors to communicate more fully with the public about their legislative intent;
2. establish a meaningful yet manageable structure by which interested parties can discuss initiative proposals; and
3. authorize courts to rely on the public record generated by proposals 1 and 2. in decisions interpreting and applying initiatives that have been adopted into law.

Adoption of these proposals would greatly benefit California voters, who are asked to make important decisions at least twice a year when considering a wide array of ballot propositions. The reforms we propose would give voters and those to whom voters look for meaningful cues the high quality, publicly vetted information they need when serving as legislators; voters would be enabled to make intelligent and positive decisions about initiative propositions. Sponsors would gain added assurance that courts would actually implement the results they seek to achieve through great effort and expense. Individuals and organizations with a special stake in public policy issues would have a forum for engaging in meaningful discussion about initiative proposals. California courts would receive more reliable tools for faithfully achieving the intent of California voters. Ultimately, the changes we recommend would improve the quality of initiative drafting, promote the rationality of the ensuing public campaign, and give voters a more informed basis upon which to cast votes on election day.

### *B. Who We Are*

No one in the Taking the Initiative Working Group is a public official or has any presumed standing to identify wrongs or recommend improvements. Nor does anyone involved in the

publication of this Report have any vested interest in the outcome of a particular proposed initiative. We are a law professor who has studied and written about the California initiative process and public-spirited law school and undergraduate students. We acknowledge, and stand on the shoulders of, many reform-minded individuals and organizations proposing a broad range of reforms in the last several decades.

We spent months in collective and individual research and writing to produce this Report because we believe that adopting the reforms we propose would remedy serious deficiencies in how initiative proposals are explained to the public, debated, and interpreted in court. Without taking a position on the value of other proposed reforms, or even on the ultimate wisdom of legislating by initiative, we seek to cause a public conversation about the validity of tailoring California's notice-and-comment rulemaking procedures to the initiative context.

We do not present these proposals as the last word on a more informative and useful process for clarifying "initiatory intent." Rather, we seek to apply the methods we advocate by presenting our recommendations and seeking public comment. We hope to generate deliberation among the broad spectrum of private individuals, public officials, and reform-minded organizations which will need to work together to adopt meaningful initiative reforms so that California voters can fully express their democratic heritage.

## II. PROBLEMS WITH THE CURRENT INITIATIVE SYSTEM

### *A. Deficits in Information*

#### *1. California Voter Attitudes*

As a general matter, California voters are largely supportive of the initiative process. In a survey conducted in 2008 by the Public Policy Institute of California, "six in ten California residents and likely voters [felt] public policy decisions made by voters during the initiative process were probably better than decisions made by the governor and

legislature.”<sup>1</sup> There was little division along party lines on the issue of initiatives—55% of Democrats, 61% of Independents, and 64% of Republicans surveyed believed California voters make better public policy decisions than legislators and the governor.<sup>2</sup>

Yet, when the 2008 survey asked whether the initiative process is in need of reform, a very different picture emerged. “Nine percent of Californians [we]re very satisfied with the way the initiative process is working, but half (51%) [we]re only somewhat satisfied and one in three [we]re not satisfied.”<sup>3</sup> Similar sentiment emerged when the survey asked Californians whether the initiative process was in need of changes or “is basically fine the way it is.”<sup>4</sup> Sixty-four percent of respondents thought the process needed “major” or “minor” changes (with 36% percent voting for “major changes”).<sup>5</sup>

More significant are specific indications that majorities consistently feel inadequately prepared to vote on initiatives at present. Fifty-three percent of Californians directly reported in a September 2000 survey that they did not have “enough information to decide how to vote on citizens’ initiatives.”<sup>6</sup> Recognition of the deficits in information they receive about initiatives was also implicit in the 78% of Californians who reported in 2008 that the “ballot wording for citizens’ initiatives is often too complex to understand what would happen if a particular initiative passed.”<sup>7</sup>

A majority of voters also consistently tell surveyors that they would support reforms to improve deliberation. In the 2008 survey, 75% of those surveyed endorsed a system of review and revision for

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1. *Californians and the Initiative Process*, PUB. POLICY INST. OF CAL. (Nov. 2008), [http://web.archive.org/web/20081229064238/http://www.ppic.org/content/pubs/jtf/JTF\\_InitiativeJTF.pdf](http://web.archive.org/web/20081229064238/http://www.ppic.org/content/pubs/jtf/JTF_InitiativeJTF.pdf) (accessed by searching for the website address in the Internet Archive index).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. J. Fred Silva, *The California Initiative Process: Background and Perspective*, PUB. POL’Y INST. CAL. 27 (Nov. 2000), [http://www.ppic.org/content/pubs/op/OP\\_1100FSOP.pdf](http://www.ppic.org/content/pubs/op/OP_1100FSOP.pdf) (summarizing results of September 2000 survey).

7. *Californians and the Initiative Process*, *supra* note 1. Information overload is also reflected in the fifty-nine percent of respondents reporting in the same survey that “there are too many propositions on the state ballot.” *Id.*



all proposed initiatives to try to avoid legal issues and drafting errors.”<sup>8</sup> An earlier 1998 survey found 63% endorsed a more deliberative process, in which “[a]fter an initiative has qualified for the ballot, the Legislature would have a short time period to hold hearings on the initiative and to adopt technical or qualifying changes” which would be submitted to voters if initiative proponents agree.<sup>9</sup> Support for these reforms likely reflects a belief that more deliberation about initiatives would reduce drafting errors and avoid complicated legal issues arising with past ballot proposals.

## 2. *Problems with Previous Initiatives: Two Prominent Case Studies*

Most initiatives deal with new and complex issues about which voters lack expertise. This only increases the need for organized, effective communication to voters about the impact, cost, and potential legal (including constitutional) problems initiatives may present. Unfortunately, as analysts of the California initiative process have long noted, voters generally lack meaningful information on which to make intelligent decisions. A major cause of that lack of meaningful information is the absence of real venues for rational deliberation about the merits and implications of initiative proposals.

As indicative of the general view found in the available literature, we briefly summarize how Professor John Allswang’s book-length analysis of the initiative process<sup>10</sup> describes California voter experience with two high-profile initiatives: Proposition 63 in 1986<sup>11</sup> and Proposition 209 in 1996.<sup>12</sup>

Included on the November 1986 election ballot, Proposition 63 sought to amend the California Constitution to make English the official state language. Essentially, Proposition 63 sought to build on the popular Proposition 38, an “opinion measure” adopted by 71% of

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8. *Id.*

9. Silva, *supra* note 6, at 32.

10. See JOHN M. ALLSWANG, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA 1898-1998*, at 182-83, 208-09 (2000).

11. CAL. SEC’Y OF STATE, 1986 GENERAL ELECTION BALLOT PAMPHLET 44-47 (1986), available at [http://traynor.uchastings.edu/ballot\\_pdf/1986g.pdf](http://traynor.uchastings.edu/ballot_pdf/1986g.pdf).

12. CAL. SEC’Y OF STATE, 1996 GENERAL ELECTION BALLOT PAMPHLET 94 (1996), available at [http://traynor.uchastings.edu/ballot\\_pdf/1996g.pdf](http://traynor.uchastings.edu/ballot_pdf/1996g.pdf).

voters in 1984 expressing Californians' desire to print voting materials in English only.<sup>13</sup>

Professor Allswang's analysis of Proposition 63 points to serious problems from the standpoint of both voter information and deliberation.<sup>14</sup> The Proposition's language was imprecise and proposed no solution other than directing the Legislature to pass "appropriate legislation" to enact the Proposition.<sup>15</sup> Voters had little-to-no guidance as to what this "appropriate legislation" would include, how much it would cost, or what impact amending the California Constitution to include English as the official state language would have on that document, judicial precedents, or other aspects of state law.<sup>16</sup> Further, the majority of scrutiny for Proposition 63 came from the media. Opponents were highly unorganized and could not raise enough money to mount a viable fight against the proponents.

Professor Allswang further argues that, despite receiving support from 73% of the voters, Proposition 63 provided little more substance than Proposition 38 did two years earlier.<sup>17</sup> In addition to signifying a cultural split in the state,<sup>18</sup> Proposition 63 led to unanticipated repercussions. One was a lawsuit producing a 1988 decision from the U.S. Court of Appeals for the Ninth Circuit, vacated on procedural grounds, reading Proposition 63 as "primarily a symbolic statement."<sup>19</sup>

Proposition 209, Professor Allswang's second example among many, was the most controversial ballot measure in 1996. The Proposition proposed the general abolition of affirmative action plans in California.<sup>20</sup> Amid significant national debate on this subject, Proposition 209 supporters and opponents spent a considerable

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13. CAL. SEC'Y OF STATE, 1984 GENERAL ELECTION BALLOT PAMPHLET 51 (1984), available at [http://traynor.uchastings.edu/ballot\\_pdf/1984g.pdf](http://traynor.uchastings.edu/ballot_pdf/1984g.pdf).

14. See ALLSWANG, *supra* note 10, at 182-83.

15. *Id.* at 182.

16. See *id.*

17. *Id.*

18. *Id.* at 182-83.

