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Direct Democracy: A Global Comparative Study on Electoral Initiative and Referendum Mechanisms

Report

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I. INTRODUCTION

This report examines the distinct mechanisms of direct democracy practiced in various foreign countries. The discussion will begin with a brief definition of direct democracy followed by the terminology used to describe the various mechanisms. After setting forth a definitional framework for the discussion, the report will focus on the electoral initiative and referendum as practiced in Switzerland, the Philippines, Kenya, and Australia, with an emphasis on comparison to the California model. Finally, this report will provide recommendations for improving the California initiative system by adopting mechanisms employed by the countries surveyed in this report.

A. Direct Democracy

In order to properly examine and compare the direct democracy mechanisms in different countries, it is important to begin with a threshold question: what is direct democracy? Direct democracy is a system of governance in which citizens make decisions regarding laws and policies through direct votes rather than delegate the decision-making process solely to elected representatives.¹

In practice, the direct democracy mechanisms which increase citizen involvement in policy decisions are mandated “by the constitution or by individual governments through legislation and through the choice and design of the electoral system.”² As such, the mechanisms of direct democracy vary from country to country. However, this report will focus on two distinct mechanisms: initiative and referendum.³

B. Definitions: Initiatives and Referendums

The initiative and referendum are two distinct mechanisms of direct democracy, and the terminology used to describe these mechanisms may also vary between countries. In addition, there are various forms of initiatives and referendums. Thus, for the purposes of this report, the definitions of certain forms of initiatives and referendums are provided below:

Table 1.1 Forms of Initiatives

Initiative (Citizen’s Initiative) ⁴
<ul style="list-style-type: none">• A mechanism of direct democracy by which voters suggest a new statute or constitutional amendment by gathering signatures to demand a popular vote• Can be operated Directly or Indirectly

¹ See INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, DIRECT DEMOCRACY: THE INTERNATIONAL IDEA HANDBOOK 19 (2008), http://www.idea.int/publications/direct_democracy/upload/DDH_inlay_low.pdf [“IDEA”].

² *Id.* at iv.

³ Please note: this is not an exhaustive study on initiative and referendum mechanisms. As such, the power of the recall will not be discussed in this report.

⁴ *Initiative, Referendum and Recall*, NAT’L CONF. ST. LEGIS., <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> (last visited September 13, 2014).

Direct Initiative ⁵	Agenda (Indirect) Initiative ⁶
<ul style="list-style-type: none"> • Citizen proposals are placed directly onto the ballot and decided by voters 	<ul style="list-style-type: none"> • Citizen proposals are first considered by the legislature • May receive a popular vote later in some systems

Table 1.2 Forms of Referendums

Referendum ⁷	
<ul style="list-style-type: none"> • A direct democracy procedure that gives the electorate a direct vote on a specific political, constitutional or legislative issue. 	
Forms of Referendums	Definitions
Mandatory Referendum ⁸	A direct democracy procedure that is required for certain government actions; often for constitutional amendments suggested by the legislature; used for bond acts in California.
Optional Referendum (Popular Veto) ⁹	A direct democracy procedure in which the electorate demands a popular vote on a piece of legislation.
Advisory Referendum (Plebiscites) ¹⁰	A direct democracy procedure in which the legislature initiates a nonbinding popular vote on an issue of public policy.

The scope of this report is limited to the terminology and the definitions provided in Tables 1.1 and 1.2.

II. CALIFORNIA’S DIRECT DEMOCRACY SYSTEM

California’s use of direct democracy dates back to 1911, when progressive Governor Hiram Johnson persuaded the legislature to adopt a system of statewide initiatives and referendums.¹¹ This report will examine three particular forms of direct democracy practiced in California. The initiative process allows citizens to propose statutes or constitutional

⁵ *Direct Democracy: Referendums*, THE ELECTORAL KNOWLEDGE NETWORK, <http://aceproject.org/ace-en/focus/direct-democracy/citizen-initiatives> (last visited Sept. 14, 2014).

⁶ *Id.*

⁷ IDEA, *supra* note 1, at 84.

⁸ *Direct Democracy: Referendums*, THE ELECTORAL KNOWLEDGE NETWORK, <http://aceproject.org/ace-en/focus/direct-democracy/citizen-initiatives> (last visited Sept. 14, 2014).

⁹ *Id.*

¹⁰ *Types of Referendums*, AUSTRALIAN ELECTORAL COMMISSION, <http://www.aec.gov.au/Elections/referendums/types.htm> (last visited Sept. 13, 2014).

¹¹ *California*, INITIATIVE & REFERENDUM INSTITUTE, <http://iandrinstitute.org/California.htm> (last visited Sept. 13, 2014).

amendments.¹² Mandatory referendums are a popular vote held to decide on constitutional amendments originating in the legislature.¹³ The optional referendum endows voters with a veto power by which they can reject a law passed by the legislature.¹⁴ Though this report will not discuss it, California also uses a system of legislatively referred acts, whereby certain types of statutes that originate in the legislature must be passed by a popular vote in order to become law. Any statute that incurs a public debt of \$300,000 or greater must be approved in this manner.¹⁵ Most commonly, this method is used to pass water and school bonds, including Proposition 1 on the November 2014 ballot.¹⁶ Californians also have the power to recall state officials, as evidenced by the recall of Governor Gray Davis in 2003.¹⁷ These methods of direct democracy exist for the limited purposes of restricting the legislature's ability to accrue debts and allowing voters to remove state officials. Because this report focusses on methods of enacting policy through law creation, it will not discuss legislatively referred acts or recall elections

A. Legal Framework

The Constitution of California sets forth the steps involved in the initiative process. First, proponents of an initiative must submit the measure's text to the California Attorney General, who will give the initiative an official name and summary.¹⁸ Second, proponents must circulate a petition requesting that the initiative appear on the statewide ballot. The number of signatures required to qualify an initiative is based upon the number of votes cast in the last gubernatorial election: ballot measures that initiate constitutional amendments require eight percent of the most recent gubernatorial election, whereas initiative statutes or veto referendums require only five percent.¹⁹ Finally, if an initiative qualifies for the ballot, it will pass with a simple majority of votes.²⁰

Moreover, initiatives may not “embrac[e] more than one subject,” and courts are willing to invalidate initiatives that violate this rule.²¹ However, the California Supreme Court has consistently interpreted the single-subject rule to allow a multi-part initiative, so long as its provisions are “reasonably germane to a single theme or purpose.”²² Consequently, extensive statutory schemes have become law through the initiative process, including the Victims' Bill of

¹² CAL. CONST. art. II, § 8.

