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# **Legislatively Referred Advisory Questions on the Ballot:**

## **The Struggle For Proposition 49**

Report

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## I. INTRODUCTION

Proposition 49 was an advisory question that was put on the ballot by the Legislature. The Proposition asked Californians two questions: (1) whether or not Congress should be instructed to pass a constitutional amendment that would limit campaign spending; and (2) whether the California Legislature should ratify said amendment. Proposition 49 was placed on the ballot but was challenged and ultimately removed by the California Supreme Court, pending a full trial after the election.

This report first addresses why the Supreme Court and other officials are hesitant to allow advisory questions such as Proposition 49, in a state that is known for its direct democracy. Second, it addresses the possible outcomes of the upcoming California Supreme Court case regarding Proposition 49 as well as how it will affect future propositions advocating for national change. Additionally, this report attempts to educate voters on the limits of California's direct democracy, highlighting how the pending California Supreme Court decision may affirm or extend these limits. Finally, this report explores how other states have implemented advisory questions and how incorporation of advisory questions in California may be possible in the future.

## II. BACKGROUND

### A. Past Advisory Questions in California

Unlike other initiatives on the ballot, advisory questions, would not create binding law if the electorate were to answer with a majority *Yes*. An advisory question simply polls voters to give the Legislature information about voter opinions regarding the topic at hand.

Although advisory questions are uncommon, they have been on the ballot three other times in California's history.<sup>1</sup> In November 1892, voters approved a legislatively referred advisory question that United States senators should be elected directly by a vote of the people.<sup>2</sup> Twenty years later in 1912, the United States Congress submitted for ratification the Seventeenth Constitutional Amendment to the states, which changed the election process of U.S. senators to be directly elected by a vote of the people.<sup>3</sup> On January 28, 1913, California ratified the amendment. On May 31, 1913, thirty-six states had ratified the amendment so the Secretary of State certified it as part of the United States Constitution.<sup>4</sup> The advisory question in 1982 provided Congress with the voters' opinion that senators should be elected by a direct vote, resulting in Congress proposing the Seventeenth Amendment.

In June 1933, voters rejected two advisory questions on whether the legislature should divert gas taxes to pay off highway bonds.<sup>5</sup> In this election, the Secretary of State made it clear

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<sup>1</sup> ASSEMBLY FLOOR ANALYSIS, COMMITTEE ANALYSIS OF S.B. 1272, at 2 (June 26, 2014).

<sup>2</sup> *Id.*

<sup>3</sup> U.S. CONST. amend. XVII.

<sup>4</sup> *Id.*

<sup>5</sup> ASSEMBLY FLOOR ANALYSIS, COMMITTEE ANALYSIS OF S.B. 1272, at 2 (June 26, 2014).

that this was a question posed by the Legislature through the title and summary.<sup>6</sup> Voters rejected the advisory questions<sup>7</sup>, directing their elected officials not to divert gas taxes and thus participating in the legislative process.

<b>9</b>	<b>DIVERTING GASOLINE TAX FUNDS FOR BIENNIUM ENDING JUNE 30, 1933. Question submitted to electors by Legislature as follows:</b>	YES	
	1. Shall the Legislature divert \$8,779,750 from the gasoline tax funds to the general fund for payment of bond interest and redemption on outstanding highway bonds for the biennium ending June 30, 1933?	NO	
<b>10</b>	<b>DIVERTING GASOLINE TAX FUNDS FOR BIENNIUM ENDING JUNE 30, 1935. Question submitted to electors by Legislature as follows:</b>	YES	
	2. Shall the Legislature divert \$8,449,326 from the gasoline tax funds to the general fund for payment of bond interest and redemption on outstanding highway bonds for the biennium ending June 30, 1935?	NO	

In November 1982, voters approved an advisory question that urged the United States government to propose to the Soviet Union that both countries agree to immediately stop all testing and production of nuclear weapons.<sup>8</sup> Voters answered with a majority *Yes*.<sup>9</sup>

After the November election in 1982, the Supreme Court of California ruled in *American Federation of Labor v. Eu* regarding an advisory question on the November 1984 ballot, stating that placing advisory questions on the ballot by means of the voter initiative process was an improper use of the initiative system.<sup>10</sup> The court held that the initiative was invalid because it did not adopt a state statute.<sup>11</sup> However, the court did not directly address whether or not the Legislature was permitted to place an advisory question on the ballot through the referendum process.<sup>12</sup>

## B. Proposition 49's Removal from the Ballot

### 1. *The Nature of Proposition 49*

Proposition 49 was an advisory question, enacted by the Legislature. The proposition was to ask Californians: whether or not the United States Congress should propose a constitutional amendment regarding campaign spending, and whether the California Legislature should ratify that amendment.