19. Gutierrez v. Municipal Court, 838 F.2d 1031, 1044 (9th Cir. 1988), vacated *as moot*, 490 U.S. 1016 (1989).

20. ALLSWANG, *supra* note 10, at 208.

amount of money on advertising and support for their positions.<sup>21</sup> However, little information flowed to voters about the specific impact Proposition 209 would have on legislation and judicial precedents. Influential business interests sat out of the debate because they were not interested in aligning themselves with either side.<sup>22</sup>

Instead, California voters appeared to get the majority of their information on Proposition 209 from political candidates and inflammatory media coverage. Presidential candidate Robert Dole began promoting Proposition 209 during his later campaign stops in California, touting it as an anti-racism measure.<sup>23</sup> Opponents used the media to portray Proposition 209 as an extremely racist measure, and painted David Duke, a noted Ku Klux Klan member, as a supporter of the proposition.<sup>24</sup> In the end, Proposition 209 passed, but little information about its impact or cost reached the public. Proposition 209 was immediately the subject of litigation challenging its constitutionality.<sup>25</sup> The Proposition has been challenged in several subsequent lawsuits since 2000.<sup>26</sup>

The 1996 election involving Proposition 209 is also notable for two other phenomena. First, as the popularity of email and various internet sites rose in the mid-to-late 1990s, Proposition 209 proponents and opponents engaged in the first large-scale use of internet sites to disseminate information.<sup>27</sup> Even the new technology proved mostly futile in disseminating useful information to voters.<sup>28</sup> The sites were primarily accessed by those working on the campaign, or those already firmly on one side or the other of the various propositions.<sup>29</sup>

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21. *See id.* at 208-09.

22. *Id.* at 209.

23. *Id.*

24. *Id.* at 210.

25. *See Econ. Equity v. Wilson*, 122 F.3d 692, 697, 710-11 (9th Cir. 1997) (reversing district court's preliminary injunction barring implementation).

26. *See Coal. to Defend Affirmative Action v. Schwarzenegger*, No. 10-641 SC, 2010 WL 5094278, at \*2 (N.D. Cal. Dec. 8, 2010) (rejecting latest equal protection challenge and citing two others in 2000 and 2010).

27. ALLSWANG, *supra* note 10, at 208.

28. *Id.*

29. *Id.*

Second, the year 1996 also saw the rise of multi-proposition committees. These large committees both opposed and were in favor of a multitude of propositions, which led to voter confusion.<sup>30</sup> Allswang notes that one committee's name was especially mystifying—"Taxpayers Against Frivolous Lawsuits, No on Proposition 211, A Coalition of Seniors, Small Businesses, Taxpayers, High Technology, and Financial Services Companies and Associates (and oppose Propositions 207, 208, 210, 212, 214, 216, 217 and support Propositions 192, 200, 201, 202, 203, and 204)."<sup>31</sup> While there may be advantages to multi-purpose proposition committees, they can confuse voters looking for information about the specific impact of the various propositions.

The Proposition 63 and 209 examples noted above illustrate the problems this Working Group seeks to remedy by disseminating relevant and high-quality information to voters needing to make informed decisions about California initiatives. Lack of proper information not only frustrates and misleads voters, but leads to unnecessary litigation and delays in implementing voter initiatives. Unfortunately, as the studies of Professor Allswang and others suggest, the problems are not new, and have been ongoing for decades.

*B. The Lack of Detailed and High-Quality Information and Deliberation: The February 2008 Initiative Campaign as a Case Study*

To determine whether past information and deliberation deficits about initiatives continue into the present, our Working Group analyzed the information readily available to the general public about Propositions 92-99 and Propositions 1A-12—the initiative proposals on the February 5, 2008, primary election ballot; the June 3, 2008, primary election ballot; and in the November 4, 2008, general election.<sup>32</sup> Our assessment suggests three main conclusions:

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30. *Id.* at 207.

31. *Id.*

32. Proposition 91 was not addressed in the study because its proponents ultimately urged voters to "Vote No on 91" (because in their view, legislation had already incorporated their intended legal revisions). This quelled the debate on 91.

1. Proponents and opponents of the 2008 ballot propositions generally did not provide detailed or useful information. The two sides rarely engaged in actual debate or deliberation.
2. Other interest groups, political parties, and public officials to whom voters often look for guidance on public issues were surprisingly absent as providers of useful voting cues for the 2008 ballot items.
3. Because the previously mentioned outlets gave no noticeable cues, the media—which largely relies on those sources for their own reporting—provided limited help to voters seeking information regarding the ballot measures.

*1. Proponent/Opponent Information is Often Insufficient, Emotionally Charged, and Unresponsive to the “Other Side”*

Voters understandably look to initiative proponents and key opposition organizations for information about the rationale behind, and the likely implications of, ballot propositions. One problem with this information is that it is frequently incomplete about key issues. For example, the supporters of Proposition 93 on the February 2008 ballot, which would have shortened absolute term limits for the Legislature as a whole but removed term limits for each house, did not report that a majority of incumbent legislators would have their terms extended.<sup>33</sup> Another example comes from Propositions 94-97, which proposed to expand casinos on American Indian reservations. Opponents of these propositions argued that the proposed casino expansions would increase state gambling problems, yet opponents failed to disclose that the main funding behind this opposition itself came from tribes owning major gambling institutions.<sup>34</sup> (Even when

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*See* CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: FEBRUARY 5, 2008, PRESIDENTIAL PRIMARY ELECTION 10 (2007), *available at* <http://primary2008.sos.ca.gov/voterguide/lang/eng.pdf>. Although we reviewed every proposition in the November 4, 2008, election, we were only able to do in depth analysis of Propositions 4, 5, 6, and 9.

33. *See id.* at 20-21 (providing arguments for and against Proposition 93).

34. *See* CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE SUPPLEMENT: FEBRUARY 5, 2008, PRESIDENTIAL PRIMARY ELECTION 12-36 (2007), *available at* [http://primary2008.sos.ca.gov/voterguide/lang/english\\_sup.pdf](http://primary2008.sos.ca.gov/voterguide/lang/english_sup.pdf); *February 2008 Presidential Primary Election: About the Propositions*, CAL. VOTER

the “other side” ultimately provided this information, as noted below, the failure to “join” issues left voters with a skewed and incomplete basis for evaluating the claim.)

A second problem is that much of the information provided by initiative sponsors and detractors focuses less on rational details and more on emotionally charged (and often substantively tenuous) appeals. For example, proponents of several 2008 propositions evoked emotional themes of war, crime, and anti-terrorism. The Faculty Association of California Community Colleges supported Proposition 92, which would have increased funding for community colleges by \$300 million.<sup>35</sup> This group fielded a campaign song tying the cause of enhanced funding to themes of strife associated with military service.<sup>36</sup> Groups opposing Proposition 5, which mainly sought to divert drug abusers from incarceration to drug rehabilitation programs, stated that perpetrators of unrelated crimes (e.g., grand theft auto, child molestation, arson) can claim that a drug addiction forced them to commit that crime, and be diverted to a drug rehab program. They made this claim despite it not being in the statutory language of Proposition 5.<sup>37</sup> A group in support of Proposition 98, the Apartment Owners Association, likened opponents of the Proposition to terrorists.<sup>38</sup> Finally, instead of focusing on broader statistics or policy questions, supporters of Propositions 4 and 9 used anecdotal claims

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FOUND., <http://calvoter.org/voter/elections/2008/primary/props/index.html> (last visited July 28, 2008) (providing arguments against Propositions 95, 96, and 97).

35. See CAL. SEC’Y OF STATE, *supra* note 34, at 13-14.

36. See Blue Rain, *Proposition 92 Song*, FAC. ASS’N CAL. COMMUNITY COLLEGES, [www.facc.org/song.htm](http://www.facc.org/song.htm) (last visited July 28, 2008) (“A young soldier tryin’ to rebuild his life / Lookin’ towards the future for him and his wife / Spilled his blood for his country, now he’s lost the game / No money for school - no soldiers / Well who’s to blame?”).

37. CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: NOVEMBER 4, 2008, GENERAL ELECTION 39, 86-106 (2008), *available at* <http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf>.

38. Dan Fuller, *How to Protect Your Property Now Or.... Lose it Later!!*, APARTMENT OWNERS ASS’N NEWSL. (Apartment Owners Ass’n of Cal., Inc.), 2008, at 1, 3, *available at* <http://tenantstogether.org/downloads/AOANewsletter.pdf> (“Terrorists hit apartment owners with ‘explosives’ . . . Ever hear about the ‘suicide bombers’ who are terrorizing owners over the state? Of course, you have. They are our current day politicians who vote to forcibly seize your property rights.”).

about two girls being abused in order to persuade people to vote for their side.<sup>39</sup>

A third problem with information from principal supporters and opponents is that the traditional ballot-pamphlet forum allows each side to sidestep the other's arguments, thus failing to "join" the issues in a way that would provide illumination to voters. For example, supporters of the community-college-enhancing Proposition 92 failed to indicate how they would fund the increased financial support—even after their opponents pointed this out several times.<sup>40</sup> The proponents constantly responded that the proposition was neither going to raise taxes nor cut spending.<sup>41</sup> Although they adeptly stated where the funding was *not* going to come from, they simply did not answer the charge of the opposition—that, because Proposition 92 does not "identify a way to pay for all the new spending," it could lead to "politicians" raising sales or other taxes.<sup>42</sup> There is little incentive for either side to answer the other's questions, and thus such questions are ignored.