¹³ *Id.* art. XVIII, § 4.

¹⁴ *Id.* art. II, § 9.

¹⁵ *Id.* art. XVI, § 1.

¹⁶ Sean Creadick & Patrick Lewis, *Proposition 1: Water Quality, Supply, and Infrastructure Improvement Act of 2014*, CAL. INIT. REV., (Fall 2014).

¹⁷ CAL. CONST. art. II, §§ 13–19.

¹⁸ *Id.* art. II, § 10(d).

¹⁹ *Id.* art. II, § 8(b).

²⁰ *Id.* art. II, § 10(a).

²¹ *Id.* art. II, § 8(d); *Senate of State of Cal. v. Jones*, 21 Cal. 4th 1142, 1168–1169, 988 P.2d 1089, 1105–1106 (1999) (invalidating an initiative which affected electoral redistricting and the salaries of legislators).

²² *Senate of State of Cal.*, 21 Cal. 4th at 1163.

Rights in 1982 (Prop 8) and the Political Reform Act of 1974 (Prop 9).²³ Critics have questioned the value of allowing such large bodies of law to become effective through a popular vote.²⁴

B. Criticism of California's Initiative Process

California's initiative process has been subject to intense criticism. For example, critics argue that it is too easy to amend the California constitution since only a simple majority of votes is required to pass an amendment.²⁵ Because of this low threshold, commentators claim that the California constitution has become a "bloated mishmash."²⁶

Another area of concern is the sheer number of initiatives on the ballot.²⁷ A large number of initiatives can lead to voter fatigue, which affects a measure's outcome based on its position on the ballot.²⁸ Similarly, commentators worry that voters who are not well educated about the content of initiatives are largely casting votes based on the content of paid advertising and limited news coverage.²⁹ This is attributable to the fact that many initiatives are complex and difficult to comprehend. One study found that seventy-eight percent of voters believe that "some or only a few of the propositions are understandable to most voters."³⁰

Critics also point to consistently low voter turnout as a major weakness of California's direct democracy system.³¹ Initiatives and referendums are intended to represent the will of the voting public, but this purpose is subverted when only a small percentage of voter actually participate.³² Turnout in the June 2014 primary election was only twenty-five percent, and two ballot initiatives were passed.³³ Arguably, these measures did not receive a strong mandate from the state's voters when so few of them actually voted.

Perhaps most disconcerting to critics is the significant role that money plays in the initiative process.³⁴ Statistically, the outcome of an initiative campaign is often correlated with

²³ *California Crime Victims' Rights*, CAL. VICTIM COMPENSATION PROGRAM, <http://vcgcb.ca.gov/victims/rights.aspx> (last visited Sept. 13, 2014); Political Reform Division, CAL. SECRETARY ST., <http://www.sos.ca.gov/prd/> (last visited Sept. 13, 2014).

²⁴ Op-Ed Edward L. Lascher et al., *It's Too Easy to Amend California's Constitution*, L.A. TIMES, Feb. 4, 2009, <http://articles.latimes.com/2009/feb/04/opinion/oe-hodson4>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Jessica Levinson, *Ballot Initiatives Have Harmed California*, KCET (Jan. 23, 2012, 10:15 AM), http://www.kcet.org/updaily/socal_focus/commentary/would-you-like-to-save-california.html.

²⁸ CHARLENE WEAR SIMMONS, CALIFORNIA'S STATEWIDE INITIATIVE PROCESS 11 (California State Library 1997) available at <https://www.library.ca.gov/CRB/97/06/97006.pdf>.

²⁹ *Id.*

³⁰ *Id.*

³¹ LEDUC, *supra* note 31, at 151.

³² *Id.*

³³ Press Release, Cal. Sec'y of State, June Primary Results Certified, Showing Record-Low Turnout and Record-High Vote-by-Mail Rate (July 11, 2014), available at <http://www.sos.ca.gov/admin/press-releases/2014/db14-057.htm>.

³⁴ See generally DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000) (detailing the significant influence of special interests upon the initiative process).

the amount of money spent by the measure’s proponents and opponents.³⁵ In particular, a well-funded opposition can severely limit a proposition’s chances of passing.³⁶ This inevitably drives up the cost of a successful campaign in support of a ballot initiative. For instance, even before an initiative campaign truly begins, the expense of gathering hundreds of thousands of signatures sets a high price of admission for citizens who want to propose an initiative. One study found that during the 2012 election, the cost of gathering signatures ranged from \$584,126 to \$8,773,490.³⁷ From the outset, this cost limits the use of the “citizens’ initiative” to well-funded interests. Despite the criticisms leveled against California’s initiative process, it continues to be popular with voters.³⁸

III. INITIATIVE AND REFERENDUM MECHANISMS: A GLOBAL COMPARATIVE STUDY

This section of the report provides a global comparative study of selected countries with an aim towards proposing solutions to improve California’s initiative and referendum system. This comparative study focuses on Switzerland, the Philippines, Kenya, and Australia, respectively. While there are numerous other countries that authorize direct democracy mechanisms, these countries provide a diverse cross section of how direct democracy mechanisms can be used to engage citizens.³⁹

A. Direct Democracy in Switzerland

1. *Legal Framework*

The Swiss constitution established four separate mechanisms of direct democracy: (1) mandatory referendums, where the Swiss parliament seeks permission from the voters to amend the constitution; (2) initiative constitutional amendment referendums, where the voters request that a change be made to the constitution; (3) optional referendums, where the voters decide on a piece of legislation passed by the parliament; and (4) referendums, where the voters decide whether to ratify an international treaty.⁴⁰ Swiss citizens regularly participate in their

³⁵ SIMMONS, *supra* note 28, at 12.

³⁶ *Id.*

³⁷ 2012 Ballot Measure Petition Signature Costs, California, BALLOTPEDIA, http://ballotpedia.org/2012_ballot_measure_petition_signature_costs#California (last visited Sept. 13, 2014).

