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COMMENTS

INTERPRETATION OF INITIATIVES BY REFERENCE TO SIMILAR STATUTES: CANONS OF CONSTRUCTION DO NOT ADEQUATELY MEASURE VOTER INTENT

It is common knowledge that an initiative measure is originated by some organization or a small group of people . . . that the measure is then placed on the ballot and a large number of the population, not knowing what the context of the act is, rely solely upon its title as a guide to intelligent voting thereon.

— California Supreme Court, 1927¹

Generally, the drafters who frame an initiative and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source.

— California Supreme Court, 1989²

I. INTRODUCTION

Established in 1911, the California initiative process sought to further public discussion of important issues, create alternative solutions to public problems, and foster fuller participation in public life.³ Today, however, it is unclear to what extent the initiative process has succeeded in achieving these noble goals.⁴

1. *Wallace v. Zinman*, 200 Cal. 585, 592, 254 P. 946, 949 (1927).

2. *In re Harris*, 49 Cal. 3d 131, 136, 775 P.2d 1057, 1060 (1989).

3. David Butler & Austin Ranney, *Theory, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 25-33 (David Butler & Austin Ranney eds., 1978).

4. Signature drive deceptions, weakening of the legislature, infringement on minority rights, the effect of money on success in an election, paid petition circulators, and deceptive mail and advertising campaigns are all cited as major shortcomings of direct democracy in California. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 207-19 (1989). Recently, the California Commission on Campaign Financing conducted a two-year study on initiatives that produced 20 recommendations. CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *DEMOCRACY BY INITIATIVE: SHAP-*

One branch of government that has suffered from initiative shortcomings is the judiciary. Subsequent to the enactment of many initiatives, courts are burdened with tremendous amounts of litigation due to ambiguity in initiative language⁵ and constitutional challenges.⁶ In turn, courts do their best to "jealously guard" the public's right to the initiative by interpreting initiatives to be consistent with the public's desires.⁷ Yet, in the process of reviewing initiatives, California courts often overestimate voter knowledge of initiative language by assuming that voters are aware of judicial inter-

ING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 19-30 (1992) [hereinafter DEMOCRACY BY INITIATIVE]. Among the suggestions of the commission: (1) limit initiatives to no more than 5,000 words; (2) require disclosure of financial contributors on petitions, in advertisements and in a newly designed summary ballot pamphlet; and (3) allow the legislature, with a 60% vote in each house, to amend laws enacted by initiative. *Id.*

5. For instance, litigation required to resolve the ambiguities in the 1978 Proposition 13 continued well into the decade following its enactment. DEMOCRACY BY INITIATIVE, *supra* note 4, at 82. Proposition 13 is not unique, as costly litigation because of unclear initiative language is a major problem at the state and county levels. *Id.* at 83 n.9.

6. Initiatives are subject to federal and state constitutional limitations applicable to all legislation. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981). In addition, California courts must invalidate initiatives revising (rather than amending) the state Constitution; see CAL. CONST. art. XVIII; *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077 (1990); initiatives containing more than one subject must be struck down by the judiciary; see CAL. CONST. art. II, § 8(d); see also *infra* text accompanying notes 89-95; initiatives cannot conflict with any law higher than the statutory or constitutional section amended; CAL. CONST. art. I, § 26; and finally, initiatives cannot further any purpose prohibited by any of the subject matter limitations in the California Constitution. CAL. CONST. art. II, § 12.

7. See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 248, 583 P.2d 1281, 1302 (1978). Initiatives pose problems for courts that are not present when reviewing ordinary legislation. On the one hand, legislation enacted by initiative necessitates judicial activism because the initiative lacks the benefit of bicameralism, executive veto, political parties, and a legislative committee system that gives minorities bargaining power. See Julian N. Eule, *Checking California's Plebiscite*, 17 HAST. CONST. L.Q. 151, 154 (1989). On the other hand, "one would hope that the courts will not fall prey to the elitist argument that the people do not know what is best for them and therefore need someone else to tell them." Donald S. Greenberg, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1747 (1966). In addition to these pressures, judges are pressured with "the political force of the electorate at large." Stephen R. Barnett, *California Justice*, 78 CAL. L. REV. 247, 258 (1990) (quoting former California Supreme Court Justice Charles Grodin). Former Justice Grodin states: "It is one thing for a court to tell a legislature that a statute it has adopted is unconstitutional; to tell that to the people of a state who have indicated their direct support for the measure . . . is another." *Id.*

pretations of previous statutes that were the source of the initiative language.⁸ Consequently, the interpreting court views the initiative in light of the existing law rather than inquiring into the voter's understanding of the initiative language and ballot argument.

This comment argues that the assumption of voter knowledge of existing laws and their judicial constructions weakens the initiative process.⁹ The background section examines the initiative process, the limited knowledge voters have of the origins of the initiatives and of the initiative subject matter, and the willingness of California courts to use existing statutes and their judicial construction to resolve ambiguities in initiatives.¹⁰ This comment uses the California Supreme Court's interpretation of the single-subject rule as an example of judicial interpretation of an initiative by reference to a similar statute.¹¹ The comment demonstrates that voters generally have no exposure to the sources that serve as the origin of the initiative's wording,¹² that there is no reasonable certainty the voters considered the judicial significance of the borrowed words,¹³ and that the primary reasons for utilizing canons of similar construction are not served in the review of initiatives.¹⁴ For the reasons set forth, the comment proposes that California courts limit interpretation of initiatives to materials officially presented to the voters in the ballot pamphlet.¹⁵

II. BACKGROUND: THE INITIATIVE, THE VOTER, AND JUDICIAL INTERPRETATION BY REFERENCE TO SIMILAR STATUTES

To fully comprehend the initiative process and judicial review of initiatives, it is crucial to understand the modern-day initiative process rather than the process imagined by its original proponents. As is demonstrated in the materials be-

8. *See infra* text accompanying note 67-68.

9. *See infra* text accompanying notes 103-137.

10. *See infra* text accompanying notes 16-102.

11. *See infra* text accompanying notes 69-102.

12. *See infra* text accompanying notes 108-126.

13. *See infra* text accompanying notes 127-133.

14. *See infra* text accompanying notes 134-137.

15. *See infra* text accompanying notes 138-143.

low, the initiative process is often intimidating to voters.¹⁶ In addition, initiative drives are expensive and time-consuming, and, as a result, are almost exclusively run by well-financed interest groups. Thus, the initiatives may be voted on by the public, but they generally are not a product of the average citizen.

A. *The Initiative Process*

The initiative process has been characterized as a "legislative battering ram"—a tool for the populace to enact legislation ignored by elected representatives.¹⁷ Lobbyist control of Sacramento at the turn of the century prompted California professionals and small businessmen to push the initiative process as a means to give power back to the people.¹⁸ Accordingly, the initiative process was designed to allow grassroots access to law-making. Structurally, the process is relatively unchanged from its original form of 1911.¹⁹

16. The 1990 election was described as "the most extensive and complicated list of ballot propositions in the history of electoral politics—more and more various items . . . than the Framers were asked to consider at the Constitutional Convention." *Election Excess, 1990-Style: The Issues and the Dangers*, L.A. TIMES, Oct. 8, 1990, at B4. The November 1990 ballot was 222 pages in length and would have taken the average voter 10 hours to read—excluding the wording of the initiative measures. DEMOCRACY BY INITIATIVE, *supra* note 4, at 15.

17. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 228, 583 P.2d 1281, 1289 (1978).

18. Eugene C. Lee, *California, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY*, *supra* note 3, at 88. The Progressives, California's populist political party, were primarily responsible for the movement of direct democracy against the Southern Pacific Railroad and other strong interest groups in California. DEMOCRACY BY INITIATIVE, *supra* note 4, at 38-40. Historians generally agree that the Progressive's platform consisted of "[e]xpanding citizen participation in politics (initiative, referendum, recall, and the replacement of party nominating conventions with the direct primary); [t]aming unrestrained corporate influence process . . . ; [p]rotecting the environment . . . ; [and] [i]mproving adverse living and working conditions." *Id.* at 38-39. Advocates believed the initiative process would allow the poor and other minority groups some access to the state legislative process. NANCY YOUNG, *THE INITIATIVE PROCESS IN CALIFORNIA* 1 (1982). In addition, the initiative process would further the goals of public discussion of important issues and consideration of alternative solutions to public problems. Butler & Ranney, *supra* note 3, at 24-33.

19. Between 1911 and 1922, 35 attempts were made to restrict the voter right to the initiative. DEMOCRACY BY INITIATIVE, *supra* note 4, at 44. Most successful changes to the initiative process since 1911, however, were not aimed at curbing a voter's right to direct democracy, but were "minor attempts to improve the system or clarify omissions or inconsistencies in the law." *Id.* at 45.

A proposed initiative²⁰ measure in California may be a statutory or constitutional amendment, depending upon the initiative's goal.²¹ If the initiative measure becomes law, the relevant constitutional or statutory section is amended.²² Passed initiative measures are more difficult to amend than regular legislation. An amendment or repeal of an initiative is effective only when approved by a majority of voters in an election.²³ Therefore, because an enacted initiative may be amended or repealed only by the voters, the measure is almost certain to be permanent unless a new initiative drive and election is organized for amendment.

Thus, as designed, the initiative not only serves as a vehicle for bypassing powerful interest groups, it also preserves from legislative amendment law passed by initiative. Accordingly, the initiative process should strengthen the populist causes of citizen participation in politics and taming unrestrained corporate influence. In reality, however, the initiative process may not be a tool for the politically powerless, but a tool for the well-financed and politically connected.