### 3. *Less than Illuminating "Backup" Cues from Other Interest Groups and Political Parties*

Initiative process observers note that voters pick up generalized "cues" and additional information about how to vote from interest groups or political parties to which they align.<sup>43</sup> Some might argue that such cue reading compensates for lack of detailed and useful

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39. CAL. SEC'Y OF STATE, *supra* note 37, at 28, 62. Proposition 4 required that parents be notified before a minor gets an abortion, and used "Sarah" as anecdotal evidence. *Id.* at 24-29. The actual existence of "Sarah" was a main contention in this debate. *See id.* at 28. Proposition 9 sought to have victims get involved in every step of the criminal justice process, prevent the substantial diminishment of criminal sentences, and lengthen the time between parole hearings for people sentenced to life. *Id.* at 58-61.

40. CAL. SEC'Y OF STATE, *supra* note 34, at 16-17; *see also* *Yes on Prop 92*, CALIFORNIANS FOR IMPROVING CMTY. COLLS., <http://prop92yes.com> (last visited July 28, 2008).

41. CAL. SEC'Y OF STATE, *supra* note 34, at 16-17.

42. *Id.* at 17.

43. *See, e.g.*, Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1149-59 (2003).

information and deliberation available to voters directly. If the experience with the 2008 elections is typical, however, meaningful cues are often lacking.

A large majority of key interest groups simply did not list a position or opinion on initiatives proposed on the February 2008 ballot.<sup>44</sup> A significant number of interest groups took “no position” on the Indian gaming propositions;<sup>45</sup> these groups merely stated, but did not explain, the basis for their neutrality. Given the significant defects noted above about the information and deliberations attending the Indian gaming propositions, this meant that the public was especially bereft of cues with which to navigate a generally unenlightening flood of print media, television, and radio advertising.

Even for that minority of interest groups which took generic “Yes” or “No” positions on 2008 ballot propositions, their positions tended to be accompanied by only the briefest of statements explaining their positions. The explanations generally rehashed the publicly available positions of supporters and opponents, and rarely provided new analysis or information to the voters. For example, the California Log Cabin Republicans stated: “Proposition 92-Community Colleges Funding. Governance. Fees. Oppose. More mandatory budgeting through the ballot box with no accountability.”<sup>46</sup> Another example was the *People’s Advocate Proposition Voter Guide*, which merely stated: “Prop 91: No Position/ Prop 92: NO/ Prop 93: NO!/ Prop 94,95,96,97: NO.”<sup>47</sup> The Lincoln Club of San Diego County

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44. Our researcher used a list of interest groups adapted from the California Voter Foundation and the California Progress Report in researching each proposition. The researcher searched more than 123 websites for information about each proposition; of these websites, 16% had information about Proposition 92, 12% had information about Proposition 93, and 10% on Propositions 94-97.

45. The propositions referred to are Propositions 94-97, which probably had the most television coverage and were the most politically charged at the time. Our researcher discovered that 50% of the organizations listing opinions for Propositions 94-97 declared themselves neutral, while 18% were neutral on Proposition 92, and 26% were neutral on 93.

46. LOG CABIN REPUBLICANS OF CAL., <http://web.archive.org/web/20080214112232/http://www.logcabin.org/logcabinca/index.html> (last visited Sept. 23, 2008) (accessed by searching for website link in the Internet Archive index).

47. *People’s Advocate Proposition Voter Guide*, PEOPLE’S ADVOCATE, <http://www.peoplesadvocate.org> (last visited Sept. 23, 2008) (screenshot on file with author).



stated in its pamphlet: “Proposition 98 Regulation of Private Property Vote Yes” and “Proposition 99 Eminent Domain Vote No.”<sup>48</sup> Even when organizations try to provide a bit more analysis, its relative brevity stops short of providing detailed explanations or persuading voters not already sympathetic to the organizations’ views. For example, the California Federation of Teachers’ opinion on Propositions 94-97 stated: “No 94-97. Amends Indian gaming compacts/ Codifies gambling deals that fail to protect work rights, protect the environment, or provide any funds to schools and colleges.”<sup>49</sup>

Nor were political parties and officials an especially rich source of cues for voters in the 2008 elections. A number of political party websites stated positions of neutrality on proposed initiatives. Even when parties took positions, they tended to advocate a bare “yes” or “no” vote without substantial further explanation—although the Green Party was a noted exception.<sup>50</sup> Further, it was even rarer for individual public officials, rather than their political parties, to post their positions on their websites for the February 2008 propositions.

### 3. *The General Lack of Meaningful Information from Media Sources*

The lack of meaningful information and deliberation from supporters, opponents, other interest groups, political parties, and officials had a derivative effect on media coverage of the February 2008 ballot propositions. Newspaper coverage available on the Internet generally repeated the summary arguments of supporters and opponents or reprinted portions of Legislative Analyst evaluations from the official ballot pamphlet. But media information did not

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48. *2008 Endorsed Ballot Measures*, LINCOLN CLUB OF SAN DIEGO CNTY., <http://www.sdlincolnclub.org/mc/page.do?sitePageId=61225&orgId=lcsdc> (last visited May 25, 2008) (screenshot on file with author).

49. *Legislative Matters*, CAL. FED’N OF TEACHERS, <http://www.cft.org/resources/leg/pdfs/cftslate08.pdf> (last visited Sept. 23, 2008).

50. For example, the party explained that it supported Proposition 92 because it guaranteed community college funding and was a good investment for California, and it opposed Proposition 93 as a ploy to keep a prominent Democratic officeholder in office. *See Green Voter Guide*, GREEN PARTY OF CAL., <http://cagreens.org/elections> (last visited Mar. 4, 2011).

significantly add to the total storehouse of information available to voters.

Typical of such articles was one published on December 13, 2007, in the *Press-Enterprise*, a newspaper covering Riverside County and surrounding areas. After briefly explaining that Proposition 92 (on the February 2008 ballot) sought to “roll back student fees and guarantee funding for California’s community colleges,” the article stated that “[p]owerful education groups such as the California Teachers Association, the University of California regents and Cal State trustees oppose the measure, which is supported by a coalition of community-college associations and faculty groups.”<sup>51</sup> The article then devoted five sentences to summarizing and quoting the positions of two proponents, characterized opponent positions in seven sentences summarizing several concerns and quoting a spokesperson for the California Teachers Association, and used four sentences to repeat budget estimates from “[t]he nonpartisan Legislative Analyst’s Office.”<sup>52</sup> (Media editorials generally followed a similar pattern.)<sup>53</sup>

#### *4. Two Bright Spots: Often Useful Legislative Analyst Perspectives and a Joint Cal Channel/CGS Project*

Experience with the initiative process in 2008 was not uniformly disappointing. Although the actual arguments on the ballot pamphlet

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51. Elaine Regus, *Community-College Ballot Measure Not an Easy Sell to Educators*, PRESS-ENTERPRISE (Riverside, Cal.) (Dec. 13, 2007), <http://www.scrippsnews.com/node/29145>.

52. *Id.*

53. See, e.g., Editorial, *No on 92: Bad Ballot Box Budgeting*, BAKERSFIELD CALIFORNIAN (Jan. 3, 2008), <http://www.bakersfield.com/opinion/editorials/x41286912/No-on-92-Bad-ballot-box-budgeting> (summarizing proponent arguments in three sentences, summarizing opponent rebuttals in seven sentences, noting that “[f]unding concerns are pitting two of the state’s most powerful teachers unions against each other,” and citing the estimate of funding and budget impacts from “Legislative Analyst Elizabeth Hill”); Editorial, *No on 94, 95, 96, 97: Sucker Bets We Can’t Win*, MODESTO BEE (Jan. 17, 2008), [http://digital.library.ucla.edu/websites/2008\\_999\\_002/nounfairdeals.com/blog/no-on-94-95-96-97-sucker-bets-we-cant-win/default.htm](http://digital.library.ucla.edu/websites/2008_999_002/nounfairdeals.com/blog/no-on-94-95-96-97-sucker-bets-we-cant-win/default.htm) (briefly characterizing Governor Arnold Schwarzenegger’s “optimistic” state-revenue-increase projections from expanded Indian gaming, countering them with “much smaller” prediction from “the nonpartisan Legislative Analyst Office,” and summarizing proponent and opponent positions on whether tribes could abuse “serious loopholes” in how state revenues are calculated).

generally failed to provide detailed and helpful information, another part of the ballot pamphlet often did. The Legislative Analyst's initiative summary often provided voters with an overview of the broad outlines of initiatives and gave some useful details, especially about fiscal and legal implications.<sup>54</sup> Even so, on occasion the Analyst's mission to remain unbiased appeared to restrict the Analyst from fully disclosing useful information. This can be seen with Proposition 8, the simplest and most contentious of the propositions on the November ballot.<sup>55</sup> The Legislative Analyst stated that the California Supreme Court had invalidated Proposition 22 (the statutory predecessor of Proposition 8), but failed to explain the court's rationale.<sup>56</sup> Regarding Proposition 9, the Analyst stated that the Proposition may conflict with a federal court case, *Valdivia v. Schwarzenegger*, but the Working Group does not feel that the

