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## **MAKING CALIFORNIA'S INITIATIVE PROCESS MORE DELIBERATIVE**

NORA H. KASHANI\* AND ROBERT M. STERN\*\*

### INTRODUCTION

Deliberation is an essential ingredient to democracy. Deliberation helps ensure that decisions are made only after thoughtful consideration of opposing views, pertinent facts and potential consequences. The Framers designed our national governmental structure to ensure that deliberation takes place in each of the three branches of government. Our carefully crafted U.S. Constitution creates a policy making process that tempers the legislative process with thoughtful deliberation. This process balances the need for majority rule with the need to protect minority interests, as well as the need to serve strong public desires with the need to set aside the immediate—perhaps fleeting—public opinion in favor of a policy that better serves the long-term public good. The deliberative process contains mechanisms for fact-finding, debate, compromise, and consensus-building which are essential to the representative form of democracy and the promotion of good public policy.

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Deliberation goes even further in promoting a democratic society. It helps ensure the actual purpose and intent of a law, already enacted, can be properly interpreted and applied. Given the inexact nature of language, it will not always be clear what is meant by a law in certain situations. Therefore, interpreters of the law may look to the deliberative process record to ascertain the intent of its enactors. Each of the fifty states has developed a governmental structure and legislative process that emulates the national model and adheres to these democratic principles. California, along with many other states, has instituted another form of democracy via the initiative process.

Some observers argue that the initiative process, or direct democracy, is the purest form of democracy.<sup>1</sup> Others counter that it lacks a procedural guarantee of deliberation, and therefore needs to be improved.<sup>2</sup> Regardless, initiatives are popular with the citizenry. “[R]oughly three out of four Californians approve of direct democracy in the state . . . .”<sup>3</sup> The general sentiment seems to be that, although the initiative system has weaknesses, it remains important as a tool of empowerment for voters. The initiative process can speed up passage of statutes and constitutional amendments, and may more directly reflect the will of the voters with respect to specific issues. In addition to and perhaps because of the popularity of initiatives, there has been an increase in the rate they have been used over the last few decades.<sup>4</sup> “[T]he number of initiatives reached an all-time high in the last

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1. See, e.g., Michael S. Kang, *Voting as Veto*, 108 MICH. L. REV. 1221, 1275 (2010) (stating that direct democracy has been described as a way to perfect democracy, and is more democratic than representative democracy).

2. See, e.g., Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 253 (1999) (“By their nature, however, initiatives lack this procedural safeguard, and therefore do not deserve the same level of judicial deference accorded to legislation.”); Catherine Engberg, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 576 (2001) (“In the case of direct democracy, the procedural safeguards of representative government are removed.”).

3. Kang, *supra* note 1, at 1279-80.

4. CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* 57 (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).

decade.”<sup>5</sup> Because the initiative process does have virtues and is a popular form of democracy, care should be taken to improve it.

Parts II through V of this Article discuss common problems that have been part of the ongoing academic and political discussion relating to the initiative process, as well as proposed solutions to these problems. Part VI summarizes four recommendations we propose to improve the deliberative aspect of California's initiative process.

## II. PROBLEM 1: DELIBERATIVE DEFICIENCY

Many of the problems with the initiative process in California stem from the deliberative process being cut short at various stages during the development of the initiative. For example, once an initiative is titled by the California Attorney General's office before its circulation, it cannot be modified.<sup>6</sup> This is true despite the legislature's willingness to compromise, the proponent realizing a drafting error or unforeseen problem, or a change in circumstances or law. Further, the legislature cannot amend an initiative once passed, unless the initiative itself allows for legislative amendment.<sup>7</sup>

Lack of deliberation at the drafting stage by proponents can cause confusion among voters if the resulting initiative is unclear or full of esoteric language. Lack of deliberation by signers during the petition signature-gathering phase can cause unpopular initiatives to be placed on the ballot because voters often sign initiatives without reading or fully understanding them. Lack of deliberation during the campaign and voting process can create voter confusion, which can lead to the passage of unpopular policies or the rejection of popular measures despite support.

Finally, the inability (specifically by the legislature) to consider post-enactment amendments to an initiative can present legislative problems and frustration in implementation. Initiative voting is often based on shortcuts and quick decision-making, rather than thorough analysis and consideration of the issues. Quick decision-making by voters may be inevitable due to the time constraints of everyday life, the length of the ballot, and the complexity of some initiatives.