20. The direct and indirect initiatives were established via initiative in 1911. CALIFORNIA OFFICE OF THE SECRETARY OF STATE, HISTORY OF THE INITIATIVE PROCESS IN CALIFORNIA 2 (1988) [hereinafter HISTORY OF INITIATIVE PROCESS]. A direct initiative becomes law when a majority of the voting public approves it. CAL. CONST. art. II, § 10(a). The indirect initiative is approved by the public and goes to the legislature for a vote before it becomes law. HISTORY OF INITIATIVE PROCESS, *supra*, at 2. The indirect initiative was repealed in 1966, and, as a result, all current initiatives are direct initiatives. *Id.*

21. CAL. ELEC. CODE § 3524 (West 1993). For a measure to qualify for the state ballot, a title and summary must be submitted to the Attorney General and petitions circulated and signatures gathered from state residents. *Id.* § 3502. These petitions are then filed with the county clerk in the county where signatures were collected. *Id.* § 3523. Signatures representing five percent of the previous gubernatorial vote are required for a statutory revision and eight percent are required for a constitutional amendment. CAL. CONST. art. II, § 8(b).

22. The fact that initiatives do not undergo extensive scrutiny during the law's formulation has led some to conclude that initiative proposals make bad law. An initiative measure, unlike a piece of legislation, often contains extreme views because drafters are not restrained by political considerations. See Nick Brestoff, Note, *The California Initiative Process: A Suggestion For Reform*, 48 S. CAL. L. REV. 922, 930-34 (1975). The initiative is typically written in complete isolation by its proponent—not by an elected representative. *Id.* The proponent often does not worry about satisfying constituents and never need worry about re-election. *Id.* Unlike the legislative process, there is no opportunity for public hearings on the law or for voter input. *Id.*

23. CAL. CONST. art. II, § 10(c). The section provides that the Legislature "may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors." *Id.*

The cost, the time, and the energy required to place an initiative on the ballot are impractical for local grass-roots movements.²⁴ Petition circulation has become a multi-million dollar business in California, with costs per signature gathered for the 1990 campaign estimated at \$1.21.²⁵ Not surprisingly, the high cost of seeing an initiative to the ballot affects who sponsors initiatives.

Well-financed individuals, lobbyists, and special interest groups proposed most of the initiatives for recent elections.²⁶ Such a result is ironic, given the original goals of the initiative process.²⁷ Special interest groups have discovered cir-

24. In 1990, the average cost for an initiative to qualify for the ballot was one million dollars. John Garamendi, *Insurers Lost the Battle, but Won the War*, L.A. DAILY J., May 16, 1990, at 6. It is doubtful the average citizens' group would be able to raise such a substantial sum. This problem does not seem to be unique to the 1980's and 1990's. In 1966, Casper Weinberger, practicing law in California, made the following observation:

The theory [behind the initiative process] was that people always would be able to pass legislation they wished and needed if such legislation had been denied to them by a legislature subservient to special interests and pressure groups. As it has actually worked out, the theory has actually failed

The costs of statewide elections being what they are, it is usually *only heavily financed pressure groups* that can utilize the initiative to secure passage of measures that no representative legislature would dream of passing.

LEGISLATIVE COUNCIL OF CAL., FINAL REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON CONSTITUTIONAL AMENDMENTS 28-29 (1966) (emphasis added).

25. DEMOCRACY BY INITIATIVE, *supra* note 4, at 267. This cost includes legal assistance in drafting an initiative, signature-gathering costs, payments to petition circulation firms, direct mail costs, and other organizational expenses. *Id.* at 267 n.7. Signature-gathering firms charge anywhere from twenty-five cents to one dollar per signature. Lee, *supra* note 16, at 102.

26. DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 199 (1984). Most initiative proposals do not emerge from the electorate, but are part of the legislative strategy of the well-financed. DEMOCRACY BY INITIATIVE, *supra* note 4, at 265. "Any individual, corporation, or organization with approximately \$1 million to spend can now place any issue on the ballot and at least have a chance of enacting a state law." *Id.* The signature threshold requirement means that success is usually achieved by hiring a professional signature-gathering firm. *Id.* Thus, persons or groups without money will have little success in qualifying an initiative for election. *Id.* For the most part, initiatives are funded by wealthy individuals, organizations, and corporations—individuals who likely have influence in Sacramento despite the initiative drive. *Id.* at 279. For instance, in 1990, 67% of the total dollars raised by all campaigns were received in amounts of \$100,000 or more. *Id.*

27. The influence of the Southern Pacific Railroad in Sacramento at the end of the 19th Century mirrors the modern-day lock well-financed parties have on the initiative process. A leading newspaper reporter in 1896 commented, "[i]t

cumvention of an unresponsive legislature is easily achieved by the initiative process.²⁸ As a result, the voter is left to wade through the diverse desires of the interest group and determine whether the entire initiative deserves a "yes" or "no" vote.²⁹ Enacted to empower the under-represented members of society, it appears the initiative process now serves the heavily financed interest groups the system was hoping to bypass.

B. *The Voter*

Today, the vast majority of people work long hours, lessening their ability to fully consider issues on the ballot.³⁰ In

didn't matter whether a man was Republican or Democrat. The Southern Pacific Railroad controlled both parties, and he either had to stay out of the game altogether or play it with the railroad." CHARLES G. BELL & CHARLES M. PRICE, CALIFORNIA GOVERNMENT TODAY: POLITICS OF REFORM 55 (3d ed. 1980). Populist historians have argued that this stranglehold on the state government was one reason the American economy almost collapsed in 1870. See DEMOCRACY BY INITIATIVE, *supra* note 4, at 38. While the initiative process does not necessarily pose such a threat, the resulting laws from initiatives may do more harm than good.

28. See Vlae Kershner, *Fewer Initiatives Expected in the Next Election*, S.F. CHRON., May 6, 1991, at A1, A12. The article contends that during Governor Deukmejian's term, the Assembly and Governor were at an impasse. *Id.* at A12. As a result, organized groups turned to the initiative process to get their laws enacted. *Id.* Recent initiatives that support this contention are Proposition 13 in 1978 (property tax reform) and the \$80 million automobile insurance reform battle in 1988, both a result of the failure of the legislature to respond to proposals. See DEMOCRACY BY INITIATIVE, *supra* note 4, at 9.

29. The fact that complex issues presented in voter initiatives are decided by a "yes" or "no" vote has resulted in criticism of the initiative as an indication of public opinion rather than as contemplated law making. See Carol S. Hunting, Note, *Pre-election Review of Voter Initiatives: American Fed'n of Labor-Congress of Indus. Org. v. Eu*, 60 WASH. L.REV. 911, 920 (1985).

30. With the increased number of initiatives, the voter has less time to study each initiative. In the 1940's, 1950's, and 1960's, the average number of initiatives on the ballot was 13. DEMOCRACY BY INITIATIVE, *supra* note 4, at 55. In the 1970's there were an average of 22 initiatives on the ballot. *Id.* The 1980's saw a boom, with an average of 46 initiatives presented to the voter. *Id.* In 1990 alone, there were 18 initiatives on the ballot. *Id.*

The amount of time needed to study the large number of initiative measures arguably deprives the voters of the power to use their right intelligently. Indeed, the first opponents of the initiative process believed the system to be undemocratic because of the time it would take a voter to study ballot measures: "This new method of handling the basic law of a state is advocated in the name of democracy. In reality it is utterly and hopelessly undemocratic. While pretending to give greater rights to the voters, it deprives them of the opportunity effectively and intelligently to use their powers." *Id.* at 42 (quoting Editorial, *Anti-Democracy in California*, N.Y. TIMES, Oct. 18, 1911).

addition, issues of politics are not of central concern to most Californians.³¹ Thus, with the increase in the number of initiatives submitted to the electorate,³² voter frustration at playing lawmaker is increasing.³³ There may not be much frustration over having to decide whether legislators should have term limits, but many feel it is not fair to ask voters how the hearsay rule should be interpreted in California courts.³⁴

In addition, many voters complain of confusion due to misleading³⁵ and deceptive³⁶ advertising campaigns.³⁷ For

31. In a highly publicized campaign surrounding a controversial 1976 nuclear power initiative, voters were asked how much attention they had given the campaign. See MAGLEBY, *supra* note 26, at 129. Almost one-fifth said they had paid little attention to the news surrounding the debate. *Id.* The authors of the study estimated that "between 10 and 33 percent of the voters were well enough informed to make educated judgments" on the nuclear power initiative. *Id.* at 140. In addition, a study also cited evidence that 14% of voters interviewed had voted contrary to their stated intentions. CRONIN, *supra* note 4, at 74. Studies such as this have led commentators to believe that:

the vast majority of voters have no set opinions on most ballot questions and are usually unaware of the proposition until late in the campaign. . . . [I]t is reasonable to assume that 35 percent or more of those who turn out [for an election] will not be aware of the less controversial but more common propositions.

MAGLEBY, *supra* note 26, at 129.