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54. These analyses vary significantly as to detail and specificity. For example, the Legislative Analyst's analysis for Proposition 5 (a November 2008 ballot proposal entitled "Nonviolent Drug Offenses, Sentencing, Parole and Rehabilitation") ran more than 5,000 words and provided a summary of the proposal's basic effects, a discussion of the three-track drug-treatment-diversion programs the initiative proposed to set up (replete with a chart listing which offenders would be included and excluded from each track), a detailed description of how the initiative proposal would otherwise change existing parole and rehabilitation programs, and a table and multi-part discussion detailing major fiscal effects. CAL. SEC'Y OF STATE, *supra* note 37, at 30-37. By contrast, the analysis for Proposition 2 (a November 2008 ballot proposal entitled "Standards for Confining Farm Animals") ran fewer than 500 words, briefly described current animal cruelty laws, summarized the proposal in two sentences, and concluded that if "higher production costs" associated with different animal-handling practices "cause some farmers to exit the business, or otherwise reduce overall production and profitability, there could be reduced state and local tax revenues" of an "unknown" magnitude "potentially in the range of several million dollars annually." *Id.* at 17. The analysis also noted "unknown, but probably minor, local and state costs for enforcement and prosecution" that would be "practically offset by revenue from the collection of misdemeanor fines." *Id.* The analysis did not speculate about the cost issue likely to be even more on the minds of voters: impact on food prices.

55. Proposition 8 overturned a May 2008 ruling by the California Supreme Court holding that laws refusing to recognize same-sex marriage violated the equal protection clause of the California Constitution. *See* CAL. SEC'Y OF STATE, *supra* note 37, at 55. The proposition amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." *Id.* at 128.

56. *See id.* at 55.

Analyst gave an adequate explanation of the case.<sup>57</sup> (The bigger problem is that, by inherent design, the Legislative Analyst's input can neither speak authoritatively for initiative sponsors nor adjudicate the conflicting or incomplete claims of both sides.)

The 2008 general election had an especially extensive ballot. Voters had to concentrate on their Presidential choice, their Assembly Member choice, and a number of local elections. Moreover, there were twelve ballot propositions, of which ten would have added statutes or constitutional amendments by voter initiative; these voter-initiated propositions spanned a wide variety of important topics requiring sophisticated decisions.<sup>58</sup> In response to this, certain groups sought to provide useful, unbiased information. Most notably, the Center of Governmental Studies' "Video Voter" project provided short statements by and interviews with one proponent and one opponent of eight of the propositions on the 2008 election ballot.<sup>59</sup>

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57. *See id.* at 60.

58. The table of contents of the 144-page *Voter Information Guide* for the November 2008 general election listed the ten initiatives as follows:

Proposition 2: Standards for Confining Farm Animals. Initiative Statute.

Proposition 3: Children's Hospital Bond Act. Grant Program. Initiative Statute.

Proposition 4: Waiting Period and Parental Notification Before Termination of Minor's Pregnancy. Initiative Constitutional Amendment.

Proposition 5: Nonviolent Drug Offenses. Sentencing, Parole and Rehabilitation. Initiative Statute.

Proposition 6: Police and Law Enforcement Funding. Criminal Penalties and Laws. Initiative Statute.

Proposition 7: Renewable Energy Generation. Initiative Statute.

Proposition 8: Eliminates Right of Same-Sex Couples to Marry. Initiative Constitutional Amendment.

Proposition 9: Criminal Justice System. Victims' Rights. Parole Initiative Statute.

Proposition 10: Alternative Fuel Vehicles and Renewable Energy. Bonds. Initiative Statute.

Proposition 11: Redistricting. Initiative Constitutional Amendment and Statute.

CAL. SEC'Y OF STATE, *supra* note 37, at 3. (Two other propositions on the November ballot, Propositions 1 and 12, were bond-issue proposals (relating to high-speed rail bonds and bonds relating to veterans services, respectively) placed on the ballot by the California Legislature. *Id.*)

59. *Interviews*, VIDEO VOTER, <http://www.videovoter.org/index.php?option=>

Although brief and one-sided, these statements and interviews could have modestly facilitated voter education by pointing voters toward sources of useful information.<sup>60</sup>

*C. Legislative Public Hearings on Proposed Initiatives: A Promising Idea Not Yet Fully Realized*

California law already provides one further, potentially useful source of information about proposed initiatives beyond what is provided in the ballot pamphlet. Section 9034 of the California Elections Code obligates “appropriate committees” of the California Senate and Assembly to “hold joint public hearings on the subject of [each initiative measure certified to appear on the ballot] at least thirty days prior to the election date for the initiative.”<sup>61</sup> Admittedly, these legislative hearings are not intended to provide the kind of in-depth information and deliberations among interested persons recommended by our Working Group; nor does the text of section 9034 ensure that the information will be provided before the beginning of the initiative campaign period, thus assuring maximum voter consideration.<sup>62</sup> Still,

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com\_content&view=article&id=174&Itemid=98 (last visited May 1, 2011); *Statements*, VIDEO VOTER, [http://www.videovoter.org/index.php?option=com\\_content&view=article&id=175&Itemid=97](http://www.videovoter.org/index.php?option=com_content&view=article&id=175&Itemid=97) (last visited Nov. 18, 2011). Video Voter recorded only a proponent statement and interview for Proposition 2, and only opponent statements and interviews for Propositions 4 and 8. There were no statements or interviews for Proposition 12.

60. 2011 NOTE FROM PROFESSOR GLENN SMITH: The “Archive” section of the Video Voter website does not contain similar proponent/opponent statements or interviews for later elections. Instead, Video Voter’s more recent voter-education efforts appear to emphasize “Voter Minutes”—in which a CGS staffer narrates “short explainer videos that provide a concise overview of a ballot measure[], for instance: what a yes or no vote means, who is for and against a measure, and where one can go for more information.” See *Voter Minutes*, VIDEO VOTER, [http://videovoter.org/index.php?option=com\\_content&view=article&id=102&Itemid=37](http://videovoter.org/index.php?option=com_content&view=article&id=102&Itemid=37) (last visited Nov. 11, 2011).

61. CAL. ELEC. CODE § 9034 (West 2008).

62. Specifically, the current joint legislative hearing format lacks a mechanism to require initiative sponsors to provide detailed information about the scope and application of their proposals. And even if legislative hearing conveners secured the participation of all major organizations supporting and opposing a particular ballot measure—which would itself be a Herculean task for particularly significant or controversial propositions—nothing in the legislative-hearing format would require

consistently held and readily accessible legislative hearings would give voters direct and indirect recourse to additional potentially useful information about the scope and application of proposed ballot measures.

Unfortunately, if the experience with February 2008 initiative proposals is typical, section 9034 legislative hearings are neither uniformly conducted nor readily accessible to even highly diligent researchers. One of our Working Group members who has substantial experience in research methodologies conducted a comprehensive search for hearings on Propositions 91 through 97. Our member could only find information hearings on Proposition 92 (relating to funding for community colleges) and Proposition 93 (relating to legislative term limits).

Even these hearings would have been very hard for a voter researcher to uncover. Searching the Senate and Assembly websites for information on hearings about proposed initiatives is a time-consuming endeavor yielding few, if any, results relating to proposed initiatives.<sup>63</sup> Nor are searches for public hearings through a generic internet-search engine likely to yield useful results. Such a search

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those testifying to engage to meaningfully “join issues” and respond to each other’s arguments. Further, as noted below, present judicial approaches to initiative construction would not credit any statements made by sponsors at these hearings; there would be little incentive to use the hearings to make useful legislative history. Finally, the timing provision of section 9034 guarantees that the joint hearings are held after the initiative is qualified for the ballot, and they can take place as late as thirty days before the election. Thus, whatever useful information and deliberation these hearings prompt comes later in the process than the sponsor disclosure and notice-and-comment processes this Working Group proposes. Our procedures would ensure that improved information on proposed initiatives is available at the start of the campaign.

63. At least as of September 14, 2008, the date on which the websites described here were last visited, the California Legislature’s website pointed to hearings in the Legislature’s “Daily File”—a daily publication referencing the Legislature’s activities, including committee hearings. *See* CAL. ST. LEGISLATURE, <http://www.legislature.ca.gov> (last visited Sept. 14, 2008). Unfortunately, the only way a member of the public could have received this information was to access the website on a daily basis and search through the hearings for that day. The California Senate and Assembly Committee websites had links to hearings, however, very few of these links include hearings for propositions on the ballot. *See* CAL. ST. ASSEMBLY, <http://www.assembly.ca.gov/defaulttext.asp> (last visited Sept. 14, 2008); CAL. ST. SENATE, <http://www.senate.ca.gov> (last visited Sept. 14, 2008).

conducted by the Working Group member produced an overwhelming amount of information, none of which had to do with legislative hearings on initiatives. The experience with the February 2008 election further shows that voters able to learn of the hearings that were conducted would still have had difficulty accessing them.<sup>64</sup>

In sum, while the intent of section 9034 is admirable, the execution appears to be lacking. Information on the required public hearings is very difficult for even the most diligent searcher to access. This, combined with the inevitable realities that section 9034 hearings will not likely trigger an in-depth interchange between initiative sponsors and opponents and that the required hearings may come late in the process of voter consideration, suggest that legislative hearings are unlikely to provide the kind of detailed information and deliberation this Report recommends.