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5. Note, *Making Ballot Initiatives Work: Some Assembly Required*, 123 HARV. L. REV. 959, 974-75 (2010).

6. CAL. ELEC. CODE § 9007 (West Supp. 2011).

7. CAL. CONST. art. II, § 10(c).

However, proponents of initiatives can be required to undergo a more deliberative process, and voters can be provided with better information to match both their time constraints and their current deliberative methods.

### *A. Background*

Deliberation at the drafting stage is generally only done by initiative proponents, sometimes with the help of professionals such as experienced lawyers. Initiative proponents in California *may* request assistance from the Legislative Counsel<sup>8</sup> and Secretary of State<sup>9</sup> to help improve the clarity and layout of their draft proposals. However, proponents and the legislature have little incentive to work together, and therefore proponents rarely seek this assistance. Citizens with sufficient knowledge and resources generally either draft the initiative themselves or hire professional drafting assistance. Nonprofessional citizens with limited resources are the ones who tend to request legislative assistance, which is provided free of charge. However, these initiatives generally fail at the polls. Drafting help is also available from the Secretary of State,<sup>10</sup> although this is not known to most proponents because the state guide prepared by the Secretary of State's office does not mention this assistance.<sup>11</sup>

In Colorado, by contrast, proponents *must* submit their draft proposals to the Legislative Council and the Office of Legislative Legal Services for review and comment.<sup>12</sup> The purpose of this review and subsequent public meeting is to make sure the wording of the proposal would accomplish the proponent's intent and to give the public notice that the topic of the proposal is under consideration.<sup>13</sup>

Deliberation at the signature-gathering stage should be performed by voters, if it is to serve the purpose for which it is intended, i.e., to

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8. CAL. GOV'T CODE § 10243 (West 2005).

9. *Id.* § 12172.

10. *Id.*

11. See CAL. SEC'Y OF STATE, INITIATIVE GUIDE (2011), <http://www.sos.ca.gov/elections/ballot-measures/pdf/initiative-guide-010611.pdf>.

12. COLO. REV. STAT. § 1-40-105(1) (2010).

13. *Placing an Initiated Proposal on the Statewide Ballot*, COLO. LEGIS. COUNCIL, <http://www.colorado.gov/cs/Satellite/CGA-LegislativeCouncil/CLC/1200536135670> (last visited Mar. 11, 2011).

judge which proposals have enough support to be placed on the ballot. However, the signature-gathering process is often done in areas such as shopping malls or supermarkets,<sup>14</sup> and a single person may collect up to thirty signatures an hour.<sup>15</sup> This means some voters may spend less than a minute considering whether an initiative should be placed on the ballot. Many other signers merely answer affirmatively to three questions: Are you registered to vote? Are you registered to vote in this county? Will you sign here?<sup>16</sup> This certainly cannot be considered adequate deliberation. Further, the fact that ballot placement can be bought, via paid solicitors, may be a factor leading to more initiatives on the ballot. An increase in the number of initiatives may cause a decrease in deliberation on any individual initiative.

Several studies have indicated that voters often do not understand what they are voting for, either because they have failed to read about the initiative or they read information describing the initiative, but the language was confusing or perhaps even misleading. For example, a majority of voters found the wording of propositions on the November 2006 California ballot "too complicated and confusing."<sup>17</sup> Research has shown about a third of voters do not see the initiative until they are in the voting booth.<sup>18</sup>

In a 1998 survey, 79 percent of Californians agreed that ballot measures are often "too complicated and confusing for voters to understand what happens if the initiative passes." . . . Even more troubling, substantial numbers of confused voters cast votes that support the opposite outcome from what they actually intended to bring about. For instance, on one rent-control proposition in California, over three-quarters of the electorate either wrongly

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14. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 4, at 178 n.83.

15. *Id.* at 160.

16. *Id.* at 159-60 ("Circulators are trained to avoid any extensive discussion or debate. . . . [After answering affirmatively to the first two questions] the person feels, 'Oh goodie, I get to play,' and signs it. If the table doesn't get 80 signatures an hour using this method, it's moved the next day.").

17. *Id.* at 107.