32. See *supra* note 30.

33. Sentiment today seems to suggest that many topics covered by initiative measures could be addressed at the legislative level. In the aftermath of the unusually complicated 1990 measures, "it is pretty clear the public does not want the future responsibility of voting on complex programs." Kershner, *supra* note 28, at A12. This recent increase in ballot measures is quite a shift from the electorate's original desire for the initiative process to serve as an alternative to legislative law-making. The California special election ballot pamphlet proposing the initiative process stated the initiative would "supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact." DEMOCRACY BY INITIATIVE, *supra*, note 4, at 53 (citing *Arguments in Favor of SCA 22*, in CALIFORNIA OFFICE OF THE SECRETARY OF STATE, SPECIAL ELECTION BALLOT PAMPHLET (1911)).

34. See John Bulgar, *Initiatives: Time for Reform?*, L.A. TIMES, Mar. 27, 1990, at A22; see also *Proposition 115*, in CALIFORNIA OFFICE OF THE SECRETARY OF STATE, GENERAL ELECTION BALLOT PAMPHLET (1990). There may even be a basis for believing voters are confused by initiatives surrounding the most prevalent issues of our day. In a 1991 Washington State campaign to codify the decision in *Roe v. Wade*, the initiative passed by the "narrowest of margins The measure was originally considered a shoo-in in the state, where abortion rights guarantees date back to 1970 Supporters of the measure, Initiative 120, blamed the close finish on voter confusion about what the measure would actually do." *Abortion Rights Law Passes after Recount*, HOUSTON CHRON., Dec. 15, 1991, at A13.

35. In 1988, one group opposed to a campaign finance reform initiative (Proposition 68) targeted voters by suggesting in an advertisement that Nazi

this reason, California has made a considerable effort to inform the voters by mailing, at government expense, a voter pamphlet³⁸ describing all of the issues on the ballot.³⁹ In the pamphlet, proponents and opponents of the measure are given equal space to debate the initiative's potential advantages and drawbacks.⁴⁰

storm troopers might receive public financing should the proposition pass. DEMOCRACY BY INITIATIVE, *supra* note 4, at 200. The initiative itself, however, included multiple safeguards to protect public money from going to extremists. *Id.*

36. In 1988, the tobacco industry aired one advertisement against a proposition to raise cigarette taxes (Proposition 99) by claiming the tax would increase the contraband sale of cigarettes. DEMOCRACY BY INITIATIVE, *supra* note 4, at 200. The profits from the illegal sale, argued the tobacco industry, would in turn be used to buy guns, thereby forcing law enforcement officials to spend extra time pursuing criminals. *Id.*

37. Advertisements rarely reach the actual content of an initiative measure. See Hunting, *supra* note 29, at 920 n.56 (relaying example of advertisement against three initiative measures, "one for electronic rate reform, one for handgun prohibition, and one to ban no-return beverage containers all marked by industry sponsored ads opposing the initiatives by 'suggesting the enactment of the measures would result in loss of jobs, manhood, and the opportunity to grab gusto'") (citation omitted). The goal of those funding these advertisements is winning the initiative election, not necessarily educating the voter regarding the effects of an initiative. See Derrick A. Bell, *The Referendum: Democracy's Barrier To Racial Equality*, 54 WASH. L. REV. 1, 20 (1978). Therefore, information that helps the initiative campaign is released, and information that hurts is likely suppressed. *Id.*

38. A 1990 survey of voters determined that 69% found information in the ballot pamphlet helpful. DEMOCRACY BY INITIATIVE, *supra* note 4, at 212. As a source of information, it was second only to newspaper articles and analyses (73%). *Id.* Of all the information a voter may use in evaluating an initiative, however, the voter pamphlet is the only source a court may be sure the voter has been exposed to. For instance, in the Los Angeles area, voter pamphlets are mailed to 8 million people, whereas the L.A. TIMES reaches a maximum of 2.4 million people. *Id.* at 236.

39. The 1992 November ballot pamphlet contained 95 pages. CALIFORNIA OFFICE OF THE SECRETARY OF STATE, GENERAL ELECTION BALLOT PAMPHLET (1992). The 1993 November ballot pamphlet for the special statewide election contained 47 pages. CALIFORNIA OFFICE OF THE SECRETARY OF STATE, SPECIAL STATEWIDE ELECTION BALLOT PAMPHLET (1993) [hereinafter 1993 CALIFORNIA BALLOT PAMPHLET]. While this amount of information may be difficult for voters to digest, unlike the press or advertisements, the pamphlet offers an equal forum for an initiative's debate.

40. The November 1993 ballot pamphlet briefly summarized the measures on the ballot. 1993 CALIFORNIA BALLOT PAMPHLET, *supra* note 39, at 4-7. The pamphlet also contained an analysis of the ballot measure by the Legislative Analyst and the ballot arguments by the measure's proponents and opponents. *Id.* at 8-37. The last seven pages of the pamphlet were devoted to the language of the ballot measures themselves. *Id.*

Unfortunately, the ability to inform the public has not been as successful as hoped.⁴¹ Characterized by one political scientist as "impenetrable prose," one analysis in California concluded that "[i]n highly contested proposition elections, the pamphlet ranks well behind television, newspapers and often the radio as a source of information . . . indicat[ing] that most of the voters do not read the pamphlet or use it as a source . . . for decisions on propositions."⁴² In comparison, legislators spend weeks in committee reviewing laws and debating the impact they will have on citizens, leaving behind a clear record of their intent and decision-making process.⁴³

Thus, many voters do not take considerable time to study the ballot arguments and summaries in a ballot measure, and even fewer take time to read the language of a proposed initiative. When ambiguities arise in an initiative's interpretation, there is some question as to which sources the court should examine to determine the intent of the enacting body. With this in mind, the next section explores the judicial approach to interpreting the intent of the enacting body of an initiative.

41. A study on the 1990 ballot pamphlet indicated that the equivalent of three or four years of college education was needed to understand its parts. DEMOCRACY BY INITIATIVE, *supra* note 4, at 241. This is despite legal obligations to write in "clear and concise terms." *Id.* at 238 (citations omitted). Indeed, there is no telling what level of expertise is needed to understand some of the actual initiative language. However, some voter confusion may be present due to lack of interest. For example, only twenty days before the 1992 election, fewer than four in ten voters in California had heard of three measures which, if enacted, would have had a "profound effect" on future California law. Vlae Kershner, *Poll Finds Few Voters Familiar with State Budget Measures*, S.F. CHRON., Oct. 14, 1992, at A6. Thirty-nine percent of the voters questioned said they had heard of Proposition 165, Governor Wilson's budget and welfare initiative. *Id.* Twenty-three percent of voters had heard of Proposition 167, a "tax the rich" initiative. *Id.* Proposition 163, a repeal of a sales tax on snack food, also suffered from poor exposure. *Id.*

42. CRONIN, *supra* note 4, at 82. A noted California politician comments that "[s]ixty second commercials may be entertaining, but they shouldn't form the basis for policy decisions. If immensely complicated issues could be easily whittled down to four lines and a yes-or-no answer, there would be no need for a legislature." Garamendi, *supra* note 24, at 6. *But see supra* note 38 (1990 survey indicated that 69% of voters find the ballot pamphlet a helpful source).

43. See *Schmitz v. Younger*, 21 Cal. 3d 90, 99, 577 P.2d 652, 657 (1978) (Manuel, J., dissenting).

C. *Judicial Interpretation of Intent in Initiative Measures*

Today's voter faces dozens of initiatives containing multiple provisions.⁴⁴ These initiatives purport to create a package of reforms that will further an object. Often, the initiatives contain huge amounts of ambiguous terminology.⁴⁵ Thus, a reviewing court faces a tough task in divining the meaning of initiatives.

"[T]he cardinal rule" of statutory interpretation in California is that "the statute is to be construed so as to give effect to the intent of the law makers."⁴⁶ Therefore, "[i]n construing constitutional and statutory provisions, whether enacted by the legislature *or by initiative*, the intent of the enacting body is the paramount consideration."⁴⁷ When ambiguity arises in the language of an initiative measure, courts in California often turn to ballot summaries and arguments to determine the intent of the voters and to understand the meaning of the ballot measure.⁴⁸ "As such, they may prop-

44. In the 1988 and 1990 elections, voters were faced with 13 initiatives over 5,000 words long. DEMOCRACY BY INITIATIVE, *supra* note 4, at 85. In 1990, Proposition 129 ("Big Green" Initiative) was 13,665 words; Proposition 130 ("Forests Forever" Initiative) was 10,838 words; Proposition 131 (Campaign Finance Initiative) was 15,633 words; and Proposition 138 (Timber Harvesting Initiative) was 9,735 words. *Id.* at 86.

45. For instance, in 1978, the governor's office determined that Proposition 13 (Property Tax Reform Initiative), which was exposed to great scrutiny in the months before the election, contained at least 40 ambiguities in the language. DEMOCRACY BY INITIATIVE, *supra* note 4, at 81 (citing LEAGUE OF WOMEN VOTERS, INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST? 40 (1984)). These ambiguities often result because initiatives are drafted out of the public eye. *See supra* note 21.

46. *Mercer v. Perez*, 68 Cal. 2d 104, 112, 436 P.2d 315, 318 (1968).

47. *In re Lance*, 37 Cal. 3d 873, 889, 694 P.2d 744, 753 (1985) (emphasis added). *See also* *Yoshisato v. Superior Court*, 2 Cal. 4th 978, 989, 831 P.2d 327, 329 (1992); *Legislature v. Eu*, 54 Cal. 3d 492, 505, 816 P.2d 1309, 1316 (1991); *Whitman v. Superior Court*, 54 Cal. 3d 1063, 1072, 820 P.2d 262, 266 (1991); *Sanford v. Garamendi*, 233 Cal. App. 3d 1109, 1118, 284 Cal. Rptr. 897 (Ct. App. 1991); *In re Quinn*, 35 Cal. App. 3d 473, 483, 110 Cal. Rptr. 881 (Ct. App. 1973).