*D. Current California Judicial Approaches to Initiative  
Interpretation: Ongoing Frustration for Sponsors,  
Voters, Courts, and the Law*

So far the discussion has focused on difficulties preceding enactment of ballot propositions. However, other difficulties occur *after* initiatives are adopted—specifically, when California courts are called upon to interpret the intent and application of enacted initiatives during subsequent lawsuits. The Working Group reviewed forty-one

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64. The California Legislature website did provide links to listen to hearings. See *Hearings and Events, Audio and Television Information*, CAL. ST. LEGISLATURE, [http://www.legislature.ca.gov/the\\_state\\_legislature/calendar\\_and\\_schedules/audio\\_tv.html](http://www.legislature.ca.gov/the_state_legislature/calendar_and_schedules/audio_tv.html) (last visited Sept. 14, 2008). However, this service was limited to that day's hearings; previous hearings were not available. The hearings may also have been broadcast on the California Channel, which is available on television or over the Internet. See CAL. CHANNEL, <http://www.calchannel.com> (last visited Sept. 14, 2008). But again, even a motivated voter might have faced formidable barriers. From the main website for the California Legislature, there was no direct link to the California Channel. Not until the researcher entered the Senate or Assembly website could he access the Channel's website. Upon reaching the website, it was difficult to maneuver—in order to find hearings, the researcher first had to select "Webcasts" then "Search Archives." Then, the researcher had to type in the proposition number in order to find any hearings. The amount of time and effort it took to find information and access public hearings on the California Channel made it very difficult for a voter to find the information he or she needed.

California Supreme and appellate court decisions cited and analyzed in law review articles written by Professor Jane Schacter<sup>65</sup> and Working Group member Professor Glenn Smith.<sup>66</sup> These articles, and the judicial opinions they cite—opinions categorized by issue and date of decision in Table 1, appearing at the end of this section—indicate common deficiencies in the approach California courts have used for decades in interpreting the meaning of voter-passed initiative legislation.

Voter-passed initiatives often end up in court. Competing litigants argue extensively (and expensively) about the proper interpretation of initiative language, and substantial judicial energy must be devoted to answering questions of initiative intent and application.<sup>67</sup> In these initiative-interpretation cases, California courts typically take the same approach as when interpreting laws passed by the California Legislature. First, the courts review the plain language of the statute passed by the initiative; at this stage, courts may use a variety of rules and presumptions of statutory construction. If the language of the statute remains ambiguous, the courts look to other information presented to voter-legislators when the initiative was passed. This information includes ballot pamphlets and Legislative Analyst Office reports available for the election. Occasionally, courts reference existing statutes and cases to harmonize them with the adopted initiative. However, California courts have repeatedly declined to consider other evidence about the intent of the initiative's sponsors because this intent was not officially communicated to voters.

If all this effort produced uniformly reliable and accurate judicial interpretation, consistently honoring the intentions of voters and

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65. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 *YALE L.J.* 107 (1995).

66. Glenn C. Smith, *Solving the "Initiatory Construction" Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 *U. COLO. L. REV.* 257 (2007).

67. Initiatives are often subject to a different kind of legal challenge in which opponents argue that an initiative is void because it is procedurally or constitutionally defective. Although initiative-sponsor intent may be considered in a judicial analysis for procedural or constitutional compliance, it is in interpreting legally validated initiatives that courts centrally address questions of application and intent (the focus of this section).



initiative sponsors, then the time and expense would be worthwhile. However, a decade and a half of research and scholarly commentary suggests that, to the contrary, the current judicial approach to interpreting initiatives is seriously flawed.

The problems begin with the way California courts focus on the “intent of the voter.” On a superficial level, this focus on voter intent makes sense. Initiative voters stand in the shoes of legislators, and California courts traditionally seek to determine legislators’ intent in giving meaning to representative-enacted laws. However, the voter-legislator analogy has its limitations because voters generally lack detailed and authoritative information on which to base their decisions. Given current deficits in information and deliberation, voters are unlikely to form a sophisticated understanding or “intent” about how the provisions in an initiative might apply to the full range of problems the initiative seeks to address. It is even more difficult for voters to form an intent with respect to how initiatives should interact with each other, or how they may affect current statutes and judicial decisions. Voters, even more than legislators, are likely to defer the details to the experts who draft, and advocate on behalf of, proposed laws. After all, voters lack staff, access to public hearings, and the many other sources of official and unofficial information routinely available to legislators.

The current judicial approach to initiative construction assigns an often-unrealistic degree of specific intent to voters. One 2005 California Supreme Court decision attributed to California voters the specific intent that “the trial court’s discretionary authority under Penal Code section 1170.19, subdivision (a), to commit a minor to the Youth Authority applies only when the minor meets the eligibility requirements of Welfare and Institutions Code section 1732.6.”<sup>68</sup> The court found that the electorate developed this specific intention even though “resolving this issue require[d] the interpretation and cross-referencing of five statutes from two different codes.”<sup>69</sup> It implies no disrespect for California voters to doubt that they in fact arrived at any such sophisticated understanding. More likely, the interpreting judges reached this view on their own and, thinking it imminently logical, attributed it to the voters.

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68. *People v. Thomas*, 109 P.3d 564, 565 (Cal. 2005).

69. *Id.* at 568.

Current California initiatory construction is curious in another way. As the California Supreme Court made clear in a 2003 decision, California courts interpreting initiatives are forbidden from consulting “evidence of the drafters’ intent that was not presented to the voters.”<sup>70</sup> This means that only the brief, general, and often emotional sponsor sentiments expressed in ballot-pamphlet arguments are admissible to solve complex initiative-construction problems. California courts generally ignore detailed evidence about the intentions of the individuals and organizations who draft and sponsor initiatives—those who have thought most deeply about initiatives and on whose judgment the voter significantly depends. This current approach to initiative interpretation contrasts sharply with the method used by courts to interpret laws passed by the legislature; in the legislation context, courts consider and credit a wide variety of evidence about the specific and strategic goals of sponsors.

The judiciary’s general refusal to consider sponsor intent may reflect in part an admirable respect for California voters. It also likely shows suspicions about the reliability of expressions of sponsor intent not placed “on the record.” Courts may validly fear that sponsor statements outside of the ballot-pamphlet context will be misleading, careless, or inaccurate.<sup>71</sup> If so, great value would flow from adopting the effective and cost-efficient procedures we propose. If initiative sponsors could reliably and specifically declare their intentions and have a constructive dialogue with interested persons—one that would as a by-product further clarify and refine sponsor intent—courts would be more likely to use detailed and reliable indications of sponsor intent.

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70. *Robert L. v. Superior Court*, 69 P.3d 951, 958 (Cal. 2003).

71. Ironically, the present judicial posture may *encourage* irresponsible statements by some sponsors by assuring them that irresponsible or misleading advocacy in forums other than the ballot-pamphlet would not be “used against them” when their initiatives are construed.

TABLE 1: HOW INITIATIVES END UP IN COURT: LITIGATED DISPUTES OVER THE MEANING OF ADOPTED INITIATIVES IN SELECTED CALIFORNIA CASES (BY INTERPRETIVE ISSUE RAISED AND DECISION DATE)<sup>72</sup>

Issue: How Initiative Interacted with California Constitutional Provisions

- \*Silicon Valley Taxpayers Ass'n v. Santa Clara Cnty. Open Space Auth., 30 Cal. Rptr. 3d 853 (Ct. App. 2005).
- \*Hi-Voltage Wire Works v. City of San Jose, 12 P.3d 1068 (Cal. 2000).
- People v. Jones, 857 P.2d 1163 (Cal. 1993).
- \*Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n, 799 P.2d 1220 (Cal. 1990).
- \*People v. Castro, 696 P.2d 111 (Cal. 1985).

Issue: How Initiative Interacted with Other California Statutory Provisions

- \*People v. Thomas, 109 P.3d 564 (Cal. 2005).
- \*In re Brent F., 30 Cal. Rptr. 3d 833 (Ct. App. 2005).
- \*Knight v. Superior Court, 26 Cal. Rptr. 3d 687 (Ct. App. 2005).
- \*Tain v. State Bd. of Chiropractic Med., 30 Cal. Rptr. 3d 330 (Ct. App. 2005).
- \*Robert L. v. Superior Court, 69 P.3d 951 (Cal. 2003).
- \*Hodges v. Superior Court, 980 P.2d 433 (Cal. 1999).
- \*Horwich v. Superior Court, 980 P.2d 927 (Cal. 1999).
- People v. Jones, 857 P.2d 1163 (Cal. 1993).
- People v. Meyers, 858 P.2d 301 (Cal. 1993).
- DaFonte v. Up-right, Inc., 828 P.2d 140 (Cal. 1992).
- Whitman v. Superior Court, 820 P.2d 262 (Cal. 1991).
- Curl v. Superior Court, 801 P.2d 292 (Cal. 1990).
- Travelers' Indem. Co. v. Gillispie, 785 P.2d 500 (Cal. 1990).
- People v. Burton, 771 P.2d 1270 (Cal. 1989).
- People v. Guerrero, 748 P.2d 1150 (Cal. 1988).