³⁸ PUB. POLICY INST. OF CAL., THE CALIFORNIA INITIATIVE PROCESS—HOW DEMOCRATIC IS IT? 2, available at http://www.pplic.org/content/pubs/op/OP_202XXOP.pdf. A study in 2000 found that seventy percent of voters approved of the initiative process, with fifty-six percent believing that it is a better way of making policy decisions than is using the legislature.

³⁹ This report is not an exhaustive study, but rather highlights four countries that have mechanisms of direct democracy that encompass the initiative and referendum systems as defined in Section I of this report. *See supra* Table 1.1 and 1.2.

⁴⁰ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 138–42. This paper will focus on the first three types of referendums because they have the most relevance to the system of initiatives and referendums that exists in California.

nation's system of direct democracy. Elections take place between two and four times every year, with a small number of referendums appearing on the ballot in every election.⁴¹

Under the Swiss constitution, all constitutional amendments must be approved by a popular vote.⁴² An amendment will only take effect if it is approved with a *double majority*.⁴³ A double majority requires that a simple majority of all Swiss voters approve the amendment, as well as a majority of voters in a majority of the Swiss states (called *cantons*).⁴⁴ This requirement makes it more difficult for constitutional amendments to become law, and it allows the small states to place a check on the power of the large states.⁴⁵

2. *The Agenda Initiative and Referendum Process*

The Swiss utilize an agenda initiative system, also known as indirect initiative.⁴⁶ Citizens must collect 100,000 signatures to qualify a constitutional amendment for the ballot.⁴⁷ Voter initiatives come immediately before the legislative body instead of going directly onto the ballot, and parliament reviews the amendment to ensure that it complies with the law.⁴⁸ If the amendment is defective, it will be disqualified. Otherwise, the legislature may either accept it and pass it into law or propose an alternative amendment to appear alongside the voter-initiated amendment on the ballot.⁴⁹ After parliament has acted on the amendment, proponents can abandon the amendment if they are satisfied with parliament's response or continue to advocate for the measure if they disagree with parliament.⁵⁰ Parliament opposes most constitutional amendments that originate from the voters. Nevertheless, commentators estimate that about forty percent of all voter-initiated constitutional amendments result in some type of change to the law, which is often made through a compromise on the part of the legislature.⁵¹ In this sense, the Swiss parliament is officially involved in the referendum process.

⁴¹ LEDUC, *supra* note 31, at 154–58.

⁴² BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 140, para. 1(a).

⁴³ *Id.* at art. 142, para. 1–4.

⁴⁴ *Id.*

⁴⁵ RENÉ SCHWOK, SWITZERLAND – EUROPEAN UNION: AN IMPOSSIBLE MEMBERSHIP? 105 (2006), available at

http://books.google.com/books?id=L8HZoBv4_MAC&printsec=frontcover&dq=inauthor:%22Ren%C3%A9+Schwok%22&hl=en&sa=X&ei=-eIVVIXDAabRiwKsiYCYDQ&ved=0CCgQ6AEwAA#v=onepage&q&f=false.

⁴⁶ PHILIP L. DUBOIS, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 49–50 (1998), available at

<http://books.google.com/books?id=Rq18JkGtj6IC&printsec=frontcover&dq=inauthor:%22Philip+L.+Dubois%22&hl=en&sa=X&ei=n9kVVPLDAtbjoASTgYH4Bg&ved=0CB8Q6AEwAA#v=onepage&q&f=false>.

⁴⁷ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 138, para. 1.

⁴⁸ *Id.* at art. 139, para. 3.

⁴⁹ *Id.* at art. 139, para. 4–5. When a parliamentary counterproposal appears on the ballot, Swiss voters will vote on both the initiative amendment and the counterproposal, and they also indicate which measure they would prefer, should both measures pass. *Id.* at art. 139(b), para. 2.

⁵⁰ DUBOIS, *supra* note 46, at 51.

⁵¹ *Id.* at 52.

The Swiss initiative and referendum process is similar, in many respects, to the system in California.⁵² Both California and Switzerland require a popular vote to affirm legislative amendments to the constitution, both allow an optional referendum on statutes passed by the legislature, and both permit citizens to pass their own constitutional amendments through the initiative process.

The systems of direct democracy in Switzerland and California diverge in several ways, perhaps most notably in the use of the agenda initiative. In Switzerland, all voter-initiated constitutional amendments must go through the parliament before they appear on the ballot. On the other hand, California uses only the direct system of initiative wherein measures are placed on the ballot without any useful exposure to the legislative branch.⁵³ Although the agenda initiative (indirect initiative) process existed in California until 1966, it was abolished that year by Proposition 1A.⁵⁴

B. Direct Democracy in the Philippines

1. Legal Framework

Article XVII, Section 2, of the 1987 Constitution of the Philippines authorizes constitutional amendments or revisions through the initiative process. Article XVII, Section 2, states the following:

Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered votes therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than once every five years thereafter. The Congress shall provide for the implementation of the exercise of this right.⁵⁵

In 1989, the Eighth Congress of the Philippines passed implementing legislation which set forth a system of initiative and referendum. Republic Act No. 6735, titled “The Initiative and Referendum Act,” enables the electorate “to directly propose, enact, approve or reject, in whole or in part, the Constitution, laws, ordinances, or resolutions passed by any legislative body.”⁵⁶

Section 3 of the Initiative and Referendum Act codifies three distinct forms of direct democracy. The direct initiative grants “power . . . [to] the people to propose amendments to the

⁵² *Id.* at 49.

⁵³ See CAL. SEC’Y OF STATE, *Statewide Initiative Guide*, <http://www.sos.ca.gov/elections/ballot-measures/initiative-guide.htm> (last visited Sept. 13, 2014) (describing each step of the California initiative process, which does not require the legislature to consider initiatives); see *infra* Part IV.B.

⁵⁴ CAL. SEC’Y OF STATE, PROPOSED AMENDMENTS TO THE CONSTITUTION: GENERAL ELECTION TUESDAY, NOV. 8, 1966, available at http://librarysource.uchastings.edu/ballot_pdf/1966g.pdf. Proposition 1A was a legislative constitutional amendment which was submitted to voters through a mandatory referendum. *Id.*

⁵⁵ *Id.*

⁵⁶ Rep. Act. No. 6735, § 3.