48. *See, e.g., Yoshisato*, 2 Cal. 4th at 982, 831 P.2d at 329; *Eu*, 54 Cal. 3d at 504, 816 P.2d at 1315; *Taxpayers v. Fair Political Practices Comm.*, 51 Cal. 3d 744, 749 n.5, 799 P.2d 1220, 1223 n.5 (1990); *Lungren v. Deukmejian*, 45 Cal. 3d 727, 739-40, 755 P.2d 299, 307 (1988); *White v. Davis*, 13 Cal. 3d 757, 775, 533 P.2d 222, 233 (1975); *People v. Knowles*, 35 Cal. 2d 175, 182, 217 P.2d 1, 5 (1950).

erly be resorted to as a construction aid to determine the 'probable meaning of *uncertain* language.'⁴⁹

The official ballot materials are reliable because they are presented to the voter,⁵⁰ whereas courts are reluctant to consult materials not officially presented to the electorate when interpreting a statute.⁵¹ Presumably, the court is reluctant to include material not presented to the voter in its analysis of an initiative because the enacting body did not consider the materials when formulating its interpretation of the initiative.⁵² Yet, California courts have indicated no such concern when interpreting initiatives by reference to similar statutes.

1. *Canons of Similar Construction: Discovering Intent By Reference to Similar Statutes*

When interpreting initiatives, the California courts have drawn upon similar statutes to determine the intent of ambiguous words.⁵³ This method of interpretation uses the

49. *Board of Supervisors v. Loneragan*, 27 Cal. 3d 855, 866, 616 P.2d 802, 808 (1980). See also *Carter v. Seaboard Fin. Co.*, 33 Cal. 2d 564, 580-81, 203 P.2d 758, 769 (1949). A recent California Supreme Court case indicates that ballot arguments may be viewed by the current court as only somewhat helpful: "Ballot arguments often embody the sound-bite rhetoric of competing political interests vying for public support. However useful they may be in identifying the general evils sought to be remedied by an initiative measure, they are principally designed to win votes, not to present a thoughtful or precise explication of legal tests or standards." *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 22 n.5, 865 P.2d 633, 646 n.5 (1994).

50. The voter pamphlet is mailed to every citizen registered to vote. Other sources, such as newspapers and advertisements, are likely to have some public exposure, but there is no certainty they are presented to all the voters. See *supra* note 38.

51. See, e.g., *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm.*, 51 Cal. 3d 744, 764, 799 P.2d 1220, 1232 (1990) (rejecting the motive and purpose of the drafters of an initiative as irrelevant to its construction for a lack of reason to conclude that the body that adopted the statute was aware of that purpose). Other cases rejecting the opinion of the legislators and drafters of initiatives to interpret ambiguous language include: *Lungren*, 45 Cal. 3d at 743, 755 P.2d at 309; *People v. Castro*, 38 Cal. 3d 301, 311-12, 696 P.2d 111, 116 (1985); *City of San Francisco v. Farrell*, 32 Cal. 3d 47, 52, 648 P.2d 935, 937 (1982). Courts relying on materials presented in the voter pamphlet include: *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 242-44, 583 P.2d 1281, 1298, 1300 (1978) (using title and summary of purpose in initiative as described in voter pamphlet); *Carter*, 33 Cal. 2d at 580-81, 203 P.2d at 769 (using summary of Attorney General in voter pamphlet).

52. See *Taxpayers to Limit Campaign Spending*, 51 Cal. 3d at 764 n.10, 799 P.2d at 1232 n.10.

53. See *infra* text accompanying notes 67-68.

words and judicial constructions of a statute from its own jurisdiction or another jurisdiction to resolve ambiguous language in initiatives.

a. *In Pari Materia: Intra-Jurisdictional Interpretations*

“Statutes *in pari materia*’ are those relating to the same person or thing or having a common purpose.”⁵⁴ Thus, where a statute from the same jurisdiction was interpreted previously by a court, a subsequent statute on the same subject will be harmonized with that interpretation.⁵⁵ This inclination “is based on the common-sense assumption that when the legislature enacted statutes on the same topic, it most likely intended that they be consistent with each other even though the statutes contain no reference to each other.”⁵⁶

This canon of construction presumes enactments from the same jurisdiction are considered part of the same uniform system.⁵⁷ The canon rests on the assumption that the legislative body contemplated the existing legislation on the same subject at the passage of the new act.⁵⁸ Here, the “critical question concerns how *reasonable* it is to assume that legislators and members of the public know the provisions of other acts on the same subject when they consider the meaning of the act to be construed.”⁵⁹ Thus, the assumption of the legis-

54. BLACK'S LAW DICTIONARY 711 (5th ed. 1979). For application in California, *see, e.g.*, *Kizer v. Hanna*, 48 Cal. 3d 1, 767 P.2d 679 (1989); *Long Beach Officers Ass'n v. City of Long Beach*, 46 Cal. 3d 736, 759 P.2d 504 (1988); *People v. Woodhead*, 43 Cal. 3d 1002, 741 P.2d 154 (1987); *International Business Mach. v. State Bd. of Equalization*, 26 Cal. 3d 923, 609 P.2d 1 (1980); *People v. Caudillo*, 21 Cal. 3d 562, 580 P.2d 274 (1978); *Lawler v. City of Redding*, 7 Cal. App. 4th 778, 9 Cal. Rptr.2d 392 (Ct. App. 1992); *Clubs of Cal. for Fair Competition v. Kroger*, 7 Cal. App. 4th 709, 9 Cal. Rptr.2d 247 (Ct. App. 1992); *In re Jason V.*, 229 Cal. App. 3d 1168, 280 Cal. Rptr. 562 (Ct. App. 1991).

55. Application of the rule is most justified when statutes of the same subject matter are passed in the same legislature. *See International Business Mach.*, 26 Cal. 3d at 923, 601 P.2d at 1; *Caudillo*, 21 Cal. 3d at 562, 580 P.2d at 274.

56. WILLIAM P. STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING 93-94 (1984).

57. *See* HENRY C. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 332 (1911).

58. *Id.* at 233.

59. 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.01, at 450 (4th ed. 1973) (emphasis added) [hereinafter SUTHERLAND]. *In pari materia* rests on the premise that “when a legislature enacts a provision, it has available all the other provisions relating to the same subject matter whether in the same statute or in a separate act.” *Id.*

lative *knowledge* of the previous statute is of particular concern when applying the canon.

Another policy consideration of the canon is that the legislature seeks to promote the *uniformity* of law.⁶⁰ Thus, the interpretation of the second statute "shall be such, if possible, as to avoid repugnancy or inconsistency between different enactments of the same legislature."⁶¹ This commonly occurs when words from a previous statute are added to the subsequent statute:

For example, when the legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using the word in the same sense, unless there is something in the *context* or in the *nature* of things to indicate it intended a different meaning thereby.⁶²

b. *Statutes Adopted From Other Jurisdictions*

Where the legislature of one jurisdiction adopts a provision, clause, or phrase from a statute of another jurisdiction, it is presumed that the enactment was made with knowledge of the prior interpretation and that the legislature intends for the court to apply the new language with a similar interpretation.⁶³ This canon of interpretation "rests altogether on the presumption that the legislature, in deliberating upon the adoption of the statute, had before it not only the terms of the law itself, but also the judicial decisions in which it had been interpreted, and, moreover, it must be supported by a presumption that such interpretation was regarded by the legislature as definite, clear and established."⁶⁴ Likewise, where the legislature makes a material change in the borrowed lan-

60. See BLACK, *supra* note 57, at 333.

61. *Id.*

62. *Id.* at 333-34 (emphasis added). A different "context" or "nature" may be when a "new statute embod[ies] policies or compromises subtly different from those in the similar statute." WILLIAM N. ESKRIDGE & PHILLIP P. FRICKEY, LEGISLATION, STATUTES, AND THE CREATION OF PUBLIC POLICY 786 (1988).

63. See BLACK, *supra* note 57, at 597.

64. *Id.* at 598-99. See also *Associated Truck Parts, Inc. v. Superior Court*, 278 Cal. App. 3d 864, 279 Cal. Rptr. 76 (Ct. App. 1991) (stating that legislature is presumed to have been fully aware of the judicial construction of the statute and intended to alter the law).

guage, the court must assume the legislature did not intend to adopt the interpretation.⁶⁵

Therefore, it is clear that when legislators adopt language of earlier statutes in new laws, the courts correctly interpret the new law consistently with the prior statute because it is plausible to assume that (1) the legislature acted with *knowledge* of the previous law, and (2) the legislature desires *uniformity* unless otherwise stated.

2. *California Courts, Initiatives, and Reference to Similar Statutes*

Despite the fact that statutory canons are often objected to because there is no guarantee a legislator was aware of the canon used to interpret the statute,⁶⁶ California courts assume voter knowledge of existing laws and constructions when interpreting initiatives by applying canons of similar construction.⁶⁷ The California Supreme Court has repeatedly stated that “[w]here the language of a statute uses terms that have been judicially construed, ‘the presumption is almost irresistible’ that the terms have been used ‘in the precise and technical sense which had been placed on them by the courts’ This principle applies to legislation adopted through the initiative process.”⁶⁸

65. BLACK, *supra* note 57, at 601. See also *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 754 P.2d 708 (1988); *Lawler v. City of Redding*, 7 Cal. App. 4th 778, 9 Cal. Rptr.2d 392 (Ct. App. 1992).