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72. Cases denoted by an asterisk are referenced in Glenn C. Smith, *Solving the "Initiatory Construction" Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257 (2007). All other cases are referenced in Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

People v. Anderson, 742 P.2d 1306 (Cal. 1987).  
 People v. Woodhead, 741 P.2d 154 (Cal. 1987).  
 People v. Fritz, 707 P.2d 833 (Cal. 1985).  
 People v. Jackson, 694 P.2d 736 (Cal. 1985).  
 \*People v. Skinner, 704 P.2d 752 (Cal. 1985).  
 People v. Weidert, 705 P.2d 380 (Cal. 1985).  
 People v. Bigelow, 691 P.2d 994 (Cal. 1984).  
 People v. Turner, 690 P.2d 669 (Cal. 1984).

Issue: How Initiative Interacted with Prior California Judicial Decisions

\*Tain v. State Bd. of Chiropractic Med., 30 Cal. Rptr. 3d 330 (Ct. App. 2005).  
 People v. Guerrero, 748 P.2d 1150 (Cal. 1988).  
 People v. Anderson, 742 P.2d 1306 (Cal. 1987).  
 People v. Hendricks, 737 P.2d 1350 (Cal. 1985).  
 \*People v. Skinner, 704 P.2d 752 (Cal. 1985).  
 People v. Turner, 690 P.2d 669 (Cal. 1984).

Issue: How Initiative Interacted with Other Ballot Propositions

\*Armijo v. Miles, 26 Cal. Rptr. 3d 623 (Ct. App. 2005).  
 \*Knight v. Superior Court, 26 Cal. Rptr. 3d 687 (Ct. App. 2005).  
 Gerken v. Fair Political Practices Comm'n, 863 P.2d 694 (Cal. 1993).  
 Yoshisato v. Superior Court, 831 P.2d 327 (Cal. 1992).  
 \*Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n, 799 P.2d 1220 (Cal. 1990).

Issue: Whether Initiative Applied Retroactively

\*Armijo v. Miles, 26 Cal. Rptr. 3d 623 (Ct. App. 2005).  
 Tapia v. Superior Court, 807 P.2d 434 (Cal. 1991).  
 Evangelatos v. Superior Court, 753 P.2d 585 (Cal. 1988).  
 People v. Garcia, 684 P.2d 826 (Cal. 1984).

Issue: How Criminal-Law Change Intended to Affect Defendants

\*People v. Thomas, 109 P.3d 564 (Cal. 2005).  
 \*In re Brent F., 30 Cal. Rptr. 3d 833 (Ct. App. 2005).  
 \*Robert L. v. Superior Court, 69 P.3d 951 (Cal. 2003).  
 In re Littlefield, 851 P.2d 42 (Cal. 1993).

People v. Jones, 857 P.2d 1163 (Cal. 1993).  
 People v. Meyers, 858 P.2d 301 (Cal. 1993).  
 Whitman v. Superior Court, 820 P.2d 262 (Cal. 1991).  
 Curl v. Superior Court, 801 P.2d 292 (Cal. 1990).  
 In re Harris, 775 P.2d 1057 (Cal. 1989).  
 People v. Andrews, 776 P.2d 285 (Cal. 1989).  
 People v. Burton, 771 P.2d 1270 (Cal. 1989).  
 People v. Griffin, 761 P.2d 103 (Cal. 1988).  
 People v. Guerrero, 748 P.2d 1150 (Cal. 1988).  
 People v. Guzman, 755 P.2d 917 (Cal. 1988).  
 People v. Anderson 742 P.2d 1306 (Cal. 1987).  
 People v. Woodhead, 741 P.2d 154 (Cal. 1987).  
 People v. Balderas, 711 P.2d 480 (Cal. 1985).  
 People v. Boyd, 700 P.2d 782 (Cal. 1985).  
 \*People v. Castro, 696 P.2d 111 (Cal. 1985).  
 People v. Fritz, 707 P.2d 833 (Cal. 1985).  
 People v. Hendricks, 737 P.2d 1350 (Cal. 1985).  
 People v. Jackson, 694 P.2d 736 (Cal. 1985).  
 People v. Skinner, 704 P.2d 752 (Cal. 1985).  
 People v. Weidert, 705 P.2d 380 (Cal. 1985).  
 People v. Bigelow, 691 P.2d 994 (Cal. 1984).  
 People v. Turner, 690 P.2d 669 (Cal. 1984).

Issue: How Civil-Law Change Intended to Affect Various Parties

\*Hodges v. Superior Court, 980 P.2d 433 (Cal. 1999).  
 \*Horwich v. Superior Court, 980 P.2d 927 (Cal. 1999).  
 DaFonte v. Up-right Inc., 828 P.2d 140 (Cal. 1992).  
 Travelers' Indem. Co. v. Gillispie, 785 P.2d 500 (Cal. 1990).

### III. RECOMMENDATIONS

#### *A. Variations on a Familiar Theme: Greater Information and Consultation*

Our Working Group is not the first to suggest that the California initiative process is in need of improvements to better serve California voters. Nor is our group the first to suggest improvement at the fundamental deliberative level—improved information to voters, improved sponsor disclosure, and improved collaboration with

interested parties. Other organizations<sup>73</sup> have undertaken similar studies in California and recommend reforms with themes similar to those sounded in our “Taking the Initiative” Report. California legislators have also introduced and seriously considered reforms to make the initiative process more deliberative.<sup>74</sup>

First, previous reformers sought to provide more detailed information for voters in a variety of ways. These suggestions range from use of new technology to improve existing information-dissemination techniques. One suggestion, for example, is to change areas of the Secretary of State’s website to create a more user-friendly environment for voters accessing information.<sup>75</sup> Other suggestions

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73. Among those included is the Center for Governmental Studies (CGS), a non-profit, non-partisan organization committed to creating innovative political and media solutions to help individuals participate more effectively in their communities and governments. Also considered is the Public Policy Institute of California (PPIC), a non-profit organization dedicated to informing and improving public policy in California through independent, objective, nonpartisan research. Additionally, the work of the National Conference of State Legislators (NCSL), the Center for Policy Alternatives (CPA), and the Ballot Initiative Strategy Center Foundation (BISCF) were also included. 2011 NOTE FROM PROFESSOR GLENN SMITH: The Of-Counsel Attorney and President of the Center for Governmental Studies elaborated on the organization’s initiative-deliberation-enhancing proposals in a recent article. See Nora Kashani & Robert Stern, *Making California’s Initiative Process More Deliberative*, 47 CAL. W. L. REV. 311 (2011).

74. 2011 NOTE FROM PROFESSOR GLENN SMITH: After the finalization of the Working Group Report—and based on extensive background research done for it by Group member Brendan Bailey—he and I wrote a comprehensive article surveying the last fourteen years of legislative reform proposals and highlighting proposals relating to deliberation enhancement. See Glenn Smith & Brendan Bailey, *Legislative Reform of California’s Direct Democracy: A Field Guide to Recent Efforts*, 47 CAL. W. L. REV. 259 (2011). In particular, we focused on reform proposals primarily or secondarily related to making the initiative process more deliberative. *Id.* at 271-75; see also *id.* app. C at 291-96 (summarizing twenty-three proposals in tabular form).

75. CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* 237-38 (2d ed. 2008), available at [http://www.cgs.org/images/publications/cgs\\_dbi\\_full\\_book\\_f.pdf](http://www.cgs.org/images/publications/cgs_dbi_full_book_f.pdf). CGS envisioned that such a website would serve as a clearinghouse of information; the site would include audio and video sources and would allow voters to discuss and share information about ballot initiatives. *Id.* A related CGS proposal recommends that voters should be able to opt to have ballot initiative information received by email instead of regular mail. *Id.* at 247.

include enhancing voter understanding by improving information on the ballot pamphlet, such as grouping competing initiatives together, encouraging use of charts and graphs in the pro and con argument section, or simplifying readability standards for state-written materials.<sup>76</sup> Some groups have proposed disclosure of sponsorship in advertisements and initiative funding, and increased public education on the subject of the initiative process.<sup>77</sup>

In these ways, various groups have made recommendations with a common theme of increasing the amount and quality of information disseminated to the public in the initiative process. A variety of reform bills considered in the California Legislature have pursued a similar purpose. These range from a 1997 proposal to allow the Secretary of State to ask three retired state-appellate judges to review the constitutionality of initiative proposals<sup>78</sup> to a 2006 proposal to transfer responsibility for conducting hearings on ballot-qualified initiatives from the California Legislature to the Little Hoover Commission (a body arguably more able to concentrate on in-depth analysis).<sup>79</sup>

Second, it is apparent that organizations and officials proposing initiative-process reform share a common desire to promote consultation between initiative sponsors and interested parties (including individuals, organizations, and political officials). Various groups and legislative reformers suggest an enhanced role for the legislature in the initiative process through consultation and negotiation with initiative proponents; a variant would allow time for the California Legislature to adopt the substance of a proposed piece of legislation.<sup>80</sup> Other promising proposals seek to enhance deliberation between initiative sponsors and interested parties—including a 2003 bill passing both houses of the Legislature which would have subjected draft initiative proposals to thirty days of public

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76. *Id.* at 244, 246, 364-65.