<sup>6</sup> CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, JUNE 27, 1933, at 32, *available* at [http://web.archive.org/web/20110725180054/http://traynor.uchastings.edu/ballot\\_pdf/1933s.pdf](http://web.archive.org/web/20110725180054/http://traynor.uchastings.edu/ballot_pdf/1933s.pdf).

<sup>7</sup> ASSEMBLY FLOOR ANALYSIS, COMMITTEE ANALYSIS OF S.B. 1272, at 2 (June 26, 2014).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; *American Federation of Labor v. Eu*, 36 Cal. 3d 687 (1984).

<sup>11</sup> *American Federation of Labor v. Eu*, 36 Cal. 3d 687 (1984).

<sup>12</sup> *Id.*

If Proposition 49 had garnered an affirmative majority vote, the California Secretary of State would have had to inform the United States Congress of the results.<sup>13</sup> The advisory question asked voters:

Shall the Congress of the United States propose, and the California Legislature ratify, an amendment or amendments to the United States Constitution to overturn *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, and other applicable judicial precedents, to allow the full regulation or limitation of campaign contributions and spending, to ensure that all citizens, regardless of wealth, may express their views to one another, and to make clear that the rights protected by the United States Constitution are the rights of natural persons only?<sup>14</sup>

## 2. *Proposition 49 and Citizen's United*

The federal constitutional amendment that Proposition 49 sought to propose would be focused on overturning the results *Citizens United v. Federal Election Commission*.<sup>15</sup> *Citizens United* was a case regarding the First Amendment protections of free speech heard by the Supreme Court in 2010. Citizens United, a non-profit corporation, produced a film regarding a candidate seeking nomination with a political party in the next presidential election.<sup>16</sup>

The law at the time prohibited corporations and unions from funding speech that expressly advocates an “electioneering communication.”<sup>17</sup> Electioneering communications are public cable or satellite broadcasts made within thirty days of the primary election that refer to a clearly identified candidate for federal office.<sup>18</sup> Citizens United brought the case to ask the Supreme Court to grant a declaratory judgment so they would not be subject to civil and criminal penalties for broadcasting their film.<sup>19</sup>

The United States Supreme Court held that under the First Amendment, the government may not suppress the political speech of a corporation or union.<sup>20</sup> The federal statute barring independent corporate funding for electioneering communications was thus unconstitutional and void.<sup>21</sup>

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<sup>13</sup> S.B. 1272 (Lieu) (2013–2014), available at <http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml>.

<sup>14</sup> *Id.* at § 4(a).

<sup>15</sup> S.B. 1272 (Lieu) (2013–2014).

<sup>16</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>17</sup> *Id.* at 310.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 311.

<sup>21</sup> *Id.*

This change in federal campaign finance law angered many across the nation, as the law no longer limited the influence of wealthy corporations on elections.<sup>22</sup> This outrage resulted in the California Legislature passing Assembly Joint Resolution 1, which called for an amendment similar to the one called for by Proposition 49.<sup>23</sup>

### 3. Summary of Proposition 49's Effect

In essence, Proposition 49 sought to ask Californians if they agreed or disagreed with the U.S. Supreme Court's holding in *Citizens United*. A "Yes" vote would have meant voters support a Congressional amendment to overturn *Citizens United* and other applicable laws so that regulations and limitations could be placed on campaign contributions and spending.<sup>24</sup> The theory was that this would allow equal expression of opinion by citizens, regardless of wealth.<sup>25</sup> A "No" vote would mean voters do not support a Congressional amendment to overturn the holding in *Citizens United* and that the law should stay the same.<sup>26</sup>

## III. PROPOSITION 49'S ROAD TO THE BALLOT

Proposition 49 was introduced by Senator Lieu as Senate Bill 1272 in February 2014.<sup>27</sup> It was named the "Overturn *Citizens United* Act."<sup>28</sup> The bill included numerous legislative findings: that corporations are not mentioned in the United States Constitution; and that corporations have not historically been given constitutional rights.<sup>29</sup> The bill effectuated the placement of Proposition 49 on the ballot by calling a special election in the form of an advisory question and ordering the Secretary of State to place Proposition 49's language on the ballot.<sup>30</sup>

Both the Senate and the Assembly passed S.B. 1272, so it was presented to Governor Brown.<sup>31</sup> In July 2014, SB 1272 became law without the Governor's signature.<sup>32</sup> The Governor's allowance of the measure to become law without taking the action of a signature veto was a compromise position.<sup>33</sup> The Governor expressed concern that the measure was invalid because of its advisory nature and was concerned with "cluttering" the ballot with speculative

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<sup>22</sup> Bob Elgko, *California Seeks Constitutional Convention Over Citizens United*, SF GATE (June 24, 2014), <http://www.sfgate.com/politics/article/California-seeks-constitutional-convention-over-5579322.php>.