66. A prominent jurist and legal scholar criticizes canons of construction for the following reason:

Most canons of statutory construction go wrong not because they misconceive the nature of a judicial interpretation or of legislative or political process but because they impute omniscience to [the enacting body]. Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process.

Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHICAGO L. REV. 800, 811 (1983). Besides the criticism that statutory canons presume legislative omniscience, canons are often criticized because the thrust of one canon is easily rebutted by another. See KARL LLEWELLYN, *THE COMMON LAW TRADITION* 521-35 (1960) (providing a list of canons of construction that conflict directly with one another).

67. See, e.g., *Hobbes v. Municipal Court*, 233 Cal. App. 3d 670, 284 Cal. Rptr. 655 (Ct. App. 1991) (stating the body enacting the initiative is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted).

68. *People v. Weidert*, 39 Cal. 3d 836, 845-46, 705 P.2d 380, 385 (1985) (citations omitted). See also *In re Harris*, 49 Cal. 3d 131, 136, 775 P.2d 1057, 1060 (1989) (stating that drafters of the language of Penal Code § 667 used the language “on charges brought and tried separately” as a derivation of the old Penal

This judicial assumption appears to have its origins in the interpretation of a hotly contested initiative issue—the single-subject rule.⁶⁹ The single-subject rule has engendered considerable controversy over its proper enforcement.⁷⁰ Perhaps the genesis of this debate is the judicial assumption that the voters knew of existing statutes and their judicial construction when voting for the single-subject rule.⁷¹

The following discussion traces the reasons for the assumption of voter knowledge of an existing law in the initial interpretation of the initiative single-subject rule. The discussion is useful for illustrating the problems of assuming voter knowledge of existing laws and interpretations where little evidence to do so is present.

Code § 644 language “upon charges separately brought and tried” and therefore a presumption of the same meaning of the prior phrase should be applied); *In re Lance W.*, 37 Cal. 3d 873, 889, 694 P.2d 744, 754 (1985) (stating that the electorate is presumed to be aware of a similar construction of a legislative statute when interpreting ambiguous terms of Proposition 8); *In re Jeanice D.*, 28 Cal. 3d 210, 216, 617 P.2d 1087, 1089-90 (1980) (interpreting language “25 years to life” in Penal Code § 190 as enacted by voters in November 1978 with the aid of a prior statute enacted by the legislature); *Robert S. v. Superior Court*, 9 Cal. App. 4th 1417, 1421, 12 Cal. Rptr.2d 489, 492 (Ct. App. 1992) (deeming the electorate to be aware of Welf. & Inst. Code § 203, which states a proceeding in juvenile court is not a criminal proceeding when interpreting definition of “criminal proceeding” in Proposition 115).

69. See *Perry v. Jordan*, 34 Cal. 2d 87, 207 P.2d 47 (1949). For a discussion of judicial review under the California single-subject rule see, Marilyn E. Minger, Comment, *Putting the “Single” Back In the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS L. REV. 879 (1991); Daniel Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983); Steven W. Ray, Comment, *The California Initiative Process: The Demise of the Single-Subject Rule*, 14 PAC. L.J. 1095 (1983).

70. Over the last 15 years, the California Supreme Court has debated how the single-subject rule should be enforced. See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281 (1978); *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274 (1982). Propositions that have recently satisfied challenges under the rule include: Proposition 140 in *Legislature v. Eu*, 54 Cal. 3d 245, 816 P.2d 1309 (1991) (allowing term limits, budget limits, and pension limits under the subject of “incumbency reform”); Proposition 115 in *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal. 3d 245, 806 P.2d 1360 (1991) (allowing health education programs, tobacco-related disease research, and programs for fire prevention under the subject of “tobacco tax”); Proposition 115 in *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077 (1990) (allowing initiative covering post-indictment hearings, constitutional independence, joinder and severance rules, hearsay testimony, discovery procedures, and others under “Crime Victim Rights”).

71. See *infra* text accompanying notes 95-102.

a. *The Single-Subject Rule—California Courts and Reference to Similar Statutes*

In California, there are two single-subject rules, one for the legislative process and one for the initiative process. The single-subject rule as a limit to legislation was adopted in 1849.⁷² It is codified in Article IV, § 9 of the California Constitution and states in relevant part:

A statute shall embrace but one subject which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is reenacted as amended.⁷³

The single-subject rule as a limit on initiatives was enacted as "Assembly Constitutional Amendment No. 2" in the 1948 election.⁷⁴ It is now codified in Article IV, § 8(d) of the California Constitution and states that "an initiative embracing more than one subject may not be submitted to the voters or have any effect."⁷⁵

In California, both the legislative single-subject rule and the initiative single-subject rule are interpreted and enforced by the judiciary.

1) *The Legislative Single-Subject Rule*

For centuries, the single-subject rule has been a limit on the ability of legislatures to pass laws with more than one subject.⁷⁶ The primary purpose of the legislative single-sub-

72. CAL. CONST. art. IV, § 25.

73. CAL. CONST. art. IV, § 9. An amendment providing an exception for budget act appropriations was rejected by statewide election on November 2, 1993. *Id.*

74. See CALIFORNIA OFFICE OF SECRETARY OF STATE, BALLOT PAMPHLET 8 (1948) [hereinafter 1948 BALLOT PAMPHLET].

75. CAL. CONST. art. II, § 8(d). As proposed, the initiative single-subject rule was similar to the rule today, although considerably more wordy:

Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute shall be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose.

1948 BALLOT PAMPHLET, *supra* note 74, at 17.

76. See Milliard H. Ruud, *No Law Shall Embrace More than One Subject*, 42 MINN. L. REV. 389, 389 (1958). The single-subject rule originated in Rome where the enactment of the *Lex Caelcilia Didia* prohibited laws containing un-

ject rule is recognized as the prevention of log-rolling, "the practice of several minorities combining their legislative proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained."⁷⁷ Additional purposes of the legislative single-subject rule are the preservation of an orderly legislative process and the prevention of deception of the legislature and the public.⁷⁸ Single-subject legislation promotes clarity in the legislative process and ensures there will be little confusion due to multi-subject bills.⁷⁹

The seminal case on the California Supreme Court's application of the legislative single-subject rule is *Evans v. Superior Court*.⁸⁰ In *Evans*, the court determined that legislation may include any provision as long as all parts of the legislation are "reasonably germane."⁸¹ The *Evans* test is a "liberal" standard of review.⁸² The main rationale for liberal application of the single subject rule to legislation is the California Supreme Court's reluctance to impinge upon the state legislature's prerogative.⁸³ To determine whether an act contains a single subject that is sufficiently referred to in its title, "the court [is] permitted to look at the history of the particular legislation to which the act relates when read as a whole."⁸⁴ The history of the bill indicates to the court that the bill is legitimate legislation.⁸⁵ When determining whether the parts of a legislative enactment are reasonably germane, a court need not find substantial evidence of a single-subject bill. As the *Evans* court noted, the single-subject rule "was not enacted to provide a means for the overthrow of legitimate legislation."⁸⁶

related provisions. *Id.* Today, this limit on omnibus legislation exists in most of the nation's states. MAGLEBY, *supra* note 26, at 201.

77. Ruud, *supra* note 77, at 391. See also, *Planned Parenthood Affiliates v. Swoap*, 173 Cal. App. 3d 1187, 1196, 219 Cal. Rptr. 664, 668 (Ct. App. 1985).

78. See Ruud, *supra* note 77, at 391.

79. *Id.*

80. 215 Cal. 58, 8 P.2d 467 (1932).

81. 215 Cal. at 62; 8 P.2d at 469.

82. *Id.*

83. 215 Cal. at 62, 8 P.2d at 470.

84. 215 Cal. at 62, 8 P.2d at 469.

85. *Evans v. Superior Court*, 215 Cal. 58, 62, 8 P.2d 467, 470 (1932). Legitimate legislation is legislation whose subjects are sufficiently referred to in the title so as not to mislead legislators and the public. *Id.*

86. 215 Cal. at 62, 8 P.2d at 469.

The attitude of judicial restraint exercised by the *Evans* court makes perfect sense in light of the educated nature of the representatives and the extensive amount of scrutiny given a piece of legislation before a vote. Thus, the California Supreme Court's approach to the legislative single-subject rule is wary of "judicial interference with legislative action . . . so as not to hamper the legislature nor embarrass honest legislation."⁸⁷

b) *The Initiative Single-Subject Rule*

In 1948, the California Constitution was amended to limit initiatives to a single subject.⁸⁸ This amendment was enacted through the initiative process in order "to eliminate the danger of voter confusion and deception."⁸⁹ In the 1948 ballot summary, the advocates of the single-subject rule reasoned that the "purposes to be achieved by the enactment were: (1) Simplification and clarification of the issues presented to the voters; and (2) A more intelligent amendment of the constitution by permitting the adopted sections to be placed in the appropriate subdivision of the constitution."⁹⁰ The advocates further reasoned:

The busy voter does not have the time to devote to the study of long, wordy propositions and must rely upon such sketchy information as may be received through the press, radio, or picked up in general conversation. If improper emphasis is placed upon one feature of the initiative and the remaining features [of the initiative] ignored, or if there is a failure to study the entire proposed amendment, the voter may be misled as to the overall effect of the proposed amendment.⁹¹

In response, the opponents of the single-subject initiative argued that the single-subject rule was "an attempt to invade the fundamental principles of the initiative After all, what consists of one subject? Is 'taxation', or 'education', or

87. Ruud, *supra* note 77, at 393-94.

88. "Assembly Constitutional Amendment No. 2" of the 1948 election was the title of the single-subject rule initiative. See 1948 BALLOT PAMPHLET, *supra* note 74, at 8. There are six states where the single-subject rule limits initiatives. See DEMOCRACY BY INITIATIVE, *supra* note 4, at 312.

