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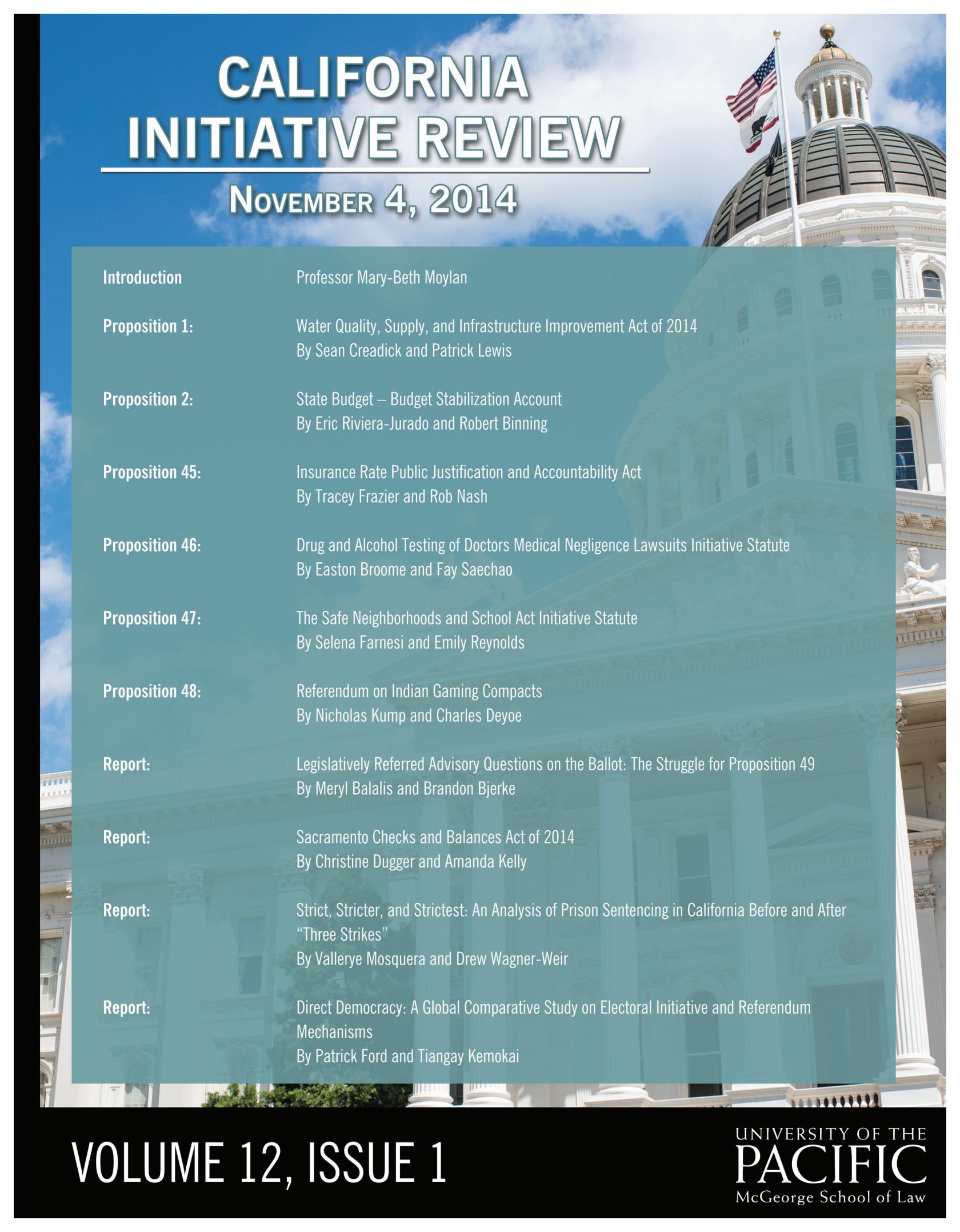
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CALIFORNIA INITIATIVE REVIEW

NOVEMBER 4, 2014

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VOLUME 12, ISSUE 1

UNIVERSITY OF THE
PACIFIC
McGeorge School of Law

Introduction

The California Initiative Review (CIR) is a non-partisan, objective publication of independent analyses of California statewide ballot initiatives. The CIR is a publication of the Pacific McGeorge Capital Center for Public Law and Policy and is prepared before every statewide election. Each CIR covers all measures qualified for the next statewide ballot, and also contains reports on topics related to initiatives, elections, or campaigns. This edition covers the six statewide ballot measures that will appear on the November 4, 2014 ballot, as well as presents reports on Proposition 49, which was removed from the ballot, Measure L, a history of Three Strikes and the initiative process, and comparative initiative law.

The CIR is written and edited by law students enrolled in the California Initiative Seminar course at University of the Pacific, McGeorge School of Law. This fall, 20 students were enrolled in the seminar. In addition to distribution at our California Initiative Forum, the CIR is posted online as a public service to the voters of California. This issue and past issues of the CIR are housed online and can be accessed from the main Pacific McGeorge home page, www.mcgeorge.edu, or from the new Under the Dome: California Law, Politics, & Policy blog site: <http://blogs.mcgeorge.edu/lawandpolicy>.

The student authors and I are grateful to the Capital Center for sponsoring the publication of the CIR and the California Initiative Forum. We hope that the information contained in these analyses will be helpful to you as you prepare to vote on the Propositions presented to the electorate this November.

Happy Voting,



Prof. Mary-Beth Moylan

Proposition 1:
Water Quality, Supply, and Infrastructure Improvement
Act of 2014

Initiative Statute

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McGeorge School of Law

By

Sean Creadick

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Sociology, University of California, Davis, 2010

&

Patrick Lewis

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Philosophy and Spanish, University of California, Davis, 2012

I. EXECUTIVE SUMMARY

Proposition 1, the *Water Quality, Supply, and Infrastructure Improvement Act of 2014*, will authorize \$7.5 billion in bond funding if approved by a majority of voters.¹ The funds must be spent according to certain criteria and include projects designed to: increase water storage, watershed protection, and improvements to groundwater and flood protection.² This bill replaces a similar water bond that was scheduled to appear on the November ballot that would have authorized \$11.1 billion in bond spending for water related projects.³

A **YES** vote means the state could sell \$7.1 billion in general obligation bonds as well as redirect \$425 million in unsold bonds previously approved by voters for various water related projects.⁴

A **NO** vote means the state could not sell \$7.1 billion in general obligation bonds and redirect \$425 million in unsold bonds previously approved by voters for various water related projects.⁵

II. THE LAW

California has one of the most complex water systems in the entire world.⁶ It is responsible for delivering approximately 40,000,000 acre-feet of water throughout the state for a variety of interrelated purposes such as drinking water, agriculture, and floodshed protection.⁷ State, federal, and local agencies all play a role in California's water operation--in total, these agencies spend approximately \$30 billion dollars annually for maintenance and operation.⁸ A majority of funding for this massive endeavor comes from the thousands of local entities (including private water utilities) throughout the state, accounting for 84 percent of total spending.⁹ The state comes in second by a wide margin at 12 percent, and the federal

¹ See CAL. CONST., art. II, § 10 (providing that a statewide ballot measure can be approved by a majority vote of the people).

² *California Proposition 1, Water Bond (2014)*, BALLOTPEdia, [http://ballotpedia.org/California Proposition 1, Water Bond \(2014\)](http://ballotpedia.org/California_Proposition_1,_Water_Bond_(2014)) (last visited Oct. 6, 2014) [“*California Proposition 1, Water Bond (2014)*”].

³ *Id.*

⁴ *Proposition 1 – Water Quality, Supply, and Infrastructure Improvement Act of 2014*, LEGISLATIVE ANALYST'S OFFICE (Aug. 22, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-1-110414.pdf>.

⁵ *Id.*

⁶ Andrew Maddocks, Paul Reig, & Francis Gassert, *Drought Is Only One Explanation for California's Water Crisis*, WORLD RESOURCES INST. (Mar. 27, 2014), <http://www.wri.org/blog/2014/03/drought-only-one-explanation-california%E2%80%99s-water-crisis>.

⁷ MARION JENKINS ET AL, *Optimization of California's Water Supply System: Results and Insights*, 271-280, J. WATER RESOURCES PLANNING & MANAGEMENT.

⁸ ELLEN HANAK ET AL, *PAYING FOR WATER IN CALIFORNIA*, 3 (Public Policy Institute of California, 2014).

⁹ *Id.*

government in last place at 4 percent.¹⁰ State financial support of water projects primarily comes in the form of bonds.¹¹

Since 2000, California voters have approved four bond measures that totaled \$19.6 billion in general obligation bond funding.¹² Proposition 84(2006) was the largest of the four bonds and was passed in the wake of hurricane Katrina, it authorized \$5.4 billion in general obligation bonds for water and flood control projects.¹³ Past water bonds did not prioritize funding for water supply or clean drinking water, instead about 75 percent of the funds were spent on flood protection, parks and public access, and flood protection.¹⁴ On the other hand, the proposed water bond allocates nearly 60 percent of the funds towards water supply and ensuring communities have clean drinking water.¹⁵

A. Path to the Ballot

In October of 2009, the *Safe, Clean, and Reliable Drinking Water Supply Act of 2010* was introduced in the Senate.¹⁶ The bill was approved by the Legislature and the subsequent bond measure was scheduled to appear on the 2010 ballot as Proposition 18; it would have authorized \$11.1 billion in bond funding for various statewide water projects.¹⁷ However, Governor Schwarzenegger raised concerns about referring the bond measure to the voters in the midst of the budget crisis and urged legislators to focus on, “[S]olving the deficit, reforming out-of-control pension costs and fixing our broken budget system....”¹⁸ Ultimately, Governor Schwarzenegger’s concerns were heeded and the legislature voted to postpone the bond vote until 2012.¹⁹

In January of 2012, Governor Brown raised similar concerns about the viability of passing the \$11.1 billion water bond in the midst of a budget crisis.²⁰ Governor Brown was particularly concerned with the water bond’s chance of passing on the same ballot as Proposition

¹⁰ *Id.*

¹¹ *Id.*

¹² UC Davis Center for Watershed Sciences, *Beyond Bonds: Funding the governor’s Water Action Plan*, CAL. WATERBLOG (June 5, 2014), <http://californiawaterblog.com/2014/06/05/beyond-bonds-funding-the-governors-water-action-plan/>.

¹³ Rodney Smith, *Is Relying on the 2014 Water Bond To Help Fund California’s Bay Delta Conservation Plan a Good Bet?*, HYDROWONK BLOG (Aug. 18, 2013), <http://hydrowonk.com/blog/2013/08/08/is-relying-on-the-2014-water-bond-to-help-fund-californias-bay-delta-conservation-plan-a-good-bet/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *California Proposition 1, Water Bond (2014)*, *supra* note 2.

¹⁷ *Id.*

¹⁸ Lisa Lien-Mager, *Schwarzenegger, Legislators Seek Delay on Water Bond*, ASS’N CAL. WATER AGENCIES (June 30, 2010), <http://www.acwa.com/news/water-supply-challenges/schwarzenegger-legislators-seek-delay-water-bond>.

¹⁹ *California Proposition 1, Water Bond (2014)*, *supra* note 2.

²⁰ *Id.*

30, a controversial measure that would increase taxes on high income earners.²¹ Senator Wolk echoed Brown's concerns, saying, "It is critically important that we focus on the revenue measure [Proposition 30]. We are faced with a tax levy in November. It would be disastrous to have [the borrowing] on the ballot."²²

Among public requests from Governor Brown to postpone the water bond and a lack of the bi-partisan support required, the Legislature voted to postpone the bond a second time, until 2014.²³

In June of 2014, Governor Brown called on the legislature to replace the \$11.1 billion bond with a "leaner" \$6 billion bond.²⁴ He called the previous water bond "a pork-laden water bond . . . with a price tag beyond what's reasonable or affordable."²⁵ The Legislature, specifically Central Valley Republicans, felt the \$6 billion bond was inadequate to provide funding for much needed reservoirs and water storage.²⁶ Working in conjunction with Governor Brown, the Legislature enacted Assembly Bill (A.B.) —1471 a \$7.5 billion measure that assuaged Republican desires for water storage projects that kept the bond size reasonable.²⁷ In August of 2014 the legislature passed the water bond with almost unanimous support and it was signed by Governor Brown shortly thereafter.²⁸

Voters will have the opportunity to decide whether to invest in this bond measure against the backdrop of one of the states most severe droughts on record.²⁹ Assembly Bill 1471, the *Water Quality, Supply, and Infrastructure Improvement Act of 2014* will appear on the November ballot as Proposition 1.³⁰

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²¹ Anthony York, *Jerry Brown says November water bond vote might need to be delayed*, L.A. TIMES, Jan. 19, 2012, <https://web.archive.org/web/20140808152200/http://latimesblogs.latimes.com/california-politics/2012/01/jerry-brown-water-bond.html>.

²² Patrick McGreevy, *California Legislature Pulls Water Bond Off Fall Ballot*, L.A. TIMES, July 6, 2012, <http://articles.latimes.com/2012/jul/06/local/la-me-water-bond-20120706>.

²³ *Id.*

²⁴ Scott Detrow, *Brown Wades Into Water Bond Debate*, KQED NEWS (Aug. 6, 2014), <http://blogs.kqed.org/newsfix/2014/08/05/brown-wades-into-water-bond-debate>.

²⁵ *Id.*

²⁶ Juliet Williams, *California Water Bond Signals Historic Compromise*, THE DESERT SUN, Aug. 14, 2014, <http://www.desertsun.com/story/news/nation/california/2014/08/15/california-state-water-bond/14096953/>.

²⁷ *Id.*

²⁸ *California Proposition 1, Water Bond (2014)*, *supra* note 2.

²⁹ LATHAM & WATKINS, MASSIVE CALIFORNIA WATER BOND SLATED FOR NOVEMBER 4 GENERAL ELECTION AS PROPOSITION 1 (Sept. 4, 2014), available at <http://www.lw.com/thoughtLeadership/lw-california-water-bond-proposition-2014>.

³⁰ *Id.*

B. Proposed Law

1. Authorization of \$7.5 Billion in Bond Funding

The enactment of Proposition 1 would repeal the \$11.14 billion bond and replace it with the *Water Quality, Supply, and Infrastructure Improvement Act of 2014* (Water Bond).³¹ The Water Bond provides \$7.5 billion in general obligation bond funding for various water-related programs.³² The majority would come from additional \$7.1 billion bond funding while another \$425 million from redirected bonds that were previously approved for water related projects, for a total of \$7.5 billion.³³ The funds must be dispersed according to the specific uses set forth in figure 1.³⁴

Figure 1	
Uses of Proposition 1 Bond Funds	
<i>(In Millions)</i>	
Water Supply	\$4,235
• Dams and groundwater storage—cost share associated with public benefits.	\$2,700
• Regional projects to achieve multiple water-related improvements (includes conservation and capturing rainwater).	810
• Water recycling, including desalination.	725
Watershed Protection and Restoration	\$1,495
• Watershed restoration and habitat protection in designated areas around the state.	\$515
• Certain state commitments for environmental restorations.	475
• Restoration programs available to applicants statewide.	305
• Projects to increase water flowing in rivers and streams.	200
Improvements to Groundwater and Surface Water Quality	\$1,420
• Prevention and cleanup of groundwater pollution.	\$800
• Drinking water projects for disadvantaged communities.	260
• Wastewater treatment in small communities.	260
• Local plans and projects to manage groundwater.	100
Flood Protection	\$395
• Repairs and improvements to levees in the Delta.	\$295
• Flood protection around the state.	100
Total	\$7,545

³¹ *Proposition 1 – Water Quality, Supply, and Infrastructure Improvement Act of 2014*, LEGISLATIVE ANALYST’S OFFICE (Aug. 22, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-1-110414.pdf>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

2. Major Elements of Allocation

a. Dams and Groundwater Storage

The Water Bond would authorize \$2.7 billion as a continuous appropriation for water storage by the California Water Commission(CWC).³⁵ Continuous appropriations are not subject to the annual legislative budget process, they would bypass the Legislature and go directly to the CWC for eligible projects of their choosing.³⁶

The CWC is an existing commission that advises the Department of Water Resources(DWR), approves rules and regulations, and monitors and reports on the State Water Project.³⁷ Members of the nine person commission are appointed by the governor, subject to senate confirmation.³⁸ Two of the members of the CWC are chosen based on their general knowledge of the environment and the remaining seven are chosen based on “general expertise related to the control, storage, and beneficial use of water.”³⁹ Each CWC member is paid \$100 per day when engaged in their duties.⁴⁰

The CWC has discretion to decide which projects to fund, however the projects are selected through a competitive public process and must include certain public benefit factors.⁴¹ These public benefit factors are: ecosystem improvements, water quality improvements, flood control benefits, emergency response, and recreational purposes.⁴²

Though several projects will be considered, currently there are four major reservoir projects that are under review, any of which may or may not be selected by the commission.⁴³

- The Sites Reservoir in Colusa County, which will cost \$3.8 billion and provide a 164,000 acre-feet of water increase.⁴⁴
- The Temperance Flat Reservoir on the San Joaquin River, which will cost \$2.5 billion and provide a 76,000 acre-feet of water increase.⁴⁵
- The raising of Shasta Dam to increase capacity, which will cost \$1.2 billion and provide a 75,000 acre-feet of water increase.⁴⁶

³⁵ Cal. Proposition 1 at § 79750 (2014).

³⁶ See DEPT. OF FIN., GLOSSARY OF BUDGET TERMS, available at http://www.dof.ca.gov/html/bud_docs/glossary.pdf.

³⁷ Home, CAL. WATER COMMISSION, <https://cwc.ca.gov/Pages/Home.aspx> (last visited Oct. 6, 2014).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ CAL. WATER CODE § 157 (as added by Proposition 1).

⁴¹ *Proposition 1 – Water Quality, Supply, and Infrastructure Improvement Act of 2014*, LEGISLATIVE ANALYST’S OFFICE (Aug. 22, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-1-110414.pdf>.

⁴² *Id.*

⁴³ Matt Weiser & Jeremy B. White, *Should California Build Dams, Reservoirs to Deal With Future Drought?* FRESNO BEE, June 1, 2014, http://www.fresnobee.com/2014/06/01/3956458_should-calif-add-new-dams.html?rh=1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

- The raising of Los Vaqueros Dam in Contra Coast County, which will cost \$1 billion and provide a 20,000 acre-feet of water increase.⁴⁷

The projected increases in water supply are based off average year rainfall.⁴⁸ The increased water supply is measured in acre-feet of water, roughly the size of a football field covered in one foot of water.⁴⁹ California’s integrated water system manages over 40,000,000 acre-feet of water per year; a typical family uses two acre-feet of water per year.⁵⁰

Prior to dispersing funds for a project, the CWC must hold a public meeting for comment and review, complete and file all feasibility reports related to the project, and submit their findings of the public benefit factors to the legislature.⁵¹ The Water Bond states that any state agency who receives funds under this bill is subject to random audit by the Department of Finance.⁵² Should the Department of Finance find any signs of “impropriety” in the agencies operations, the agency will be subject to a full and complete review.⁵³

Further, fund recipients(usually local governments) must match the total cost of the project by at least 50%.⁵⁴ Local governments would likely pay these costs over time through revenue generated from ratepayers as reflected in their water and sewer bills.⁵⁵ Fiscal implications on local governments who qualify for funds are detailed below.

b. Watershed Protection and Restoration

The Water Bond would allocate \$1.5 billion for grants and loans for watershed⁵⁶ protection and restoration projects.⁵⁷ The Legislature would approve the funding and then disperse it to various conservancies and state agencies for projects in accordance with that agency’s function.⁵⁸

⁴⁷ *Id.*

⁴⁸ MARION W. JENKINS ET AL., OPTIMIZATION OF CALIFORNIA’S WATER SUPPLY SYSTEM: RESULTS AND INSIGHTS, 271–80 (2004).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ CAL. WATER CODE § 79755 (as added by Proposition 1).

⁵² CAL. WATER CODE § 79708 (as added by Proposition 1).

⁵³ *Id.*

⁵⁴ *Proposition 1 – Water Quality, Supply, and Infrastructure Improvement Act of 2014*, LEGISLATIVE ANALYST’S OFFICE (Aug. 22, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-1-110414.pdf>.

⁵⁵ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2014, at 2, available at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/proposition-1-title-summary-analysis-v2.pdf> [“NOVEMBER 2014 VOTER GUIDE”].

⁵⁶ LATHAM & WATKINS, *supra* note 29 (defining a watershed as an area or ridge of land that separates waters flowing to different rivers).

⁵⁷ *Id.*

⁵⁸ *Id.*

Local conservancies throughout the state would receive an aggregate total of \$327 million in funding.⁵⁹ Conservancies work with local government agencies and non-profits to accomplish projects that improve and protect local natural resources under their control.⁶⁰ Notably, the State Coastal Conservancy will receive \$100 million in bond funds which is about twice its annual operating budget for their projects.⁶¹ In 2012, the State Coastal Conservancy used its budget on projects such as: construction of off-stream storage facilities to benefit salmon; improvements to hiking and biking trails; and purchases of undeveloped lots for scenic preservation.⁶²

Various state agencies would receive funds to preserve and maintain marine life.⁶³ The Wildlife Conservation board would receive \$320 million in funding to enhance stream flows, protect urban creeks, and fund watershed projects.⁶⁴ The Department of Fish and Wildlife would receive \$87.5 million for projects relating to the delta and \$285 million for non-delta watershed protection projects.⁶⁵

Significantly, the Natural Resources Agency would administer \$475 million for projects that would support state funding obligations to the San Joaquin River Restoration Act and the Central Valley Project Improvement Act.⁶⁶ The San Joaquin River Restoration Act aims to restore and maintain fish populations in the main stem of the San Joaquin River.⁶⁷ The Central Valley Project Improvement Act strives to protect fish and wildlife in the Central Valley, increase water-related benefits to the State of California, and contribute to long term efforts to protect the San Joaquin Delta Estuary.⁶⁸

c. Groundwater Sustainability

The Water Bond would authorize \$900 million in grants and loans for projects that prevent or clean up groundwater contamination that serve as a source of drinking water.⁶⁹ These funds are approved by the legislature and then directed to the State Water Resources Control Board for application to specific projects.⁷⁰

⁵⁹ *Id.*

⁶⁰ *About the Conservancy*, ST. CAL. COASTAL CONSERVANCY, <http://scc.ca.gov/about/> (last visited Oct. 6, 2014).