<sup>23</sup> *Id.*

<sup>24</sup> S.B. 1272 (Lieu) at § 4(b) (2013-14).

<sup>25</sup> *Id.*

<sup>26</sup> S.B. 1272 (Lieu) (2013-14).

<sup>27</sup> *Id.* at § 1.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at §2(b).

<sup>30</sup> S.B. 1272 (Lieu) (2013-14).

<sup>31</sup> *Id.*

<sup>32</sup> Editorial, *Fighting Ballot Bloat in California: The Prop. 49 Ruling*, L.A. TIMES, Aug. 12, 2014, <http://www.latimes.com/opinion/editorials/la-ed-citizens-united-20140813-story.html>.

<sup>33</sup> *Id.*

propositions.<sup>34</sup> Members of the Governor’s political party supported the measure through the Legislature and sought to have it appear on the ballot.<sup>35</sup>

### A. Senate Floor

The Senate Floor Report explained that existing law authorizes cities, counties, school districts, or special districts to hold an advisory election in order to allow voters to voice their opinions on issues or to inform the local government of their approval or disapproval of the ballot proposal.<sup>36</sup>

Senators in support of Proposition 49 argued that it would give Californians a valuable opportunity to respond to the United States Supreme Court rulings, as well as to advise Congress and the California Legislature to pass an amendment that would overturn *Citizens United* and allow regulation and limitation of campaign spending.<sup>37</sup> Senators in opposition cited the additional costs that the advisory question would impose, which are not in the budget.<sup>38</sup>

### B. Assembly Floor

The Assembly’s analysis of SB 1272 explains Senator Lieu’s position that the United States Constitution and Bill of Rights protect the rights of individual human beings, per the phrase “We the people.”<sup>39</sup> Lieu and others warned that the *Citizens United* holding grants those same rights to corporations.<sup>40</sup> Assembly analysis also pointed to California’s past experience with advisory questions.<sup>41</sup>

## IV. LITIGATION IN THE CALIFORNIA SUPREME COURT

In 2014, the Howard Jarvis Taxpayers Association sued the California Secretary of State and the Legislature to have Proposition 49 removed from the ballot.<sup>42</sup> The court, through a preliminary order, has removed Proposition 49 from the ballot for the November 2014 election. This is unusual, as the policy of the court is that “it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF S.B. 1272, at 2 (July 1, 2014), available at [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_1251-1300/sb\\_1272\\_cfa\\_20140701\\_164653\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1251-1300/sb_1272_cfa_20140701_164653_sen_floor.html).

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.*

<sup>39</sup> ASSEMBLY FLOOR ANALYSIS, COMMITTEE ANALYSIS OF S.B. 1272, at 1 (June 26, 2014), available at [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_1251-1300/sb\\_1272\\_cfa\\_20140627\\_131559\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1251-1300/sb_1272_cfa_20140627_131559_asm_floor.html).

<sup>40</sup> *Id.*

<sup>41</sup> *Supra* Sec. II Background: Past Advisory Questions in California.

<sup>42</sup> *Howard Jarvis Taxpayers Assn. v. Bowen, Secretary of State* S220289 (2014).

rather than to disrupt the electoral process by preventing the exercise of the people’s franchise, in absence of some clear showing of invalidity.”<sup>43</sup>

Rather than applying the “clear showing of invalidity” standard for removal, the majority considered the potential harm that the invalid measure may have on the electorate. The court decides that “an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.”<sup>44</sup> The court reasoned that because there is not enough time for a full trial on the merits before the voter guides and ballots need to be printed, the course of action that brings the least harm is to not have Proposition 49 on the ballot.<sup>45</sup> The case will be heard in the spring of 2015. If the court rules favorably, the advisory question could be placed on the ballot for the 2016 election.