89. *Schmitz v. Younger*, 21 Cal. 3d 90, 97, 577 P.2d 652, 656 (1978) (Manuel, J., dissenting).

90. 1948 BALLOT PAMPHLET, *supra* note 74, at 8.

91. *Id.*

'social welfare', one or more than one subject?"⁹² Nowhere in the ballot argument, ballot summary, or the text of the initiative was the legislative single-subject rule mentioned.

The single-subject rule was approved by the electorate by a vote of 1,973,761 to 963,387, an overwhelming majority.⁹³ If the language of the ballot argument is any indication, those who voted in favor of the rule were concerned with long and complex measures for which they were unable to weigh the long-term implications.⁹⁴ There was no mention of the legislative single-subject rule or its "liberal" review under *Evans*, thereby indicating a fresh analysis by the California Supreme Court was appropriate.

Seven months after the single-subject rule for initiatives was passed, however, the California Supreme Court held in *Perry v. Jordan*⁹⁵ that the "[single-subject] provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, all parts of which are reasonably germane."⁹⁶ Thus, the interpretation of the initiative single-subject rule was the same interpretation the California Supreme Court gave the legislative single-subject rule in *Evans*. The basis for the application of the interpretation handed down in *Evans* rested on "an indication" that if words and phrases are used in a subsequent statute in a similar setting, then the subse-

92. *Id.* at 9.

93. CALIFORNIA OFFICE OF THE SECRETARY OF STATE, A STUDY OF BALLOT MEASURES 1894-1980 22 (1982).

94. A common tactic prior to the enactment of the initiative single-subject rule was to create omnibus measures with the hope that one issue or the issues combined could ride the measure to victory. Lowenstein, *supra* note 69, at 950. One of the most interesting groups was the "Ham and Eggs" coalition that proposed a "monstrous" measure under the title of "California Bill of Rights" in 1938, 1939, 1940, and 1944. See WINSTON W. CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 8 (1950). Included in this proposition were 12 sections and 12,000 words dealing with such subjects as pensions, taxes, gambling, Indians, and Senate Reapportionment. *Id.* at 9. None of the initiatives passed, but the public was clearly frustrated with the pattern of multi-subject initiatives. See Lowenstein, *supra* note 69, at 950-52. The drafting of the single-subject rule for initiatives was a direct response to these catch-all initiatives. *Id.*

95. 34 Cal. 2d 87, 207 P.2d 47 (1949). The plaintiffs in *Perry* contended that an initiative measure for the repeal of pensions for the needy, aged, and blind was in violation of the single-subject rule. *Perry*, 34 Cal. 2d at 89-90, 207 P.2d at 48-49.

96. *Perry*, 34 Cal. 2d at 92, 207 P.2d at 50 (quoting *Evans v. Superior Court*, 215 Cal. 58, 62, 8 P.2d 467, 469 (1932)).

quent statute carries with it a like interpretation.⁹⁷ The court stated that nothing in the argument to the voters led them to believe a different construction was necessary.⁹⁸ The court did not discuss that the legislative single-subject rule was never exposed to the public for consideration. The court also failed to consider that the voters might desire less deference than the legislature⁹⁹ or might have intended a stricter inquiry.¹⁰⁰ Nevertheless, the California Supreme Court adopted the *Evans* "liberal" review based on the assumption that the *initiative* single-subject rule intended to adopt the *legislative* single-subject rule's interpretation.¹⁰¹

97. *Id.*

98. *Id.* Contrary to the court's suggestion, there is significant difference in the statute's wording. See *infra* text accompanying notes 113-126.

99. It is surprising the court chose this adaptation, because the main rationale for the liberal review was the court's reluctance to infringe upon the legislature's prerogative. See *supra* text accompanying notes 80-88.

100. Consider *Wallace v. Zinman*, 200 Cal. 585, 254 P. 946 (1927), where the California Supreme Court recognized the dangers associated with complex laws before the electorate. *Wallace* involved a challenge to an initiative measure as violating the *legislative* single-subject rule. *Wallace*, 200 Cal. at 590, 254 P. at 947. The court lectured that "[t]he majority of qualified electors are so much interested in managing their own affairs that they have no time to carefully consider measures affecting the general public." *Wallace*, 200 Cal. at 592, 254 P. at 949 (citing *State v. Richardson*, 85 P. 225, 229 (Or. 1906)). The court continued:

[t]he greater number of voters . . . usually derive their knowledge of the contents of a proposed law from an inspection of its title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage.

Wallace, 200 Cal. at 592-93, 254 P. at 949. Therefore, the *Wallace* court concluded, this limited knowledge necessitates that initiative measures "strictly comply" with the constitutional requirement of a single subject. *Wallace*, 200 Cal. at 593, 254 P. at 949. Using the analysis employed by the *Perry* court, it is possible to assume that the voters knew of *Wallace* and desired strict compliance with the initiative single-subject rule. See *infra* text accompanying notes 130-133.

101. Since the *Perry* decision, the court has repeatedly applied the "reasonably germane" test to determine whether an initiative violates the single-subject rule. The test has received much criticism. See *supra* notes 69-70.

In the past 15 years, the California Supreme Court has upheld initiatives challenged by the single-subject rule in some noteworthy cases. See, e.g., *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309 (1991) (upholding incumbency reform initiative, Proposition 140 on June 1991 primary election ballot); *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal. 3d 245, 806 P.2d 1360 (1991) (upholding tobacco tax initiative, Proposition 99 on November 1988 election ballot); *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077 (1990) (upholding "Crime Victims Justice Reform Act," Proposition 115 on June 1990 primary ballot election); *Cal farms Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 771 P.2d

Thus, in its interpretation of the initiative single-subject rule, the *Perry* court applied the canon of construction that assumes the voters intended the judicial interpretation of the previous legislative single-subject rule. While the opinion in *Perry* is only one case of applying canons of similar construction to initiatives, the courts have repeatedly employed such an analysis.¹⁰²

Use of such canons to interpret initiatives assumes *knowledge* of the previous statute by the enacting body and an intent for *uniformity* and *consistency*. This practice of applying the canon when analyzing an initiative, however, ignores the limited knowledge of voters and the initiative as a resource to alter the status quo.

III. ANALYSIS

When California courts interpret initiatives by reference to similar statutes, the court assumes that (1) the voter has *knowledge* of the terms of the similar statute, knows the judicial interpretations of the similar statute, and regards them as definite, clear, and established,¹⁰³ and (2) the initiative carries with it a legislative desire for *uniformity* and *consistency* with respect to similar statutes.¹⁰⁴

The following analysis rejects the assumption that voters act with knowledge of a previous similar statute, because voters are exposed to few sources for discovering the origin of

1247 (1989) (upholding insurance regulation initiative, Proposition 103 on November 1988 election ballot); *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274 (1982) (upholding "The Victim's Bill of Rights," Proposition 8 on the June 1982 primary election ballot); *Fair Political Practices Comm. v. Superior Court*, 25 Cal. 3d 33, 599 P.2d 46 (1979) (upholding Political Reform Act of 1974, Proposition 9 on the June 1974 ballot); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281 (1978) (upholding the *Jarvis-Gann* initiative, Proposition 13 on the June 1978 election ballot).

Two recent appellate court decisions, however, held initiatives violated the single-subject rule. See *Chemical Specialties Mfr. Ass'n v. Deukmejian*, 227 Cal. App. 3d 663, 278 Cal. Rptr. 128 (Ct. App. 1991) (invalidating 1988 Proposition 105, the "Public's Right to Know Act"); *California Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351, 245 Cal. Rptr. 916 (Ct. App. 1988) (invalidating 1988 no-fault insurance measure). *But see League of Women Voters v. Eu*, 7 Cal. App. 4th 649, 9 Cal. Rptr. 2d 416 (Ct. App. 1992) (upholding Government Accountability and Taxpayer Protection Act of 1992).

102. See, e.g., *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 23, 865 P.2d 633, 646 (1994); *In re Harris*, 49 Cal. 3d 131, 136, 775 P.2d 1057, 1060 (1989); *In re Lance W.*, 37 Cal. 3d 873, 889, 694 P.2d 744, 754 (1985).

103. See *supra* text accompanying notes 54-59, 63-64.

104. See *supra* text accompanying notes 60-62.

ballot language¹⁰⁵ and because voters have little or no knowledge of the judicial significance of initiative wording.¹⁰⁶ Further, the analysis demonstrates that the presumption for uniformity and consistency as applied to the initiative process is inappropriate due to the initiative's role as an alternative legislative body.¹⁰⁷

A. *Knowledge of Statute's Wording and Construction*

1. *Voters' Minimal Exposure to Sources That Provide the Origins of Borrowed Words*

The California Supreme Court consistently deems the electorate to "have voted intelligently upon an amendment to their organic law, the whole text of which was supplied to each of them prior to the election and which [we] must assume [each of them] to have duly considered."¹⁰⁸ Assuming the voters comprehend the purpose of a statute, however, does not mean the court should assume voters are able to advance judgments on the origins of a word, phrase, or sentence.