18. William M. Lunch, *Budgeting by Initiative: An Oxymoron*, 34 WILLAMETTE L. REV. 663, 669-70 (1998).

voted for rent control when they intended to oppose it or wrongly voted against rent control when they intended to support it.<sup>19</sup>

This initiative, Proposition 10 in 1980, did not pass. Similarly, regarding Washington voters polled in 2003: “About three out of four voters who had decided how they would vote on the initiative were unsure whether the measure would overturn the ergonomics rules or retain them. In fact, roughly one-in-six of those voting for the initiative mistakenly believed it would actually enact ergonomics rules.”<sup>20</sup> About ninety percent of people (both sides) could state an argument in support of their side, but less than half could recall an argument from the opposing side.<sup>21</sup> The Washington initiative was approved, thereby repealing the state’s worker-safety regulations.

In Ohio there were two opposing ballot measures regarding smoking.<sup>22</sup> One was regarded as “a ban on smoking in public places, with some reasonable exceptions.”<sup>23</sup> However, upon closer inspection, the exceptions were virtually nonexistent. For example, not even hookah bars were considered “reasonable exceptions,” and there was some disagreement as to whether smoking as part of a dramatic act in a theater production was exempted.<sup>24</sup> On the other hand, the other measure, advertised as a “smoking ban,” would have virtually “enshrine[ed] the right to smoke in restaurants and bars in the Ohio Constitution.”<sup>25</sup>

Although the initiative banning public smoking passed, there was uproar from the public as to certain provisions of the initiative that had not been made clear. Fortunately, Ohio allows post-enactment

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19. Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1145-46 (2003).

20. John Gastil et al., *When Good Voters Make Bad Policies: Assessing and Improving the Deliberative Quality of Initiative Election,* 78 U. COLO. L. REV. 1435, 1443 (2007).

21. *Id.*

22. Patrick Kabat, “Till Naught But Ash is Left to See”: *Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere,* 9 YALE J. HEALTH POL’Y L. & ETHICS 128, 149-50 (2009).

23. *Id.* at 155.

24. *Id.* at 156.

25. *Id.* at 150.

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legislative clarification of the intent of the voters. In California, however, this is not permitted unless so provided in the initiative text. Absent such a provision, the way to change initiative-enacted law is by either enacting another initiative placed on the ballot by proponents or by the legislature placing another measure on the ballot that overturns or amends the previously enacted one.<sup>26</sup> However, more often than not, initiatives do provide for some sort of legislative amendment.

Because voters typically rely on titles, summaries, or information from people and organizations that support or oppose a proposition, it is easy to gloss over the particulars, resulting in confusion or misunderstanding. To some extent, the legislature also relies on others to make decisions. This process is well-developed and organized. Legislative committees consist of legislators hearing from experts on the subject at issue. 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. This may not matter if the initiatives are relatively simple. However, for the more complex issues that require increased time, knowledge of relevant facts, and opportunity to explore diverse viewpoints, this may result in wrong decisions being made.

Voters tend to vote “no” if they do not understand a particular initiative.<sup>27</sup> Therefore, most of the initiatives that pass are probably supported by a public that understands the main focus of the initiative. This is evidenced by the fact that few initiatives have actually been repealed or substantially amended in California. Thus, there is rarely enough of an uproar over the effects of an initiative to cause a repeal.

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26. CAL. ELEC. CODE § 9007 (West Supp. 2011).

27. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 4, at 108.



## B. Solutions

### 1. On-Line Signature-Gathering and Voting

The use of the Internet to gather signatures for initiatives would take some of the quick decision-making pressure off. Rather than being confronted at a table at a mall where paid circulators are rushing voters for signatures, the deliberation would happen on the voters' own time and in their own space. Further, more information about the initiative would be easily accessible from their computers. For some of these same reasons, on-line voting may help increase deliberation when the time comes for voters to actually cast their votes for elected office and ballot measures.

In California about half the voters now vote by mail,<sup>28</sup> which has similar advantages to on-line voting in terms of privacy and timing. If Internet utilization is successful and replaces paper ballots and ballot pamphlets, it may have an added benefit of saving California money, as printing ballot pamphlets and ballots costs millions of dollars.<sup>29</sup>

### 2. Legislative Involvement

Those who have studied the initiative process in various states have proposed many solutions to improve the process, and many suggest some sort of legislative partnership.<sup>30</sup> Many of the problems discussed in this Article could be mitigated by legislative involvement. At the very least, working with the legislature adds an experienced deliberative component to the initiative process.

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28. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 2, 2010 GENERAL ELECTION 3 (2011), <http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf> [hereinafter STATEMENT OF VOTE].

29. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 4, at 233.

30. See Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1064-68 (2001); Miranda Mahe, Note, *The National Conference of State Legislatures' Attempt to Reform the Initiative Process: What Nevada Needs to do to Heed the NCSL's Advice*, 10 NEV. L.J. 535, 542-47 (2010); Kabat, *supra* note 22, at 175-78.

*a. Indirect Initiative*

The indirect initiative is a form of pre-election legislative review of initiatives. It takes different forms in different states, but generally requires that proponents draft a measure, gather enough signatures, and submit a draft to the legislature.<sup>31</sup> The legislature either adopts it or, if not, the measure goes to the voters.<sup>32</sup> One commentator recommends the use of indirect initiatives for the purpose of pointing out unintended consequences to proponents, making them aware of the points of most intense disagreement and potentially reducing the problem of oppressing unpopular minorities.<sup>33</sup>

The overall rationale behind the indirect initiative is to inject deliberation into a process that is too rigid. The indirect initiative is an attempt to prevent certain problems before they are realized. In addition, it is a way for the legislature to work in tandem with the people it represents. In theory, the indirect initiative appears to have many benefits, such as the potential for compromise, better drafting, and a reduction in unintended consequences. However, particularly in states where both the direct and indirect initiative processes are used, the indirect initiative tends to be disfavored because some proponents of an initiative distrust the legislature.<sup>34</sup> They argue that working through the legislature would be a wasted effort and cause unproductive delay.<sup>35</sup>

In California, the indirect initiative was used until 1966, when it was abolished. However, it was rarely used when it was available, because it took at least two and one-half years to complete the process.<sup>36</sup>

We recommend bringing the indirect initiative back to California, but in a new and improved form. This new and improved indirect initiative would allow initiative proponents to negotiate with the legislature and determine if they could come to some acceptable

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31. Miller, *supra* note 30, at 1066.

32. *Id.*

33. Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do And Don't Work*, 66 U. COLO. L. REV. 47, 107 (1995).

34. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 4, at 113-14.

35. *See id.* at 114 n.51.

36. *Id.* at 113.

compromise. If compromise is possible, then one of two actions could be taken: (1) the legislature could enact a modified version of the initiative, which is acceptable to the proponents and consistent with the purposes and intent of the original proposal; or (2) the legislature could place the modified version of the initiative, acceptable to the proponents and consistent with the purposes and intent of the original proposal, on the ballot and then allow the original version to be withdrawn.

If compromise is not possible, the proponents could place either their original proposal or a modified proposal, consistent with the original proposal's purposes and intent, on the ballot. This deliberative process between proponents and the legislature may improve the drafting of initiatives. It may also save time and money if a compromise solution is passed via legislation, thus eliminating the need for an expensive ballot initiative campaign. Further, it may reduce voter fatigue and confusion by reducing the number of initiatives on a given ballot. Proponents will not be discouraged from proposing ballot initiatives because they will always have the final say as to whether the initiative or legislation is satisfactory. "The proposal will, in effect, merge the legislative and initiative process for a brief period to allow a give-and-take that can enhance the drafting and quality of initiative legislation."<sup>37</sup> The Attorney General's Office should be tasked with determining whether the changes are "consistent with the purposes and intent" of the original proposal.

How is this new indirect initiative proposal different from the traditional indirect initiative? First, this proposal allows for more negotiation and flexibility between proponents and the legislature. In most states that use the indirect initiative, if the legislature enacts a modified version of the proposal, the original initiative must still go on the ballot. Second, this proposal allows for proponents to retain control, while utilizing the legislature's drafting assistance and making substantive improvements. The indirect systems do not allow proponents to retain control even when substantive changes are made by the legislature. This proposal allows proponents to amend their original proposal and place this amended version on the ballot.

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37. *Id.* at 136.