⁶¹ *Id.*

⁶² *Id.*

⁶³ LATHAM & WATKINS, *supra* note 29.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Home*, SAN JOAQUIN RIVER RESTORATION PROGRAM, <http://www.restoresjr.net/> (last updated Aug. 26, 2014).

⁶⁸ *Reclamation: Managing Water in the West*, U.S. BUREAU RECLAMATION, http://www.usbr.gov/mp/cvpia/title_34/public_law_complete.html (last visited Oct. 6, 2014).

⁶⁹ *Proposition 1 – Water Quality, Supply, and Infrastructure Improvement Act of 2014*, LEGISLATIVE ANALYST’S OFFICE (Aug. 22, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-1-110414.pdf>

⁷⁰ *Id.*

Projects would be prioritized based on specific criteria including: threat to groundwater, potential for the spreading of groundwater contamination, potential for enhanced water supply reliability, potential to recharge high-use ground water basis, and projects when responsible parties for past contamination have not been identified or are unable to pay for cleanup.⁷¹

The Water Bond stipulates that 10% of these funds shall be allocated to severely disadvantaged communities. The Proposition considers communities with an annual median household income that is less than 80 percent of the statewide annual median household income to be severely disadvantaged.⁷²

d. Regional Water Reliability

The Water Bond would allocate \$810 million to grants and loans for projects that are included in an integrated regional water management plan.⁷³ Generally, the Legislature would disperse money to state agencies during the budget process in order to fund qualified projects.⁷⁴ Projects already part of the integrated regional water management plan include, but are not limited to, promotion of water reuse and efficiency, underground water storage projects, regional conveyances, and water desalination projects.⁷⁵ Applicants would be required to show how the project would address regional risks to water supply and water infrastructure arising from climate change.⁷⁶ Applicants, excluding disadvantaged communities, would be required to fund 50% of the total cost of the project.⁷⁷ At least \$81 million must be dispersed to disadvantaged communities.⁷⁸

e. Water Recycling

The Water Bond would authorize \$725 million in grants and loans for water recycling and advanced treatment technology projects.⁷⁹ These projects include, but are not limited to: infrastructure and potable reuse pilot projects, research and development, and desalination.⁸⁰

Projects approved for water recycling would be subject to appropriation by the Legislature.⁸¹ In choosing which projects to fund, these criteria must be considered by the Legislature: water supply improvement, decreased reliance on the Delta, public health benefits, cost effectiveness, greenhouse gas emission impacts, and reasonable allocation to eligible

⁷¹ CAL. WATER CODE § 79702 (as added by Proposition 1).

⁷² *Id.*

⁷³ NOVEMBER 2014 VOTER GUIDE, *supra* note 55, at 7.

⁷⁴ *Id.*

⁷⁵ SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1471: WATER QUALITY, SUPPLY, AND INFRASTRUCTURE IMPROVEMENT ACT OF 2014 (Aug. 13, 2014), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1451-1500/ab_1471_cfa_20140813_192610_sen_floor.html.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ LATHAM & WATKINS, *supra* note 29.

⁸⁰ *Id.*

⁸¹ CAL. WATER CODE § 79765 (as added by Proposition 1).

projects throughout the entire state.⁸² Like funding awarded for regional water reliability, applicants would be required to match 50% of the total cost of the project, but this requirement can be waived for disadvantaged communities.⁸³

f. Clean Drinking Water

The Water Bond would allocate \$520 million in grants and loans for projects to, “Ensure access to clean, safe, reliable, and affordable drinking water for California’s communities.”⁸⁴ Water districts and local agencies requesting funds for these projects are subject to appropriation from the legislature.⁸⁵ Priority is given to projects that provide treatment for contamination, increase access to alternate drinking water sources, or provide water for disadvantaged communities whose drinking water is currently impaired by hazardous chemicals.⁸⁶

g. Flood Management

The Water Bond would authorize \$395 million in grants and loans for statewide flood management projects that provide public safety benefits as well as enhance fish and wildlife habitats.⁸⁷ The CVFPB was created in 1911 and granted certain regulatory authority to reduce the risk of flooding within California’s Central Valley.⁸⁸ The board is comprised of seven members that are appointed by the Governor and subject to senate confirmation.⁸⁹ Their jurisdiction spans the entirety of California’s Central Valley and they work in conjunction with the Department of Water Resources and the U.S. Army Corps of Engineers.⁹⁰

The Central Valley Flood Protection Board(CVFPB) would be instructed to coordinate a sizeable amount of money (\$4.8 billion) from previous propositions related to flood control for projects under this classification.⁹¹ The delta region would receive exclusive access to \$295 million of these funds, which will go to projects that reduce the risk of levee failure and flooding.⁹² Eligible projects under this classification would include levee maintenance and improvements, emergency repair and response, and special flood protection projects.⁹³

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Proposition 1 – Water Quality, Supply, and Infrastructure Improvement Act of 2014*, LEGISLATIVE ANALYST’S OFFICE (Aug. 22, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-1-110414.pdf>

⁸⁵ CAL. WATER CODE § 79720 (as added by Proposition 1).

⁸⁶ *Id.*

⁸⁷ *Proposition 1 – Water Quality, Supply, and Infrastructure Improvement Act of 2014*, LEGISLATIVE ANALYST’S OFFICE (Aug. 22, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-1-110414.pdf>.

⁸⁸ STRATEGIC PLAN 2013–2017, CAL. CENT. VALLEY FLOOD PROT. BD. (2013), available at http://www.cvpfb.ca.gov/strategicplan/2013/9012013_CVFPB_Strategic_Plan.pdf.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ CAL. WATER CODE § 79780 (as added by Proposition 1).

⁹² LATHAM AND WATKINS, *supra* note 29.

⁹³ *Id.*

3. Fiscal Effects

At the state level, Proposition 1 would allow \$7.1 billion in borrowing by selling general obligation bonds to investors, who would be repaid with interest from the state's general tax revenues.⁹⁴ The cost to taxpayers would average about \$360 million annually over the next 40 years.⁹⁵ This estimate assumes that the interest for the bonds would be slightly over 5%, that they would be sold over the next 10 years, and they would be repaid over a 30-year period.⁹⁶ For perspective, this amount is roughly one-third of one percent of the state's current General Fund budget, totaling \$14.4 billion over 40 years.⁹⁷

Local government savings related to water projects are likely to average a couple hundred million dollars annually over the next few decades.⁹⁸ However, effects at the local level are harder to predict due to the various ways local governments might use their savings.⁹⁹ In some cases, the availability of state bonds could reduce local spending because it would replace money the local government would have spent anyways.¹⁰⁰ However in other cases, state bonds could motivate local agencies to build substantially larger projects than they would otherwise.¹⁰¹ These projects would be create higher maintenance and operating costs that are not covered by the bond measure.¹⁰²

III. DRAFTING ISSUES

There do not appear to be drafting issues concerning Proposition 1 because the bond measure will fund existing programs and agencies that have already been operating.

IV. CONSTITUTIONAL BASIS

A bond is a debt investment by an investor who loans money to a corporation or government to finance various projects. If the Water Bond passes, the government would have the authority to enter the marketplace and sell bonds that will be paid back over time and with interest from the General Fund.¹⁰³ The California Constitution requires the Legislature to pass a bond act by a two-thirds vote in each legislative chamber.¹⁰⁴ Once the bond act passes the Legislature it is referred to the voters who must pass it by a majority vote.

⁹⁴ *Proposition 1 – Water Quality, Supply, and Infrastructure Improvement Act of 2014*, LEGISLATIVE ANALYST'S OFFICE (Aug. 22, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-1-110414.pdf>

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1471: WATER QUALITY, SUPPLY, AND INFRASTRUCTURE IMPROVEMENT ACT OF 2014, at 7 (Aug. 13, 2014), available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1451-1500/ab_1471_cfa_20140813_192610_sen_floor.html.

¹⁰⁴ CAL. CONST., art. XVI, § 1.

V. PUBLIC POLICY CONSIDERATIONS

A. Proponents Main Arguments

There are three large scale organizations (among others) that have been very vocal in their support of Proposition 1. They are the Association of California Water Agencies (ACWA), California Alliance for Jobs, and Western Growers.

1. Mitigation of Economic and Social Impacts of Future Droughts

The water bond allocates \$810 million to respond to climate change and contribute to regional water security.¹⁰⁵ Proponents believe the bond will provide critical funds as the state continues to struggle with one of the most severe droughts in its history.¹⁰⁶ A 2014, University of California Davis study tallied the financial hardships of the drought and included \$810 million from crop revenue loss, \$203 million from the loss of livestock and dairy revenue, and \$454 million to pump groundwater in order to maintain production levels.¹⁰⁷ The study also found the drought will result in a 6.6 million acre-feet reduction in surface water available to agriculture and groundwater pumping will have to replace some of this loss.¹⁰⁸ In addition to the economic loss, the drought has led to the loss of 17,100 seasonal and part-time jobs.¹⁰⁹ Proponents believe the construction of new dams as well as improvements to existing water storage will provide the necessary water storage to mitigate the impact of severe droughts.¹¹⁰ Timothy Quinn Executive Director of the ACWA, commented on the critical need to invest in a comprehensive plan to secure the state's water future:

“The bond will provide investments where we need them—in new surface and groundwater storage projects, regional water reliability, sustainable groundwater management and cleanup, water recycling, water conservation, watershed protection and safe drinking water.”¹¹¹

Proponents claim Proposition 1 represents an important step toward preparing California for our current and future water needs.¹¹²

¹⁰⁵ Cal. Proposition 1 at § 79740 (2014).

¹⁰⁶ Pamela Martineau, *ACWA Hails Legislative Approval of Historic 2014 Water Bond*, ASS'N CAL. WATER AGENCIES (Aug. 13, 2014), <http://www.acwa.com/news/infrastructure/acwa-hails-legislative-approval-historic-2014-water-bond>.

¹⁰⁷ RICHARD HOWITT ET AL., *ECONOMIC ANALYSIS OF THE 2014 DROUGHT FOR CALIFORNIA AGRICULTURE 3* (2014), available at <https://watershed.ucdavis.edu/2014-drought-report>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Martineau, *supra* note 106.

¹¹¹ John Frith, *Alliance Sends Support Letter for Water Bond Bills*, CAL. ALLIANCE FOR JOBS (Aug. 13, 2014), <http://rebuildca.org/alliance-sends-support-letter-water-bond-bills/>.

¹¹² *Id.*

2. *Makes High-Priority Investments in Water Infrastructure*

The Water Bond makes \$260 million available in grants and loans for public water system infrastructure improvements and related actions to meet safe drinking water standards.¹¹³ A 2013 drinking water infrastructure needs survey and assessment by the Environmental Protection Agency (EPA), determined that California needs an estimated \$26.7 billion to improve drinking water transmission, \$8.4 billion for water treatment, and \$6.4 billion for water storage.¹¹⁴ Proponents note that California's water delivery system was built in the mid-20th century and the state's water infrastructure is struggling to keep up with population growth.¹¹⁵ An example of this concern is the aging water main that burst flooding the University of California Los Angeles campus, losing millions of gallons of water.¹¹⁶

Speaking in favor of the Water Bond, the California Alliance for Jobs, Executive Director, James Earp, highlighted that the Water Bond makes smart, high-priority investments in a water delivery system that was built to serve less than half the number of people it struggles to support now.¹¹⁷ He went on to state that approval of the plan will add water storage above and below ground, clean water supplies, and provide funding for critical projects. The water bond provides incentives for water agencies throughout California to collaborate in managing the region's water resources and setting regional priorities for water infrastructure improving regional water self reliance.¹¹⁸ Proponents believe this will enable regions to gain self-sufficiency and increase competition between alternative supply systems and drinking water treatment techniques.¹¹⁹

3. *Helps Disadvantaged Communities*

The Water Bond dictates that \$510 million shall be dispersed to various hydrological regions as identified in the California Water Plan.¹²⁰ It also specifies that the DWR shall use no less than 10% of the funds on disadvantaged communities.¹²¹ Throughout California, there are

¹¹³ SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1471: WATER QUALITY, SUPPLY, AND INFRASTRUCTURE IMPROVEMENT ACT OF 2014, at 2 (Aug. 13, 2014), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1451-1500/ab_1471_cfa_20140813_192610_sen_floor.html.

¹¹⁴ U.S. ENVTL. PROT. AGENCY, DRINKING WATER INFRASTRUCTURE NEEDS SURVEY AND ASSESSMENT FIFTH REPORT TO CONGRESS (Apr. 2013), *available at* http://water.epa.gov/grants_funding/dwsrf/upload/epa816r13006.pdf.

¹¹⁵ *Water Information*, ASS'N CAL. WATER AGENCIES, <http://www.acwa.com/content/water-information> (last visited Oct. 8, 2014).

¹¹⁶ Caitlin Owens et. al., *UCLA-Area Water Main Break Spews Millions of Gallons*, L.A. TIMES, July 29, 2014, <http://www.latimes.com/local/la-me-0730-ucla-flood-20140730-story.html#page=1>

¹¹⁷ Frith, *supra* note 111.

¹¹⁸ SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1471: WATER QUALITY, SUPPLY, AND INFRASTRUCTURE IMPROVEMENT ACT OF 2014, at 4 (Aug. 13, 2014), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1451-1500/ab_1471_cfa_20140813_192610_sen_floor.html.

¹¹⁹ Frith, *supra* note 111.

¹²⁰ Cal. Proposition 1 at § 79744 (2014).

¹²¹ *Id.*

thousands of small rural communities whose residents are economically disadvantaged without reliable access to clean drinking water.¹²² The systems in these rural communities are unable to afford technical expertise; pay for upgrades to meet regulatory changes; retain qualified operators; meet the demands for long-term operations and maintenance of an aging or inadequate infrastructure; and lack access to capital necessary to fix problems.

For instance, a 2006 study conducted by the State Water Resources Control Board (SWRCB) in Tulare County, CA, found a significant number of wells were found to contained coliform bacteria, fecal coliform bacteria, and nitrates in excess of community drinking water standards.¹²³ The rate based system used in larger metropolitan areas provides additional revenue to generate the funds needed supply systems and water quality control. However, disadvantaged and rural communities do not generate the additional funding necessary improve their infrastructure. Proponents claim the water bond will help resolve this problem by providing the funding rural communities need to update their water systems and meet water quality standards.¹²⁴

B. Opponents Main Arguments

Opponents believe the Water Bond represents a grave and insidious threat to core environmental values and other principles established to protect fisheries and the environment as a whole.¹²⁵ A large number of opponents to the Water Bond have joined in opposition against the bond. The opposition's statement contains fourteen reasons to vote against the water bond, three of which are discussed below.

1. Ushers In a New Era of Big Dams

The water bond allocates \$2.7 billion continuous appropriation funding to water storage projects.¹²⁶ This is the largest appropriation for new dams in the state's history.¹²⁷ The funds will be considered for the construction of dams in Temperance Flat and the Sites Reservoir, and to elevate Shasta Dam.¹²⁸ The \$2.7 billion dollars is only a down payment, the rest of the money is dispersed by the CWC, and is not subject to legislative approval.¹²⁹ Opponents also point out a number of dam projects (including one on Bear River) have been abandoned because of low water yield and financial in-feasibility, are being resurrected due the injection of billions of

¹²² Brian Haddix et al., *Water Assistance for Disadvantaged Communities*, ALL ONE WATER (Jan. 30, 2013), http://www.allonewater.com/WM/WMArticles/Water_Assistance_for_Disadvantaged_Communities_20319.aspx.

¹²³ *Id.*

¹²⁴ Frith, *supra* note 111.

¹²⁵ California Sportfishing Protection Alliance, *Statement of Opposition Proposition 1: Water Quality, Supply and Infrastructure Improvement Act of 2014* (2014), available at <http://calsport.org/news/wp-content/uploads/CSPA-14-Point-Opposition-Prop-1.pdf> ["CSPA Statement"].

¹²⁶ Cal. Proposition 1 at § 79750 (2014).

¹²⁷ CSPA Statement, *supra* note 125.

¹²⁸ Barbara Barrigan-Parrilla, *Proposition 1 adds a big debt for little new water*, MODESTO BEE, Sept. 16, 2014, http://www.modbee.com/2014/09/16/3541955_barbara-barrigan-parrilla-proposition.html?rh=1.

¹²⁹ *Id.*

dollars for dams.¹³⁰ Opponents believe if Proposition 1 is passed they will spend decades fighting proposed dams on rivers throughout the state, wasting even more taxpayers dollars.¹³¹

Kathryn Phillips the director of Sierra Club California, said, “The world is much different today than during the dam-building heyday in the 20th century. Climate disruption has begun and precipitation patterns are already changing. New dams won’t respond to that.”¹³² Rather than see new dams built, opponents would like the state to develop new 21st century methods for water storage and conservation.¹³³

2. *Incorporates Environmentally Damaging Hidden Promises*

Opponents to the Water Bond claim there are numerous environmentally damaging sidebar promises included in the bond.¹³⁴ For example, they note the promise the Governor made to northern San Joaquin Valley legislators that he would use his influence to keep the State Water Board from implementing the flow increases on the San Joaquin River the Board identified as necessary to protect public trust resources.¹³⁵ The State Water Board is looking to increase the unimpaired flow on the river out to the delta by 40%, a move that would require farmers to rely more heavily on pumping groundwater.¹³⁶ The Board as states the river is currently so over-tapped that it runs completely dry in stretches. This threatens the quality of communities' water, endangers fish and wildlife, and creates uncertainty for farmers, leaving communities vulnerable in the face of more frequent and severe droughts.¹³⁷ Opponents also claim they have learned supporters of specific dam projects have been promised the projects they support will receive prioritized funding, including sites at Temperance Flat, Sites Reservoir, and elevating Shasta Dam.¹³⁸

Raising Shasta Dam would flood sacred sites of the Winnemem Wintu people, flood part of the Wild & Scenic McCloud River (which has some of the best fly fishing in the state), and provide almost no benefits for salmon or other fisheries.¹³⁹ Opponents have used these two examples to show not only the environmental concerns surrounding the Water Bond need to be taken into account but also the cultural concern. If these concerns are not address California will suffer environmentally and culturally, opponents claim.

¹³⁰ CSPA Statement, *supra* note 125.

¹³¹ *Id.*

¹³² Op-Ed Kathryn Phillips, *Dams Are Not the Answer to Long-Term Water Woes*, SACRAMENTO BEE, Aug. 19, 2014, <http://www.sacbee.com/2014/08/19/6637290/another-view-dams-are-not-the.html>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Editorial, *Central Valley Delegation Led Way on California Water Bond*, MERCED SUN STAR, Aug. 13, 2014, <http://www.mercedsunstar.com/2014/08/13/3794563/our-view-central-valley-delegation.html#>.

¹³⁶ *Id.*

¹³⁷ *Tell the California Water Board: A Healthy San Joaquin River Supports a Healthy Economy*, AM. RIVERS, <http://act.americanrivers.org/page/speakout/mer-ca-waterboard?js=false> (last visited Oct. 6, 2014).

¹³⁸ Phillips, *supra* note 132.

¹³⁹ Doug Obegi, *The Era of Big Dams is Still Over (Even With the Water Bond)*, SWITCHBOARD NATURAL RESOURCES DEFENSE COUNCIL STAFF BLOG, Sept. 3, 2014, http://switchboard.nrdc.org/blogs/dobegi/the_era_of_big_dams_is_still_o.html.

3. *Crowds Out Other Critical Investments*

The Water Bond imposes hidden costs by using the General Fund revenues to pay the accumulating interest, crowding out investment money for public schools, roads, and public safety and health.¹⁴⁰ The water bond would add over \$7 billion in taxpayer indebtedness not including the interest.¹⁴¹ California is \$777 billion in debt, with \$128 billion already approved to be taken from the General Fund to repay bonds to taxpayers.¹⁴² Barbara Barrigan-Parrilla, Director of Vote NO on proposition 1, said, “Proposition 1 is a corporate money grab aimed at bankrolling special interests with taxpayer dollars while providing tragically inadequate funding for projects that provide safe, clean water for the people of California.”¹⁴³ Opponents argue the taxpayer dollars that will be spent on finishing the proposed dam projects; Temperance Flat project would cost nearly \$2.5 billion and raising Shasta Dam project would cost \$1 billion.¹⁴⁴ The stored water will go to agribusinesses like Paramount Farms, of Kern County, that already receives subsidies for the water they buy.¹⁴⁵

VI. CONCLUSION

Proposition 1, a compromise measure from the 2009 Water Bond, represents the culmination of bi-partisan effort to invest in the state’s water infrastructure. If passed, Proposition 1 will allow the government to sell bonds in order to fund the various projects designed to restore and clean up the state’s water systems. The water bond will authorize \$7.54 billion to be allocated for the following purposes: \$4.2 billion for water supply, \$1.4 billion for watershed protection and restoration, \$1.4 billion to improvements to groundwater and surface water quality, and \$395 million for flood protection.¹⁴⁶

Proponents claim Proposition 1 ensures a reliable water supply for farms and businesses protecting both the economy and the environment during this severe drought. Among the proponents are many governmental agencies, corporations, and farmers associations. The main thrust of their argument is to avoid further economic and social impact from the drought the state must invest heavily in the water infrastructure so the water needs of everyone can be meet. They believe the best way to accomplish this is by increasing aboveground and belowground water storage, recycling water, and protecting watersheds.

Opponents believe Proposition 1 contains a few worthy projects but they do not justify abandoning important environmental principles and fiscal responsibility. Among the list of opponents are many environmental organizations, who believe Proposition 1 is an outdated

¹⁴⁰ Phillips, *supra* note 132.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Op-Ed Barbara Barrigan-Parrilla, *No On Water Bond*, DESERT SUN, Sept. 6, 2014, <http://www.desertsun.com/story/opinion/readers/2014/09/06/voice-vote-water-bond/15230109/>.