77. *See, e.g.*, Nat'l CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY, at x-xii (2002), *available at* [http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/landR\\_report.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/landR_report.pdf).

78. *See* A.B. 677, 1997-1998 Leg., Reg. Sess. (Cal. 1997).

79. *See* S.B. 1243, 2005-2006 Leg., Reg. Sess. (Cal. 2006).

80. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 75, at 361.

comment before seeking to qualify initiatives for the ballot,<sup>81</sup> and an earlier 1992 proposal that public hearings be conducted once initiative sponsors have gathered twenty-five percent of the required signatures.<sup>82</sup>

In sum, others have recognized that effective initiative reform includes providing more information to voters, thereby holding sponsors more accountable in the process. Others have also seen the value of promoting greater deliberation among those in a position to improve the substance of ballot propositions and voter understanding of their implications. Ideally, an improved process would better declare the detailed intentions of initiative sponsors and inform them of interested parties' concerns *prior* to initiative circulation. In turn, requiring sponsors to provide improved information to voters on proposed legislation would strengthen the process, and reduce confusion among voters and in the courts.

*B. The Rulemaking Process in California as a Proposed Model for Initiative Reform*

Our Working Group believes that the reforms to which others have pointed can best be achieved by looking in a previously unrecognized direction. Specifically, we recommend that the initiative proposal process borrow *selectively* from the notice-and-comment procedures long used by California administrative agencies when they adopt rules functionally equivalent to laws. The remainder of this section summarizes the key phases of the administrative rulemaking process and delineates how we propose to adapt them for the initiative context. The next section explains why notice-and-comment rulemaking is an apt metaphor for lawmaking by initiative.

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81. See A.B. 1245, 2003-2004 Leg., Reg. Sess. (Cal. 2003). 2011 NOTE FROM PROFESSOR GLENN SMITH: For a recent article on A.B. 1245, co-written by its legislative author, see John Laird & Clyde MacDonald, *A.B. 1245 of 2003 – An Attempt at Modest Reform of California's Initiative Process*, 47 CAL. W. L. REV. 301 (2011).

82. See Silva, *supra* note 6, at 14 (summarizing a 1992 recommendation of the twenty-four-member California Commission on Campaign Financing).



*1. Providing Early Public Notice of Intended Initiative Lawmaking*

As with rulemaking at the federal government level and in other American states, in California, the first major step toward adopting a regulatory “law” is the issuance of notice of proposed rulemaking.<sup>83</sup> The essential elements of this notice—which are posted on agency websites, published in an official register, and sent to various specially interested parties—are the text of the proposed law change, an explanation of how the proposal would affect current laws and regulations, and an overview of the major objectives the proposal seeks to achieve.<sup>84</sup>

Our Working Group proposes that, before submitting their proposed initiative measure for initial qualification by voter-signed petitions, proponents would file a “notice of proposed initiative lawmaking” with the California Secretary of State. Similar to notices of proposed administrative rulemaking, this initiative-lawmaking notice would provide the text of the intended changes to current constitutional or statutory provisions. Because legal disputes over the meaning of initiatives often concern their application to current

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83. See CAL. GOV'T CODE § 11346.5 (West 2005). For complex rules, public involvement may begin sooner. As the Office of Administrative Law explains, agencies planning to adopt complex proposals face a “pre-notice involvement” requirement; these agencies may involve the public in workshops or other preliminary activities prior to the start of the formal rulemaking process. OFFICE OF ADMIN. LAW, HOW TO PARTICIPATE IN THE RULEMAKING PROCESS 3 (2006), available at <http://www.oal.ca.gov/res/docs/pdf/howtoparticipate.pdf>. Individuals may contact agencies to be added to their mailing lists to ensure they are notified of the opportunity. *Id.* Additionally, agency websites often provide information on upcoming rulemaking actions. *Id.* Proponents of complex initiatives might do well to seek a similar earlier public involvement. However, consistent with our intention to limit the initiative notice-and-comment process to the barebones necessary to accomplish reform objectives, the Working Group has not recommended that such “pre-notice involvement” be *required*.

84. California law also imposes a variety of specialized study requirements, such as mandates that agencies document the financial impact of proposed rules on California business, that agencies explain how they considered and rejected regulatory alternatives, and the like. Such analyses might improve the formulation of certain types of initiative proposals, but the Working Group is reluctant to propose their adoption across-the-board. In significant part, this reflects the Working Group’s commitment to impose only the most universally applicable and most valuable rulemaking requirements on the process of initiative drafting and proposal.

constitutional, statutory, or regulatory provisions (as well as judicial opinions), the notice would also prompt proponents to explain the proposal's impact on these sources of law. Similarly, the notice would address how different initiative provisions relate to each other, a subject often probed in lawsuits about the application of initiative-passed laws. Finally, the notice would give proponents an opportunity to describe in appropriate detail their proposal's objectives.

We recognize that mailing the notice to all voters would be prohibitively expensive. Moreover, millions of voters are already inundated with election information; detailed mail notices might only bog down the process further.<sup>85</sup> Thus, our proposal places the responsibility on the Secretary of State to post the notice on the agency's website and otherwise distribute the report (using email to the extent feasible) to interested parties. Specifically, our recommendations borrow from procedures used for administrative rulemaking by allowing interested persons to place themselves on a list of interested notice recipients maintained by the Secretary. Of course, it is likely that many initiative sponsors and other organizations interested in voter education would place the notice (or links to the Secretary of State's website) on their own websites.

## *2. Establishing a Process for Public Comments on Proposed Initiatives*

To accomplish its second reform goal—establishing an effective and cost-efficient process to promote a constructive consultation among initiative sponsors and interested officials, organizations, and individuals—the Working Group also believes it desirable to borrow from the California rulemaking process. California law requires that, after they provide notice of proposed action, administrative agencies allow interested persons to comment on the proposal over a forty-five-day period.<sup>86</sup> California law always allows the submission of *written*

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85. Hard mailers would not be eliminated entirely; voters would simply need to request hard mailers, making the electronic format the main hub of information.

86. CAL. GOV'T CODE § 11346.4(a)(1) (West 2005) (“At least 45 days prior to the hearing and close of the public comment period on the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be . . . [m]ailed to every person who has filed a request for notice of regulatory actions with the state agency. Each state agency shall give a person filing a request for notice of regulatory actions

“statements, arguments, and contentions”; *oral* statements at public hearings can be triggered either by the agency or by a request from an interested party.<sup>87</sup> The Working Group’s proposal is to require a forty-five-day written comment period and leave it to initiative proponents to determine whether a public hearing, conducted under the auspices of the California Secretary of State, should be held.

Through selective borrowing from the time-tested comment procedures used by California, the federal government, and other states, our Working Group thus seeks to promote an expanded dialogue about proposed initiatives to achieve several goals, including (1) identifying ways in which initiative proposals can be improved prior to their submission to the voters, and (2) developing a more detailed “public record” available to voters in making intelligent decisions at the ballot box. The comment period in particular is an excellent way for the public to become involved and informed before the initiative is placed in circulation.

One important logistical issue is ensuring that public comments are easily accessible to initiative proponents, other would-be commentators, the media, and the public. Our Working Group proposes to handle this concern by having the Secretary of State create a central web location where all comments on proposed initiatives and their accompanying notices can be easily and cheaply compiled. We envision a process similar to that already in place for U.S. governmental agencies. There is a central “one-stop source” for all regulations or rulemakings issued by the U.S. Government.<sup>88</sup> The website includes regulations that are open for public comments, as well as finalized regulations and supporting materials.

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the option of being notified of all proposed regulatory actions or being notified of regulatory actions concerning one or more particular programs of the state agency.”).

87. CAL. GOV’T CODE § 11346.8 (West 2005).

88. REGULATIONS.GOV, <http://www.regulations.gov> (last visited Sept. 23, 2008).

### 3. *Promoting Dialogue Among Initiative Proponents and Other Knowledgeable and Interested Parties*

The third facet of the California notice-and-comment rulemaking process we deem worthy of emulation is the requirement that, when they finalize their proposed changes to the law, administrative law changers update the information they provided in their initial notice and respond to the comments made during the comment period.<sup>89</sup> Making initiative sponsors responsible for responding to relevant comments promotes dialogue and accountability. Proactive sponsors would naturally seek to listen to the interested parties and engage with them in real discussions about eventual consequences of initiatives; sponsors would have a natural incentive to respond to comments and refine initiatives in an effort to get voter support. Sponsors who ignored valid public comments would worry that they would be admitting the truth of the comments and that this could affect them adversely in the court of public opinion and in courts of law (when the meaning and application of initiatives are at issue).

Speaking of courts, our selective transplantation of rulemaking procedures into the initiative context aims to enhance public education and deliberation—not to complicate the initiative process or bog it down in legal red tape. Therefore, the *adequacy* of proponent compliance with notice-and-comment procedures (including how thoroughly proponents have responded to public comments) would not be judicially reviewable; further actions to qualify initiatives for a place on the California ballot would not be postponed by lengthy judicial challenges.<sup>90</sup> Instead, the Working Group proposal would rely on the natural incentives explained in the previous paragraph. Eliminating judicial review would streamline the process and lessen

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89. See CAL. GOV'T CODE § 11346.9 (West 2005).