*b. Post-Election Review*

The result of a “yes” or “no” vote on ballot initiatives gives the legislature an indication of the will of the voters. Because the legislature has the tools and training to make law more focused and tailored, it makes sense to give it some ability to refine the laws enacted by initiatives. Just as regulatory bodies are in greater positions than legislatures with regard to making certain nuanced policy decisions, legislatures are in a greater position than the average citizen to deal with certain specifics. Citizens are often well-versed in general policy ideas and ideology, but not so much in how these work within the overall legal framework. It is well-documented that voters often vote based on general ideology rather than on specific, sometimes minute, details of the law.<sup>38</sup> They may vote on what they do not want to happen rather than what they do want to happen.<sup>39</sup> “Remedial action, therefore, is incumbent upon state legislatures, who can supply the deliberation and interest representation in proportion to the deficiencies apparent in ballot campaigns.”<sup>40</sup> California is the only initiative state that prohibits the legislature from amending or repealing voter-approved statutory initiatives.<sup>41</sup>

We recommend that the legislature be allowed to amend statutory initiatives after they are enacted. Specifically, amendments should be allowed so long as (1) they further the purpose and intent of the law; (2) the final form is public for at least ten days prior to the legislative vote; and (3) they are approved by a two-thirds vote of both houses. Initiatives, however, could reduce the number of legislative votes needed to amend the measure, for example down to a simple majority.

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38. See Gastil et al., *supra* note 20, at 1440 (“In such a low-information, low-attention environment, it is all too easy for citizens to be mistaken or misled about the complex policy issues on the ballot. . . . [V]oters may also incorporate distorted information about the issue, based on biased presumptions or deliberately misleading campaign messages.”); Kang, *supra* note 19, at 1141 (“[C]ritics of direct democracy point out that voters do not know basic facts about ballot measures, seem confused about the issues and appear unduly influenced by superficial advertising.”); Lunch, *supra* note 18, at 669 (“[R]esearch has shown that as many as one-third of the voters first encountered the initiatives and other measures the moment they stepped into the voting booth.”).

39. See generally Kang, *supra* note 1.

40. Kabat, *supra* note 22, at 175.

41. Miller, *supra* note 30, at 1046.

## III. PROBLEM 2: VOTER CONFUSION

*A. Background*

It has been argued that participation by the citizenry is at the heart of what makes direct democracy so desirable. This may be true. There certainly seem to be virtues to creating empowerment among voters to influence public policy directly. Voters may pay more attention to public policy issues, and it may create a greater sense of cohesion among fellow voters and the government.

On the other hand, the level of meaningful participation in policy making by voters might not be as great as the representative democracies set up by the Framers and subsequently by the states. Voters may be confused or overwhelmed by the various sources of information that are injected into initiative discussions and debate. Polling data shows that voters are sometimes “grossly ignorant of the content of initiative measures,” and therefore rely on other cues, i.e., shortcuts, in deciding how to vote.<sup>42</sup> In California, according to one article, voters generally don’t read the pamphlet explaining initiatives.<sup>43</sup> However, polls show the ballot pamphlet is one of the most trusted and helpful sources of voter information.<sup>44</sup>

Of course it is not voters’ full-time job to legislate, so they don’t have the time or resources necessary to research beyond the information made readily available to them. Most initiatives are complex, and require thoughtful consideration and research. As the numbers of initiatives increase, it becomes harder for the ordinary citizen to find adequate time to become sufficiently informed to make good decisions about all of the initiatives that appear on the ballot. Many voters rely on shortcuts, such as a ballot titles and summaries, campaign slogans or ads, or the positions of individuals or groups they trust who have endorsed or opposed an initiative.

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42. *Id.* at 1053.

43. Pak, *supra* note 2, at 254.

44. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 4, at 232.

## *B. Solutions*

### *1. State Agency Review*

Some state agencies review and draft the ballot title for each initiative in order to identify the principal effect of the proposed initiative and to ensure that the ballot title is unbiased, clear, accurate and written so that a “yes” vote changes current law. In addition, state agencies sometimes initiate and draft a fiscal impact statement for placement on the ballot. One suggestion to improve the initiative process is for states to create a process in which citizens can challenge the ballot title and fiscal impact statement.<sup>45</sup> This process is currently available in California.<sup>46</sup>

### *2. Improve Information*

California, a state where the initiative process is heavily used, employs a very comprehensive system to provide voters with a great deal of information. The Secretary of State’s ballot pamphlet and website provide the Legislative Analyst’s analysis of all measures, a list of pros and cons, supporters and opponents, as well as fiscal and/or other potential impacts.<sup>47</sup> It is accessible to voters on-line and is mailed to all registered households.