¹⁴⁴ Obegi, *supra* at note 139.

¹⁴⁵ Dan Bacher, *Meet the Resnicks: The Koch Brothers of California Water (2014)*, LA PROGRESSIVE (Sept. 29, 2014), <http://www.laprogressive.com/no-on-prop-1/>.

¹⁴⁶ *Proposition 1 – Water Quality, Supply, and Infrastructure Improvement Act of 2014*, LEGISLATIVE ANALYST’S OFFICE (Aug. 22, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-1-110414.pdf>.

answer to the relatively new problem of climate change. They argue rather than funding the special interest projects of corporations, like new water storage schemes and a new era of dam building, the state should invest in developing new methods to survive in an ever changing climate.

If the Water Bond passes, the government would have the authority to enter the marketplace and sell bonds that will be paid back over time and with interest from the General Fund.

Proposition 2:
State Budget – Budget Stabilization Account

Initiative Statute

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McGeorge School of Law

By

Eric Riviera-Jurado

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2015
B.A., Political Science, California State University, Sacramento, 2011*

&

Robert Binning

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2015
M.A., Government, California State University, Sacramento, 2010
B.A., Political Science, California Polytechnic State University, San Luis Obispo, 2008*

I. EXECUTIVE SUMMARY

Proposition 2 is a legislatively referred constitutional amendment that would impact California's debts as well as both the State's and school districts' monetary reserves.¹ The proposition was originally titled Proposition 44, but was renamed by Senate Bill (S.B.) 867 on August 11, 2014.² Proposition 2 would amend the State constitution in three ways.³

First, Proposition 2 would mandate that the State, subject to budget emergencies, deposit specified funds into the State's Budget Stabilization Account (B.S.A.), which functions as a rainy-day fund for the State during difficult economic times.⁴ Additionally, it would increase the maximum size of the B.S.A. and would make it more difficult for the State to withdraw funds from or deposit less than the statutorily prescribed amount of funds into the B.S.A.⁵ Second, for the next fifteen fiscal years, Proposition 2 would require the State, subject to budget emergencies, to spend General Fund revenue to reduce State debts owed to pensions, retiree health benefits, local governments, and other state accounts.⁶ Third, Proposition 2 would create a State reserve account for the benefit of public schools and community colleges and its passage would trigger a stipulation in a separate legislative act, S.B. 858, which would require school districts to reduce their reserve accounts to a specified level.⁷

A "yes" vote would likely lead the State to increase State budget reserves, decrease State debt faster than it would otherwise, and reduce the amount of funds school districts may keep in local reserve accounts.⁸

A "no" vote would leave the rules related to State budget reserves, repayment of State debts, and public school district budget reserves unchanged.⁹

II. ROAD TO THE BALLOT

Proposition 2 is a legislatively referred constitutional amendment, which is a bill from the Legislature proposing to amend the State constitution.¹⁰ It was originally introduced by

¹ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2014, at 12, *available at* <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf#page=74> ["NOVEMBER 2014 VOTER GUIDE"].

² S.B. 867 (2013–14), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0851-0900/sb_867_bill_20140811_chaptered.pdf.

³ *Infra* Part III(B).

⁴ *Infra* Part III(B)(1).

⁵ *Id.*

⁶ *Infra* Part III(B)(2).

⁷ *Infra* Part III(B)(3).

⁸ LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 2, 1 (July 17, 2014), *available at* <http://www.lao.ca.gov/ballot/2014/prop-2-110414.pdf> ["L.A.O. ANALYSIS"].

⁹ *Id.*

¹⁰ Both the California State Legislature and the people of California must approve amendments to the California constitution. CAL. CONST. art. XVIII, §§ 1, 4.

Assembly Member Gatto (Democratic Party, Assembly District 43, Los Angeles) during the 2009–2010 legislative session.¹¹ The bill received the requisite two-thirds vote from each chamber of the State Legislature and the Governor approved it on October 13, 2010.¹² Under prior law, the Secretary of State was required to submit the constitutional amendment, then known as Assembly Constitutional Amendment (A.C.A.) 4, to the first general or statewide special election to occur within 131 days of the amendment’s qualification for the ballot.¹³ However, in 2011, Senator Hancock (Democratic Party, Senate District 9, Berkeley) authored S.B. 202 that explicitly required the Secretary of State to place A.C.A. 4 on the November 4, 2014, statewide general election ballot and all subsequent constitutional amendments only on ballots during general elections occurring in even-numbered years.¹⁴

On April 16, 2014, Governor Edmund G. Brown called an extraordinary session of the California State Legislature to alter A.C.A. 4 to more “adequately address [the State’s] debts and liabilities.”¹⁵ In particular, the Governor sought for the new version of the amendment to: “(1) [i]ncrease deposits when the state experiences spikes in capital gains revenues, the state’s most volatile tax revenue; (2) [a]llow supplemental payments to accelerate the state’s payoff of its debts and liabilities; (3) [c]reate a Proposition 98 reserve to smooth school spending and avoid future cuts; (4) [r]aise the maximum size of the Rainy Day Fund to 10 percent of General Fund revenues; (5) [and] [l]imit withdrawals to ensure the state does not overly rely on the fund at the start of a downturn.”¹⁶ During the extraordinary session, the State Legislature adopted A.C.A. 1, which integrated the Governor’s requested changes and required the Secretary of State to replace A.C.A. 4 with A.C.A. 1 on the November 4, 2014, ballot under the designation “Proposition 44.”¹⁷

Following the extraordinary session and the adoption of A.C.A. 1, S.B. 867 was enacted, changing the ballot designation of the constitutional amendment from “Proposition 44” to “Proposition 2,” and required the Secretary of State and county election officials to revise all voting materials to reflect this new designation.¹⁸ Pundits explain that the renumbering of both

¹¹ See A.C.A. 4 (2009–10), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/aca_4_bill_20101013_chaptered.pdf.

¹² *Complete Bill History*, OFFICIAL CAL. LEGIS. INFO., http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/aca_4_bill_20101013_history.html (last visited September 2, 2014). While the Governor approved the amendment, the Governor’s approval is not necessary to the amendment’s viability. CAL. CONST. art. XVIII, §§ 1, 4.

¹³ CAL. ELEC. CODE § 9040.

¹⁴ S.B. 202 (Hancock) at § 1 (2011–12), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_202_bill_20111007_chaptered.pdf.

¹⁵ Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Calls Special Session to Strengthen Rainy Day Fund (Apr. 16, 2014), available at <http://www.gov.ca.gov/news.php?id=18482>.

¹⁶ *Id.*

¹⁷ A.C.A. 1 (Second Extraordinary Session, 2013–14), available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/acax2_1_bill_20140516_chaptered.pdf.

¹⁸ S.B. 867 (2013–14), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0851-0900/sb_867_bill_20140811_chaptered.pdf. “Commencing with the November 3, 1998, general election, all State measures in all elections at which State measures are submitted to a vote of the voters shall be numbered in a continuous sequence, commencing with the number “1” and continuing in

Proposition 44 and the water bond measure, now known as Proposition 1, “symbolically linked” the measures at the top of the ballot.¹⁹ This may increase support for Proposition 1 by linking it to the “almost universally lauded” Proposition 2 and distinguishing the two measures from the other measures on the ballot.²⁰

III. THE LAW

A. Existing Law

Under current law, the State may deposit funds into the existing B.S.A.; however, the Governor may choose to put less than the prescribed three percent of General Fund revenues or nothing at all into the account at his or her discretion.²¹ Although State law requires that half of the money deposited into the B.S.A. be used to pay off certain specified debts, this year’s State budget is expected to fully repay those obligations.²² As a result, after this year, there will no longer be any statutory requirements for the State to expend additional revenue to reduce the State’s substantial debt.²³ Additionally, the State is required to spend a constitutionally prescribed amount on public schools and community colleges each year.²⁴ While current law does not mandate a State-controlled reserve account exclusively benefitting public schools or community colleges, local school districts are required to maintain their own reserve accounts.²⁵

1. State Reserves

The amount that the State may spend each year is based on the amount of taxes the State receives and available reserve funds.²⁶ When the economy is struggling, it causes tax revenue to drop, usually requiring the State to reduce spending or raise taxes.²⁷ To avoid spending decreases or tax increases, governments often create budget reserve accounts that they contribute to during economic booms and then use to mitigate the effects of volatile tax revenue streams in times of recession.²⁸ As the Legislative Analyst’s Office (“L.A.O.”) succinctly stated, “[I]f a government

numerical sequence for a period of ten years from the year of commencement.” CAL. ELEC. CODE § 13117(a). At the conclusion of the ten-year period, the numbering of the ballot measures restarts at “1.” CAL. ELEC. CODE § 13117(b). However, as evidenced in this case, the Legislature may renumber propositions appearing on ballots. *See, e.g.*, S.B. 867 (2013–14), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0851-0900/sb_867_bill_20140811_chaptered.pdf.

¹⁹ John Myers, *New Ballot Numbers for November’s Water, Budget Propositions*, KQED NEWS (Aug. 12, 2014), <http://blogs.kqed.org/newsfix/2014/08/12/new-ballot-numbers-for-November-water-and-budget-propositions/>.

²⁰ *Id.*

²¹ *See generally* CAL. CONST. art. XVI, § 20.

²² NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 16.

²³ *Id.*

²⁴ *Id.* at 14.

²⁵ *Id.*

²⁶ *Id.* at 12.

²⁷ *Id.*

²⁸ *Id.*

saves more in reserves when the economy is doing well, it spends less during that time and has more money to spend when the economy is doing poorly.”²⁹

California has had the B.S.A. since 2004 when voters passed Proposition 58, a prior constitutional amendment.³⁰ Proposition 58 empowered the Governor, through executive order, to determine each year whether the state Controller would deposit three percent or less of General Fund revenues into the B.S.A. reserve.³¹ Currently, three percent of General Fund revenue is roughly equivalent to three billion dollars.³² The State Treasurer must spend half of the funds deposited into the B.S.A., up to five billion dollars, to pay off deficit recovery bonds, which are likely to be fully repaid in this year’s budget.³³ By statute, the maximum amount the B.S.A. may reach is \$8 billion or five percent of General Fund revenue, whichever is greater.³⁴ The State may withdraw any or all funds from the B.S.A. through a majority vote by the Legislature.³⁵ Since the B.S.A. was created, the State has only deposited funds into the account in the 2006–2007 and 2007–2008 fiscal years and it currently has a zero balance, although this year the Governor has decided to deposit funds into the B.S.A.³⁶

2. State Debts

Currently California is roughly \$300 billion, or about three times the State’s annual budget, in debt.³⁷ This substantial debt has contributed to the reduction of California’s credit rating to one of the lowest state ratings in the country, although its creditworthiness has improved in recent years.³⁸ The debt includes about \$150 billion in already earned pension and retiree health care benefits owed to public employees and “several billion dollars” owed to local governments, including school districts.³⁹ After the deficit recovery bonds issued in 2004 to overcome California’s immense deficit are fully repaid this year, which will cost the state

²⁹ *Id.* at 12–13.

³⁰ *See generally* CAL. CONST. art. XVI, § 20.

³¹ *Id.* at § 20(e).

³² NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 13.

³³ CAL. CONST. art. XVI, § 20(f)(1). The State issued these deficit recovery bonds to relieve the State of its substantial budget deficit in 2004. *See id.* at § 1.3.

³⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 13; CAL. CONST. art. XVI, § 20(c).

³⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 14.

³⁶ *Id.* at 13.

³⁷ *Id.* at 14–15. However, reports about California’s actual amount of debt varies widely. For instance, the California Public Policy Center estimates that California’s combined outstanding debts may be \$848.4 billion. *Calculating California’s Total State and Local Government Debt*, CAL. PUB. POL’Y CENTER (Apr. 26, 2013), <http://californiapolicycenter.org/calculating-californias-total-state-and-local-government-debt/>. *But see* Autumn Carter, *Unsustainable California*, CAL. COMMON SENSE (June 11, 2014), <http://cacs.org/research/unsustainable-california-the-top-10-issues-facing-the-golden-state-wall-of-debt/> (“California’s actual wall of debt is \$443 billion.”).

³⁸ *Moody’s Lifts View on California Debt to Highest in 13 Years*, CNBC (June 25, 2014, 6:46 PM), <http://www.cnbc.com/id/101789976> (“Of the 47 states rated by Moody’s, just two—Illinois and New Jersey—have lower ratings, while 42 have higher ratings.”).

³⁹ NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 14–15.

approximately \$6 billion, there will be no existing statutory requirements for the state to expend extra funds to repay State debt faster than each individual debt would otherwise require.⁴⁰

3. *School Reserves*

Under the current California Constitution, the State is required to spend about forty percent of the State's budget to fund public schools and community colleges.⁴¹ As the vast majority of the funding for public schools and community colleges comes from the State, any changes in tax revenue levels dramatically affects the size of the State's budget and causes erratic changes to public school funding that significantly affects the services schools may offer.⁴² To mitigate the impact of volatile funding, State law requires school districts to keep minimum amounts of funds in reserve accounts.⁴³ While State law requires school districts to keep between one and five percent of their annual budget in reserve, many districts keep much more than that in their reserve accounts.⁴⁴ Reserve funds serve a multitude of purposes and can allow districts to make large infrequent expenses or to mitigate the impact of decreased State funding in low tax revenue years.⁴⁵

B. Proposed Law

Proposition 2 would mandate that the State deposit funds into the B.S.A. and use funds to reduce State debt, except during a budget emergency.⁴⁶ Additionally, the proposition would create a State reserve account for public schools and impose caps on the amount of funds school districts may keep in their own reserve accounts.⁴⁷

1. *State Reserves*

Proposition 2 would change how the State determines how much money is deposited into the B.S.A., the maximum size of the B.S.A., and when the State may withdraw funds from the B.S.A.⁴⁸ For the first fifteen fiscal years following the approval of Proposition 2, the State would be required to deposit 0.75 percent of General Fund revenues into the B.S.A.,⁴⁹ while using an additional 0.75 percent of General Fund revenues to pay down specified debts.⁵⁰ After Proposition 2's requirement to pay down those debts expires in the 2030–2031 fiscal year, the

⁴⁰ *Id.* at 16.

⁴¹ *Id.* at 14; see CITY COLLEGE OF S.F., PROPOSITION 98—HOW DOES IT WORK? 1, available at http://www.ccsf.edu/dam/Organizational_Assets/About_CCSF/Admin/Governmental_Relations/Proposition98_TheTests.pdf.

⁴² NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 14.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Infra* Part III(A)(1)–(2).

⁴⁷ *Infra* Part III(A)(3).

⁴⁸ NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 15.

⁴⁹ CAL. CONST. art. XVI, § 20(c)(1) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 8.

⁵⁰ CAL. CONST. art. XVI, § 20(c)(1) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 8; see *infra* Part III(b)(2).

State would be required to deposit the entire 1.5 percent of General Fund revenues previously allocated by Proposition 2 into the B.S.A.⁵¹ Thus, based on Legislative Analyst’s Office estimates, for the first fifteen years of Proposition 2 being in effect it would require the State to deposit between \$800 million and \$2 billion dollars into the B.S.A. and twice that afterwards.⁵²

However, the State may put less than the required amount into the B.S.A. or suspend deposits altogether under two exceptions.⁵³ Both exceptions require the Governor to call a “budget emergency” with the support of the Legislature by a majority vote.⁵⁴ Under Proposition 2, the Governor may only declare a budget emergency in the event of an emergency, as defined by the California Constitution,⁵⁵ or if available funds are insufficient to maintain “General Fund spending at and not exceeding the highest level of [any of] the past three years.”⁵⁶

Proposition 2 would increase the maximum size of the B.S.A. to about⁵⁷ ten percent of General Fund revenues, which would currently be \$11 billion.⁵⁸ If this maximum were reached, Proposition 2 would instead require that the State use excess funds to maintain infrastructure, as currently defined in California’s Government Code.⁵⁹

Under Proposition 2, the State may only take funds out of the B.S.A. if the Governor declares a budget emergency and the Legislature, by majority vote, authorizes the State to remove funds either to address an emergency or to maintain spending at the highest level of any of the past three years.⁶⁰ In the first year of a budget emergency, the Legislature may not

⁵¹ CAL. CONST. art. XVI, § 20(c)(1) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 8. The additional 0.75% of General Fund revenue will become available as a result of Proposition 2’s additional mandate that 0.75% of General Fund revenue be used to pay off State debt will expire after 2029–2030. CAL. CONST. art. XVI, § 20(c)(1) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 8.

⁵² L.A.O. ANALYSIS, *supra* note 8, at 8.

⁵³ CAL. CONST. art. XVI, § 22(b) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 9.

⁵⁴ CAL. CONST. art. XVI, § 22(a) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 9.

⁵⁵ CAL. CONST. art. XVI, § 22(b)(1) (added by Proposition 2). “[E]mergency” means the existence, as declared by the Governor, of conditions of disaster or of extreme peril to the safety of persons and property within the State, or parts thereof, caused by such conditions as attack or probable or imminent attack by an enemy of the United States, fire, flood, drought, storm, civil disorder, earthquake, or volcanic eruption.” CAL. CONST. art. XIII B, § 3(c)(2).

⁵⁶ CAL. CONST. art. XVI, § 22(b)(2) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 9.

Historically General Fund spending is adjusted for State population and the cost of living. CAL. CONST. art. XVI, § 22(b)(2)(A) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 9.

⁵⁷ Because amounts used for paying off prescribed debts and deposited into the B.S.A. are based on Department of Finance estimates, Proposition 2 can only provide that the B.S.A. will not exceed ten percent of the Department of Finance’s estimate of General Fund revenues, which cannot be expected to be perfect each year. *See* CAL. CONST. art. XVI, § 20(e) (added by Proposition 2).

⁵⁸ L.A.O. ANALYSIS, *supra* note 8, at 9–10.

⁵⁹ CAL. CONST. art. XVI, § 20(e) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 10.

“[I]nfrastructure” means real property, including land and improvements to the land, structures and equipment integral to the operation of structures, easements, rights-of-way and other forms of interest in property, roadways, and water conveyances. CAL. GOV’T CODE § 13101.

⁶⁰ CAL. CONST. art. XVI, § 22(a) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 9.

authorize the State to withdraw more than half of the B.S.A. funds.⁶¹ Only in a second consecutive year of a budget emergency may the Legislature authorize the State to liquidate the B.S.A.⁶²

2. State Debts

Proposition 2 would mandate that the State use additional funds each year to reduce the debt owed to “pension and retiree health benefits” and for “specified debts to local governments and other State accounts.”⁶³ From the 2015–2016 fiscal year through the 2029–2030 fiscal year, Proposition 2 would require that the State use 0.75 percent of General Fund revenues⁶⁴ to pay down these specified debts.⁶⁵ Under current General Fund revenue estimates the proposition would require the State to pay about \$800 million this year towards those debts.⁶⁶ Beginning in the 2030–2031 fiscal year, the proposition would no longer require that the State use 0.75 percent of General Fund revenue to reduce those debts and would instead require the State to deposit those funds into the B.S.A.⁶⁷

Furthermore, Proposition 2 would require the State to spend additional funds to reduce the debt “when state tax revenue from capital gains are higher than average.”⁶⁸ Capital gains tax revenue⁶⁹ varies widely from year-to-year based on fluctuations in the economy, making the effect of this requirement difficult to predict.⁷⁰ For example, if Proposition 2 were in place over the last thirteen fiscal years, capital gains tax revenues would only have been high enough to trigger additional debt funding about half of the time.⁷¹ However, the Legislative Analyst’s

⁶¹ CAL. CONST. art. XVI, § 22(a)(2)(B) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 9.

⁶² CAL. CONST. art. XVI, § 22(a)(2)(B) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 9.

⁶³ L.A.O. ANALYSIS, *supra* note 8, at 7; *accord* CAL. CONST. art. XVI, § 20(c)(1)(B) (added by Proposition 2).

⁶⁴ For the purposes of Proposition 2, the Director of Finance will estimate General Fund revenues and expenditures for the upcoming four fiscal years within ten days of the enactment of the budget bill. CAL. CONST. art. IV, § 12.5 (added by Proposition 2).

⁶⁵ CAL. CONST. art. XVI, § 20(c)(1) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 8. Proposition 2 requires the State to use the 0.75% of General Fund revenues set aside to reduce State debt related to: (1) unfunded General Fund obligations to schools under Proposition 98 that existed on July 1, 2014; (2) budgetary loans to the General Fund from non-General Fund State funds that existed on July 1, 2014; (3) costs imposed on local programs occurring before the 2004–2005 fiscal year that the State must reimburse the local programs for and that the State may, as prescribed by law, repay over a term of years; and (4) “[u]nfunded liabilities for State-level pension plans and prefunding other postemployment benefits” in excess of the amounts already required. CAL. CONST. art. XVI, § 20(c)(1)(B)(2) (added by Proposition 2).

⁶⁶ L.A.O. ANALYSIS, *supra* note 8, at 8.

⁶⁷ CAL. CONST. art. XVI, § 20(c)(2)(A) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 8.

⁶⁸ L.A.O. ANALYSIS, *supra* note 8, at 8.

⁶⁹ *Capital Gains Tax*, INVESTOPEDIA, http://www.investopedia.com/terms/c/capital_gains_tax.asp (last visited Oct. 9, 2014) (The capital gains tax is “[a] type of tax levied on capital gains incurred by individuals and corporations. Capital gains are the profits that an investor realizes when he or she sells the capital asset for a price that is higher than the purchase price.”).

⁷⁰ See L.A.O. ANALYSIS, *supra* note 8, at 8.