Constitutions or to propose and enact legislation through an election.”⁵⁷ Under the agenda initiative, the electorate sends a proposition to “Congress or the local legislative body for action.”⁵⁸ Finally, the optional referendum empowers “the electorate to approve or reject legislation through an election called for that purpose.”⁵⁹ Thus, the Philippine statutory scheme embodies three distinct forms of direct democracy.

2. *The Agenda Initiative*

Out of the three forms of direct democracy, the agenda initiative is the most divergent from California’s system of initiative. This form of direct democracy allows the citizens to submit a proposal that will be considered by Congress or the local legislative body for action as opposed to a vote by the electorate. California’s initiative system, on the other hand, only permits initiatives to be placed directly onto the ballot

3. *Signature and Distribution Requirements*

In the Philippines, the number of signatures required to invoke the power of initiative or referendum takes into consideration the national and local process by imposing signature and distribution requirements. For instance, an initiative affecting the 1987 Constitution requires the signature of at least 12 percent of registered voters of which “every legislative district must be represented by at least 3 percent of the registered voters.”⁶⁰ However, the percentage of registered voters is reduced by two percentage points when the initiative or referendum is affecting a law, ordinance, or resolution passed by a legislative assembly of an autonomous region, province, municipality, or city. In that case, the requirement is 10 percent of registered voters “of which every legislative district must be represented by at least 3 percent of the registered voters.”⁶¹ But, “if the city or province is composed of only one legislative district, then at least each municipality in a province or each barangay⁶² in a city should be represented by at least three per centum (3%) of the registered voters therein.”⁶³ In a barangay, the signatures of at least 10 percent of registered voters is required.⁶⁴ Conversely, in California, the signature requirement is based upon the number of votes cast during the most recent gubernatorial election which must be equal to 8 percent of the votes cast.⁶⁵ A statute or veto referendum only requires 5 percent of the votes cast.⁶⁶

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* § 3.

⁶⁰ *Id.* § 5(b).

⁶¹ *Id.* § 5(d).

⁶² “A unit of administration in Philippine Society consisting of from 50 to 100 families under a headman.” *Barangay Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/barangay> (last visited Sept. 30, 2014).

⁶³ Rep. Act. No. 6375, § 5(d).

⁶⁴ *Id.* § 5(f).

⁶⁵ CAL. CONST. art. II, § 8(b).

⁶⁶ *Id.*

Furthermore, the local initiative system imposes a minimum signature requirement that is different for each of the local government units.⁶⁷ Autonomous regions require the signatures of two thousand registered voters; provinces and cities require the signatures of one thousand registered voters; municipalities require the signatures of one hundred registered voters; and barangays require the signatures of fifty registered voters.⁶⁸

In order to make comparisons between the local initiative process in the Philippines and the local initiative process in California, it is important to first compare the Philippine local system of government to California's system. The State of California, as a unit of government, is most comparable to the provinces⁶⁹ of the Philippines.⁷⁰ The provinces are within regions, which could be loosely compared to the geographical references used when discussing the Midwest or Northeast in the United States.⁷¹ On the other hand, autonomous regions are comparable to US territories and therefore not relevant for comparison.⁷²

To further compare, within every province there are municipalities and cities.⁷³ The municipalities and cities are two distinct units of government.⁷⁴ A municipality is a corporate body acting as a subsidiary of the province within its territorial boundaries, whereas there are three classifications of cities.⁷⁵ The highly urbanized and the independent component cities are comparable to the concept of chartered cities⁷⁶ in California because they function independently of the province.⁷⁷ In contrast, component cities are analogous to general law cities⁷⁸ in California because they are subject to the administrative supervision of the province.⁷⁹ Lastly, California does not have a government unit that is the functional equivalent to a barangay.⁸⁰

After outlining a few similarities in the local government structures of the Philippines and California, there are a few specific comparisons that can be made in regards to the local initiative process. For example, the local initiative and referendum system in the Philippines can only be

⁶⁷ Local government units is a term of art that "refers to provinces, cities, municipalities and barangays." Rep. Act. No. 6375, § 3.

⁶⁸ Rep. Act. No. 6375, § 13(a).

⁶⁹ There are 81 provinces in total. *Philippines Has a New Province*, LOC. GOV'T ACAD. (Jan. 24, 2013), <http://www.lga.gov.ph/update/philippines-has-new-province>.

⁷⁰ *Id.*

⁷¹ *Concepts and Definitions: Local Government Units*, PHIL. STATS. AUTHORITY (2014), http://www.nscb.gov.ph/activestats/psgc/articles/con_lgu.asp.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ A charter city has supreme authority over municipal affairs which means it overrides a state law governing the same topic. LEAGUE OF CAL. CITIES, CHARTER CITIES: A QUICK SUMMARY FOR THE PRESS AND RESEARCHERS, available at <http://www.cacities.org/Resources-Documents/Resources-Section/Charter-Cities/Charter-Cities-A-Quick-Summary-for-the-Press-and-R>.

⁷⁷ *See supra* note 71.

⁷⁸ *See supra* note 76.

⁷⁹ *See supra* note 71.

⁸⁰ *See supra* note 62.

exercised once a year,⁸¹ whereas the California system tracks regularly scheduled elections or a special election can be held.⁸² In California, procedural requirements for local initiatives vary among general law cities, charter cities, and counties.⁸³ In general-law cities, proponents “must obtain signatures of 10 percent of registered voters for a measure to appear on the ballot in the next regularly scheduled election.”⁸⁴ The requirement is 15 percent if a special election is called.⁸⁵ However, charter cities have a wide latitude in setting their procedures. As such, signature requirements range from 5 to 30 percent of registered voters or votes cast in the last mayoral election.⁸⁶ Still, counties require signatures from 10 percent of registered voters or 20 percent if it is a special election.⁸⁷ In summary, in California, signature requirements differ for local measures and initiatives so there are some similarities here. These similarities demonstrate how the initiative process operates on a local level irrespective of the terms used to describe local government units.

4. *Frequency of Initiatives Amending the Constitution*

Along with signature requirements, the Philippine system limits the frequency in which citizens can exercise the power of initiative as it relates to the 1987 Constitution of the Philippines.⁸⁸ An initiative on the Constitution can only be exercised once every five years.⁸⁹ This is not the case in California. The statutory scheme in California does not regulate the frequency where with an initiative may be put forth to amend the constitution.