As previously discussed, an average voter has little time to consider the purpose of an initiative, much less to study an initiative's language.¹⁰⁹ Former Justice Manuel, dissenting in *Schmitz v. Younger*,¹¹⁰ acknowledged the need for a stricter scrutiny of initiatives due to the differences in the legislative arena:

[T]he dangers presented by a multi-subject [initiative] are much more limited in the legislative context than in the initiative context. A proposed bill is closely scrutinized by legislators and their staffs in both houses of the Legislature. Each bill is assigned to a standing committee that receives testimony from interested parties and makes recommendations concerning the bill . . . the Governor exam-

105. See *infra* text accompanying notes 108-112.

106. See *infra* text accompanying notes 127-133.

107. See *infra* text accompanying notes 134-137.

108. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 243-44, 583 P.2d 1281, 1298-99 (1978). In *Raven*, the court stated that "[w]e must assume the voters duly considered and comprehended" the measure. *Raven v. Deukmejian*, 52 Cal. 3d 336, 349, 801 P.2d 1077, 1085 (1990). In *Brosnahan*, the court stated that "[w]e should not . . . presume that the voters did not know what they were about in approving Proposition 8." *Brosnahan v. Brown*, 32 Cal. 3d 236, 252, 651 P.2d 274, 283 (1982).

109. See *supra* text accompanying notes 30-43.

110. 21 Cal. 3d 90, 577 P.2d 652 (1978).

ines the bill before signing it into law. By contrast, no such scrutiny is afforded a proposed initiative by the voter.¹¹¹

Voter exposure to initiatives is limited solely to official materials presented in the ballot pamphlet, and judicial review should reflect this.¹¹² Research revealed no pamphlet in California or any other state where there is a discussion of the origin of the borrowed words. Therefore, not only is it probable that the electorate has no actual knowledge of the genesis of or judicial significance of an initiative's language, it is clear voters do not even have constructive knowledge of an initiative language's significance. To assume the electorate is aware of the origin or significance of complex, ambiguous, and imprecise wording is unsound.

111. 21 Cal. 3d at 99, 577 P.2d at 657 (Manuel, J., dissenting).

112. Several commentators suggest courts look at materials not officially presented to the voters to determine the voter knowledge and intent in initiatives. See, e.g., Lowenstein, *supra* note 69, at 971 (advocating that a court look at articles, books, television, radio programs, and past legislation to see if the public was exposed to all the issues the initiative covered); Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 174, 176 (1989) (suggesting exit polls, media editorials, advertising, bumper stickers, and other potential devices to determine the meaning of a popularly enacted statute). Indeed, the California Supreme Court in *Amador* stated that "the advance publicity and public discussion [of Proposition 13] and its predicted effects were massive. The measure received as much public attention as any other ballot proposition in recent years. These circumstances would seem to dilute the risk of voter confusion or deception . . ." *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 231, 583 P.2d 1281, 1291 (1978). Thus, such an analysis may indicate that the California Supreme Court accepts information other than that officially presented to the voter.

Incorporation of such information when interpreting initiatives, however, is problematic. First, the analysis only speculates about what the public knows. Under such an analysis, there is no certainty all voters were exposed to the information the court uses to evaluate voter understanding. See *supra* note 38. Second, such an analysis places a tremendous burden on the court to determine which sources were influential in formulating voter understanding of an initiative. Finally, looking at material extrinsic to that in the voter pamphlet opens the door for proponents and opponents of initiatives to flood public discussion with favorable information prior to the election.

As is discussed in this comment's proposal, a reviewing court should not consider extrinsic sources and opinions of an initiative's meaning, but should consider only materials officially presented in the voter pamphlet. While it may be speculative to assume the voter's only source of information is the ballot pamphlet, it is entirely unreliable to assume voters were exposed to media editorials, television advertisements, and other extrinsic sources.

a. *Application of The Canon Ignores Significance of Initiative Wording*

Another problem with applying a canon of similar construction to initiatives is that the reviewing court focuses on the previous judicial interpretation rather than on the words and materials of the ballot pamphlet itself. Nowhere is this clearer than the California Supreme Court's analysis in *Perry*.

When interpreting by reference to a similar statute, it is generally accepted that "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed."¹¹³ The *Perry* court ignored this significance when interpreting the single-subject rule for initiatives. Had the court analyzed the words of the initiative single-subject rule, rather than the interpretation of the legislative single-subject rule, the court may have found several significant differences.

First, the single-subject rule for initiatives does not require that the title state the measure's subject,¹¹⁴ whereas the single-subject rule for legislation does.¹¹⁵ The title requirement in the legislative single-subject rule is a separate inquiry for analysis of a legislative bill.¹¹⁶ In *Perry*, however, the California Supreme Court analyzed the initiative's title despite the fact the initiative did not require it to do so.¹¹⁷

Second, the "context" and "nature" of the initiative single-subject rule embodied policies "subtly different" from the legislative single-subject rule.¹¹⁸ Because the main rationale

113. *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 507, 754 P.2d 708, 717-18 (1988) (quoting *City of Port Huenne v. City of Oxnard*, 52 Cal. 3d 385, 395, 341 P.2d 318, 324 (1959)). See also *supra* note 65 and accompanying text.

114. See CAL. CONST. art. II, § 8(d). See also *supra* text accompanying note 75. The original language of the initiative single-subject rule also omitted the title requirement. See *supra* note 75.

115. See CAL. CONST. art. IV, § 9. See also *supra* text accompanying note 73.

116. See *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1096, 742 P.2d 1290, 1300 (1987) (stating the single-subject rule and title requirement are independent provisions that serve separate purposes).

117. See *Perry v. Jordan*, 34 Cal. 2d 87, 94-95, 207 P.2d 46, 51 (1949). Such a step demonstrates that the court may have been more concerned with harmonizing the analysis of the initiative single-subject rule with that of the legislative single-subject rule, thereby ignoring the words of the initiative itself.

118. See *supra* text accompanying note 62.

for the liberal review in *Evans* was not to impinge upon the state legislature's prerogative,¹¹⁹ the "nature" of the review for initiatives is different, as there is no legislative prerogative. In addition, the "context" of the enactment is different, as the voters, unlike the legislature, did not have resources to determine the legislative single-subject rule's interpretation.

Next, comparing the language of the initiative single-subject rule with that of the legislative single-subject rule, there is significance in the different wording. Besides the omission of the title requirement,¹²⁰ the consequences for a violation of the single-subject rules are different. A violation of the initiative single-subject rule will invalidate the entire initiative,¹²¹ whereas a violation of the legislative single-subject rule will merely invalidate the part not encompassed by the title.¹²² Together with the "context" and "nature" of the enactment and the omission of the title requirement, the different language is likely enough to "show that a different intention existed."¹²³

Finally, checking the different wording against the backdrop of the materials in the voter pamphlet, it is clear there is voter desire "not to be misled as to the overall effect of the proposed amendment."¹²⁴ Indeed, the language of the ballot pamphlet insinuates a review closer to that of the "strict" review the court discussed in *Wallace v. Zinman*.¹²⁵ An objective examination of the text of the initiative and the ballot pamphlet hardly reveals concerns akin to the legislative prerogative.¹²⁶

In short, the court concluded that the liberal *Evans* review applied, because it assumed that voters intended a statute similar to the legislative single-subject rule. Had the court focused instead on the initiative language and the materials officially presented to the voter, it may have reached a different conclusion.

119. See *supra* text accompanying note 84.

120. See *supra* text accompanying notes 114-115.

121. "An initiative measure embracing more than one subject may not . . . have any effect." CAL. CONST. art. II, § 8(d).

122. "If a statute embraces a subject not expressed in its title, only the part not expressed is void." CAL. CONST. art. IV, § 9.

123. See *supra* text accompanying note 113.

124. See 1948 BALLOT PAMPHLET, *supra* note 74, at 8.

125. See *infra* text accompanying notes 130-132.

126. See *supra* text accompanying notes 84-88.

2. *Failure of Court to Inquire Into Whether Voters Are Reasonably Certain of the Judicial Significance of Initiative Wording*

The canons of interpretation by reference to similar statutes are applied only when it is *reasonably certain* the enacting body regards the interpretation of the similar statute by the judiciary as definite, clear, and established.¹²⁷ When courts skip the inquiry into how likely it is that an enacting body views the similar words and their judicial interpretation as established, the courts fail to account for the intent of the legislating body. Again, the California Supreme Court's analysis in *Perry* demonstrates the problems of failing to inquire whether the enacting body is reasonably certain of the origin of the initiative's language.

The *Perry* court relied on the "indication" that if words and phrases are used in a subsequent statute in a similar setting, then the subsequent statute carries with it a like interpretation.¹²⁸ The *Perry* court, however, failed to consider how likely it was that voters contemplated the legislative single-subject rule and its liberal "reasonably germane" test.¹²⁹ The failure to inquire into how likely it was that the voters knew of the legislative single-subject rule and its interpretation in *Evans* allowed the court to reach a conclusion it desired, regardless of the language of the initiative and the materials in the voter pamphlet.