⁷¹ *Id.*

Office notes that when capital gains tax revenues are particularly high, Proposition 2 could trigger up to an additional \$2 billion in spending towards the repayment of State debts per year.⁷²

3. *School Reserves*

Proposition 2 would also create a new school State reserve account known as the “Proposition 98 Reserve” or Public School System Stabilization Account (P.S.S.S.A.).⁷³ When the Legislature deposits funds into the P.S.S.S.A. it would trigger a stipulation in S.B. 858 that would set a cap on the reserve accounts school districts control.⁷⁴ However, the implementation of these changes would not go into effect until after school funding is restored to the levels it was prior to the latest recession.⁷⁵ In years when tax revenue from capital gains is above average and other specified conditions are met, Proposition 2 would direct some of these additional funds into the P.S.S.S.A., which may not exceed “ten percent of the total allocations to school districts and community college districts”⁷⁶ The State could then spend funds from this new reserve account to moderate the sometimes-harsh effects of volatile budgets on schools and community colleges by stabilizing the funding they receive.⁷⁷ However, in order to allocate funds from the P.S.S.S.A., the Governor, with the support of the Legislature, would have to declare a budget emergency.⁷⁸ While Proposition 2 would alter when the State spends funds on schools by holding some funds in the State reserve account, the total amount the State spends on schools under Proposition 2 would, over time, be identical to the amount spent in its absence.⁷⁹

Furthermore, if Proposition 2 is passed and school funding is restored, a section in S.B. 858 would set a cap on the amount of funds school districts can keep in their own reserves in any

⁷² *Id.*

⁷³ CAL. CONST. art. XVI, § 21(a) (added by Proposition 2).

⁷⁴ CAL. EDUC. CODE § 42127.01 (as added by S.B. 858 (2013–2014)); L.A.O. ANALYSIS, *supra* note 8, at 10; *California Proposition 2, Rainy Day Budget Stabilization Fund Act (2014)*, BALLOTPEDIA, [http://ballotpedia.org/California Proposition 2, Rainy Day Budget Stabilization Fund Act \(2014\)](http://ballotpedia.org/California_Proposition_2,_Rainy_Day_Budget_Stabilization_Fund_Act_(2014)), (last visited Sept. 3, 2014); *see* CAL. EDUC. CODE § 42127.01 (as added by S.B. 858 (2013–2014)) (capping the reserve funds a school district may preserve only if Proposition 2 is adopted by the people in the November 4, 2014, general election).

⁷⁵ CAL. CONST. art. XVI, § 21(f) (added by Proposition 2); Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown, Legislative Leaders Announce Rainy Day Fund Agreement (May 8, 2014), *available at* <http://gov.ca.gov/news.php?id=18517> (“[T]he Proposition 98 reserve would not begin until school funding is fully restored following cuts made during the Great Recession.”) [Press Release].

⁷⁶ CAL. CONST. art. XVI, § 21(h) (added by Proposition 2); *accord* L.A.O. ANALYSIS, *supra* note 8, at 10.

⁷⁷ *See* L.A.O. ANALYSIS, *supra* note 8, at 10 (“Before money would go into this reserve, the State would have to make sure that the amount spent on schools and community colleges grows along with the number of students and the cost of living. The State could spend money out of this reserve to lessen the impact of difficult budgetary situations on schools and community colleges.”).

⁷⁸ CAL. CONST. art. XVI, § 22(a)(4) (added by Proposition 2).

⁷⁹ CAL. CONST. art. XVI, § 21(j), (k) (added by Proposition 2); L.A.O. ANALYSIS, *supra* note 8, at 10 (“Though Proposition 2 changes when the State would spend money on schools and community colleges, it does not directly change the total amount of State spending for schools and community colleges over the long run.”); Press Release, *supra* note 75 (Proposition 2 would “[c]reate a Proposition 98 reserve to smooth school spending and avoid future cuts. This reserve for schools makes no changes to the guaranteed level of funding dedicated to schools under Proposition 98.”).

year after the State deposits funds into the P.S.S.S.A.⁸⁰ For the most part, S.B. 858 would require school districts to keep their reserves below a certain threshold in years after the State deposited funds into the P.S.S.S.A.⁸¹ Depending on the size of the district, the cap will be set between three percent and ten percent of the district’s annual budget.⁸² When school districts face “extraordinary fiscal circumstances, including, but not limited to, multiyear infrastructure or technology projects,” county education officials may exempt school districts from these caps on their reserves.⁸³ Because the cap on school district reserves is the creation of S.B. 858, which is contingent on Proposition 2 passing, future Legislatures could change the law regarding the cap on school district reserves by majority vote.⁸⁴

IV. DRAFTING ISSUES

The Legislative Analyst’s Office (L.A.O.) has noted that Proposition 2 may further reduce the public’s already limited understanding of the budget process and relies on uncertain revenue estimates, which may lead to unintended consequences.⁸⁵ Formula-driven ballot measures have already complicated California’s budget process.⁸⁶ For example, Proposition 98 employs several constitutional budget formulas that have created a process for determining annual school funding that “is understood by a small number of insiders.”⁸⁷ Additionally, the L.A.O. notes that the Gann limit, the progeny of Proposition 111, includes estimates relevant to the budget that “are difficult to fathom.”⁸⁸ The L.A.O. cautions that the creation of additional constitutional budget formulas through Proposition 2 could adversely affect the public’s understanding of the budget process.⁸⁹

Second, the L.A.O. notes that the implementation of Proposition 2 would require reliance on data that is uncertain, currently unknown, and subject to interpretation.⁹⁰ For example, Proposition 2 would require a certain percentage of General Fund revenue to be deposited into different accounts each year, but as the L.A.O. notes, when the Governor and Legislature finalize the amount to be deposited under the proposition’s formulas, they would be relying on uncertain,

⁸⁰ CAL. EDUC. CODE § 42127.01 (as added by S.B. 858 (2013–2014)); L.A.O. ANALYSIS, *supra* note 8, at 10. This restriction would not affect community colleges. CAL. EDUC. CODE § 42127.01 (as added by S.B. 858 (2013–2014)); L.A.O. ANALYSIS, *supra* note 8, at 10.

⁸¹ L.A.O. ANALYSIS, *supra* note 8, at 10; see CAL. EDUC. CODE § 42127.01 (as added by S.B. 858 (2013–2014)).

⁸² L.A.O. ANALYSIS, *supra* note 8, at 10; see CAL. EDUC. CODE § 42127.01 (as added by S.B. 858 (2013–2014)).

⁸³ CAL. EDUC. CODE § 42127.01(b) (as added by S.B. 858 (2013–2014)); L.A.O. ANALYSIS, *supra* note 8, at 10. In failing to explicitly define “extraordinary fiscal circumstances” the Legislature would leave county superintendents of schools significant leeway to grant districts exceptions to the reserve cap.

⁸⁴ L.A.O. ANALYSIS, *supra* note 8, at 10–11.

⁸⁵ MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, THE 2014–2015 BUDGET: OVERVIEW OF THE GOVERNOR’S BUDGET 20–21 (2014), *available at* <http://www.lao.ca.gov/reports/2014/budget/overview/budget-overview-2014.pdf>.

⁸⁶ *Id.* at 20.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 21.

imperfect, unreliable data concerning capital gains taxes, among other things.⁹¹ Since Proposition 2’s deposit and withdrawal mechanisms for the B.S.A. and P.S.S.S.A. are contingent on exact percentages, a difference of even one percent between estimated amounts and actual amounts could determine whether the Legislature deposits funds into the B.S.A. and P.S.S.S.A.⁹²

V. CONSTITUTIONAL ANALYSIS

Propositions can violate the California Constitution by violating the Single Subject Rule.⁹³ The Single Subject Rule requires that all parts of an initiative be “reasonably germane” to each other and the general purpose of the initiative.⁹⁴ Proposition 2 generally concerns legislative reserve fund deposits and expenditures.⁹⁵ Section 27 of S.B. 858, which only becomes operative if Proposition 2 is enacted, contains a provision capping local school district reserves.⁹⁶ Although Section 27 of S.B. 858 is inextricably linked to Proposition 2, S.B. 858 is the result of distinct legislative action separate from Proposition 2; as a result, the Single Subject Rule would not require the topics of Proposition 2 and S.B. 858 to be reasonably germane.⁹⁷ Therefore, Proposition 2 does not appear vulnerable to a challenge under the Single Subject Rule.⁹⁸

A proposition can also violate the constitution if it fails to comply with the procedural rules governing the initiative process.⁹⁹ In analyzing whether a proposition unconstitutionally fails to comply with procedural rules, the court determines the substantive purpose of the rule and will only find the proposition unconstitutional if the substantive purpose of the rule is violated.¹⁰⁰ “The main purpose of the title and summary requirements is to avoid misleading the public with inaccurate information.”¹⁰¹ By failing to discuss S.B. 858’s contingent provisions, the Attorney General’s official summary may mislead the public with inaccurate information, violating the essential purpose of the summary or Section 9051 of the Election Code requiring the summary be “true.”¹⁰² Courts have not analyzed whether failing to describe contingent provisions, like those in S.B. 858, makes a summary unconstitutionally deficient; however, as a summary is only required to describe the “chief principals and points” of the initiative and

⁹¹ *Id.*

⁹² See NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 15–17.

⁹³ CAL. CONST. art. II, § 8(d).

⁹⁴ Fair Political Practices Comm’n v. Superior Court, 25 Cal. 3d 33, 38–39 (1979).

⁹⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 12.

⁹⁶ CAL. EDUC. CODE § 42127.01 (as added by S.B. 858 (2013–2014)).

⁹⁷ See *Zaremborg v. Superior Court*, 115 Cal. App. 4th 111, 118 (2004) (“[T]he title and summary prepared by the Attorney General are presumed accurate, and substantial compliance with the ‘chief purpose and points’ provision is sufficient.” While the Act also contains numerous ‘auxiliary and subsidiary’ matters not mentioned in the summary, it is not unreasonable to conclude, as referendum proponents argue, that failure to mention the tax credit contingency does not alter the chief purpose nor render the summary fatally defective. As we have previously explained ‘a statement of the major objectives . . . of the measure is satisfactory’” (citations omitted).).

⁹⁸ *Id.*

⁹⁹ *Assembly of the State of Cal. v. Deukmejian*, 30 Cal. 3d. 638, 649 (1982).

¹⁰⁰ *Id.* at 648–50.

¹⁰¹ *Zaremborg*, 115 Cal. App. 4th at 116.

¹⁰² *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 243–44 (1978); CAL. ELEC. CODE § 9051.

Proposition 2’s summary describes the B.S.A. and P.S.S.S.A. reserves the court could reasonably find that Proposition 2’s summary is not “fatally defective.”¹⁰³ Furthermore, invalidating a voter-approved initiative is likely an inappropriate remedy for a procedural violation that may be remedied by a lawsuit prior to the election.¹⁰⁴ Even if the court were willing to invalidate a proposition, SB 858 is not part of the official language of Proposition 2, so there is a strong argument that the Attorney General’s summary is true *as applied* to Proposition 2.

VI. PUBLIC POLICY CONSIDERATIONS

Proposition 2 received unanimous support in the Legislature and is strongly supported by the Governor, thus unsurprisingly the proposition has received minimal debate in the Legislature and the media.¹⁰⁵ For the most part, Proposition 2’s provisions creating more robust State reserve requirements and requiring the paying down of State debts more quickly have received widespread support.¹⁰⁶ However, in creating a State school reserve account the funding of which would satisfy Proposition 98’s spending requirements and by triggering S.B. 858’s limit on local school reserve accounts, Proposition 2 has faced opposition from education interest groups.¹⁰⁷

A. State Reserves

The official arguments registered with the Secretary of State in support of Proposition 2 emphasizes that the creation of the B.S.A. will help stabilize California’s volatile budget process, encourage the Legislature to live within their means, and pay down existing debt.¹⁰⁸ According to Speaker Emeritus Perez, Proposition 2 would “establish a better approach for California’s budget that saves the spiking revenues we take in during good years, and saves it for those tough years where revenues are scarce.” Spiking revenue largely results from changes in capital gains tax revenue, which varies widely from year to year.¹⁰⁹ Since capital gains are the profits a person or company makes from investments, capital gains tax revenue fluctuates with the stock market.¹¹⁰ The Governor has emphasized the need for California legislators to “avoid the mistakes of the past . . . and . . . establish a solid rainy day fund, locked into the constitution”¹¹¹ By imposing more rigid requirements for depositing and withdrawing funds from the

¹⁰³ Amador Valley Joint Union High Sch. Dist., 22 Cal. 3d at 243–44.

¹⁰⁴ No pre-election lawsuit alleging that the Title or Summary were defective has been brought.

¹⁰⁵ *Complete Bill History: ACAX2-1*, OFFICIAL CAL. LEGIS. INFO., http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/acax2_1_bill_20140516_history.html (last visited Oct. 5, 2014).

¹⁰⁶ *Infra* Part IV(A)–(B).

¹⁰⁷ *Infra* Part IV(C).

¹⁰⁸ NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 12.

¹⁰⁹ *See id.* at 14.

¹¹⁰ Michael B. Marois, *California Law Makers Pass Rainy Day Fund Ballot Measure*, BLOOMBERG (May 15, 2014, 11:07 AM), <http://www.bloomberg.com/news/2014-05-15/california-lawmakers-pass-rainy-day-fund-ballot-measure.html>.

¹¹¹ Sharon Bernstein, *California Governor Brown Urges Continued Fiscal Restraint*, REUTERS (Jan. 22, 2014), <http://www.reuters.com/article/2014/01/23/us-usa-california-governor-idUSBREA0K1LJ20140123>.

B.S.A., Proposition 2 would help to ensure the State is financially prepared to mitigate future downturns in the economy.¹¹²

B. State Debts

The Governor, in particular, has supported Proposition 2 as a way to address California's debt.¹¹³ In his official press release calling for the special session that led to the adoption of the current form of the proposition, Governor Brown stated, "We simply must prevent the massive deficits of the last decade and we can only do that by paying down our debts and creating a solid rainy day fund."¹¹⁴ Credit ranking companies, such as Standard and Poor's, have also criticized California for failing to save money when the economy is doing well and for relying too heavily on volatile revenue sources like capital gains taxes.¹¹⁵

Reliance on volatile revenue sources to fund as much as two-thirds of the State's budget,¹¹⁶ which includes several long-term funding obligations like public employee pensions, has been a major source of California's "Wall of Debt."¹¹⁷ When Governor Brown first proposed his changes to the proposition, the California Chamber of Commerce quickly endorsed his effort.¹¹⁸ Other groups like California Forward and the California Business Roundtable, in addition to tax-payer groups, have also lent their support, noting that the "Wall of Debt" makes California a risky investment to investors and job creators.¹¹⁹ Past attempts to address the State's debts and continuing obligations came at the cost of cuts to education spending, which Proposition 2 does not, in the long-run, decrease.¹²⁰ While California will continue to face significant debt problems in the future, Proposition 2's mandate that the State use, at minimum,

¹¹² *Supra* Part III(B)(1).

¹¹³ *Governor Calls Special Session on Rainy Day Fund*, CBS L.A. (Apr. 16, 2014), <http://losangeles.cbslocal.com/2014/04/16/governor-calls-special-session-on-rainy-day-fund/>.

¹¹⁴ Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown, Governor Brown Calls Special Session to Try to Strengthen Rainy Day Fund (April 16, 2014), *available at* <http://gov.ca.gov/news.php?id=18481>.

¹¹⁵ Marois, *supra* note 110.

¹¹⁶ *Id.*

¹¹⁷ Jessica Calefati, *State Budget: Governor Brown Proposes Paying Down Wall of Debt, Continues to Call for Restraint*, SAN JOSE MERCURY NEWS, Jan. 8, 2014, http://www.mercurynews.com/california/ci_24874278/state-budget-gov-jerry-brown-proposes-paying-down.

¹¹⁸ Press Release, Cal Chamber, Governor Brown, Governor Calls Special Session on Rainy Day Reserve (Apr. 17, 2014), *available at* <http://www.calchamber.com/headlines/pages/04172014-governor-calls-special-session-on-rainy-day-reserve.aspx>.

¹¹⁹ Christopher Nelson, *Bolstered Rainy Day Fund Would Benefit California Business Community*, CAL. FORWARD (Aug. 7, 2014), www.cafwd.org/reporting/entry/bolstered-rainy-day-fund-would-benefit-california-business-community; SAN DIEGO TAX PAYER'S ASS'N, ASSEMBLY CONSTITUTIONAL AMENDMENT 1 (July 2014), *available at* <http://www.sdcta.org/Uploads/Documents/Board%20Approved%20SDCTA%20Position%20Paper%20ACA%201%207-25-14,%20SK%20FINAL.pdf>.

¹²⁰ Tami Luhby, *Big Taxes + Big Spending Cuts = California Budget Surplus*, CNN MONEY (Jan. 3, 2014), <http://money.cnn.com/2013/02/07/news/economy/california-budget/>.

0.75% of General Fund revenue to reduce the debt, which will amount to between \$800 million and \$2 billion depending on capital gains tax revenues, makes an important step towards the reduction of the State's debt.¹²¹

C. School Reserves

Opposition to Proposition 2 stems from the proposition's creation of the P.S.S.S.A., a State school reserve fund. The passage of the proposition would trigger a conditional section of S.B. 858 setting a cap on the amount of funds local school districts may keep in their own reserve accounts. Although only 2BadForKids and Educate Our State are registered as opposition to Proposition 2, the California Association of School Business Officials (School Business Officials) and the Association of California School Administrators (School Administrators) additionally oppose the proposition.¹²²

1. Creation of a State School Reserve

Since the P.S.S.S.A. is a budget reserve account like the B.S.A., many of the benefits ascribed to the B.S.A. are similarly extended to the P.S.S.S.A.¹²³ Like the B.S.A., the P.S.S.S.A. may help to "end the cycle of boom and bust spending" by ensuring funds are available to stabilize education spending when General Fund revenues fall by diverting some funds away from schools and into the P.S.S.S.A. when the economy is doing well.¹²⁴ By stabilizing funding levels, the State may enable schools to better and more accurately plan for future years and implement long-term programs that depend on State revenues. Furthermore, the P.S.S.S.A. and B.S.A. align with best-practices recommendations from the National Association of State Budget Officers.¹²⁵

Opposition groups support the idea of a State reserve fund for schools, but oppose Proposition 2 because it may lead to fewer increases in aggregate education spending, it has the potential to inhibit the implementation of the recent Local Funding Formula, and it may lead the public to incorrectly believe school funding is adequate.¹²⁶

¹²¹ *Supra* Part III(B)(2).

¹²² Interview with Catherine Welsh, Treasurer, Educate Our State, in Sacramento, CA (August 2014) (noting that some opponents to the proposition failed to meet the deadline for registering as official opponents).

¹²³ LEGISLATIVE ANALYST'S OFFICE, BUDGET RESERVE PROPOSALS 6–7 (Apr. 28, 2014), *available at* http://www.lao.ca.gov/handouts/state_admin/2014/Budget-Reserve-Proposals-042814.pdf [L.A.O. PROPOSALS].

¹²⁴ Press Release, Toni G. Atkins Speaker of the Assembly, Legislature Unanimously Passes Rainy Day Fund (May 15, 2014), *available at* <http://asmdc.org/speaker/news-room/press-releases/legislature-unanimously-passes-rainy-day-fund>.

¹²⁵ NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE BUDGETING AND THE LESSONS LEARNED FROM THE ECONOMIC DOWNTURN (Summer 2013), *available at* <http://www.nasbo.org/sites/default/files/State%20Budgeting%20and%20Lessons%20Learned%20from%20the%20Economic%20Downturn-final.pdf>.

¹²⁶ Letter from Jeffrey A. Vaca, Deputy Exec. Dir. of Public Relations, Cal. Ass'n of Sch. Bus. Officials, to John A. Perez, Speaker of the Assembly, Cal. Legislature (Apr. 28, 2014), *available at*

The School Business Officials oppose Proposition 2 because it would allow the State to count any funds transferred to the P.S.S.S.A. towards the minimum education-spending guarantee, which Proposition 98 imposed, for the fiscal year when the deposit is made.¹²⁷ This would allow the State, in strong economic years, to avoid increasing the amount of education spending that reaches schools.¹²⁸ As Jennifer Bestor of Educate our State explained, “Since budget emergencies seem to get called every five years . . . it’s not hard to imagine a really good year . . . putting a little into the P.S.S.S.A., followed by a bad year when, instead of topping up school spending, anything in the P.S.S.S.A. gets used for base spending to relieve pressure on the General Fund.”¹²⁹ Additionally, 2BadForKids notes that California is currently ranked fiftieth in the nation in adjusted per-pupil expenditures and that placing revenue in the reserve instead of increasing funding for education makes long-term increases to aggregate education spending unlikely.¹³⁰ This course will keep California among the lowest in the nation for per-pupil expenditures.¹³¹ However, as Proposition 98 requires that, at minimum, a certain percentage of General Fund revenue is annually used for education, aggregate education spending will grow with General Fund revenues over time.

Additionally, the School Business Officials believe the P.S.S.S.A. will significantly delay full implementation of the Local Control Funding Formula.¹³² The Local Control Funding Formula is a recent change to the education funding formula that became operative in 2013.¹³³ Its objective was to transfer an assortment of current prior funding streams to three new grant programs to increase local control.¹³⁴ These three grant programs are based on the student populations the schools serve and allow school districts to decide how the money is spent.¹³⁵ However, the Local Control Funding Formula will not be fully implemented for eight years.¹³⁶

<http://s3.documentcloud.org/documents/1158826/statebud-24-25-rainydayfund-casboopposes042814.pdf> [Vaca Letter].

¹²⁷ Kimberly Beltran, *School Leaders Oppose Brown’s Rainy Day Measure*, CABINET REPORT (Aug. 13, 2014), <https://cabinetreport.com/politics-education/school-leaders-oppose-browns-rainy-day-measure>.

¹²⁸ *Id.*

¹²⁹ Email conversation with Jennifer Burton.

¹³⁰ *Prop 2: Fact vs. Fiction*, 2BADFORKIDS, http://www.2badforkids.org/fact_vs_fiction (last visited Oct. 5, 2014) [“*Prop 2: Fact vs. Fiction*”]; see also John Fensterwald, *Latest—But Outdated—Ed Week Survey Ranks California 50th in Per Pupil Spending*, EDSOURCE (Jan. 13, 2014), <http://edsource.org/2014/latest-but-outdated-ed-week-survey-ranks-california-50th-in-per-pupil-spending/56196#.VBZJwBYXNEM>.