### **A. Majority Opinion in Proposition 49 Case**

The court refers to the *American Federation of Labor v. Eu* case, in which the court removed an advisory measure from the ballot.<sup>46</sup> The court reasoned that an invalid measure on the ballot takes attention, time, and money, away from the valid propositions that are on the same ballot.<sup>47</sup> The court believes advisory questions would confuse or frustrate voters because the advisory question has no legal effect.<sup>48</sup>

The court ordered California Secretary of State Debra Bowen to refrain from taking further action to place Proposition 49 on the November 2014 ballot.<sup>49</sup> However, if the court finds the Proposition valid after a trial on the merits, where the Secretary of State has shown why the advisory question should be included, it would appear on the ballot at the next general election.<sup>50</sup>

### **B. Concurring Opinion in Proposition 49 Case**

The people have the powers of initiative and referendum, which Justice Liu asserts are solely law-making powers and do not include the expression of the wishes of the enacting body.<sup>51</sup>

#### *1. Legislative Validity*

According to Justice Liu’s concurring opinion, Proposition 49 is neither an initiative nor a referendum because it does not propose a law.<sup>52</sup> The Legislature refers to it as an “advisory

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<sup>43</sup> *Independent Energy Producers Assn. v. McPherson* 38 Cal. 4th 1020, 1029 (2006) (quoting *Brosnahan v. Eu* 31 Cal.1, 4 (1982)).

<sup>44</sup> *American Federation of Labor v. Eu*, 36 Cal.3d 687, 697 (1984).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Howard Jarvis Taxpayers Assn. v. Bowen, Secretary of State S220289* (2014).

<sup>50</sup> *Id.*

<sup>51</sup> *Howard Jarvis Taxpayers Assn. v. Bowen, Secretary of State S220289* (2014) at 3.

<sup>52</sup> *Id.* at 2.



question,” while the Howard Jarvis Taxpayer’s Association refers to it as an “opinion poll.”<sup>53</sup> Justice Liu further asserts that there is not a specific constitutional provision that authorizes the Legislature to put this kind of question on the ballot.<sup>54</sup>

Proposition 49 asks Congress to propose a federal constitutional amendment regarding campaign spending.<sup>55</sup> If such an amendment is proposed, Proposition 49 asks the California Legislature to ratify it.<sup>56</sup> Justice Liu cites *Hawke v. Smith*, a case in which the Ohio Secretary of State placed an advisory question regarding a federal constitutional amendment on the ballot. Justice Liu quotes: “ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word”<sup>57</sup> thus concluding that Proposition 49 is outside the legislative authority of the California State Legislature.

## 2. California State Constitution

Justice Liu further asserts that the California Constitution only gives the Legislature the authority to propose three kinds of measures on the ballot.<sup>58</sup> The first is a state constitutional amendment.<sup>59</sup> The second is a statute authorizing issuance of bond debt.<sup>60</sup> The third is an amendment or repeal of previously enacted initiative or referendum measures.<sup>61</sup> The California Constitution states,

The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.”<sup>62</sup>

The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.<sup>63</sup>

The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.<sup>64</sup>

Justice Liu argues that the California Constitution creates a distinct line between the Legislature’s law making power and the citizens’ lawmaking power through the ballot.<sup>65</sup> Furthermore, he states that the structure of the California Constitution does not grant authority for advisory questions because the concept conflicts with our representative democracy, as

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; *Hawke v. Smith*, 253 U.S. 221, 229 (1920).

<sup>58</sup> *Howard Jarvis Taxpayers Assn. v. Bowen, Secretary of State S220289* (2014) at 3.

<sup>59</sup> CAL. CONST. art. XVIII, §§ 1, 4.

<sup>60</sup> *Id.* art. XVI, § 2.

<sup>61</sup> *Id.* art. II, § 10, subd. (c).

<sup>62</sup> *Id.* art. IV, § 1; *Howard Jarvis Taxpayers Assn. v. Bowen, Secretary of State S220289* (2014).

<sup>63</sup> CAL. CONST. art. II, § 8.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

opposed to a direct democracy.<sup>66</sup> The California Constitution does not explicitly grant the combination of direct and representative law making and thus there should not be advisory questions on California state ballots.<sup>67</sup>

## V. ADVISORY QUESTIONS IN OTHER JURISDICTIONS

When the election is over and the case is returned to the California Supreme Court, the validity of Proposition 49 will be determined based on California precedent and California's Constitution. However, as there is no previous California case that has expressly addressed a legislatively proposed advisory question like Proposition 49, the California Supreme Court may wish to look to fellow states who have dealt with this exact issue in recent years. The electorate may also wish to understand the use and value of advisory questions elsewhere in deciding whether a change to the constitutional reservation of initiative and referendum power may be necessary.