Because polls show that voters view the ballot pamphlet as the most helpful and trusted source, and therefore presumably use it more than any other source, we propose improving the existing ballot pamphlet. We recommend that the ballot pamphlet (1) provide a more comprehensive list of endorsements and opposition for each ballot measure and (2) place conflicting initiatives together on the ballot pamphlet.<sup>48</sup> Particularly for complex issues, voters often vote based on groups or individuals whose opinions they trust. Therefore, providing them easy access to this information would help their decision-making process. Specifically, one page of each ballot pamphlet should be

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45. Mahe, *supra* note 30, at 540.

46. CAL. GOV'T CODE § 88006 (West 2005).

47. *See Voter Information Guides*, CAL. SECRETARY ST., <http://www.sos.ca.gov/elections/ballot-measures/voter-information-guides.htm> (last visited Mar. 20, 2011).

48. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 4, at 23.

reserved for a list of proponents and opponents in side-by-side vertical columns.

Conflicting measures go on the ballot in California, but are usually not placed next to each other. It is possible that competing measures will pass by garnering more “yes” than “no” votes. However, only the one with the most votes becomes law.<sup>49</sup> If two measures are in conflict, they should be bundled together and accompanied by a conspicuous warning to voters that the two are in conflict and that only the one with the most votes will become law. A chart should be included to compare the similarities and highlight the differences among the two measures. The Attorney General should be granted the power to determine which initiatives conflict with each other and provide this information to voters. Increasing the use of visual aids, such as graphs, charts and diagrams, will help the deliberative process because many people process information better this way.

An example of conflicting propositions can be found on the November 2010 ballot in California. Propositions 20 and 27 both dealt with redistricting. Proposition 27 would have eliminated the fourteen-member redistricting committee and returned the task of redistricting to the California State Legislature.<sup>50</sup> Proposition 20 would have increased the work of the fourteen-member redistricting committee to include drawing Congressional district lines.<sup>51</sup> Only Proposition 20 passed, i.e., received more “yes” than “no” votes.<sup>52</sup> On the ballot pamphlet, the two measures were separated by six propositions.<sup>53</sup> Although there was a warning given to voters, it was written in the same font (size, style and color) as the rest of the information.<sup>54</sup> Further, the warning was in the last sentence under “what a yes vote

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49. CAL. CONST. art. II, § 10(b).

50. CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 10, 2010: OFFICIAL VOTER INFORMATION GUIDE 62 (2010), <http://cdn.sos.ca.gov/vig2010/general/pdf/english/complete-vig.pdf> [hereinafter OFFICIAL VOTER INFORMATION GUIDE].

51. *Id.* at 18.

52. STATEMENT OF VOTE, *supra* note 28, at 7.

53. OFFICIAL VOTER INFORMATION GUIDE, *supra* note 50, at 5-8.

54. *Id.* at 5.

means” in the ballot pamphlet, where it pointed out that only one proposition could become law.<sup>55</sup>

#### IV. PROBLEM 3: TAKE IT OR LEAVE IT

##### *A. Background*

One of the principles of contract law is that society values individuals' freedom to make agreements with one another. However, contract law acknowledges that so-called take-it-or-leave-it contracts should sometimes be viewed with suspicion because the non-drafting party may or may not “freely” agree to conditions that he or she seemingly accepts. Reasons for cautious attitudes toward these contracts include: (1) the drafters are most likely to include points favorable to themselves and unfavorable to others; (2) the lack of discussion or deliberation may cause confusion or disagreement as to what some of the provisions actually mean; and (3) “acceptors” of the contracts may feel that they either must agree or will not be able to move forward and are therefore in an inferior position.

Though not identical, ballot initiatives present some of the same problems. The drafters of the initiatives are often groups of people on one end of the policy spectrum, and they don't have to, nor do they often, consider the valid interests and concerns of other groups that would be impacted if the initiative passed. Further, often as soon as the drafters draft the initiative, there is little if any room for compromise or discussion. Finally, because there need not be compromise, it is often difficult to ascertain the intent behind specific provisions of the initiatives as there is no record of their developmental history.

Additionally, because of the take-it-or-leave-it nature of ballot initiatives, voters can't express preferences on distinct points. Distinct points matter in legislation—especially for the groups or individuals who are affected. Ballot initiatives indicate whether voters want to change the status quo, but all too often that is all they do.