¹³¹ *Id.*

¹³² *LCFF Frequently Asked Questions*, CAL. DEPT. OF EDU., <http://www.cde.ca.gov/fg/aa/lc/lcfffaq.asp> (last visited Sept. 14, 2014).

¹³³ *Local Control Funding Formula*, CAL. TEACHERS ASS’N, <http://www.cta.org/Issues-and-Action/School-Funding/Local-Control-Funding-Formula.aspx> (last visited Sept. 14, 2014).

¹³⁴ *Id.*

¹³⁵ *Local Control Funding Formula*, CAL. DEPT. OF EDU., <http://www.cde.ca.gov/nr/el/le/yr13ltr0807.asp> (last visited Sept. 27, 2014).

¹³⁶ *Local Control Funding Formula Overview*, CAL. DEPT. OF EDU., <http://www.cde.ca.gov/fg/aa/lc/lcffoverview.asp> (last visited Sept. 14, 2014).

Thus, Proposition 2 may be antithetical to the Local Control Funding Formula’s objective of increasing local control as Proposition 2 may divert funds into State reserves instead of toward the grant programs.¹³⁷ The School Administrators share the School Business Officials concerns and further question the wisdom of having three reserve funds: the P.S.S.S.A., the B.S.A., and local school district reserves.¹³⁸ The opposition believes that local school districts are in the best position to assess how large a reserve is needed and to decide how it ought to be spent.¹³⁹

The School Business Officials also believe that creating a rainy day fund will suggest to the public that the school system is adequately funded, which is not the case.¹⁴⁰ According to School Business Officials the State still owes 7.9 billion to pay down the “maintenance factor,” which is the State’s obligation under Proposition 98 to backfill education funding levels when the State decreases funding from the previous year.¹⁴¹ Thus, the public may be misled by Proposition 2 to believe that the creation of a State school reserve fund is the result of a surplus of funds.¹⁴²

2. *Creation of a Local School Reserve Cap*

S.B. 858 is the education omnibus trailer bill that contains the provisions implementing local school district reserve caps and would become operative in December 2014 with the passage of Proposition 2.¹⁴³ The California Teachers Association (CTA) supports the cap on local school district reserves because “taxpayer dollars need to be spent in our classrooms and on our children not sitting in bank accounts.”¹⁴⁴ The CTA notes that the average local school reserve was 30.34% for the 2012–2013 fiscal years, with about 73% of districts having more than 15% in reserve.¹⁴⁵ During a Senate Budget and Fiscal Review Committee hearing, a lobbyist from the California School Employees Association argued that if Proposition 2 passes without some reserve cap, districts will tend to deposit more money into their reserves, regardless of need, whenever the Legislature does so.¹⁴⁶ The lobbyist asserted that school districts would see the Legislature reinforce their rainy day fund and assume they ought to follow

¹³⁷ Press Release, Ass’n of Cal. Sch. Administrators, Proposed Rainy Day Fund is Bad for Schools (last visited Oct. 5, 2014), available at

<http://www.acsa.org/FunctionalMenuCategories/Media/NewsReleases/Rainyday.aspx>.

¹³⁸ ASS’N OF CAL. SCH. ADMINISTRATORS, PROPOSITION 2—BUDGET STABILIZATION ACCOUNT TALKING POINTS 1 (last visited Oct. 5, 2014), available at

http://www.acsa.org/MainMenuCategories/Advocacy/Issues-and-Actions/PositionsonLegislation_1/Prop2TalkingPoints.aspx [“TALKING POINTS”].

¹³⁹ NOVEMBER 2014 VOTER GUIDE, *supra* note 1, at 16.

¹⁴⁰ Vaca Letter, *supra* note 126; L.A.O. PROPOSALS, *supra* note 123, at 2.

¹⁴¹ L.A.O. PROPOSALS, *supra* note 123, at 2.

¹⁴² Vaca Letter, *supra* note 126.

¹⁴³ CAL. EDUC. CODE § 42127.01 (as added by S.B. 858 (2013–2014)).

¹⁴⁴ *Local Budget Transparency and Cap on School District Reserves*, CAL. TEACHER’S ASS’N (June 12, 2014), <http://www.cta.org/Blog/2014/June/Local-Budget-Transparency-and-Cap-on-School-District-Reserves.aspx>.

¹⁴⁵ *Id.*

¹⁴⁶ John Fensterwald, *Cap on District Reserves Passes Despite Lawmaker’s Reservations*, EDSOURCE, (June 16, 2014) <http://edsource.org/2014/cap-on-district-reserves-passes-despite-lawmakers-reservations/63258#.VAAdiCmMXOSo>.

suit in preparation for a lean funding year.¹⁴⁷ This would, according to supporters, take additional funds out of the classroom as administrators move allocated funds into their local school district reserves.¹⁴⁸

Other interested parties at the hearing noted that because the State must satisfy several factors before it can deposit any funds into the P.S.S.S.A.,¹⁴⁹ it would be at least seven years before the local reserve cap would go into effect, giving the Legislature sufficient time to study and assess the effects of local reserve caps.¹⁵⁰ The CTA further emphasized that S.B. 858, as a legislatively enacted law, can be amended or appealed later.¹⁵¹ The hurdles to depositing funds into the P.S.S.S.A. and the Legislature's ability to amend any potential issues later diminish the potential harm S.B. 858 may cause.¹⁵²

The local reserve cap is opposed by several groups, including Educate Our State,¹⁵³ the School Business Officials,¹⁵⁴ School Boards,¹⁵⁵ and the School Administrators,¹⁵⁶ who focus on both the process by which S.B. 858 was passed and its effects on local school budgets. Senate Bill 858 was passed through the legislative process as a trailer bill to the State's education budget bill, Assembly Bill 86, without any vetting through the legislative process and was not part of Governor Brown's original proposed budget in June or any of his revisions in May.¹⁵⁷ Editorials in SF Gate and the San Jose Mercury News suggest that the proposal was pushed through to satisfy labor unions who want the reserve funds available for raises.¹⁵⁸

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF A.C.A. 1X2 (May 5, 2014), available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/acax2_1_cfa_20140515_093413_sen_floor.html (Deposits will not be made into the P.S.S.S.A. until the State "has met total school funding requirements . . . , has repaid and allocated the current Proposition 98 maintenance factor . . . , and, has not suspended Proposition 98 in the year of the transfer.").

¹⁵⁰ *Id.*

¹⁵¹ Fensterwald, *supra* note 146.

¹⁵² *Id.*

¹⁵³ EDUCATE OUR STATE!, <http://www.educateourstate.org/> (last visited Sept. 14, 2014).

¹⁵⁴ Jeff Vaca & Sara C. Bachez, *CASBO Adopts "Oppose" Positions on Propositions 44 and 46*, CAL. ASS'N OF SCH. BUS. OFFICIALS, <http://archive.constantcontact.com/fs109/1113248925076/archive/1118113471224.html> (last visited Oct. 5, 2014).

¹⁵⁵ *Bill to Restore School District Reserve Authority Announced at Capitol Press Conference*, C.S.B.A. (Aug. 19, 2014), <http://csba.org/Newsroom/CSBANewsletters/2014/August/ElectronicOnly/AB146PressConference.aspx?p=1>.

¹⁵⁶ *Plan to Cap Reserves Still a Vexing Issue*, CAL. ASS'N OF SCH. ADMINISTRATORS, <http://www.acsa.org/FunctionalMenuCategories/Media/EdCalNewspaper/EdCal-2014/July28/Reserves.aspx> (last visited Sept. 14, 2014) [*"Plan to Cap Reserves Still a Vexing Issue"*].

¹⁵⁷ *Id.*

¹⁵⁸ Editorial, *Legislature Allows Big Holes in Rainy Day Fund*, SFGATE (June 18, 2014), available at <http://www.sfgate.com/opinion/editorials/article/Legislature-allows-big-holes-in-rainy-day-fund-5562956.php>; Editorial, *Yes on Proposition 44's Rainy Day Fund*, SAN JOSE MERCURY NEWS, July 25 2014, http://www.mercurynews.com/opinion/ci_26215888/mercury-news-editorial.

Large local reserves, which would disappear if local reserve caps are put in place, allow districts to adapt to unexpected financial changes. Educate Our State notes that caps may harm local school district's credit ratings.¹⁵⁹ Standard and Poor's explained, "Very strong reserve levels contribute to a district's fiscal capacity to absorb episodes of unanticipated fiscal strain and, thus, affect its rating level."¹⁶⁰ A good credit rating allows school districts to borrow additional funds during economic downturns.¹⁶¹ The School Board Association echoed concerns about local school districts, especially smaller districts, to meet unexpected expenses that arise in the typical course of operating a school.¹⁶² These caps may amount to only weeks' worth of salary for most districts.¹⁶³ Such "one-size-fits-all" reserve caps, critics argue, are fiscally irresponsible in practice since schools have different financial concerns and require different sized budget reserves.¹⁶⁴

Proposition 2 and S.B. 858 may create an ironic situation wherein the Legislature is required to build up its reserves while prudent districts are barred from doing the same.¹⁶⁵ This may also be contrary to the Governor's own emphasis on local control.¹⁶⁶ The creation of a local reserve cap runs contrary to the unique position local school districts are in to assess the educational needs of their districts.¹⁶⁷

VII. CONCLUSION

Proposition 2 would likely reduce State debt over time, increase the likelihood that the State would annually deposit funds into the B.S.A., and create a reserve fund for public schools and community colleges known as the P.S.S.S.A. Additionally, the passage of Proposition 2 would trigger a stipulation in S.B. 858 that would, upon the State making a deposit into the P.S.S.S.A., place a cap on the amount of funds school districts may have in their reserve accounts.

¹⁵⁹ *S & P Ratings Service PDF*, 2BADFORKIDS, http://www.2badforkids.org/s_p_ratings_service_pdf (last visited Sept. 14, 2014).

¹⁶⁰ *Id.*

¹⁶¹ *Prop 2: Fact vs. Fiction*, *supra* note 130.

¹⁶² Letter from Dennis Meyers, Assistant Exec. Dir., Governmental Relations, Cal. Sch. Boards Ass'n, to Edmund G. Brown Jr., Governor, State of Cal. (June 19, 2014), *available at* http://www.csba.org/Advocacy/LegislativeNews/~/_media/CSBA/Files/Advocacy/LegislativeAdvocacy/2014_0619_SB858budgetlettertoGovernor.ashx ("For example, if a roof or HVAC system fails ... a small district needs to draw upon reserves Some are so small that if one family moves ... the reduction in funds is a recognizable hit").

¹⁶³ *Id.*

¹⁶⁴ TALKING POINTS, *supra* note 138.

¹⁶⁵ *Plan to Cap Reserves Still a Vexing Issue*, *supra* note 156.

¹⁶⁶ *Id.*

¹⁶⁷ ACSA: *Restore Adequate School District Reserves*, ASS'N OF CAL. SCH. ADMINISTRATORS, <http://www.acsa.org/FunctionalMenuCategories/Media/NewsReleases/Reserve.aspx> (last visited Oct. 5, 2014).

The legislation putting Proposition 2 on the ballot received unanimous support from the Legislature and the approval of the Governor. Additionally, there is opposition to the Proposition from school administrators and other education advocates.

Proposition 45:

Insurance Rate Public Justification and Accountability Act.

Initiative Statute

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McGeorge School of Law

By

Tracey Frazier

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2015
B.B.A., Business Law, Loyola Marymount University, 2008*

&

Rob Nash

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2015
B.A., Political Science, University of Illinois at Urbana-Champaign, 2010*

I. EXECUTIVE SUMMARY

Proposition 45, the Insurance Rate Public Justification and Accountability Act,¹ is a California initiative statute concerning the regulation of health insurance premiums in the “individual” and “small group” markets.²

Structurally, Proposition 45 is modeled on Proposition 103, a 1988 ballot initiative that regulated home and auto insurance.³ Proposition 45 seeks to extend the Proposition 103 regulatory scheme to health insurance.⁴ Under the Proposition 103 framework, individual and small group insurers would be required to file with and justify their premium rates to the California Department of Insurance under penalty of perjury, the Insurance Commissioner would have veto power over proposed rate changes, and Proposition 45 would also add an “intervenor” process by which members of the public can challenge rate proposals.⁵

The measure, proposed by Jamie Court and Consumer Watchdog, was written in 2011 and initially advanced for the November 2012 ballot; however, when the measure failed to qualify in time for the 2012 election, it was placed on the 2014 ballot with the language as approved in 2012.⁶ The plain text of the measure provides an effective date of November 6, 2012, which, if the measure is approved, will have a retroactive effect on rates in effect on, or approved after, that date.⁷

To further complicate the issue, from the time the measure was drafted, the petitions were circulated, and signatures were gathered, to the time when California voters will actually cast their ballots, three years will have passed. Within those three years, the major provisions of the federal Patient Protection and Affordable Care Act (the “ACA” or “Obamacare”) will have been implemented,⁸ drastically changing the health insurance marketplace.⁹

¹ Cal. Proposition 45 at § 1 (2014).

² CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2014, at 20, available at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf> [“NOVEMBER 2014 VOTER GUIDE”].

Individual coverage is a form of health insurance designed to cover just one person (and often immediate family members), as opposed to someone covered by a group plan. Group health coverage is when small and large employers, unions, and retirees cover their employees and members under one insurance contract. “Small group” policies are for employers with less than 50 employees. *Common Health Insurance Terms*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/110-health/10-basics/terms.cfm> (last visited Oct. 9, 2014).

³ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 22.

⁴ Cal. Proposition 45 at § 2 (2014).

⁵ *Id.*

⁶ *California Proposition 45, Public Notice Required for Insurance Company Rates Initiative (2014)*, BALLOTPEDIA, [http://ballotpedia.org/California_Proposition_45_Public_Notice_Required_for_Insurance_Company_Rates_Initiative_\(2014\)](http://ballotpedia.org/California_Proposition_45_Public_Notice_Required_for_Insurance_Company_Rates_Initiative_(2014)) (last visited Oct. 9, 2014) [“Prop 45 Ballotpedia”].

⁷ Cal. Proposition 45 at § 2 (2014).

⁸ *Key Features of the Affordable Care Act By Year*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES, <http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html> (last visited Oct. 9, 2014) [“DHHS Key Features”].

II. BACKGROUND

In order to place Proposition 45 in its proper context, the story must begin with Harvey Rosenfield, Consumer Watchdog, and Proposition 103.

A. Harvey Rosenfield and Consumer Watchdog

In the early 1980's, after working for Ralph Nader at a Washington D.C. citizen advocacy group, Harvey Rosenfield moved to California to organize and direct the California Public Interest Research Group (CalPIRG).¹⁰ In 1985, Rosenfield resigned from CalPIRG and founded the Foundation for Taxpayer and Consumer Rights (now known as "Consumer Watchdog").¹¹ In 1987, Rosenfield began to write a ballot measure initiative regarding the home and auto insurance markets and formed a campaign to sponsor it called "Voter Revolt."¹² The proposal turned into what was Proposition 103 on California's November 1988 ballot, and was narrowly approved by voters 51% to 49%.¹³ Jamie Court took over as Consumer Watchdog's President and Chairman of the Board in 1994.¹⁴

B. Proposition 103

The passing of Proposition 103 and its subsequent regulations imposed three overarching and enduring changes to the home and auto insurance markets. First, Proposition 103 made the California Insurance Commissioner an elected, rather than appointed, official who has the sole responsibility to approve or reject changes to home or auto insurance premiums before they take effect. Second, it requires insurance rates to be determined based on a number of factors including those that have a substantial relationship to the risk of loss and generally requires that rates not be excessive, inadequate, or unfairly discriminatory. Finally, Proposition 103 established a complex system of public participation and judicial review, within which interested

⁹ *Health Reform Implementation Timeline*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/interactive/implementation-timeline/> (last visited Oct. 9, 2014) ["Kaiser Timeline"].

¹⁰ *Home*, HARVEY ROSENFIELD CONSUMER ADVOCATE, <http://www.harveyrosenfield.com/wp/> (last visited Oct. 9, 2014); *About*, HARVEY ROSENFIELD CONSUMER ADVOCATE, <http://www.harveyrosenfield.com/wp/current-work/> (last visited Oct. 9, 2014); *Our Team*, CONSUMER WATCHDOG, <http://www.consumerwatchdog.org/about/our-team> (last visited Oct. 9, 2014); *About*, CONSUMER WATCHDOG, <http://www.consumerwatchdog.org/about> (last visited Oct. 9, 2014).

¹¹ CAL. SEC'Y OF STATE, *Consumer Watchdog Business Filings*, <https://businessfilings.sos.ca.gov/frmDetail.asp?CorpID=01349849&qrystring=CONSUMER+WATCHDOG&qrynumber=NULL> (last visited Oct. 9, 2014).

¹² Harvey Rosenfield, *Proposition 103: The Consumer's Viewpoint*, SOCIETY OF CPCU at 109, available at <http://www.harveyrosenfield.com/uploads/pdfs/opeds/CPCU%20article.pdf>.

¹³ *California Proposition 103 (1988)*, BALLOTEDIA, [http://ballotpedia.org/California Proposition 103. Insurance Rates and Regulation \(1988\)](http://ballotpedia.org/California_Proposition_103_Insurance_Rates_and_Regulation_(1988)) (last visited Oct. 9, 2014).

¹⁴ *Our Team*, CONSUMER WATCHDOG, <http://www.consumerwatchdog.org/about/our-team> (last visited Oct. 9, 2014).

parties can intervene in proceedings conducted by the Department of Insurance in order to challenge a proposed or existing rate and collect fees in connection with their efforts.¹⁵

The impacts of Proposition 103, like all reform, are speculative and subject to debate. However, according to a November 2013 study published by the Consumer Federation of America, in consultation with the former Executive Director of Consumer Watchdog, Proposition 103 saved consumers upwards of \$90 billion through 2010.¹⁶ It should also be noted that, pursuant to the intervenor fee provisions, Consumer Watchdog has collected over \$14 million in fees in connection with their efforts.¹⁷

C. From 2011 to Present

1. Proposition 45's Path to the Ballot

In California, Proponents of ballot measure initiative statutes have to write out the text of the proposed law and then submit a draft to the Attorney General for her official title and summary.¹⁸ From the official summary date, Proponents are allowed a maximum of 150 days to circulate petitions and collect the signatures of at least 504,760 registered voters.¹⁹ Once the requisite number of signatures has been collected, they must be filed with the appropriate county elections officials for the signatures to be counted and verified. A random sample is taken of 500 signatures or 3% of the total, whichever is greater.²⁰ If the total number of signatures is less than 95% of the required amount, the initiative does not qualify for the ballot;²¹ if the total is more than 110% of the required amount the initiative is deemed qualified for the ballot.²² Where the total number of signatures is between 95% and 110%, a “full check” on every signature must be conducted.²³ This process must be completed at least 131 days before the election at which it is to be submitted to the voters.²⁴

¹⁵ CAL. SEC'Y OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION, TUESDAY, NOVEMBER 8, 1988 at 98–101, available at http://librarysource.uchastings.edu/ballot_pdf/1988g.pdf.

¹⁶ J. ROBERT HUNTER, TOM FELTNER & DOUGLAS HELLER, CONSUMER FED'N OF CAL., WHAT WORKS: A REVIEW OF AUTO INSURANCE RATE REGULATION IN AMERICA AND HOW BEST PRACTICES SAVE BILLIONS OF DOLLARS (November 2013), available at http://www.consumerfed.org/pdfs/whatworks-report_nov2013_hunter-feltner-heller.pdf.

¹⁷, *Proposition 103 Consumer Intervenor Process*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/150-other-prog/01-intervenor/index.cfm> (last visited Oct. 9, 2014); *Informational Report on the CDI Intervenor Program*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/150-other-prog/01-intervenor/report-on-intervenor-program.cfm#2014> (last visited Oct. 9, 2014).

¹⁸ CAL. ELEC. CODE § 9001(a).

¹⁹ CAL. ELEC. CODE § 9014; CAL. CONST. art. II § 8(b); CAL. ELEC. CODE § 9035.

²⁰ CAL. ELEC. CODE § 9030(d).

²¹ CAL. ELEC. CODE § 9030(f).

²² CAL. ELEC. CODE § 9030(g).

²³ CAL. ELEC. CODE § 9031(a).

²⁴ CAL. ELEC. CODE § 9016; CAL. CONST. art. II § 8(c).

In late 2011, Jamie Court and Consumer Watchdog first drafted this initiative in an attempt to get it on the November 2012 ballot.²⁵ The Attorney General issued the official title and summary and approved the measure for circulation in January of 2012.²⁶ Consumer Watchdog sponsored the signature gathering effort with major funding from the Consumer Attorneys of California.²⁷ In May 2012, 800,000 voter signatures were submitted;²⁸ however, when Los Angeles County reported that only 66.6% of the signatures from the county were valid (69% of the collected signatures were needed to reach the 110% threshold), the initiative was forced in to a full check which prevented it from being able to qualify in time for the November 2012 election. As such, it was held over for the November 2014 ballot.²⁹

2. *Intervening Changes in the Health Insurance Marketplace*

The three year time frame between the drafting and signature-gathering of the initiative and its appearance on the ballot holds significant relevance. During those three years, major provisions of the Affordable Care Act were implemented,³⁰ and on October 1, 2013, Covered California opened to begin carrying out the State's responsibilities under the Act.³¹

a. The Affordable Care Act

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (the "Affordable Care Act" or ACA) into law.³² The ACA established a series of uniform requirements and regulations, imposing new duties on the individual consumer, the health insurance industry, and state governments.³³

²⁵ Prop 45 Ballotpedia, *supra* note 6.

²⁶ *Id.*

²⁷ *Cal Access: Late and \$5,000+ Contributions Received by Consumer Watchdog*, CAL. SECRETARY ST., <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1343944&session=2011&view=late1> (last visited Oct. 9, 2014).

²⁸ Deborah Crowe, *Signatures Submitted for Health Insurance Rate Initiative*, L.A. BUS. J., May 18, 2012, <http://www.labusinessjournal.com/news/2012/may/18/signatures-submitted-health-insurance-rate-initiat/>.