### A. Citizen's United Ballot Questions

The subject matter of Proposition 49, being of national importance, has motivated other states including Montana and Colorado and cities such as San Francisco and Chicago to use advisory questions to voice their discontent with the decision of the U.S. Supreme Court.<sup>68</sup>

#### 1. Colorado

In 2012, the electorate of the state of Colorado, through its initiative power, placed the "Colorado Corporate Contributions Amendment" on the ballot as Amendment 65.<sup>69</sup> The electorate approved the amendment with over 74% of voters stating *Yes* to the advisory question.<sup>70</sup> The question was similar to that of Proposition 49:

Shall there be amendments to the Colorado constitution and the Colorado revised statutes concerning support by Colorado's legislative representatives for a federal constitutional amendment to limit campaign contributions and spending, and, in connection therewith, instructing Colorado's congressional delegation to propose and support, and the members of Colorado's state legislature to ratify, an amendment to the United States constitution that allows congress and the states to limit campaign contributions and spending?<sup>71</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Derek Cressman, *Amend 2012 Ballot Measure Victories*, COMMON CAUSE, <http://www.commonblog.com/2012/11/06/amend-2012-ballot-measure-results/> (last visited Sept. 15, 2014).

<sup>69</sup> *Amendments and Propositions on the Ballot 2012*, COLO. SECRETARY ST., <http://www.sos.state.co.us/pubs/elections/Initiatives/ballot/contacts/2012.html> (last visited Sept. 15, 2014).

<sup>70</sup> *General Election Results 2012 Amendments and Propositions*, COLO. SECRETARY ST., available at <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/amendProp.html> (last visited Sept. 15, 2014).

<sup>71</sup> Colorado Amendment 65 (2012).

Both Amendment 65 and Proposition 49 stated the intention that federal representatives propose and support an amendment to the U.S. Constitution and that state representatives ratify the federal amendment when the time comes.<sup>72</sup> However, Colorado's Amendment 65 goes further by also suggesting that state representatives amend the state constitution and codes to effect the ability to limit campaign contributions and spending.

This broad based question has not been challenged as unconstitutional under either the Colorado Constitution or the U.S. Constitution. While the amendment's ability to avoid judicial review may be in part due to its popularity, as there was no official opposition filed with the Colorado Secretary of State,<sup>73</sup> it is also due to the nature of the constitutional reservation of initiative power. The Colorado Constitution states in pertinent part:

The *legislative* power of the state shall be vested in the general assembly . . . but the people *reserve* to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.<sup>74</sup>

The Colorado Supreme Court has read this provision, like the California Supreme Court has read its provision, to liberally protect the electors' power.<sup>75</sup> In Colorado one of the few limits on this power is that the initiative must be within *legislative* power, as that is the branch from which the constitution reserves the people's power, not the executive branch with its administrative power.<sup>76</sup> The Colorado Supreme Court in turn has found that an act that represents "a declaration of public policy of general applicability" is legislative in nature and is thus an appropriate use of the reserved power.<sup>77</sup> With this broad interpretation of the electors' power, it is likely no one out of the small number of *No* voters felt that a challenge would be successful or worthwhile.

## 2. *Montana*

Also in 2012, the electorate of the State of Montana through its initiative power placed the "Montana Corporate Contributions Initiative" on the ballot as I-166.<sup>78</sup> The initiative was challenged before the election, but it was allowed on the ballot by the Montana Supreme Court, as it narrowed its review to the procedural aspects of the initiative process and did not review the

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<sup>72</sup> Compare Colorado Amendment 65 (2012) with California S.B. 1272 (Lieu) (2013-2014).

<sup>73</sup> *Amendments and Propositions on the Ballot 2012*, COLO. SECRETARY ST., <http://www.sos.state.co.us/pubs/elections/Initiatives/ballot/contacts/2012.html> (last visited Sept. 15, 2014).

<sup>74</sup> COLO. CONST. Art. V § 1.

<sup>75</sup> *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013).

<sup>76</sup> *Id.* at 507.

<sup>77</sup> *Id.* at 507.