90. Our proposal does provide that submission of initial and final notices to the Secretary of State is a prerequisite to further initiative qualification steps. We envision that appropriate legal authorities (such as the California Attorney General, who is responsible under section 9002 of the California Elections Code for drafting official titles and summaries for initiative petitions) would not cooperate with initiative proponents who flatly failed to file the required notices. As with all failures of governmental authorities to follow statutory requirements, the failure of governmental authorities to withhold cooperation from non-participating initiative proponents would to this limited extent be subject to judicial correction.

the burden on sponsors, while simultaneously creating a process that would naturally hold sponsors to a higher standard of communicating intent in the initiative process.

*4. Encouraging Appropriate Judicial Use of Proponent Notices  
and Public Comments During Subsequent  
Litigation over Adopted Initiatives*

One final mission of the Working Group is causing California judges—when called upon to interpret initiatives ultimately adopted by the state’s voters—to consult and place appropriate reliance on the expanded record of intent that will be created by the achievement of the previously listed mission goals.

Adoption of the recommended notice-and-comment procedures would yield easily consultable, authoritative expressions of the impacts proposed initiatives intend, and do not intend, to have. In both the initial and final notices of proposed initiative lawmaking, proponents would declare their intentions, including how they plan for their proposals to interact with current sources of law. And in responding in the final notices to the statements, arguments, and contentions made by interested parties (or in admitting the validity of those statements, arguments, and contentions by failing to respond), initiative proponents would further clarify their intentions.

Even though California voters place significant *de facto* reliance on the judgment and intentions of initiative proponents, as noted earlier, California courts are disinclined to give *any* consideration to expressions of proponent intent not included in the severely space-limited “argument” section of the official ballot pamphlet. (In practical effect, this only permits consideration of the most generic, emotionally inflated proponent statements.) Thus, the Working Group believes that it is necessary to augment current legal provisions on the construction of statutes with language authorizing judicial recourse to the fruits of the new notice-and-comment procedures. We note that the Working Group’s proposed language continues to reference the importance of voter intent<sup>91</sup> and requires only “appropriate

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91. This is consistent with section 1859 of the California Civil Procedure Code, which declares that “[i]n the construction of a statute the intention of the Legislature . . . is to be pursued, if possible.”

consideration” to the expanded intent indicators. Courts would continue to rely on their accumulated wisdom as to when intent indicators are reliable and probative. And construction of legislation passed by initiative would continue to be governed by general provisions specifying that construing judges are to respect the democratic process and the judgments of the law-makers.<sup>92</sup>

### *C. Why the Administrative Model is Relevant to the Initiative Context*

At first blush, it might seem odd to recommend borrowing tools from the administrative rulemaking context to improve direct democracy. However, there are several important reasons why this proposal makes sense.

First, the informal-notice-and-comment rulemaking process provides a long-standing, well-understood, and generally well-regarded means for assuring that changes in current laws are imposed only after their scope and implications are fully understood and discussed. California administrative agencies have used these procedures for decades to make important policy decisions in a wide variety of contexts. In 2006, the California Supreme Court recognized the ability of the informal-notice-and-comment process to promote “responsiveness and public engagement” and to “ensure that those persons or entities” affected by a new policy “have a voice in its creation.”<sup>93</sup>

Critics of the rulemaking process point to the potential for time delays and over-elaborate explanations on the part of rule proponents in the administrative model.<sup>94</sup> But we believe that these problems stem from a combination of onerous specialized data requirements and (potentially multiple rounds of) judicial review of agency compliance.

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92. See CAL. CIV. PROC. CODE § 1858 (West 2008) (duty of judge is “simply to ascertain and declare what is in terms or in substance contained [in legislation], not to insert what has been omitted, or to omit what has been inserted”).

93. *Morning Star Co. v. State Bd. of Equalization*, 132 P.3d 249, 254 (Cal. 2006); see also *Voss v. Superior Court*, 54 Cal. Rptr. 2d 225, 229 (Ct. App. 1996) (notice-and-comment procedures are “intended to advance ‘meaningful public participation’”).

94. CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 102-13 (3d ed. 2003) (discussing several issues detracting from rulemaking timeliness).

That is, with extensive specialized reporting requirements and strong incentives to avoid being ensnared in litigation over procedural issues, agency officials understandably over-correct. As noted previously, we would expressly preclude judges from reviewing the adequacy of sponsor compliance with the new procedures for improving initiative proposal; we would rely instead on non-judicial incentives for a good-faith response. Along with rigorous time limits for the initiative consultation process, this preclusion of judicial review should prevent over-formalization and delays.

Second, initiative sponsors stand in a relationship to voters that is significantly similar to the relationship between administrative agency officials and legislators. Agency officials act as the delegates of legislators, who look to these agents for expertise and judgment. Voters give a similar—albeit more informal and ad hoc—deference to initiative sponsors. Additionally, in contrast to elected legislators, voters elect neither administrative agents nor initiative sponsors; yet both exercise important policy making judgment with short and long-range impacts on voters, their communities, and their state.<sup>95</sup>

Third, modified use of administrative-type notice-and-comment procedures for the proposal and discussion of initiatives would appropriately respond to important differences in the ways California voters relate to sponsors of *initiatives*, as compared to the ways California legislators relate to sponsors of the laws they adopt. As part of their official duties, legislators regularly interact with their colleagues who sponsor legislation. Even when legislation originates outside of the legislative branch (e.g., when proposals stem from the Governor, other executive branch officials, or non-official advocacy groups), legislators relate to these non-legislative sponsors in ongoing, reciprocal ways. As “repeat players” in an official legislative system, sponsors of legislature-enacted laws are constrained to operate with a degree of responsibility and credibility not guaranteed in the initiative process. Further, legislators have an official hearing process and

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95. As with most analogies, this one is not perfect. Administrative agents can adopt legally binding rules without legislative approval (although the legislature can override those rules by passing new laws). The proposals of initiative sponsors are, by contrast, not legally binding until a majority of voters approve them. Further, administrative agencies operate under some broad legislative parameters, whereas initiative sponsors are free to propose any legal change they believe the voters will accept.

multiple sources of useful information from which to check and balance information provided by sponsors.

By contrast, initiative sponsors stand in a significantly less formal, more episodic relationship to the voters who serve as their legislative gatekeepers. This relationship lacks similar incentives for credibility and veracity, and voters have little, if any, effective outside information sources. Thus, notice-and-comment-type procedures would provide sponsors with a regular mechanism for making their case in detail and having their representations checked and balanced by a deliberative process.

#### IV. CONCLUSION

Supporters and critics of the California initiative process have long debated its merits. In the meantime, Californians continue to adopt politically, economically, and socially vital laws through a process that fails to provide optimal information to voters and the judges called upon to implement their will. Inadequate information combines with the absence of a meaningful structure for rational, sophisticated dialogue about the merits and implications of proposed legal changes to produce a variety of untoward consequences.

The official source of voter information—the official ballot pamphlet—has important limitations. The severely space-limited “pro” and “con” arguments engaged in by initiative supporters and opponents cannot hope to provide meaningful details; far too often this limited give-and-take provides more heat than light. Even if the neutral, expert explanation provided by the non-partisan Legislative Analyst’s Office could cover all relevant issues, which may not be practical, the Office cannot speak authoritatively and conclusively for the sponsors or provide the equivalent of a detailed public give-and-take. Together, neither the ballot-pamphlet arguments nor the Legislative Analyst report can provide the kind of extended debate and discussion to which laws are routinely subjected when considered and passed by the California Legislature. As a result, the voters who are asked to stand in legislator shoes twice a year (and the judges who must interpret their work product) must act without the fruits of a meaningful dialogue.

As voters and other observers of the California initiative process have long recognized, the information sources outside of the official



ballot pamphlet leave much to be desired. So do opportunities for deliberation afforded by the initiative status quo. The information available from initiative sponsors, interest groups, political parties, public officials, and the legislative hearings envisioned by California law is too often non-existent, insufficient, or emotionally charged. The key issues are too rarely “joined” in anything resembling a deliberative dialogue. The quality of initiatives proposed and adopted, the democratic experience of voters, and the predictability and quality of subsequent judicial review are all significantly compromised.

Fortunately, easily adoptable and time-tested remedies are at hand. By selectively and commonsensically adapting several key facets of the notice-and-comment procedures our state has for decades used to adopt crucial administrative rules, California can provide to initiative proponents, voters, the media, judges, and other interested parties an efficient, expeditious mechanism by which:

- sponsors could set forth in detail their intent;
- interested parties could engage in meaningful deliberations on the merits and implications of proposed initiatives;
- voters would have access—directly or indirectly through the sources they typically consult on public-policy matters—to detailed and high-quality information on which to cast their votes; and
- judges could go beyond what is at best an “educated guess” in fathoming the intent of initiative sponsors and voters.

Adoption of these relatively simple steps could bring profound improvements to direct democracy in California.