²⁹ Laurel Rosenhall, *Initiative on Health Insurance Rates Won't Make November Ballot*, SACRAMENTO BEE, June 28, 2012, <http://blogs.sacbee.com/capitolalert/latest/2012/06/california-initiative-to-limit-health-insurance-rates-doesnt-make-nov-ballot.html>.

³⁰ CTR. FOR HEALTH POLICY STUDIES & VIVEK RAJASEKHAR, HERITAGE FOUND. YOUNG LEADERS PROGRAM, IMPLEMENTATION OF THE MAJOR PROVISIONS OF OBAMACARE: THE TIMELINE, *available at* http://fleming.house.gov/uploadedfiles/hc_timeline.pdf.

³¹ JOHN KINGSDALE, WAKELY CONSULTING GROUP, POTENTIAL IMPACT OF A 2014 BALLOT INITIATIVE ON IMPLEMENTATION OF COVERED CALIFORNIA AND HEALTH INSURANCE REFORM IN CALIFORNIA, at 14 (May 2014), *available at* <http://stophighercosts.org/wp-content/uploads/2014/05/Kingsdale-Report-May-2014.pdf> ["Kingsdale Report"].

³² Although the ACA was effective in 2010, it was written so that most major provisions were to be phased in by January 2014. DHHS Key Features, *supra* note 8; Kaiser Timeline, *supra* note 9; Public Law 111-114: *Patient Protection and Affordable Care Act*, U.S. GOV'T PRINTING OFF., <http://www.gpo.gov/fdsys/granule/PLAW-111publ148/PLAW-111publ148/content-detail.html> (last visited Oct. 9, 2014).

³³ *New Health Reform Database*, NAT'L CONF. ST. LEGIS., <http://www.ncsl.org/research/health/new-health-reform-database.aspx> (last visited Oct. 9, 2014).

Relevant to the consumer, most all U.S. citizens must now be insured or pay a penalty (also known as the “Individual Mandate”).³⁴ In order to help offset the cost of coverage, lower-income families and individuals, and small group employers (small businesses with up to 50 employees), are eligible to receive premium credits, cost-sharing subsidies, or tax credits.³⁵

As to the industry, insurance companies must now provide a comprehensive set of covered services (known as the “essential benefits package”) while standardizing prices and extending coverage to all applicants despite preexisting conditions.³⁶ Further, they are now required to disclose information relevant to their premium rates and are required to report the proportion of premium dollars spent on patient services in comparison to the amount retained for administrative costs or company profits.³⁷ This “medical-loss ratio” must be at least 85% for plans in the large group market and 80% for plans in the individual and small group markets, subject to rebate to the consumers.³⁸

Finally, among other things, the government is required to expand their oversight of the health care industry by (i) annually reviewing health insurance premiums for unreasonable increases³⁹ and (ii) maintaining health benefit exchanges (“Exchange” or “Exchanges”).⁴⁰

i. Annual Review of Premiums

Pursuant to the annual review requirement, health insurers have to submit to the State, and “prominently post” on their website, information justifying a premium increase prior to its implementation.⁴¹ With this information, States are to monitor premium increases of health insurance coverage offered both on and outside of their Exchange, provide the federal government with information about trends in premium increases in health insurance coverage, and make recommendations about whether particular health insurance issuers should be excluded from participation in the Exchange based on a pattern or practice of excessive or unjustified premium increases.

³⁴ The Henry J. Kaiser Family Foundation, *The Requirement to Buy Coverage Under the Affordable Care Act*, <http://kff.org/infographic/the-requirement-to-buy-coverage-under-the-affordable-care-act/> (last visited Oct. 9, 2014).

³⁵ *Summary of the Affordable Care Act*, HENRY J. KAISER FAMILY FOUND, <http://kff.org/health-reform/fact-sheet/summary-of-the-affordable-care-act/> (last visited Oct. 9, 2014) [“Kaiser Summary”].

³⁶ *Id.*

³⁷ *Id.*

³⁸ Ctr. for Consumer Info. & Ins. Oversight, *Medical Loss Ratio*, CENTERS FOR MEDICARE & MEDICAID SERVICES, http://www.cms.gov/apps/mlr/mlr-search.aspx#/?state=CA&reporting_year=2011 (last visited Oct. 9, 2014)

³⁹ 42 U.S.C. § 300gg-94.

⁴⁰ 42 U.S.C. § 18031 et seq.

⁴¹ 42 U.S.C. § 300gg-94.

ii. *Health Benefit Exchanges*

An Exchange is a marketplace through which individuals, families, and small-business owners (“Enrollees”) can purchase health care coverage and use their subsidies.⁴² Under the ACA, an Exchange must provide certain minimum services to enrollees and prospective enrollees, including certifying health plans as “qualified health plans” (or “QHPs”).⁴³ All health plans seeking certification as a QHP must submit to the Exchange, and make the following available to the public:

- Claims payment policies and practices;
- Periodic financial disclosures; and
- Data on enrollment, rating practices, cost-sharing premiums, and out-of-pocket expenses to consumers.⁴⁴

The Exchange takes the information submitted for certification and annual reviews into consideration when determining whether to make a health plan available through the Exchange. The Exchange must take into account any excess of premium growth outside the Exchange as compared to the rate of growth inside the Exchange.⁴⁵

b. Covered California

In 2010, California was the first state in the nation to enact legislation to implement the provisions of the ACA by creating an Exchange, now known as “Covered California.”⁴⁶ Covered California is, by statute, an independent state agency with a five-member governing board including the Secretary of the California Department of Health and Human Services, two gubernatorial appointees, and one appointee each by the Speaker of the Assembly and the Chairman of the Committee on Senate Rules.⁴⁷ All of the members must be California residents with a demonstrated expertise in health care, and all are subject to strict conflict of interest guidelines.⁴⁸

Covered California was created as an “active purchaser,” responsible for negotiating with health plans to achieve a triple aim of lowering costs, improving quality, and improving health

⁴² Kaiser Summary, *supra* note 35.

⁴³ 42 U.S.C. § 18031.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Assembly Bill No. 1602, California Health Benefit Exchange, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100AB1602 (last visited Oct. 9, 2014); Senate Bill No. 900 California Health Benefit Exchange, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB900 (last visited Oct. 9, 2014).

⁴⁷ NAT’L CONF. LEGISLATURES, HEALTH INSURANCES EXCHANGES OR MARKETPLACES: STATE PROFILES AND ACTIONS (Oct. 22, 2014), *available at* http://www.ncsl.org/Portals/1/Documents/Health/Health_Insurance_Exchanges_State_Profiles.pdf; CAL. GOV’T CODE § 100500.

⁴⁸ NAT’L CONF. LEGISLATURES, ESTABLISHING THE CALIFORNIA HEALTH BENEFITS EXCHANGE: AB 1602 AND SB 900, *available at* <http://www.ncsl.org/portals/1/documents/health/CAHBE.pdf>.

outcomes, while assuring a good choice of plans for consumers in compliance with the provisions of the ACA as described above.⁴⁹ In October 2013, after three years of planning and negotiating, Covered California began California’s first open enrollment period under the ACA, enrolling 1.3 million citizens for coverage in 2014.⁵⁰



Because of the nature of ballot measure initiatives, Proposition 45’s three-year path to the ballot, and all of the intervening changes in the health care marketplace, the language of Proposition 45 does not account for the state of California health care law today.

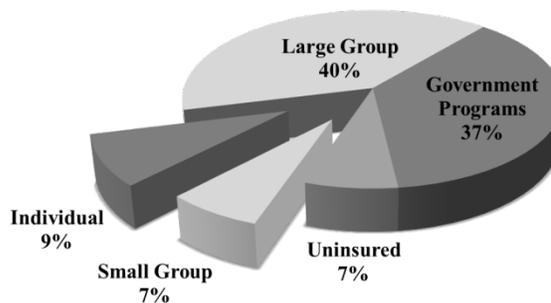
III. HEALTH COVERAGE IN CALIFORNIA

A. Types of Health Coverage

There are two separate and relatively distinct types of health coverage in California – indemnity health *insurance*, based on fee-for-service provider payments, and prepaid *managed health care* plans, providing specific services for a fixed monthly fee.⁵¹ From this distinction, California law makers gave rise to two Departments charged with the regulation and oversight of their respective type of health coverage: the California Department of Insurance (CDI) and the California Department of Managed Health Care (DMHC).⁵² CDI’s jurisdiction is limited by statute to traditional indemnity health insurance plans while DMHC oversees most all managed health care plans including all Health Maintenance Organizations (HMOs) and non-indemnity based Preferred Provider Organizations (PPOs) and Exclusive Provides Organizations (EPOs).⁵³

B. Sources of Health Coverage⁵⁴

Californians obtain health coverage from four main sources: through their “large group” employer, from a government program, through



⁴⁹ PETER V. LEE, COVERED CALIFORNIA, EXECUTIVE DIRECTOR’S REPORT (Aug. 21, 2014), available at http://board.coveredca.com/meetings/2014/8-21/PDFs/PPT%20-%20Executive%20Director's%20Report_August%2021,%202014.pdf.

⁵⁰ About, COVERED CAL., <https://www.coveredca.com/about/> (last visited Oct. 9, 2014).

⁵¹ DEBRA L. ROTH & DEBORAH REIDY KELCH, CAL. HEALTHCARE FOUND., MAKING SENSE OF MANAGED CARE REGULATION IN CALIFORNIA 6 (November 2001), available at <http://www.chcf.org/~media/MEDIA%20LIBRARY%20Files/PDF/M/PDF%20MakingSenseManagedCareRegulation.pdf>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 21.

their “small group” employer, or on their own via individual insurance.⁵⁵ While the majority of the population is insured by way of a large group or governmentally provided plan, Proposition 45 only applies to small group or individually acquired coverage – which includes approximately six million Californians, or 16% of the population.⁵⁶

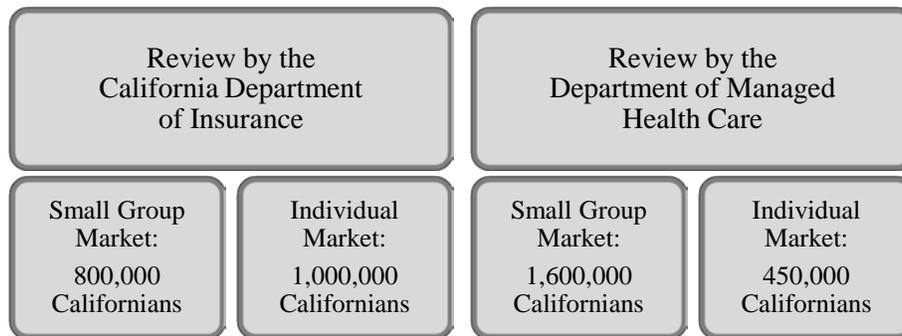
As individual and small group coverage can come in the form of indemnity or non-indemnity HMOs, PPOs, and EPOs, both CDI and DMHC split jurisdiction over licensure, oversight, and ongoing monitoring of carriers providing individual and small group health coverage in California – and both would be affected by Proposition 45.⁵⁷

Individuals, families, and small-business owners can purchase individual or small group coverage on the Exchange, through Covered California, or off of the Exchange, directly through the insurer or from a licensed insurance agent.

C. Current Regulation and Oversight

Currently, all health coverage products sold in California must be approved by their applicable regulatory body, either CDI or DMHC, before being offered to the public.⁵⁸ This includes products certified and sold by Covered California.⁵⁹ Both regulators must ensure the products meet state and federal requirements (including the ACA) by providing basic benefits to enrollees – such as physician visits, hospitalizations, and prescription drugs – and both review a health plan’s rates, policy forms, financial adequacy, network adequacy (number of physicians available), and timely access standards.

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⁵⁵ LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 45 APPROVAL OF HEALTHCARE INSURANCE RATE CHANGES (July 17, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-45-110414.pdf>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Kingsdale Report, *supra* note 31, at 14-15.

⁶⁰ CAL. LEGISLATURE (SENATE HEALTH COMMITTEE & ASSEMBLY HEALTH COMMITTEE), JOINT HEARING ON PROPOSITION 45 (July 2, 2014), available at <http://ahea.assembly.ca.gov/sites/ahea.assembly.ca.gov/files/Joint%20background%20revised.pdf> [Joint Hearing Analysis”].

D. How Proposition 45 Would Change the System

Under Proposition 45, the Commissioner is granted the powers necessary to carry out the provisions of this section, including any and all authority for health care service plan rate review previously granted to the Department of Managed Health Care.⁶¹ While the bifurcated system would essentially remain the same and the DMHC would retain all of their previously granted powers to review the products under their purview, the initiative would grant the Commissioner authority to approve or reject products already reviewed by DMHC thus creating a duplicative layer of review on upwards of 4 million plans beginning in 2015.⁶²



IV. PROPOSITION 45

A. The Elements of the Proposition

From a plain reading of the initiative, Proposition 45 involves four predominant elements: (1) the powers and duties granted to the Commissioner in connection with health insurance rate regulation; (2) the contents of each rate change application; (3) the various methods of review for each application; and (4) the penalties and fees each regulated company would be required to pay.⁶³

1. Powers and Duties of the Commissioner

Proposition 45 would grant the Commissioner the power to review and approve or reject all rates and charges associated with individual and small group health coverage, including benefits, premiums, copayments, and deductibles that were in effect on, or proposed after,

⁶¹ *Id.*

⁶² *Id.*

⁶³ Cal. Proposition 45 at §§ 1, 2 (2014).

November 6, 2012.⁶⁴ With that, the Commissioner would have the power to audit rates that were in effect between November 6, 2012, and November 4, 2014. If, in the process of this audit, the Commissioner found any of the rates to be excessive, he would require the insurers to issue rebates to their consumers.⁶⁵

2. *Contents of the Rate Change Application*

Under Proposition 45, when a health insurer desires to change a rate, they must file an application with the Commissioner,⁶⁶ under penalty of perjury.⁶⁷ This application would include data on premiums, claims, expenses, net losses and investment gains,⁶⁸ as well as complaints filed by consumers against the company.⁶⁹

3. *Reviewing the Rates*

In addition to the review by the Commissioner and his authority to reject rates, the initiative would make health care insurance rate actions subject to the intervenor provisions of Proposition 103 as follows:

a. Hearings

Under the Proposition 103 framework, the Commissioner may elect to hold a hearing within the 60 day period following the rate filing, or an intervenor may request a hearing to challenge a rate action within 45 days of the rate filing.⁷⁰ Proposition 45 incorporates Insurance Code section 1861.08, which states that public hearings held under Proposition 45 shall be conducted pursuant to the guidelines and requirements of the Administrative Procedures Act (APA⁷¹). The APA prescribes fundamental due process and public policy protections for all parties involved in formal administrative hearings.⁷² These requirements – including adequate notice and the right to pre-hearing discovery of evidence – further extend the time it would take to review and finalize any plan for which there was a public hearing.⁷³

⁶⁴ Cal. Proposition 45 at § 2 (2014).

⁶⁵ *Id.*

⁶⁶ Cal. Proposition 45 at § 2 (2014); Cal. Ins. Code § 1861.05(b).

⁶⁷ Cal. Proposition 45 at § 2 (2014).

⁶⁸ *Id.*; CAL. INS. CODE § 1857.7.

⁶⁹ Cal. Proposition 45 at § 2 (2014).

⁷⁰ CAL. HEALTH BENEFIT EXCHANGE, INSURANCE RATE PUBLIC JUSTIFICATION AND ACCOUNTABILITY ACT: POTENTIAL OPERATIONAL ISSUES AND QUESTIONS 2 (June 17, 2014), *available at* <http://board.coveredca.com/meetings/2014/6-19/PDFs/Insurance%20Rate%20Public%20Justification%20and%20Accountability%20Act%20-%20Operational%20Questions%20Outline.pdf>

⁷¹ The Administrative Procedure Act is contained in California Government Code sections 11370 through 11529.

⁷² CAL. GOV. CODE § 11500, *et seq.*

⁷³ Kingsdale Report, *supra* note 31, at 14.

b. Consumer Participation (Intervenors)

Proposition 45 would also expand the intervenor process, as established in Proposition 103, to include health insurance rate changes. This means that, in addition to requesting a rate review hearing, members of the public can challenge any rates that have been proposed. If the intervention is successful, the Department of Insurance can “award reasonable advocacy and witness fees and expenses to any person who demonstrates (1) the person represents the interests of the consumers, and, (2) he or she has made a substantial contribution to the adoption of any order, regulation, or decision by the Commissioner or a court.”⁷⁴ By its language, there is an ambiguity over when a contribution can be reimbursed through an award, and what is a “substantial contribution.”

In 2006, the Department of Insurance made amendments to the regulations responsible for the implementation of Proposition 103 that permitted awards to be paid out even when there was no formal rate hearing.⁷⁵ The amendment was challenged by insurance companies, who fought all the way to the California Court of Appeals.⁷⁶ The Second District upheld the amendment, holding that the amended regulation were consistent with Proposition 103 and valid, and that consumer participation could begin starting with “the submission of a petition for a hearing or the Commissioner’s notice of a hearing, even if there is no public rate hearing.” Based on the Second District’s decision, and since the language of Proposition 45 specifically incorporates the intervenor section of Proposition 103, any participation in the rate-challenging process is eligible for an award from the Department of Insurance.⁷⁷

As for what constitutes a “substantial contribution,” the Department of Insurance requires the information contributed be not already provided, specifically, “substantially contributing to the proceedings in presenting relevant issues, evidence or arguments which are separate and distinct from those of the California Department of Insurance.”⁷⁸

c. Judicial Review

Finally, under Proposition 45, final decisions reached by the Commissioner would be subject to review by the courts of the State.⁷⁹ In such proceedings on review, the court is authorized and directed to exercise its independent judgment on the evidence and unless the weight of the evidence supports the findings, determination, rule, ruling or order of the

⁷⁴ CAL. INS. CODE § 1861.10.

⁷⁵ *Association of California Insurance Companies v. Poizner*, 180 Cal. App. 4th 1029, 1034 (2d Dist. 2009).

⁷⁶ *Id.* at 1034.

⁷⁷ Cal. Proposition 45 § 2 (2014).

⁷⁸ *How to Participate in the Intervenor Compensation Program*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/150-other-prog/01-intervenor/participate.cfm> (last visited Oct. 9, 2014) [“CDI How to Participate”].

⁷⁹ *Id.*

Commissioner, the same shall be annulled.⁸⁰ Final decisions include the decision to not hold a hearing.⁸¹

4. *Penalties and Fees*

Every regulated company will be required to pay fees, according to a schedule established by the Commissioner, to offset the administrative and operational costs arising out of these rate regulation provisions.⁸² If, however, the Commissioner finds a company's rate to be excessive, that company will also be required to issue refunds to the consumer, with interest.⁸³ And, if a company fails to comply with these provisions, it is liable to the State for up to \$50,000; \$250,000 if the failure is willful.⁸⁴

B. Current Law, Potential Changes, and Public Policy Considerations

From a substantive point of view, there are three main categories for comparison between the law as it is currently written and the potential changes if Proposition 45 is enacted: (1) governmental review of rate changes; (2) transparency provided in the rate review process; and (3) public participation in rate regulation.

1. *Governmental Review of Rate Changes*

a. Current Law

Currently, California has what is called a "file-and-use" rate review process that was established by statute in 2010.⁸⁵ All health plans and insurance companies must file information on proposed rates for all individual and small group health insurance with either CDI or DMHC before those rates can go into effect.⁸⁶ Both CDI and DMHC review the rate information and say whether the rate increases are reasonable or not. When evaluating the reasonableness of health insurance rates, CDI and DMHC may consider a variety of factors, such as: (1) which medical benefits are covered, (2) what portion of the costs enrollees pay through copayments and deductibles, and (3) whether a company's administrative costs are reasonable.⁸⁷ If the data submitted by the health plan does not support the proposed rate change, the regulator may request additional information or request that the health plan modify the proposed rate.⁸⁸

If the regulator has found the rate filing unreasonable or unjustified, and the health plan has not agreed to a rate reduction, the regulator will publicly declare the rate unreasonable or

⁸⁰ CAL. INS. CODE § 1858.6.

⁸¹ CDI How to Participate, *supra* note 78.

⁸² Cal. Proposition 45 at § 2 (2014).

⁸³ *Id.*

⁸⁴ *Id.*; CAL. INS. CODE § 1861.14; CAL. INS. CODE § 1859.1.

⁸⁵ Joint Hearing Analysis, *supra* note 60.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

unjustified, as appropriate.⁸⁹ If the health plan agrees to a reduction in the proposed rate, the health plan must notify policyholders of the new rate. If the new rate has already taken effect, the regulator may require the health plan to send a refund to affected policyholders or issue a credit toward future premiums.⁹⁰ While the regulators can request that the insurer amend the rate change or make an official determination that the proposed rate change is unreasonable, they do not have the authority to reject or approve the rates before they take effect.⁹¹

b. Potential Changes

Under Proposition 45, both CDI and DMHC would continue to regulate their separate types of health insurance. CDI and DMHC would continue to have the authority to *review* certain health insurance rates. However, the Commissioner would have the new, and sole, authority to *approve* the rates.

c. Public Policy Considerations

The Proponents of this measure allege health insurance premiums for California families rose 185% between 2002 and 2013, more than five times the rate of inflation, and Proposition 45 could “put the brakes on rates” and provide potential cost savings of up to \$1 billion per year to Californians.⁹² However, the arguments in opposition to this element of the initiative are threefold: (1) this measure puts too much power in the hands of an elected Commissioner who can take campaign donations from special interests; (2) the definition of rates is overly broad and allows the Commissioner regulatory power over what benefits could be covered by a health care plan;⁹³ and (3) there is uncertainty as to how the law can and will be retroactively applied.⁹⁴

2. *Transparency in Rate Review*

a. Current Law

Due in large part to California’s implementation of the Affordable Care Act, several of the provisions in Proposition 45 regarding the contents, disclosure, and transparency of the Rate Change Application are already established in California law. Health plans and insurers are required by law to provide significant financial disclosures and actuarial justifications for any proposed rate changes, including 25 specified types of rate information, at least 60 days prior to

⁸⁹ *Review of Premium Rates*, CAL. DEPARTMENT OF MANAGED HEALTH CARE, <http://www.dmhc.ca.gov/HealthCareLawsRights/ReviewofPremiumRates.aspx#.VDNJGvldWS> (last visited Oct. 9, 2014); *Rate Filings and Review*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/110-health/70-rates/index.cfm> (last visited Oct. 9, 2014) [“DMHC and CDI Rate Review”].