C. Kenya

1. *Legal Framework*

Article 257 of the Constitution of Kenya incorporates several forms of direct democracy. However, Kenya’s statutory scheme conceptualizes the agenda initiative and referendum system on an escalating scale from local government, to the national government, and then to the people. For example, Article 257(1) provides that citizens may propose an amendment to the Constitution through the initiative process.⁹⁰ After the Electoral and Boundaries Commission reviews the initiative to determine if it satisfies the requirements under Article 257, the “Commission submits the draft Bill to each county assembly for consideration within three months.”⁹¹ If the Bill receives approval from the county assemblies it will be submitted to the Speakers of the two houses of Parliament: the Senate and the National Assembly.⁹² The Bill is

⁸¹ Rep. Act. No. 6375, § 15(a).

⁸² TRACY M. GORDON, THE LOCAL INITIATIVE IN CALIFORNIA 9–10 (Public Policy Institute of California 2004), available at http://www.ppic.org/content/pubs/report/R_904TGR.pdf.

⁸³ *Id.*

⁸⁴ *Id.* at 9.

⁸⁵ *Id.*

⁸⁶ *Id.* at 10.

⁸⁷ *Id.*

⁸⁸ Rep. Act. No. 6375, § 5(b).

⁸⁹ *Id.*

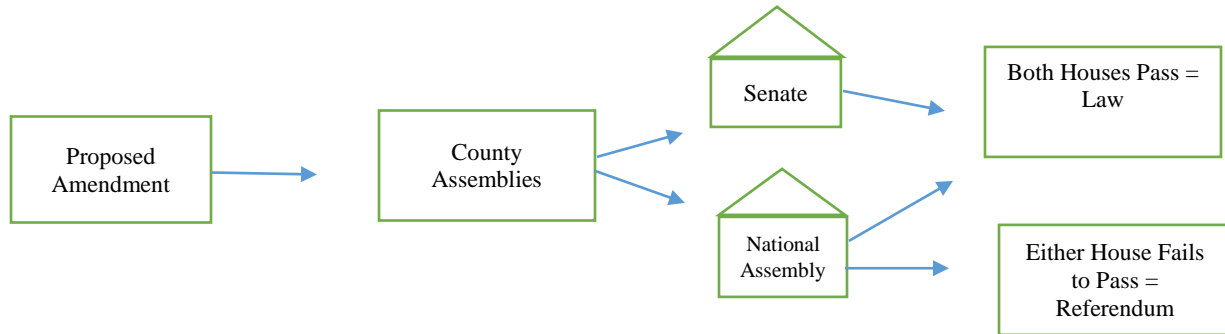
⁹⁰ CONSTITUTION, art. 257(1) (2010) (Kenya).

⁹¹ *Id.* art. 257(5).

⁹² *Id.* art. 257(6).

passed into law if it is approved by the majority in both houses of Parliament.⁹³ But, “if either House of Parliament fails to pass the Bill, . . . the proposed amendment must be submitted to the people in a referendum.”⁹⁴ Twenty percent of registered voters in at least half of the counties must vote and a simple majority of citizens must vote in favor of the referendum in order to pass the proposed amendment.⁹⁵ To summarize, the initial stage in the process is illustrative of the agenda initiative forms of democracy. In Kenya’s statutory scheme, the mandatory referendum ensures that the proposed amendment does not die in the Houses of Parliament.

Table 3.1



2. Signature Requirements and Distribution Requirements

Kenya’s signature requirements also differ in comparison to the signature requirements under California’s initiative system. In Kenya, the proposed amendment must be signed by one million registered voters, regardless of changes to the population or voter registration.⁹⁶ With an estimated 14.3 million registered voters,⁹⁷ this is roughly seven percent of the electorate. On the other hand, signature requirements in CA are expressed as a percentage of the number of votes cast in the most recent gubernatorial election, with five percent required for initiative statutes and eight percent required for initiative constitutional amendments.⁹⁸ This results in a much smaller number of signatures being required in California than in Kenya. Since roughly ten million votes were cast in the 2010 gubernatorial election, the number of signatures required to qualify initiatives in 2014 were 504,760 and 807,615 for statutes and amendments, respectively.⁹⁹ This is much less than Kenya’s flat-rate requirements of one million signatures.¹⁰⁰ When viewed as a percentage of registered voters, rather than as a percentage of votes cast for governor,

⁹³ *Id.* art. 257(8).

⁹⁴ *Id.* art. 257(10).

⁹⁵ *Id.* art. 255(2)(1)(a).

⁹⁶ *Id.* art. 257(1).

⁹⁷ *Voter Register – (Provisional) 2012*, DEEP COGITATION BLOG, <http://deepcogitation.com/elections-watch/voter-register-2012/> (last visited Oct. 6, 2014).

⁹⁸ CAL. CONST. art. II, § 8(b).

⁹⁹ *State Ballot Initiative Guide*, CAL. SECRETARY ST., <http://www.sos.ca.gov/elections/ballot-measures/how-to-qualify-an-initiative.htm> (last visited Oct. 6, 2014).

¹⁰⁰ CONSTITUTION, art. 257(1) (2010) (Kenya).

California's requirements appear even less demanding. The 504,760 signatures required to qualify an initiative statute make up less than three percent of California's roughly seventeen million registered voters.¹⁰¹ This is a stark contrast to the seven percent of all registered voters who must sign ballots to qualify an initiative statute in Kenya.¹⁰² On the other hand, a flat-rate does have the long-term benefit with population growth of possibly becoming a much lower threshold.