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55. *Id.*



### *B. Solutions*

Some states restrict the scope of initiatives by enacting a single-subject requirement.<sup>56</sup> This helps to decrease voter confusion, but it also decreases the harsh take-it-or-leave-it impact of ballot initiatives. If voters believe strongly that one main provision of the initiative should be passed, they may feel the need to acquiesce to the other provisions even though they do not necessarily agree with them. Limiting initiatives to a single subject will at least limit the acquiescence to a single subject. The California Supreme Court has interpreted the single-subject rule broadly to mean anything “reasonably germane” or “reasonably related to a common theme or purpose.”<sup>57</sup> At least one commentator has recommended the adoption of a more narrow interpretation of the single-subject rule,<sup>58</sup> resulting in initiatives that better reflect the will of the voters because it would be more likely that voters would either agree or disagree with a given proposition in its entirety. Others believe that the single-subject rule does not remedy the two main problems for which it was designed: decreasing voter confusion and avoiding logrolling (forcing acquiescence of some provisions to retain others).<sup>59</sup>

## V. PROBLEM 4: INABILITY TO DETERMINE THE INTENT OF VOTERS

### *A. Background*

All three branches of government have a documented trail of deliberation. This trail works as a tool in the promulgation of law and public policy. When inevitable confusion about what is meant by a particular law comes about, the drafters’ and voters’ intent can be gleaned based on their deliberative record.

With initiatives, such documentation is not part of the regular process. Thus, if confusion arises out of an initiative statute or

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56. *E.g.*, Miller, *supra* note 30, at 1076.

57. *Id.* at 1075.

58. *Id.* at 1077.

59. Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 954-55 (1983) (“The rule is ill-suited to prevent voter confusion because no matter how the rule is construed, it will bar some initiatives that are simple and permit others that are hopelessly complex.”).

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constitutional amendment, those tasked with enforcing the statute have little background with which to determine the true intent of the drafters and voters. “[B]ecause the voters’ intent was an inscrutable black box, it could be reconstructed with impunity, even against contrary ballot language.”<sup>60</sup> Furthermore, there has been much written about the fact that complex policy matters are often worked out by the ability to categorize preferences. This can further help identify drafter and voter intent. “[I]t distorts popular input by precluding the expression of priority among different issues. By presenting each measure in isolation as a binary decision, direct democracy does not reflect voters’ intensity of preference.”<sup>61</sup> By contrast, representative democracy allows for intensity of preferences to be expressed during the deliberative process.

### B. Solution

The National Conference of State Legislatures recommends that a public hearing on initiatives be held prior to an election.<sup>62</sup> This hearing could be documented, and become the basis for determining the intent behind initiative-enacted laws. California courts refuse to interpret such laws based solely upon proponents’ reports of their intent.<sup>63</sup> With a more collaborative, deliberative process on record to inform voters of proponents’ intent, the courts may be more willing to treat proponent intent as authoritative.

## VI. PROPOSAL

Several improvements to California’s initiative process will increase the deliberative aspect and therefore lessen the problems that

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60. Kabat, *supra* note 22, at 159.

61. Kang, *supra* note 1, at 1276.

62. Mahe, *supra* note 30, at 539.

63. *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm’n*, 799 P.2d 1220, 1232 n.10 (Cal. 1990) (citations omitted) (“The motive or purpose of the drafters of a statute is not relevant to its construction absent reason to conclude that the body which adopted the statute was aware of that purpose and believed the language of the proposal would accomplish it. The opinion of drafters of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters’ intent.”).

the current, more rigid system has caused. First, proponents should be allowed to negotiate with the legislature and withdraw their initiative if the legislature adopts it or acceptable compromise legislation. Second, proponents should be allowed to amend their initiative before it goes on the ballot. Third, the presentation of information in the existing ballot pamphlet should be improved. Finally, we recommend that the legislature be allowed to amend initiatives post-enactment by a two-thirds vote of both houses.

Critics of increased legislative involvement argue that the legislature should not be allowed to unduly influence the process. However, our proposals address this concern by giving proponents the final say at all stages of the initiative process, except for post-enactment amendments.

### CONCLUSION

Direct democracy through the initiative process has problems. However, its popularity has been on the rise in recent history. Moreover, there are virtues to this form of government. Therefore, in states that have adopted some form of direct democracy, it may not be practical, reasonable, or good public policy to simply eliminate the initiative processes. However, most could be improved by making the process more deliberative. The most practical way to increase the deliberative process is through legislative involvement. The perfect balance may never be achieved, but some combination of direct vote and formal legislative process is needed to assure the varied advantages of the deliberative legislative process and, more importantly, to guarantee that the ultimate will of the voters is done.