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Issues: Rate Regulation*, YES ON 45, <http://www.yeson45.org/rate-regulation> (last visited Oct. 9, 2014); Press Release, Yes on 45, Prop 45 Could Save Californians As Much As \$1 Billion Annually On Health Insurance (Aug. 6, 2014), available at <http://www.yeson45.org/newsrelease/prop-45-could-save-californians-much-1-billion-annually-health-insurance>.

⁹³ Kingsdale Report, *supra* note 31, at 11.

⁹⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 24–25.

implementing any rate change with the relevant State regulator. They are also required to notify their policyholders.⁹⁵ The disclosures must include a detailed certification by an independent actuary or actuarial firm that the rate increase is reasonable and that the justification for the increase is based on accurate and sound actuarial assumptions and methodologies.⁹⁶

CDI and DMHC, in turn, are required to make all rate filing information, other than contracted rates between a health plan/insurer and a provider, readily available to the public on their websites, in plain language and in a manner and format specified by the regulators.⁹⁷ Consumers and interested parties may review the information and submit comments to the regulator regarding the proposed rate changes, and the comments are then posted to the regulator's website for public viewing.⁹⁸

b. Potential Changes

The Proposition, like current law, also incorporates 60 day public notice but instead of notice through the departmental websites, notification is required by way of distribution to the news media and to any member of the public who requests placement on a mailing list for that purpose.⁹⁹ Further, the proposition reiterates the agencies' obligation to make this kind of information available to the public without necessarily invoking the California Public Records Act.¹⁰⁰ Finally, the proposition provides that all applications for health insurance rates shall be accompanied by a statement, sworn under penalty of perjury by the chief executive of the company, declaring that the contents are accurate and comply in all respects with California law.¹⁰¹ This sworn statement is substantially similar to the certification that is already required, as noted above.

All things considered, there is little to no substantive change toward the aim of public disclosure and justification that would come from the proposition.

3. *Public Participation in Rate Regulation*

a. Current Law

Under the statutes and regulations governing CDI and DMHC, the public is entitled to general "notice and comment" provisions regarding rate changes.¹⁰² Notice and comment generally consists of the relevant State regulator posting the health plan's proposed rate change to its website and allowing for the public to submit comments regarding the proposed rate changes. The regulator then posts the comments to its website for public viewing.¹⁰³

⁹⁵ DMHC and CDI Rate Review, *supra* note 89.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ CAL. INS. CODE § 1861.06.

¹⁰⁰ CAL. INS. CODE § 1861.07.

¹⁰¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 24-25.

¹⁰² DMHC and CDI Rate Review, *supra* note 89.

¹⁰³ *Id.*

b. Potential Changes

In addition to the standard notice and comment provisions, Proposition 45 would provide consumers and the public in general with the right to intervene in the rate review process as described in detail in Part IV., A., 3., above.

c. Public Policy Considerations

Proponents advance the intervenor process as the public's right to participate and as a check on the power of the Commissioner.¹⁰⁴ Proponents argue that by allowing the public the ability to make challenges to rates, health insurance companies will be deterred from even proposing rates that would be deemed excessive.¹⁰⁵

Opponents claim the intervenor process is nothing more than the proponent's inserting an opportunity to bring frivolous lawsuits in their own self-interest, citing the \$14 million Consumer Watchdog has been paid from their Proposition 103 based intervenor suits.¹⁰⁶

4. *Covered California*

a. Current Law

As discussed above, Covered California certifies new QHPs based on a broad set of criteria, including network adequacy, rates, coverage of essential health benefits, compliance with cost-sharing formulae, and standards for reporting, transparency, and quality improvement. Under the current framework, after Covered California completes its review, the QHPs file their benefits, cost-sharing, premiums, and provider networks with DMHC (or CDI for the QHPs that it licenses). DMHC (or CDI) then has 60 days to review these filings, and find the rates reasonable or not.¹⁰⁷

b. Potential Changes

Under the Proposition 45 framework, Covered California would continue to negotiate with the QHPs and submit the finalized rate information to their relevant State regulator. Proposition 45 would add the additional review from CDI, and the option to reject the agreed upon rates and benefit packages.¹⁰⁸ Should the Commissioner reject a QHPs proposal, Covered California would have to either eliminate the plan from the Exchange or attempt to renegotiate within strict time frames before open enrollment.¹⁰⁹

¹⁰⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 24, 25.

¹⁰⁵ *Public Participation*, YES ON 45, <http://www.yeson45.org/public-participation-transparency> (last visited Oct. 9, 2014).

¹⁰⁶, *Get the Facts*, CALIFORNIANS AGAINST HIGHER HEALTH CARE COSTS, <http://stophighercosts.org/get-the-facts/#specialinterests> (last visited Oct. 9, 2014).

¹⁰⁷ Kingsdale Report, *supra* note 31, at 15–16.

¹⁰⁸ *Id.* at 14–15.

¹⁰⁹ *Id.*

c. Public Policy Considerations

According to a report commissioned by the Opponents, Proposition 45 would bring regulatory and judicial delays in approving premiums as well as conflicting strategies between CDI's price setting and Covered California's managed competition. It would reduce competition among health plans and might even drive some out of the market.¹¹⁰ In response to these concerns, Harvey Rosenfield scoffed "the more likely threat to the Exchange is an asteroid hitting their building rather than these conspiracy theories."¹¹¹ Insurance Commissioner Dave Jones said the concerns are exaggerated and that big insurers hold too much market power for Covered California alone to protect consumers from excessive premiums.¹¹²

V. CONCLUSION

Due to the complex nature of health care and the inherent differences between health insurance and home and auto insurance, it is impossible to directly translate the benefits or shortcomings felt by consumers from Proposition 103 to Proposition 45.

What is certain is that the passing of Proposition 45 would give the Commissioner the power of "prior approval" over any changes to the charges assessed for health insurance in the State of California, including benefit options, retroactive to November 6, 2012. The "prior approval" system would require health insurance companies to submit documents and information substantiating their proposed rate changes, in addition to the reporting requirements and transparency efforts currently established under California law and the Affordable Care Act. For purposes of this review and approval, the Commissioner would have authority over both the California Department of Insurance and the Department of Managed Health Care creating another layer of review over what was an intentionally bifurcated system.

Additionally, Proposition 45 would expand the intervenor process, as set forth in Proposition 103, to allow members of the public to challenge proposed health insurance rate changes and collect a fee for their efforts. While rate regulation may have been anticipated by the ACA and 35 other states have implemented some variation thereof, none of the states have an intervenor process in place and the potential effects that Proposition 45 would have on the ACA and Covered California are uncertain.

Finally, there are still uncertainties as to how, if passed, Proposition 45 would be implemented. However, once it is passed, the only way to make any changes would be through the voter initiative process or a legislative amendment that is "in furtherance of the purposes of Proposition 45" and passed by a two-thirds vote of the Legislature.

¹¹⁰ Kingsdale Report, *supra* note 31, at 28.

¹¹¹ Chad Terhune, *Regulating state's health premiums could hurt exchange, report says*, L.A. TIMES, May 8, 2014, <http://www.latimes.com/business/la-fi-insurance-rate-fight-20140508-story.html>.

¹¹² *Id.*

Proposition 46:
Drug and Alcohol Testing of Doctors.
Medical Negligence Lawsuits.

Initiative Statute

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McGeorge School of Law

By

Easton Broome

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Philosophy, University of California, Berkeley, 2006

&

Fay Saechao

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Political Science, University of California, Davis, 2011

I. EXECUTIVE SUMMARY

Proposition 46, the Troy and Alana Pack Patient Safety Act of 2014 (“Patient Safety Act”), is an attempt to protect the safety of patients, including regulating doctor¹ conduct and adjusting damage awards for persons in medical malpractice lawsuits.² Specifically, Proposition 46 has three key provisions: (1) to increase the \$250,000 cap on pain and suffering damages in medical negligence lawsuits to adjust for inflation, (2) to require alcohol and drug testing and reporting of doctors, and (3) to require doctors to check the State prescription drug history database before prescribing certain controlled drugs.³

A “yes” vote would increase the cap on noneconomic damages in medical malpractice lawsuits from \$250,000 to \$1.1 million.⁴ It would also require hospitals to do random alcohol and drug testing on physicians.⁵ Additionally, it would require doctors to check the electronic database, known as the Controlled Substance Utilization Review and Evaluation System (“CURES”) before prescribing certain drugs.⁶

A “no” vote would add no new requirements for health care providers, and the noneconomic damages cap in medical negligence lawsuits would remain at \$250,000, where it has been since 1975.⁷

II. THE LAW

A. Existing Law

1. *The Medical Injury Compensation Reform Act*

In 1975, the Legislature enacted the Medical Injury Compensation Reform Act (“MICRA”) to reduce and stabilize medical malpractice costs, and to increase access to health care for Californians.⁸ MICRA made several changes intended to limit medical malpractice liability, two of which are relevant to Proposition 46.⁹ First, MICRA limited malpractice liability by establishing a \$250,000 cap on the noneconomic damages that may be awarded to an injured person.¹⁰ Second, MICRA established a cap on fees going to the attorneys representing injured

¹ “Doctor” is used interchangeably with the term “health care provider” in a broad sense to include physicians, surgeons, and pharmacists.

² See CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2014, at 26–33, 68–70, available at <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf> [“NOVEMBER 2014 VOTER GUIDE”].

³ See *id.*

⁴ *Id.* at 29.

⁵ *Id.* at 28.

⁶ *Id.*

⁷ *Id.* at 27; see CAL. CIV. CODE § 3333.2(b) (2014).

⁸ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 27; MICRA: A Brief History, CAL. MEDICAL ASS’N (Sept. 10, 2014), <http://www.cmanet.org/issues-and-advocacy/cmas-top-issues/micra/micra-a-brief-history/> [“MICRA: A Brief History”].

⁹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 27.

¹⁰ *Id.*; see CAL. CIV. CODE § 3333.2(b).

persons in medical malpractice cases.¹¹ The fee structure was made dependent upon the amount of damages awarded.¹² The percentage declines as the amount of the award grows.¹³ Specifically, attorneys cannot receive more than 40 percent of the first \$50,000 recovered; 33.33 percent of the amount recovered between \$50,000 and \$100,000; 25 percent of the amount recovered between \$100,000 and \$600,000; or more than 15 percent of any amount recovered greater than \$600,000.¹⁴

2. *The Medical Board of California Regulates Physician Conduct*

The Medical Board of California¹⁵ (“Board”) currently licenses and regulates physicians, surgeons, and certain other health care professionals.¹⁶ The Board is also responsible for investigating complaints and disciplining physicians and certain other health professionals who violate the laws that apply to the practice of medicine.¹⁷ Violations include failure to follow an appropriate standard of care, illegally prescribing drugs, and drug abuse.¹⁸ There are currently no requirements for hospitals to test doctors for alcohol or drugs.¹⁹

3. *Health Care Providers Required to Register for, but not Check, CURES Beginning in 2016*

Currently, the State Department of Justice (“DOJ”) administers CURES.²⁰ Pharmacies are required to provide specified information to DOJ on patients and the type of prescription drugs dispensed to be included in the CURES database.²¹ The information is used to reduce drug abuse and to identify potential “doctor shoppers” – persons who obtain prescriptions from various physicians with the intent to abuse or resell the drugs for profit.²² Generally, the prescription drugs that have a higher potential for abuse, like OxyContin, Vicodin, and Adderall, are subject to the reporting.²³

To register, physicians and pharmacists must first submit an application form electronically.²⁴ Beginning April 1, 2014, an annual fee of \$6 is charged to licensed prescribers

¹¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 27.

¹² *Id.*

¹³ *Id.*; see CAL. BUS. & PROF. CODE § 6146.

¹⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 24; CAL. BUS. & PROF. CODE § 6146(a).

¹⁵ “Medical Board of California” is used interchangeable with “Medical Board” and “Board” to mean the Medical Board of California.

¹⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 28, 32.

²⁰ *Id.* at 28.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 28, 70.

²⁴ CURES / PDMP, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN., <http://oag.ca.gov/cures-pdmp> (last visited Oct. 3, 2014) [“CURES”].

and licensed pharmacists.²⁵ The registration must be followed up by a notarized application and copies of validating documentation which includes: Drug Enforcement Administration Registration, State Medical License or State Pharmacy License, and a government-issued identification.²⁶ The notarized application and validating documents may be submitted by email or standard U.S. mail to the DOJ.²⁷

The DOJ limits access and dissemination of the information in CURES “to licensed prescribers, licensed pharmacists, law enforcement personnel, and regulatory board personnel strictly for patient care or official investigatory/regulatory purposes.”²⁸ Furthermore, “DOJ pursues regulatory and/or criminal sanctions for misuse [of patient] information.”²⁹

Currently, health care provider registration for CURES is optional, and there is no requirement that physicians consult with the CURES database before prescribing drugs. Health care providers will be required to register for CURES beginning on January 1, 2016.³⁰ Even when registration is required, physicians will not be required to check the database before prescribing or dispensing drugs.³¹

B. Proposed Law

Proposition 46, the Troy and Alana Pack Patient Safety Act of 2014 (“Patient Safety Act”), is intended to improve patient safety by (i) adjusting the cap on noneconomic recovery to reflect inflation and to ensure those who are injured by negligent doctors are made whole for their loss;³² (ii) regulating doctor conduct to prevent medical errors; and (iii) preventing abuse of prescription drugs.³³

1. Adjusting the \$250,000 Cap on Noneconomic Damages

Proposition 46 would amend Section 3333.2 of the Civil Code, which currently sets the cap on noneconomic recovery for medical malpractice at \$250,000.³⁴ Proposition 46 would adjust the cap to reflect the increases in inflation since the cap was established in 1975 – effectively raising the cap from \$250,000 to \$1.1 million starting on January 1, 2015.³⁵ The noneconomic damages award cap has remained the same since the Legislature enacted MICRA in 1975.³⁶ Under Proposition 46, any case that “has not been resolved ... as of January 1, 2015”

²⁵ SB 809 (Steinberg and DaSaulnier) at § 2 (2013-2014), available at http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0801-0850/sb_809_cfa_20130812_113851_asm_comm.html; approved and codified into CAL. BUS. & PROF. CODE § 208 (a) (2014).

²⁶ CURES, *supra* note 24.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

³¹ *Id.*

³² *Id.* at 68.

³³ *Id.*

³⁴ CAL. CIV. CODE § 3333.2.

³⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

³⁶ *Id.* at 32; MICRA: A Brief History, *supra* note 8.

would apply the new adjusted noneconomic damages award.³⁷ Furthermore, the cap would be adjusted annually thereafter to reflect any increase in inflation.³⁸

The sliding scale for attorneys' fees established under MICRA, however, would remain and attorneys in medical malpractice litigation would continue to be limited to 15 percent on recoveries over \$600,000.³⁹

2. *Regulating Doctor Conduct by Required Alcohol and Drug Testing*

Proposition 46 would add Article 14, the "Physician and Surgeon Alcohol or Drug Impairment Prevention," to Chapter 5 of Division 2 of the Business and Profession Code.⁴⁰ Article 14 details four main requirements related to the alcohol and drug testing.⁴¹

a. Random and Specific Alcohol and Drug Testing

This provision requires hospitals to test physicians for alcohol and drugs randomly and in three specific instances: (1) when a patient under the care and treatment of the physician suffers an adverse event;⁴² (2) when the physician is reported for possible alcohol or drug use while on duty; or (3) when the physician failed to follow the appropriate standard of care as determined by the hospital or the Medical Board.⁴³ Article 14 also requires hospitals to report verified positive test results, or the willful failure or refusal of a physician to submit to a test, to the Board.⁴⁴

b. Required Discipline of Impaired Physicians

Proposition 46 would require the Medical Board to discipline physicians who violate the alcohol and drug provisions.⁴⁵ The Board is currently tasked with licensing and regulating physicians, surgeons, and certain other health care professionals.⁴⁶ In addition, the Board is responsible for investigating complaints and disciplining physicians and certain other health professionals who violate the laws that apply to the practice of medicine.⁴⁷ Proposition 46 would specifically require the Board to discipline physicians found to be impaired by alcohol or drugs while on duty or during an adverse event, or if a physician refused or failed to comply with a drug and alcohol testing.⁴⁸

³⁷ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 69.

³⁸ *Id.* at 28, 69.

³⁹ *Id.*

⁴⁰ *Id.* at 69.

⁴¹ *Id.* at 69.

⁴² Adverse events include mistakes made during surgery, injuries associated with medical errors, or any event that causes the death or serious disability of a patient. *See id.* at 29.

⁴³ *Id.* at 29, 69.

⁴⁴ *Id.*

⁴⁵ *Id.* at 29.

⁴⁶ *Id.* at 28.

⁴⁷ *Id.*

⁴⁸ *Id.*

c. Required Reporting of Suspected Physician Misconduct

The measure also requires physicians to report other physicians to the Board if they suspect physician misconduct.⁴⁹ Individual physicians are currently not required to report this information.⁵⁰ The new reporting requirement could increase the number of doctors reported for misconduct. If the reporting system is effective in ensuring that doctors follow proper procedures to minimize medical errors, then patient safety may be improved because doctors are likely in the best position to recognize misconduct in their respective areas of practice.

d. Presumption of Professional Negligence

Proposition 46 would also add Section 1714.85 to the Civil Code.⁵¹ Section 1714.85 would allow a presumption of professional negligence by the doctor in medical malpractice lawsuits in the following circumstances: (1) when the doctor tested positive for drug or alcohol giving rise to the suit; (2) when the doctor does not comply with the testing requirements after the adverse event occurred and the lawsuit arises as a result; or (3) when the doctor failed to check the electronic drug database system⁵² and the lawsuit arises from the doctor's failure to comply.⁵³ If this measure is passed, when the doctor in a medical malpractice suit meets any of the above circumstances, then the law would assume that the doctor has committed a medical error unless she or he can prove otherwise.⁵⁴ This shifts the burden of proof from the plaintiff to the defendant doctor where one of the above conditions that create the presumption exists.

3. *Preventing Prescription Drug Abuse with Mandate to Check CURES*

Proposition 46 would add Section 11165.4 to the Health and Safety Code, which requires doctors to check the existing statewide drug monitoring program, known as the Controlled Substance Utilization Review and Evaluation System ("CURES").⁵⁵

Health care providers are required to register for CURES beginning on January 1, 2016, but the electronic system does not have the capacity to handle the higher level of use yet.⁵⁶ The system is currently in the process of updating, which is expected to be complete in summer of 2015.⁵⁷ The system recently received funding for the upgrades.⁵⁸

⁴⁹ *Id.* at 29, 69.

⁵⁰ *Id.* at 29.

⁵¹ *Id.* at 70.

⁵² Known as Controlled Substance Utilization Review and Evaluation System ("CURES"). *See id.* at 28.

⁵³ *Id.*

⁵⁴ *See id.* at 70.

⁵⁵ *Id.* at 28, 70.

⁵⁶ *Id.* at 28 (upgrades to the system expected to be complete in the summer of 2015).

⁵⁷ *Id.*

⁵⁸ *See* CAL. BUS. & PROF. CODE § 208 (a) (where an annual fee of \$6 is charged on doctors to offset the cost associated with the maintenance of CURES).

Although doctors are required to register for CURES beginning January 1, 2016, they are not yet required to check the database prior to prescribing or dispensing drugs.⁵⁹ If Proposition 46 becomes law, doctors would be required not only to register for CURES, but also required to check the electronic database prior to prescribing or dispensing certain drugs for the first time to the patient.⁶⁰ This requirement could help to reduce prescription drug abuse.⁶¹ However, since the system cannot handle the higher level of use yet, so it may be an impossibility for this provision of the law to take effect upon passage.

III. HISTORY

A. History of the MICRA Cap on Noneconomic Damages in Medical Malpractice Cases

In the mid-1970s, California doctors were embroiled in a malpractice insurance crisis.⁶² Driven by frivolous lawsuits and excessive jury awards, medical liability insurers levied massive insurance premium increases and cancelled insurance policies for many physicians across the State.⁶³ As their premiums more than tripled by 1975, anesthesiologists and surgeons began a walkout, refusing to handle any patients except those in imminent danger of death.⁶⁴ A grassroots campaign was then organized by the California Medical Association in May 1975, and more than 800 physicians, nurses, lab technicians and hospital personnel joined in a Capitol rally calling on then (and now) Governor Jerry Brown to convene a special session of the Legislature to deal with the crisis.⁶⁵ Three days later, Governor Brown issued the special session that resulted in a collection of statutes that is now known as the Malpractice Insurance Compensation Reform Act (MICRA).⁶⁶

As originally introduced at the special session, the bill limited compensation for certain noneconomic losses, including pain and suffering, to \$800 a month and provided that a claimant would not be entitled to noneconomic losses if his earnings exceeded \$1,500 a month.⁶⁷ These monthly restrictions were deleted at the request of the Assembly Judiciary Committee, and the bill (Assembly Bill 1xx) was passed on June 20, 1975, without any limit on the amount of damages that an injured party could recover.⁶⁸ A week later, the Senate Insurance and Financial

⁵⁹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

⁶⁰ *Id.* at 70.

⁶¹ *See* CURES, *supra* note 24 (DOJ expressly state that CURES is “an effort to identify and deter drug abuse and diversion through accurate and rapid tracking of Schedule II through IV controlled substances”).

⁶² NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 27; MICRA: A Brief History, *supra* note 8.

⁶³ MICRA: A Brief History, *supra* note 8.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ S. COMM. ON INSURANCE AND FINANCIAL INSTITUTIONS, ANALYSIS OF ASSEMB. B. NO. 1 AS AMENDED JUNE 27, 1975) (on file with Cal. Assemb, B. Author A.B. 1xx 1975 files).