3. *Initiatives and Referendums: Updates and Obstacles*

Nevertheless, Kenya may be facing challenges to its system of direct democracy. Currently, Amendment Bill 2014 seeks to amend provisions governing the referendum.¹⁰³ The Bill proposes to change the threshold required to pass the proposed amendment from twenty percent of registered voters to forty percent.¹⁰⁴ Moreover, the Bill will now require a participation quorum, in that at least fifty percent of registered voters must cast their votes in the referendum.¹⁰⁵ Lastly, the Bill will require that referendums be held only during a general election of members of parliament.¹⁰⁶

D. Direct Democracy in Australia

1. *Legal Framework*

The Australian constitution authorizes direct democracy for the sole purpose of approving constitutional amendments.¹⁰⁷ Australian voters do not have the power to suggest amendments through the initiative process.¹⁰⁸ In the past, Australia has held national, non-binding advisory referendums, or *plebiscites*, on controversial matters.¹⁰⁹ Certain states in Australia continue to use the advisory referendum today.¹¹⁰ Only the legislature may initiate an advisory referendum, and the outcome of these referendums influences the government's

¹⁰¹ CAL. SEC'Y OF STATE, REGISTRATION BY COUNTY SUPERVISORIAL DISTRICT, *available at* <http://www.sos.ca.gov/elections/ror/ror-pages/60day-general-2014/county.pdf>.

¹⁰² *Voter Register – (Provisional) 2012*, DEEP COGITATION BLOG, <http://deepcogitation.com/elections-watch/voter-register-2012/> (last visited Oct. 6, 2014).

¹⁰³ *Compare Shitemi Khamadi, Analysis of (Amendment Bill) 2014*, OLE-SHITEMI, <http://www.shitemi.com/politics/analysis-of-constitution-amendment-bill-2014/> (last visited September 5, 2014), with CONST. art. 255(a)(1).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See AUSTRALIAN CONSTITUTION s 128 (authorizing a popular referendum only on matters of constitutional amendment).

¹⁰⁸ *Referendums and Plebiscites*, PARLIAMENTARY EDUC. OFF., <http://www.peo.gov.au/learning/factsheets/referendums-and-plebiscites.html> (last visited Sept. 13, 2014).

¹⁰⁹ AUSTRALIAN ELECTORAL COMMISSION, *supra* note 10.

¹¹⁰ See, e.g., *Notice of Plebiscites on Council Amalgamations*, AUSTRALIAN ELECTORAL COMMISSION, http://www.aec.gov.au/elections/referendums/Advisory_Referendums/qld_council_2007/index.htm (last visited Sept. 13, 2014) (announcing a plebiscite vote in the state of Queensland).

policies.¹¹¹ Though Australian voters do not have the ability to initiate an advisory referendum, it is still an opportunity for them to affect government decision-making. Legislatures are likely to follow the results of an advisory referendum because it can appear arrogant to defy the outcome of a popular vote.¹¹²

2. *Voting and the Referendum Process*

The Australian referendum system is unique in that voting is mandatory in all referendums for citizens over the age of eighteen.¹¹³ Any adult who fails to vote in a national referendum must present a valid reason for not voting or else pay a small fine.¹¹⁴ Not surprisingly, Australia has one of the world's highest levels of voter turnout, with over ninety-three percent of voters participating in the 2013 parliamentary election.¹¹⁵

Australian mandatory referendums are also noteworthy because of their relatively low rate of passage. Of the forty-four national referendums held to decide constitutional amendments, only eight have passed, which is a success rate of roughly eighteen percent.¹¹⁶ One reason for this low rate of passage is Australia's double majority requirement, which operates on the same principle as the Swiss model. Any constitutional amendment must receive a simple majority of the national vote as well as a majority vote in at least four of Australia's six states.¹¹⁷

When comparing the systems of direct democracy in Australia and California, the differences outnumber the similarities. Australians cannot circulate petitions to create new statutes or make constitutional amendments,¹¹⁸ which is the cornerstone of the California model. Further, Australians employ the non-binding referendum, a concept relatively unknown to California voters.¹¹⁹ Voting is required in Australia and nearly all adults participate in elections. In contrast, voting is encouraged in California, but usually less than half of all registered voters cast ballots.¹²⁰ The main similarity between the systems in Australia and California is the use of a

¹¹¹ AUSTRALIAN ELECTORAL COMMISSION, *supra* note 110.

¹¹² *Id.*

¹¹³ *Voting Within Australia-Frequently Asked Questions*, AUSTRALIAN ELECTORAL COMMISSION, http://www.aec.gov.au/faqs/voting_australia.htm (last visited Sept. 14, 2014).

¹¹⁴ *Id.*

¹¹⁵ *Voter Turnout Data for Australia*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/vt/countryview.cfm?CountryCode=AU> (last visited Sept. 14, 2014).

¹¹⁶ *Referendum Dates and Results*, AUSTRALIAN ELECTORAL COMMISSION, http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm (last visited Sept. 14, 2014). There have been five constitutional amendments which captured a simple majority of the national vote, but failed to pass in at least four states. Without the double majority requirement, these amendments would have passed, raising the passage rate to over thirty percent.

¹¹⁷ AUSTRALIAN CONSTITUTION s 128.

¹¹⁸ *See id.* (including no provisions that authorize popular initiatives).

¹¹⁹ For a discussion of advisory questions in California, *see* Brandon Bjerke & Meryl Balalis, *Legislatively Referred Advisory Questions on the Ballot: The Struggle for Proposition 49* CAL. INIT. REV., (Fall 2014).

¹²⁰ CAL. SEC'Y OF STATE, HISTORICAL VOTER REGISTRATION AND PARTICIPATION IN STATEWIDE GENERAL ELECTIONS (1910–2012), available at <http://www.sos.ca.gov/elections/sov/2012-general/04-historical-voter-reg-participation.pdf>.

mandatory referendum to amend the constitution. However, even this process is notably different, with Australia requiring a double majority for amendments to pass.

IV. LESSONS FROM ABROAD

Sections II and III provide a survey of the electoral initiative and referendum mechanisms employed by California and select foreign countries. Table 4.1 highlights the various mechanisms used by each country.

Table 4.1

Country/State	Agenda Initiative	Direct Initiative	Mandatory Referendum	Optional Referendum	Advisory Referendum
California		X	X	X	
Switzerland	X*		X	X	
Philippine	X	X		X	
Kenya	X		X		
Australia			X		X

* The Swiss system only permits constitutional, as opposed to statutory, initiatives.

The foregoing sections suggest that there are as many ways to implement a system of direct democracy as there are nations that have such a system. Each of the four nations discussed has developed mechanisms to effect citizen participation. Consideration of the forms of direct democracy instituted by other countries can inform a discussion on how California could improve its own initiative and referendum system. What follows are a few proposals derived from Switzerland, the Philippines, Kenya, and Australia that California could adopt to address some of the criticisms raised concerning its initiative and referendum system.