<sup>78</sup> *2012 Ballot Issues*, MONT. SECRETARY ST., <http://sos.mt.gov/Elections/2012/BallotIssues/> (last visited Sept. 15, 2014).

substantive portions of the ballot measure.<sup>79</sup> After I-166 passed with 74.67% of the vote, the validity of the initiative was challenged again on constitutional grounds. The language of I-166 was longer than Proposition 49 or Amendment 65, establishing a state policy in one section and charging elected state and federal legislators with official actions.<sup>80</sup> The Montana Constitution states in pertinent part:

The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.<sup>81</sup>

The people may enact *laws* by initiative on all matters except appropriations of money and local or special laws.<sup>82</sup>

The district court split its decision, granting both sides a partial victory. The portion of I-166 that charged elected state and federal officials to act was struck down, but upheld the validity of the portion that established state policy.<sup>83</sup> The court held that “the people of the state of Montana may pass as an initiative a law that states policy.”<sup>84</sup>

The Montana court reasoned that state precedent required the reserved powers of the people to be broadly construed to maintain power in the people,<sup>85</sup> just as California precedent demands.<sup>86</sup> Further, the only restriction on those powers are the explicit terms; *appropriations of money*, and *local or special laws*, not the narrow argument offered by the dissent in the pre-election action that argued the use of *laws* in the reservation meant a specific type of act.<sup>87</sup> The court ruled that since *laws* as a term was not defined by the constitution it did not exclude non-binding policy acts, such as I-166.<sup>88</sup>

## B. Michigan’s Local Ballot Questions

The state of Michigan also has an important example to be understood about the relationship between state power and advisory questions. Within the context of a local advisory measure, the Court of Appeals of Michigan discussed important aspects of reservation of power between a state and its people.<sup>89</sup> The Michigan Constitution states:

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<sup>79</sup> Charles S. Johnson, *Judge Strikes Part of Montana Ballot Measure on Citizens United*, MISSOULIAN (December 23, 2013), [http://missoulian.com/news/state-and-regional/judge-strikes-part-of-montana-ballot-measure-on-citizens-united/article\\_c83a8b54-6c3f-11e3-a678-0019bb2963f4.html](http://missoulian.com/news/state-and-regional/judge-strikes-part-of-montana-ballot-measure-on-citizens-united/article_c83a8b54-6c3f-11e3-a678-0019bb2963f4.html).

<sup>80</sup> Montana Initiative 166 (2012).

<sup>81</sup> MONT. CONST. Art. V sec. 1.

<sup>82</sup> MONT. CONST. Art. III sec. 4.

<sup>83</sup> *Rickert v. McCulloch*, 2013 Mont. Dist. LEXIS 10 (1st Jud. Dist. Ct. Mont. 2013) Case No. CDV-2012-1003 [“*Rickert*”].

<sup>84</sup> *Id.* at 9.

<sup>85</sup> *Id.*

<sup>86</sup> *American Federation of Labor v. Eu*, 36 Cal. 3d 687, 708 (1984).

<sup>87</sup> *Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, 365 Mont. 520, 285 P.3d 435, 2012 Mont. LEXIS 217 (2012); *Rickert*, 2013 Mont. Dist. LEXIS at 13.

<sup>88</sup> *Rickert*, 2013 Mont. Dist. LEXIS at 13.

<sup>89</sup> *Se. Mich. Fair Budget Coal. v. Killeen (Killeen)*, 153 Mich. App. 370 (Mich. Ct. App. 1986).

The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum.<sup>90</sup>

The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted.<sup>91</sup>

The case involved a local county refusing to place advisory questions onto a ballot, as there was no clear grant of authority to do so.<sup>92</sup> The court held that nothing in the Michigan Constitution explicitly prohibited the use of advisory questions.<sup>93</sup> It further reasoned that since the state government holds plenary power subject only to the federal and state constitution, the state, and by extension their subordinate counties, could do anything not constitutionally restricted from them, including advisory questions.<sup>94</sup> The court upheld the placement of the advisory questions on the ballot, since the power of counties could be implied from Michigan's broad power sharing between the state and local governments.<sup>95</sup>

## VI. THE UPCOMING TRIAL ON THE MERITS

California precedent will be of paramount importance to the California Supreme Court next spring when the fate of Proposition 49, and all future advisory questions, will be decided. Prior cases such as *A.F.L. v. Eu* will frame the discussion of the court.

In *A.F.L. v. Eu*, the California Supreme Court reviewed an initiative that was placed on the ballot by the electorate that asked the voters whether or not the California Legislature should call for a national constitutional convention for the purposes of amending the federal constitution to include a requirement for a balanced budget.<sup>96</sup> The initiative, if passed, would have withheld the salaries of the legislators if they did not comply with the directive to call for the convention. The court held that the initiative's requirement that the Legislature initiate processes to amend the federal constitution violated the federal constitution's procedures for amendment, but more importantly held that, since the initiative did not create a statute, it was outside the reserved initiative power in the California constitution. This, however, was a limited exploration of advisory ballot questions, as it did not venture into the power of the legislature to place advisory questions on the ballot. As the prior decisions by the California Supreme Court do not have an exact precedent for the justices to follow, supporters of Proposition 49 have an opportunity to encourage the court to chart a more defined course in this area.