127. See *supra* text accompanying note 64. Undoubtedly, the drafters of an initiative will be familiar with any judicial significance a proposed initiative's words may contain. California recognizes, however, that the drafter's knowledge is irrelevant when interpreting the initiative.

Professor Lowenstein, in his article on the single-subject rule, contests that the *Perry* court's analysis was correct because the drafter of the initiative intended an interpretation akin to the legislative single-subject rule. Lowenstein, *supra* note 69, at 949-53. As Lowenstein points out, Charles J. Conrad, the Californian Assemblyman who drafted the language of the initiative single-subject rule, maintains that the single-subject rule was "directed at what was known as 'catch-all' initiatives" and was not intended to sweep broadly. Charles J. Conrad, *Letter to the Editor*, L.A. TIMES, Sept. 10, 1982, § II, at 10. As the great weight of authority indicates, however, the motive or purpose of the drafters is unreliable, because courts cannot state with assurance that the voters were aware of the drafters' intent. See *supra* notes 51-52 and accompanying text. It is clear, therefore, that when interpreting the language of an initiative, the court should inquire only into whether it is reasonably certain the voters knew of the language's significance.

128. See *supra* text accompanying note 98.

129. See *supra* text accompanying note 98.

For instance, the *Perry* court may just as easily have concluded the voters intended strict compliance with the single-subject rule pursuant to the rationale of *Wallace v. Zinman*.¹³⁰ After all, *Wallace* previously addressed initiatives and the legislative single-subject rule.¹³¹ In fact, the wording of the *Wallace* holding is similar to the arguments in the ballot pamphlet for the initiative single-subject rule.¹³² Therefore, without asking how reasonable it is that the electorate knew of *Wallace* and the legislative single-subject rule, the electorate could be charged with the knowledge of the "strict compliance" test of *Wallace*, thus justifying the application of a "strict" judicial review. The court's analysis in *Perry* relies solely on the judge's subjective belief of voter knowledge and fails to examine objective criteria. For this reason, the analysis is an unreliable reflection of the enacting body's intent.

It is crucial that a court ask how reasonable it is to assume that the voters considered previous judicial interpretations of words borrowed from similar statutes. Otherwise, the "paramount consideration" of the enacting body's intent is never considered.¹³³ Rather, the approach is simply a subjective judicial belief of the intent of the initiative and does not consider the actual materials a voter considered when studying the initiative.

B. *Uniformity, Consistency, and Initiatives*

It has been said that "the need for uniformity becomes more imperative where the same word or term is used in different statutory sections that are similar in purpose and content."¹³⁴ Thus, a similar interpretation of the same term used by the same legislature avoids "repugnancy" and "inconsistency."¹³⁵ Indeed, the reliability of legislative uniformity is strongest when the same legislature enacts similar stat-

130. 200 Cal. 585, 254 P. 946 (1927). *Wallace* involved a challenge to an initiative as violating the legislative single-subject rule. 200 Cal. at 590, 254 P. at 947. The challenge was prior to the enactment of the initiative single-subject rule in 1948.

131. 200 Cal. at 589, 254 P. at 947.

132. See *supra* text accompanying notes 91-92.

133. See *Yoshisato v. Superior Court*, 2 Cal. 4th 978, 989, 831 P.2d 327, 333-34 (1992); see also *supra* text accompanying note 47.

134. 2A SUTHERLAND, *supra* note 59, at 454.

135. See *supra* text accompanying notes 60-62.

utes in the same session.¹³⁶ Desire for uniformity is perhaps least convincing, however, when interpreting an initiative based on prior legislative enactments.

Courts acknowledge that the initiative process in California is the "legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end."¹³⁷ Most initiatives are a response to the failure or refusal of the legislature to act in a given area. Indeed, legislative inaction is the reason the initiative process was established.

Therefore, to imply voter intent to harmonize existing legislation with the initiative ignores the reason the initiative was submitted for public consideration in the first place. While canons interpreting subsequent enactments by the same legislature rightly presume desire for uniformity, the "need for uniformity" becomes less imperative when interpreting initiatives. Thus, the two primary considerations upon which the canons of similar construction rest—the enacting body had *knowledge* of the law and desired *uniformity* in the interpretation—are not served in the initiative context.

IV. PROPOSAL: INTERPRET INITIATIVES WITH MATERIALS PRESENTED TO THE VOTERS IN THE BALLOT PAMPHLET

As this comment has attempted to demonstrate, there is no evidence that voters come to the ballot box armed with knowledge of an initiative's wording and its judicial significance. Rather, it appears that the voter is often overwhelmed by the many proposals on the ballot and may grasp only the initiative's general purpose as described in the ballot argument. Thus, this comment contends that the only reliable source for interpretation of initiative language, other than its common meaning, is the material presented to all voters in the voter pamphlet prior to the election.

Justice Frankfurter, faced with problems of statutory interpretation, stated that "the answers to the problems" of in-

136. See *supra* note 55.

137. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 228, 583 P.2d 1281, 1289 (1978).

terpretation "are in its exercise."¹³⁸ Similarly, problems of interpretation of initiatives when applying a canon of similar construction are solved by a refined and reliable method of analysis. Thus, this comment proposes that, in its "exercise" of interpreting initiatives, a court should consider the materials the voters have considered themselves. The voter is the law-maker; the drafter and proponents of the initiative are not. The court must not assume the voter has great insight into the initiative's words or into the prior construction of another statute. Courts must remember the context in which the initiative is presented to the voter—a long and foreign piece of legislation whittled down to a "yes" or "no" vote. Careful scrutiny of the language of an initiative against the backdrop of the materials in the voter pamphlet is likely to lend a better understanding of the meaning of the initiative than reference to a similar statute.

Many may be quick to point out that the problem is not that it makes sense for courts to assume voter knowledge of other statutes or interpretations of words. The real problem is how a court must apply "voter intent" to some technical legal issue nobody thought about before the law was passed. Indeed, given the lack of knowledge of voters and the campaigning practices of those backing initiatives, how can we say those who said "yes" to an initiative all had one common idea of what a law was meant to do? For this reason, why shouldn't courts look to the drafters of an initiative and their intent—after all, can't the initiative process be seen as the special interests taking their case to the people?

Indeed, it would be simplistic to suppose that courts could apply "voter intent" to a technical legal issue not previously considered by the electorate. It would also be disingenuous, however, to disregard what the voters did consider—especially when applying canons of similar construction. The initiative is the most powerful type of law in California, and to look to the drafter's belief regarding how a law operates ignores what basis the electorate had to agree or disagree with that interpretation. The initiative process remains important to the citizens of California because the initiative sponsors take their case to the people and *the people decide*. As such, courts should demand that voters be reasonably cer-

138. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 530 (1947).

tain of other statutes or interpretations of words before applying canons of similar construction. In addition, when courts find difficulty with technical legal issues, they should consult the stated purpose of an initiative in the ballot argument or the initiative language—not information withheld by the initiative sponsor.

There are some who also may argue that removing a prior statute's construction from consideration of an ambiguous initiative will give judges an invitation to approach statutory construction without any standards to guide them. The argument, however, ignores the choice the judge has when applying the construction in the first place. As Judge Posner stated:

By making statutory interpretation seem mechanical rather than creative, the canons conceal, often from the reader of the judicial opinion and sometimes from the writer, the extent to which the judge is making new law in the guise of interpreting a statute or a constitutional provision The judge who recognizes the degree to which he is free rather than constrained in the interpretation of statutes, and who refuses to make a pretense of constraint by parading the canons of construction in his opinions, is less likely to act willfully than the judge who either mistakes freedom for constraint or has no compunctions about misrepresenting his will as that of the [enacting body].¹³⁹

Thus, the application of a similar statute's interpretation may actually delegate more legislative power to a judge than would be the case if a court were confined to the study of the language of the initiative and its supporting ballot materials.

Another potential criticism of the interpretation of initiatives solely by reference to materials presented to the voters in the ballot pamphlet is that the reviewing court may enforce the words of an initiative rigidly, thereby limiting the initiative's desired application. This comment, however, does not suggest that interpretation of initiatives be rigid and thus prohibit the sovereign people from either expressing or implementing their own will. Rather, the interpreting court should "jealously guard"¹⁴⁰ the right to initiative by rejecting sources

139. POSNER, *supra* note 66, at 816-17.

140. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 248, 583 P.2d 1281, 1302 (1978).

not considered by voters. This will not foster judicial activism or subvert the public will; it will, however, authenticate the law-making process. In addition, refusing to accept the drafter's knowledge of an earlier statute when interpreting initiatives encourages initiative sponsors to disclose to voters the source of initiative language. On the other hand, interpreting initiatives via canons of similar construction may encourage the drafters to hide the significance of language that voters would interpret differently than the courts.

Thus, courts should, whenever possible, return the initiative process to the voters by considering solely those materials presented to voters in the ballot pamphlet to interpret initiative measures.

V. CONCLUSION

This comment argues that the assumption of voter knowledge of existing laws and their judicial constructions weakens the initiative process. California courts are willing to use existing statutes and their judicial construction to resolve ambiguities in initiatives. The comment demonstrates that voters generally have no exposure to the sources that serve as the origin of the initiative's wording, that there is no reasonable certainty the voters considered the judicial significance of the borrowed words, and that the primary reasons for utilizing canons of similar construction are not served in the review of initiatives. For the reasons set forth, courts should limit interpretation of initiative language to materials officially presented to the voters in the ballot pamphlet.

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