A. Signature and Distribution Requirements

In order to blunt the criticism that the low threshold required to pass a constitutional amendment results in a constitution that is a “bloated mishmash,”¹²¹ implementing a distribution requirement may make it more difficult to pass a constitutional amendment. Mirroring the Philippines’ system would require a specified percentage of signatures from each county in California in order for the initiative to appear on the ballot. This would ensure proportional representation, thereby making it more arduous to amend the constitution.¹²² In addition, Kenya’s model, which requires approval from county assemblies, could provide further assurance that the measure has support throughout the state.

¹²¹ See *supra* note 20.

¹²² For a more in depth treatment of proportional representation, see *Initiative Petition Signature Requirements*, NAT’L CONF. ST. LEGIS. (last updated Sept. 20, 2012), <http://www.ncsl.org/research/elections-and-campaigns/signature-requirements.aspx>.

B. Agenda Initiatives (Indirect Initiatives)

A reintroduction of the agenda initiative could help curb the expense of signature gathering in California's initiative process.¹²³ An often cited disadvantage of California's initiative process is the exorbitant costs to carry an initiative from the signature gathering phase to statewide approval.¹²⁴ Modeled after the Swiss system, the agenda initiative could be a cost-effective alternative to the direct initiative because it requires fewer signatures. As soon as an initiative garners a sufficient number of signatures, the legislature would be required to consider the proposal. For some initiatives, this could result in a purely legislative solution, sparing proponents the costs of a full-scale campaign. However, if dissatisfied with the legislature's response, the proponents of the initiative would still have the option to take the measure to a statewide vote.

In addition, the agenda initiative may result in a more educated electorate.¹²⁵ Comparatively, when Swiss voters propose a constitutional amendment through the agenda initiative process, the Federal Assembly must formally consider the initiative before it can be placed on the ballot. This aspect of the Swiss system can result in a more in-depth conversation between the government and the people. When the parliament makes a counterproposal, Swiss voters often prefer the parliament's counterproposal to the original initiative.¹²⁶ This indicates that the agenda initiative process can yield legislative solutions that are satisfactory to Swiss voters. Both the increased flexibility of the Swiss initiative process and the wider array of proposals from which voters may choose seem to justify the use of the agenda initiative. While the California legislature is required to convene "informational hearings" about the propositions that will appear on the ballot, these hearings are not widely covered by the media, and thus have little effect on the public debate.¹²⁷ As such, reintroducing the agenda initiative could spur dialogue between the legislature and the electorate.

Another feature of the agenda initiative that could also help to increase statewide representation of the electorate is demonstrated by the system implemented in Kenya. This system incorporates a multi-layered-legislative participation. In other words, county assemblies must approve the initiative before it goes to both Houses of Parliament. If this system were implemented in California, presumably, the initiative process would require understanding of local needs rather than a statewide focus.

Nevertheless, a reintroduction of the agenda initiative could meet political resistance because the initiative process has taken on the distinctive character of "California's fourth branch

¹²³ See *supra* note 22.

¹²⁴ LEDUC, *supra* note 31, at 150.

¹²⁵ See *supra* note 23.

¹²⁶ DUBOIS, *supra* note. 46, at 51. The Swiss parliament made twenty-six counterproposals to initiative constitutional amendments between 1891 and 1991. Of these, Swiss voters adopted seventeen into law.

Id.

¹²⁷ SIMMONS, *supra* note 28, at 11.

of government.”¹²⁸ The notion of the legislature participating in the initiative process could strike voters as a power grab, contravening the original purpose of the initiative as a route around a legislative body beholden to special interests.¹²⁹ Even though any proposal rejected by the legislature would necessarily be subjected to a popular vote, voters may be hesitant to include the legislature in a method of lawmaking that historically has been the exclusive domain of the people.

C. The Double Majority Requirement

The Double Majority Requirement, as exercised in Switzerland and Australia, could also help to address the concern that it is too easy to amend the California constitution.¹³⁰ Under the Swiss and Australian constitutions, all amendments must be passed in a national referendum by a double majority. This is not the case in California, where a statewide simple majority is sufficient to pass legislative and initiative constitutional amendments.

Implementing the double majority rule in California would require all amendments to be passed by a majority of voters in the state, as well as by voters in a majority of California’s counties. Again, this would make it more difficult for constitutional amendments to pass. Further, in order to pass an amendment, it would have to garner wide support across the state, not merely a strong voting base in one region. Thus, the double majority requirement would have the dual effect of insulating the constitution from excessive amendments while mandating a more widespread consensus on proposed amendments.

D. Shorter and More Concise Initiatives

In answer to the criticism that initiatives are difficult to comprehend,¹³¹ California could mandate that initiatives be shorter and more concise. By comparison, Swiss initiatives are usually shorter in length than those that exist in California.¹³² The primary reason for this difference is that the Swiss enforce a strict single-subject rule that applies to all initiatives.¹³³ Though California has a similar rule, courts have interpreted it to allow large statutory schemes to qualify as a single subject.¹³⁴

To make initiatives more understandable, California could adopt a strict limit on the length of ballot initiatives. Though Switzerland does not have any such limitation, the rule would bring California’s initiatives more in line with the shorter proposals that appear on Swiss ballots. Alternatively, voters could pass an initiative that redefines the single subject rule, making it

¹²⁸ See CAL. COMM’N ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT 71–74 (1992) (detailing various reasons advanced for using the initiative system, the first of which is providing a method for citizens to go around the legislature).

¹²⁹ See BRODER, *supra* note 34, at 21.

¹³⁰ See *supra* note 19.

¹³¹ See *supra* note 24.

¹³² DUBOIS, *supra* note 46, at 58.

¹³³ *Id.*

¹³⁴ *Senate of State of Cal.*, 21 Cal. 4th at 1163.

much narrower. This could force initiative proponents to focus their proposal on one statute or constitutional provision, which would make it much easier for voters to comprehend the effect of the initiative by reading its text.