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<sup>90</sup> MICH. CONST. Art. II §9

<sup>91</sup> *Id.*

<sup>92</sup> *Killeen*, 153 Mich. App. at 376.

<sup>93</sup> *Id.* at 379.

<sup>94</sup> *Id.* at 381.

<sup>95</sup> *Id.*

<sup>96</sup> *American Federation of Labor*, 36 Cal. 3d at 687.

Opponents of Proposition 49 will enter the trial on the merits in a strong position as the order removing Proposition 49 from the ballot suggests that five out of the seven justices strongly question the validity of advisory questions on the ballot. The weight of precedent also weighs heavily in their favor. As *A.F.L. v. Eu* states, “the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body. Those powers are limited . . . it does not include a resolution which merely expresses the wishes of the enacting body.”<sup>97</sup>

Supporters of Proposition 49 will have a more difficult experience at trial. The supporters will need to distinguish Proposition 49 from the facts of *A.F.L. v. Eu* and persuade the court into a new viewpoint on the unique nature of advisory questions. Arguments from Colorado, Montana, and Michigan can help both sides expand the court’s understanding of advisory questions.

The dissent in *A.F.L. v. Eu* by Justice Lucas points to a break in jurisprudence within the majority’s reasoning.<sup>98</sup> The court affirmed that the people’s reserved legislative power must be “liberally constructed” and “guarded jealously by the court” but goes on to interpret the term *statutes* within the reservation, and its prior iterations of *law* and *acts* narrowly, to exclude resolutions of public policy.<sup>99</sup> This narrow interpretation is based upon the decisions of the Supreme Courts of Arkansas, Colorado, and Michigan in cases regarding the 18th Amendment, which would eventually enact the prohibition of alcohol due to the temperance movement of 1910’s.<sup>100</sup> Those courts used a variety of historical sources unique to their own states to support the contention that a vote on the ratification of a federal constitutional amendment did not fall under their definition of an act or law.<sup>101</sup> The California Supreme Court found these decisions to be persuasive enough to adopt this narrow view and apply it to the California Constitution.<sup>102</sup> Supporters may attempt to persuade the court to look to Montana’s more recent understanding of the term *laws* in deciding whether to maintain the narrow definition that constricts the people’s reserved power or expand it under its charge to liberally construct and guard the power.

In the pre-election litigation, Justice Liu cited *Hawke v. Smith* in asserting that the act of ratifying an Amendment to the U.S. Constitution through the proscribed methods is not a legislative act, and thus Proposition 49 is not within the legislative powers granted to the Legislature by the Constitution.<sup>103</sup> Supporters however, in asserting Colorado’s view that “a declaration of public policy of general applicability” is *legislative*,<sup>104</sup> can assert that Proposition 49 is in fact not the ratification of an amendment, but an ancillary consideration which seeks to declare public policy on potential amendments to the U.S. Constitution.

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<sup>97</sup> *Id.* at 708.

<sup>98</sup> *Id.* at 720 (Lucas, J. dissenting).

<sup>99</sup> *Id.* at 707–08.

<sup>100</sup> *Id.* at 710–11.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 714.

<sup>103</sup> *Howard Jarvis Taxpayers Assn. v. Bowen, Secretary of State S220289* (2014) at 2 (Liu, J. concurring).

<sup>104</sup> *See supra* Section IV.1.a.

The experience and reasoning of Michigan’s local advisory ballot questions could be applied in reverse to California. Michigan’s cities and counties were found to have an implied ability to propose advisory questions as the state had no explicit constitutional prohibition, and the state as the seat of general power could by extension provide its subordinate counties the power. The Michigan court had reasoned that state power was only limited by the state and federal constitutions, as such an explicit prohibition was required to remove the advisory ballot question power from the state.<sup>105</sup> In California, by explicit statutory grant, local governments including cities, counties and other special districts are allowed to place advisory questions on the ballot.<sup>106</sup> As these governments receive their power and authority from the state, it follows that if this statute is constitutionally valid, then advisory questions are within the state power of California.

Finally, the supporters may attempt to convince the court that Justice Liu’s narrow structural argument about the power of the Legislature to place only the three explicit types of measures before the voters on the ballot unnecessarily confines California’s power as protected by the U.S. Constitution’s Tenth Amendment broad reservation of general legislative and police power to the states.<sup>107</sup> If Justice Liu’s narrow view of the California Legislature’s power concerning the ballot is adopted, a collection of powers within California’s purview, and used by other states, would be lost.