E. Advisory Referendums (Non-binding)

The introduction of a non-binding referendum would allow voters to weigh in on a greater number of important issues, while at the same time addressing the concern that there is an excessive number of initiatives on the ballot.¹³⁵ If the legislature were able to call a non-binding vote on specific policy matters, it could have the effect of reducing the number of initiative campaigns brought by voters. The political cover provided by a popular vote would encourage the legislature to address “hot-button issues.”

The advisory referendum could also be adapted to the initiative process, whereby citizens could gather signatures to request a statewide advisory vote on a particular issue.¹³⁶ Since the results of such a vote would be non-binding, it would be more acceptable to lower the number of signatures required to qualify the measure for the ballot. This would enable citizens to call a vote on important policy matters without incurring the full financial burden of gathering the 400,000 signatures required to qualify a legislative initiative.¹³⁷ Also, there is no danger of voters passing unconstitutional or ambiguous laws. The results of a non-binding initiative would merely serve as a mandate to legislators to take action on a particular issue.

Proponents of Proposition 49 in 2014 attempted to call an advisory vote to denounce the Supreme Court’s ruling in *Citizens United v. Federal Election Commission*. The California Supreme Court removed Proposition 49 from the ballot, holding that, under current law, it is unclear whether advisory questions may be the subject of popular initiatives.¹³⁸ In order for advisory referendums to become part of California’s system of direct democracy, voters would need to amend the state constitution to explicitly allow for such a vote.

F. Improving Voter Turnout

Low voter turnout is often cited as a concern for the California initiative process.¹³⁹ California could improve its initiative process by implementing methods to increase voter turnout. An initiative statute, which is supposedly the will of California voters, loses legitimacy

¹³⁵ See *supra* note 22.

¹³⁶ Proponents of Proposition 49 in 2014 attempted to call an advisory vote to denounce the Supreme Court’s ruling in *Citizens United v. Federal Election Commission*. The California Supreme Court rejected Proposition 49, holding that, under current law, advisory questions may not be the subject of popular initiatives. The report on Proposition 49 contained in this volume details the failure of the proposition.

¹³⁷ In the last ten years, there has been a significant rise in the percentage of initiatives that are given official titles but fail to qualify for the ballot. This indicates that there are many issues that voters feel are important but that failed to reach a statewide vote. CAL. SEC’Y OF STATE, INITIATIVE TOTALS BY SUMMARY YEAR 1912–JANUARY 2013, available at <http://www.sos.ca.gov/elections/ballot-measures/pdf/initiative-totals-summary-year.pdf>.

¹³⁸ Brandon Bjerke & Meryl Balalis, *Legislatively Referred Advisory Questions on the Ballot: The Struggle for Proposition 49* CAL. INIT. REV., (Fall 2014).

¹³⁹ LEDUC, *supra* note 31, at 151.

when it is passed by just a small segment of the state's voters. For example, the 2014 primary election saw only twenty-five percent of California's registered voters participate.¹⁴⁰ This figure contrasts sharply with the high rate of turnout in Australia, which has not fallen below ninety percent voter turnout since mandatory voting was instituted in 1924.¹⁴¹ Thus, it is arguable that referendums in Australia better represent public sentiment since they are decided by a much wider segment of voters.

Mandatory voting is not a palatable solution to voter-turnout problems in California or any other state in America. However, a more realistic method to increase voter turnout would be to set a minimum level of voter participation, or *participation quorum*, required for a proposition to take effect.¹⁴² As discussed, Kenya is currently considering the implementation of a quorum requirement that would prevent any referendum from taking effect unless fifty percent of eligible voters cast a vote in the referendum. It is important to note that 55 percent of eligible California voters participated in the 2012 presidential election, and 59 percent in 2008.¹⁴³ Thus, a 50 percent participation requirement would not banish propositions from California politics. It would, however, pressure proponents to campaign for initiatives only in presidential election years. Consequently, more voters would be deciding the outcomes of initiatives and referendums which could have profound effects on the state.

G. Frequency of Initiatives

Yet another solution to the criticism that the constitution of California is amended too often is to reduce the frequency with which citizens may initiate a constitutional amendment. Similar to the Philippines, California could regulate the initiative process to limit citizen-initiated amendments to once every four years. This could have the effect of decreasing the number of initiatives and fostering a more deliberative democracy, in that citizens would be required to live with their proposed amendments for a longer period of time before voting on them. In addition, if initiatives only appeared in presidential elections, the initiative process would benefit from the considerably higher levels of voter turnout seen in these elections.¹⁴⁴

¹⁴⁰ CAL. SEC'Y OF STATE, *supra* note 33.

¹⁴¹ *Who Voted in Previous Referendums and Elections*, AUSTRALIAN ELECTORAL COMMISSION, http://www.aec.gov.au/Elections/australian_electoral_history/Voter_Turnout.htm (last visited Sept. 14, 2014).

¹⁴² Several European nations, including Italy, Latvia, Poland, Portugal, and Slovakia, require at least fifty percent of all eligible voters to cast ballots in order for any proposition to pass. LUÍS AGUILAR-CONRARIA & PEDRO MAGALHÃES, REFERENDUM DESIGN, QUORUM RULES AND TURNOUT 15 (2008), *available at* http://portal.uam.es/portal/page/portal/UAM_ORGANIZATIVO/Departamentos/CienciaPoliticaRelacionesInternacionales/publicaciones%20en%20red/working_papers/10%20Pedro%20Magalhaes%20WP%2095_08.pdf.

¹⁴³ CAL. SEC'Y OF STATE, *supra* note 22.

¹⁴⁴ *See Voter Turnout*, CENTER FOR VOTING & DEMOCRACY, <http://www.fairvote.org/research-and-analysis/voter-turnout/> (last visited Oct. 1, 2014) (indicating that voter turnout in presidential elections is usually ten to twenty percent higher than in midterm elections).

V. CONCLUSION

There are numerous systems of direct democracy implemented throughout the world. The initiative and referendum, as practiced in Switzerland, the Philippines, Kenya, and Australia, offer useful comparisons to California's initiative and referendum system because they encounter some of the same problems faced in California. Helpful techniques that are already used abroad, such as the double majority requirement, advisory and indirect initiatives, frequency limitations, and signature distribution requirements, could be put to constructive use in California. By learning how others have approached similar problems, California voters can carry on a more informed discussion of how to improve their own system of direct democracy.