## VII. CONSEQUENCES OF THE FORTHCOMING OPINION

The decision of the California Supreme Court on Proposition 49 and the wider issue of advisory questions, regardless of the outcome, will have a lasting effect on direct democracy in California and how Californians can approach grass-root campaigns for wider social issues.

A decision that allows Proposition 49 onto the ballot in 2016 and holds advisory questions to be constitutional will have various effects. Numerous advisory questions from the Legislature may begin to flood the ballot. Opponents have expressed this fear and have cited it as a reason against recognizing the power. However, the normal checks on legislative action through elections will still be present, and the voters can temper any level of questioning by the Legislature they deem excessive by voting for Assembly members and Senators that use the power judiciously. Restraint by the Legislature is likely though. During this past session while passing Proposition 49, the Legislature debated another advisory question on immigration reform that failed to pass and be placed on the ballot.<sup>108</sup> It is likely that only advisory questions that require the most reflective considerations by the entire population will survive the legislative and arrive on the ballot. This will allow legislators to make better decisions based on a more reflective polling of the electorate, resulting in better outcomes, rather than utilizing the less-than-accurate commercial polling that interrupts Californians with a phone call during dinner.

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<sup>105</sup> See *supra* Section IV.2.

<sup>106</sup> CAL. ELEC. CODE § 9603 (1994).

<sup>107</sup> U.S. CONST. amend. X.

<sup>108</sup> S.B. 1402 (De León) (2013–2014), available at [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_1401-1450/sb\\_1402\\_bill\\_20140604\\_amended\\_asm\\_v97.pdf](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1401-1450/sb_1402_bill_20140604_amended_asm_v97.pdf).

A decision that does not allow Proposition 49 on the ballot will leave the state in the same position in which it is has been since the last advisory question was on the ballot in 1982 for decades. However, this will be at the cost of limiting the tools of the people to voice their political views.

Further, a decision to not allow advisory questions will require future initiative and referendum campaigns to expend additional time and money drafting their measure, to clearly promulgate law rather than policy. If they do not, their chances of drawing litigation on policy aspects of proposals increases, as opponents will use this new standard to defeat measures in court rather than at the ballot box. A decision against advisory questions would forever sink the hopes of initiative proponents like Tim Draper and his Six Californias Initiative that he attempted to get onto the 2016 ballot. While Mr. Draper failed for a lack of signatures, his initiative would likely have been found to not make law and merely be advisory. The initiative he proposed by itself could not have created the new states as federal Congressional action is required, and there would be no effective change of law for the people, as they awaited federal action that may never happen.<sup>109</sup>

The ability of the people to grant themselves additional powers of direct democracy should not be forgotten. As the reservation explicitly allows constitutional amendments,<sup>110</sup> the electorate may decide that advisory questions are important enough that they will amend the California Constitution to explicitly allow for legislatively referred, or even go further and have voter initiated, advisory questions on the ballot. While even this may be challenged as a revision, which requires a state constitutional convention called by the Legislature to enact,<sup>111</sup> the support of the Legislature in this matter has already been demonstrated by its passage of Proposition 49.

The electorate may even concede that placing non-binding questions on general election ballots is confusing, but propose that placing non-binding questions on primary ballots as an acceptable alternative. Primary ballots are filled with electoral races which may need a second vote to actually elect an official, either due to the top-two primary system in partisan races or a candidate failing to receive a majority requiring a run-off. Thus, the presence of a measure which will not effect a change in the law without another subsequent vote, be it by another initiative or act of the Legislature, will not be out of place on a primary ballot. In light of changes to the initiative and referendum systems that only allows their placement on general election ballots, there could be a clear segregation of law-making votes to November, and tentative electoral decisions, including advisory questions, to June.

## VIII. CONCLUSION

While the fate of Proposition 49 and advisory questions on the California statewide ballots looks grim in the face of California precedent, the proponents should find hope in the fact that the California Supreme Court's jurisprudence has used other states' opinions in adopting changes to its understanding of the people's reserved legislative powers, and that recent

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<sup>109</sup> Jim Miller, *Six California Initiative Fails to Make 2016 Ballot*, SACRAMENTO BEE, Sept. 12, 2014, <http://www.sacbee.com/2014/09/12/6702457/six-californias-initiative-fails.html>.

<sup>110</sup> CAL. CONST. art. II, § 8.

<sup>111</sup> CAL. CONST. art. VIII, § 2.



decisions in favor of advisory questions may well influence the court. Additionally, supporters can always use the initiative process the traditional way and amend the California Constitution to explicitly provide for the use of advisory questions by the Legislature on statewide ballots.