⁶⁸ Amanda Edwards, *Medical Malpractice Noneconomic Damages Caps*, 43 HARV. J. ON LEGIS. 213, 221–22 (2006).

Institutions Committee adopted significant amendments to the bill, which included the provision limiting noneconomic damages to \$250,000.⁶⁹

As the bill progressed through the State Senate, Senate Judiciary Committee consultant and later legislative counsel, Bion Gregory, suggested indexing the noneconomic damages cap.⁷⁰ However, this suggestion was disregarded because the plaintiff lawyers' lobby would not support the idea.⁷¹ Ironically, some of the representatives of the trial bar thought indexing the cap would improve the bill's overall chance for passage and increase the likelihood of the Governor signing it.⁷² As a result, they withheld their support of the indexed cap to try to kill the bill altogether.⁷³ Even without the provision indexing the cap, the Governor still signed the bill.

Following passage of MICRA, the constitutionality of the noneconomic damages cap was challenged on a number of occasions.⁷⁴ Then, in 1985, the California Supreme Court upheld the cap's constitutionality, stating:

[The limitation on recoverable noneconomic damages] is, of course, one of the provisions which made changes in existing tort rules in an attempt to reduce the cost of medical malpractice litigation... It appears obvious that this section – by placing a ceiling of \$250,000 on the recovery of noneconomic damages – is rationally related to the objective of reducing the costs of malpractice defendants and their insurers.⁷⁵

In February 2014, State Senate Democratic leader Darrell Steinberg introduced a bill concerning the medical malpractice damages cap that would have avoided the current ballot box battle between doctors and lawyers over Proposition 46.⁷⁶ The compromise would have raised the damages limit to \$500,000 under MICRA, well below the rate of inflation.⁷⁷ While representatives for both doctors and lawyers seemed close to agreement, no agreement was reached.⁷⁸ Consumer Watchdog (a nonprofit organization with a focus on protecting patients, health care, political reform, privacy, and energy⁷⁹) then drafted Proposition 46.⁸⁰

⁶⁹ *Id.*

⁷⁰ *Id.* at 224.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Lawrence Fein v. Permanente Medical Group, S.F.*, 38 Cal. 3d 137, 139 (1985).

⁷⁶ Walton Law Firm, *Medical Malpractice Initiative Will Appear on November Ballot*, SAN DIEGO INJURY LAW BLOG (Apr. 3, 2014), <http://www.legalpad.com/2014/04/medical-malpractice-initiative-will-appear-november-ballot.html>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Who We Are*, CONSUMER WATCHDOG, <http://www.consumerwatchdog.org/about> (last visited Oct. 10, 2014).

⁸⁰ *Id.*

B. History of Random Alcohol/Drug Testing of Physicians

If Proposition 46 passes, California would become the first State to require doctors to submit random drug and alcohol tests.⁸¹ However, Massachusetts General Hospital in Boston and the Cleveland Clinic Foundation in Ohio have implemented random urine testing in their anesthesia residency teaching departments.⁸² The problem with drug testing doctors is that doctors are familiar with the signs of addiction and are sometimes able to mask their drug use from coworkers.⁸³ This makes it difficult to detect when they need help, and those determined to hide their habits have been known to find creative ways of beating drug tests, including submitting fake urine samples.⁸⁴ Despite the difficulties, the administrators of the programs in Boston and Cleveland believe they have been successful, and now hope more comprehensive studies will be done to determine whether such programs help stave off drug use long-term.⁸⁵

C. History of the CURES Database

To combat prescription drug abuse, the California Triplicate Prescription Program (TPP) was created in 1939.⁸⁶ It was replaced by the CURES database in 1997, and in 2009 the Prescription Drug Management Program (PDMP) system was implemented as a searchable database component of CURES.⁸⁷ In 2012, the program responded to more than 800,000 requests.⁸⁸

CURES is maintained by the DOJ.⁸⁹ CURES allows preregistered users including licensed healthcare prescribers eligible to prescribe controlled substances, pharmacists authorized to dispense controlled substances, law enforcement, and regulatory boards to access timely patient controlled substance history information.⁹⁰ As of August 2013, only 8.23 percent of prescribers and pharmacists in California were registered with the CURES database.⁹¹ According to the Legislative Analyst's Office (LAO) report on Proposition 46, that number has since increased to 12 percent.⁹²

⁸¹ Adam Nagourney, *California Asks: Should Doctors Face Drug Tests?*, N.Y. TIMES, Aug. 1, 2014, http://www.nytimes.com/2014/08/02/us/california-asks-should-doctors-face-drug-tests.html?_r=0.

⁸² Lauren Cox, *Urine Drug Tests for Doctors?*, ABC NEWS (Nov. 12, 2008), <http://abcnews.go.com/Health/PainManagement/story?id=6232694>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF S.B. 809, (Aug. 21, 2013), available at http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0801-0850/sb_809_cfa_20130820_094453_asm_comm.html.

⁸⁷ *Id.*

⁸⁸ *Id.* at 2–3.

⁸⁹ CURES PRESCRIPTION DRUG MONITORING PROGRAM, CAL. DEP'T JUST. (Feb. 2013), available at http://www.deadiversion.usdoj.gov/mtgs/pharm_awareness/conf_2013/august_2013/san_diego/small.pdf. [“CURES Prescription Drug Monitoring Program”].

⁹⁰ CURES, *supra* note 24.

⁹¹ CURES Prescription Drug Monitoring Program, *supra* note 89, at 15-16.

⁹² NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

Senate Bill No. 809, which became effective January 1, 2014, requires prescribers of medication and pharmacists to register with CURES.⁹³ Beginning January 1, 2016, providers will be required to register with CURES (even if Proposition 46 does not pass), but they will not be required to check the database prior to prescribing or dispensing drugs.⁹⁴ Currently, CURES does not have sufficient capacity to handle the higher level of use that is expected to occur when providers are required to register beginning in 2016.⁹⁵ The State is currently in the process of upgrading CURES, and these upgrades are scheduled to be complete in the summer of 2015.⁹⁶ Currently, CURES has 30,000 registered users.⁹⁷ If all prescribers of medication and physicians register with CURES, that total will increase to 200,000 users.⁹⁸ Currently, it takes about thirty days after a prescriber/pharmacist files their paperwork with the DOJ before they become registered with CURES.⁹⁹

IV. LIKELY FISCAL EFFECTS

Proposition 46 would likely have a wide variety of fiscal effects on State and local governments, many of which are subject to substantial uncertainty.¹⁰⁰

A. Fiscal Effects of Raising the Cap on Noneconomic Damages in Medical Malpractice Cases

Raising the cap on noneconomic damages would likely increase overall health care spending in California (both governmental and nongovernmental) by: (1) increasing direct medical malpractice costs, and (2) changing the amount and types of health care services provided.¹⁰¹

1. Direct Medical Malpractice Costs

Theoretically, raising the cap may encourage health care providers to practice medicine in a way that decreases malpractice. However, the prospect of a more substantial recovery could increase the number of claims and, of those that are successful, the damages awarded could be significantly higher.¹⁰² On balance, it is anticipated by the LAO that the increase in medical malpractice costs would result in higher total health care spending.¹⁰³

⁹³ CAL. HEALTH & SAFETY CODE § 11165.1.

⁹⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Dave Roberts, *Hearings Dissect Prop 46 on Medical Malpractice*, CAL WATCHDOG.COM (Oct. 1, 2014), <http://calwatchdog.com/2014/10/01/hearings-dissect-prop-46-on-medical-malpractice/>.

⁹⁸ *Id.*

⁹⁹ *Joint Legislative Hearing on Proposition 46, California State Legislature*, (Sept. 29, 2014) (statement of Arwen Flint, Assistant Chief at Attorney General's Office), *video available at* http://calchannel.granicus.com/MediaPlayer.php?view_id=7&clip_id=2456.

¹⁰⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 29.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 30.

California's counties would be greatly affected by the change in the noneconomic damages cap as the counties run hospitals and clinics, offering health care services to the underserved and hardest to reach populations.¹⁰⁴ Counties would have to pay higher medical malpractice premiums if Proposition 46 were to pass.¹⁰⁵ Counties that are self-insured would have to wholly cover the costs of higher payouts in medical lawsuits – meaning redirecting dollars out of the delivery, care, or other local services.¹⁰⁶

State and local governments pay for tens of billions of dollars of health care services annually.¹⁰⁷ Assuming additional costs for health care providers – such as higher direct medical malpractice costs – are generally passed along to purchasers of health care services (such as governments), and assuming State and local governments will have net costs associated with changes in the amount and types of health care services, there would likely be a very small percentage increase in health care costs in the economy overall from raising the cap.¹⁰⁸ However, a 0.5 percent increase in State and local government health care costs in California as a result of raising the cap would increase government costs by roughly a couple hundred million dollars annually.¹⁰⁹ Given the range of potential effects on health care spending, the LAO estimates that State and local government health care costs associated with raising the cap would likely range in the tens of millions of dollars to several hundred million dollars annually.¹¹⁰

Raising the cap would also affect the amount and types of health care services provided in California because health care providers would likely change how they practice medicine in an effort to avoid medical malpractice claims.¹¹¹ A physician may order a test that he or she would not otherwise have ordered, and this could either reduce future health care costs by preventing future illness or increase the total costs of health care services, with little or no future offset savings.¹¹² The LAO estimates that this would result in a net increase in total health care spending by 0.1 percent to 1 percent.¹¹³

B. Fiscal Effects of Random Alcohol and Drug Testing of Physicians

If Proposition 46 is passed, it could have the effect of savings from fewer medical errors, because testing would deter some physicians from using alcohol or drugs while on duty.¹¹⁴ This would decrease overall health care spending.¹¹⁵ However, these costs would be offset to a degree

¹⁰⁴ Matt Cate, *Opinion: California Cannot Afford Proposition 46*, PUBLIC CEO (Sept. 16, 2014), <http://www.publicceo.com/2014/09/opinion-california-cannot-afford-proposition-46/>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 30.

¹¹² *Questions and Answers About the MICRA Ballot Measure*, VOTE NO ON 46, <http://www.noon46.com/take-action/q-a/> (last visited Oct. 1, 2014).

¹¹³ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 30.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

by the costs of performing the tests.¹¹⁶ Some of these costs would be passed along to State and local governments in the form of higher prices for health care services provided by physicians.¹¹⁷

Physician alcohol and drug testing would also create State administrative costs, including the costs for the Board to enforce the measure.¹¹⁸ These costs would likely be less than \$1 million annually, to be paid for by a fee assessed on doctors.¹¹⁹

C. Fiscal Effects of Requiring Doctors and Pharmacists to Use CURES

If Proposition 46 has the effect on the CURES database that it intends to have, doctors will be using the system to check a patient's prescription history prior to prescribing certain medicines. This could result in lower prescription drug costs because a doctor would be more likely to identify potential doctor shoppers and, in turn, reduce the number of prescription drugs dispensed.¹²⁰ This would result in lower governmental costs associated with prescription drug abuse, such as law enforcement, social services, and other health care costs.¹²¹ However, these savings could be lessened if drug abusers find other ways to obtain prescription drugs.¹²²

Another likely fiscal effect associated with the proposed usage of the CURES database is that additional staff may need to be hired at hospitals if doctors are required to spend time using CURES.¹²³ Some of these cost increases would eventually be passed on to government purchasers of health care services in the form of higher prices.¹²⁴

D. Overall Fiscal Effect

The requirements to check CURES and test physicians for alcohol and drugs would likely result in annual savings to State and local governments.¹²⁵ Raising the MICRA cap would likely result in increased State and local government health care costs, ranging from the tens of millions of dollars to several hundred million dollars annually.¹²⁶ The amount of annual savings is highly uncertain, but potentially significant.¹²⁷ These savings would offset to some extent the increased governmental costs from raising the cap on noneconomic damages.¹²⁸

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ CalPERS, Pension & Health Benefits Committee, *Agenda Item 6 – Update on Proposition 46 – Drug and Alcohol Testing of Doctors and Medical Negligence Lawsuits*, at 7, (Sept. 16, 2014), available at <http://www.calpers.ca.gov/eip-docs/about/committee-meetings/agendas/pension/201409/item-6.pdf>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *The Situation – Costly for State & Local Governments*, VOTE NO ON 46, <http://www.noon46.com/costs/> (last visited Oct. 1, 2014).

¹²⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 31.

¹²⁶ LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 46, DRUG AND ALCOHOL TESTING OF DOCTORS. MEDICAL NEGLIGENCE LAWSUITS. INITIATIVE STATUTE (Jul. 17, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-46-110414.pdf>.

¹²⁷ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 31.

¹²⁸ *Id.*

V. CONSTITUTIONAL ANALYSIS AND DRAFTING ISSUES

A. Single-Subject Rule

The California Constitution states that “an initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”¹²⁹ The single-subject rule seeks to prevent “logrolling,” whereby proponents “combin[e] in one measure two or more unrelated provisions” to get the weaker issue passed into law.¹³⁰ More importantly, the principal objective of the constitutional provision is to avoid confusion on voters.¹³¹ An initiative complies with the single-subject rule if, “despite its varied collateral effects,” all of its parts are “reasonably germane” to a common theme or purpose.¹³² The provisions are not required to “effectively interlock in a functional relationship.”¹³³ The court construes the reasonably germane test in “an accommodating and lenient manner so as not to unduly restrict the Legislature’s or the people’s right to package provisions in a single bill or initiative.”¹³⁴

On its face, Proposition 46 appears to have three distinct objectives: (1) to increase the noneconomic medical malpractice award; (2) to require alcohol and drug testing of doctors; and (3) to require physicians, surgeons, and pharmacists to check CURES prior to proscribing certain prescription drugs to patients.¹³⁵ A constitutional challenge may be brought under the single-subject rule arguing that each of the objectives in should be voted on separately. However, due to the standard for finding a single-subject violation, it is unlikely the challenge would succeed and the court would likely find that the provisions are “reasonably germane” to a common theme or purpose – patient safety.¹³⁶

B. Severability Clause

Proposition 46 contains a severability clause that allows invalid provisions to be removed from an otherwise enforceable law.¹³⁷ Specifically, Section 10 of Proposition 46 states: “If any of the provisions of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.”¹³⁸ A severability clause “establishes a presumption in favor of severance [although not conclusive.]”¹³⁹ Proposition 46 does contain a severability clause so the court will likely favor severance if part of the proposed law is found to be invalid or unconstitutional.¹⁴⁰

¹²⁹ CAL. CONST. art. II, § 8(d).

¹³⁰ *Independent Energy Producers v. MacPherson* (“*MacPherson*”), 38 Cal. 4th 735 (2006).

¹³¹ *See Senate v. Jones*, 21 Cal. 4th 1142 (1999).

¹³² *Senate v. Jones*, 21 Cal. 4th at 1157 (internal quotation marks and citation omitted).

¹³³ *Id.*

¹³⁴ *MacPherson*, 38 Cal. 4th at 764.

¹³⁵ *See generally* NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 26–31, 68–70.

¹³⁶ *See Senate v. Jones*, 21 Cal. 4th 1142; *see also MacPherson*, 38 Cal. 4th 735.

¹³⁷ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 70.

¹³⁸ *Id.*

¹³⁹ *See California Redevelopment Assn. v. Matosantos* (“*Matosantos*”), 53 Cal. 4th 231, 270 (2011) (where the California Supreme Court established the three-part test for a severability challenge).

¹⁴⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 70; *id.*

When determining whether to maintain other sections where one has been deemed invalid, the court will consider three factors.¹⁴¹ First, the court will identify the grammatical structure of the clause to determine whether the invalid portion “can be removed as a whole without affecting the wording or coherence of what remains.”¹⁴² Second, the court will consider whether the valid sections can function independently and is “complete in itself.”¹⁴³ Third, the court will decide whether voters would have still passed the legislation knowing that parts of the statute would be invalidated.¹⁴⁴

Proposition 46 has three distinct provisions relating to patient safety and recovery: (1) the alcohol and drug testing of doctors; (2) the checking of CURES; and (3) adjusting the noneconomic medical malpractice cap to reflect inflation.¹⁴⁵ Proposition 46 meets the grammatically separable factor because each of the three categories can be separated grammatically and still retain coherence. Proposition 46 is likely to meet the volitional factor, because voters who support the measure are likely in support of the proposed law’s focus on patient safety. Therefore, voters would likely support the measure “knowing that parts of the statute would be invalidated.”¹⁴⁶

However, the functional factor is not as clear. At first glance, Proposition 46 likely satisfies the functional separation factor because each provision appears to be complete on its own and can function independently without relying on the other sections. However, on a closer look, there is one provision that cannot stand on its own. Section 6 of Proposition 46, the presumption of professional negligence, relies on Section 4 of Proposition 46, the alcohol and drug testing, to be valid.¹⁴⁷ In other words, Section 6 cannot function independently if Section 4 is declared invalid or unconstitutional because Section 6 refers to the alcohol and drug testing as a prerequisite for the professional negligence presumption.¹⁴⁸

Nonetheless, if alcohol and drug testing of doctors is declared unconstitutional and invalid, then the severability clause will likely favor severance.¹⁴⁹

C. Alcohol and Drug Testing of Doctors May Be a Constitutional Violation

Opponents may challenge the drug and alcohol testing of doctors as a nonconsensual search and seizure in violation of the Fourth Amendment under the United States Constitution¹⁵⁰

¹⁴¹ *Matosantos*, 53 Cal. 4th at 271.

¹⁴² *Id.* (citation omitted).

¹⁴³ *Id.* (citation omitted).

¹⁴⁴ *Id.* (citation omitted).

¹⁴⁵ See NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 26–31, 68–70.

¹⁴⁶ See Christopher Cadelago, *Support Plummetts for California Health Initiatives*, SACRAMENTO BEE, Sept. 11, 2014, <http://www.sacbee.com/2014/09/11/6697111/support-plummetts-for-california.html> [“*Support plummetts*”].

¹⁴⁷ See NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 68–70.

¹⁴⁸ *Id.*

¹⁴⁹ See *Matosantos*, 53 Cal. 4th 316 (the court gave great weight to the severability clause and allowed for severability after applying the three severability factors).

¹⁵⁰ U.S. CONST. amend. IV.

and a privacy violation of the California Constitution.¹⁵¹ If the challenge is successful, then the provisions related to alcohol and drug testing of doctors would be declared unconstitutional and be removed from the measure.¹⁵² However, such a challenge may not be successful since patient safety in the medical and health care industry will likely outweigh privacy rights of doctors.¹⁵³

In *Skinner v. Ry. Labor Executives' Ass'n*, the Supreme Court held that the Federal Railroad Safety Act of 1970, which allowed the Federal Railroad Administration “to regulate and mandate blood and urine tests of employees who are involved in certain train accidents[,]” did not violate the Fourth Amendment.¹⁵⁴ The Court in *Skinner* applied a balancing test and found that the Government had compelling interests that outweigh privacy concerns.¹⁵⁵ Privacy interests of employees in a regulated industry are considered minimal where the industry is “regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.”¹⁵⁶

The rationale for the alcohol and drug testing of doctors in Proposition 46 is similar to the rationale for alcohol and drug testing of employees in the rail industry.¹⁵⁷ The medical and health care industry is regulated by both federal and State statutes and regulations to ensure patient safety.¹⁵⁸ For instance, section 8355 of the California Government Code requires persons or organizations that are awarded a contract or grant from the State to provide a drug-free workplace.¹⁵⁹ Therefore, the provisions relating to alcohol and drug testing of doctors will likely be upheld as constitutional under both the U.S. Constitution and California Constitution.

VI. PUBLIC POLICY CONSIDERATIONS

A. Supporting Arguments

As of September 8, 2014, Proposition 46 supporters had raised more than \$7.8 million.¹⁶⁰ Among those supporters are the Consumer Attorneys Issue PAC, contributing \$1,108,000, Consumer Watchdog, contributing \$267,148, Casey, Gerry, Schenk, Francavilla, Blatt & Penfield, LLP, contributing \$100,000, Bruce G. Fagel, A Law Corporation, contributing

¹⁵¹ CAL. CONST. art. I, § 1 (“All people [...] have inalienable rights. Among these are enjoying and defending life and liberty, [...] and privacy.”).

¹⁵² NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 70; *Matosantos*, 53 Cal. 4th 231.

¹⁵³ *See generally Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (Supreme Court held that the drug testing regulation did not violate the Fourth Amendment).

¹⁵⁴ 489 U.S. at 606 (1989).

¹⁵⁵ *Id.* at 632.

¹⁵⁶ *Id.* at 626.

¹⁵⁷ *See Skinner*, 489 U.S. 602 (1989).

¹⁵⁸ *See generally Laws and Regulations*, MED. BOARD CAL., http://www.mbc.ca.gov/About_Us/Laws/ (last visited Oct. 5, 2014) (visit the website for a list of California Laws and Regulations on health care providers).

¹⁵⁹ CAL. GOV. CODE § 8355 (2014).

¹⁶⁰ *California Proposition 46, Medical Malpractice Lawsuits Cap and Drug Testing of Doctors (2014)*, § 3.3 Donors, BALLOTPEDIA, [http://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_\(2014\)](http://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_(2014)) (last visited Sept. 8, 2014).

\$85,000, Bisnar/Chase Personal Injury Attorneys, LLP, contributing \$75,000, and CA Nurses Association Initiative PAC, contributing \$50,000.¹⁶¹

1. *Medical Malpractice Insurance Will Not Skyrocket if the Cap is Raised, and Doctors Will Not Have to Flee California or Reduce Access to Care*

Over the last ten years, California medical malpractice insurers have earned a 16.7 percent return on net worth – more than 250 percent of the industry average (which was a 6.5 percent return).¹⁶² Medical malpractice insurers in California have consistently had such high profits that they would continue to make above-average profits even if the MICRA cap were indexed to inflation.¹⁶³ Moreover, in each of the last eight years California malpractice insurers had loss ratios of 38 percent or less, meaning that they always had at least 62 cents of each premium dollar, plus all investment income, left over for expenses and profit.¹⁶⁴

Doctors will not leave California to practice in another State with lower malpractice insurance rates because California already has an effective and successful system to regulate medical malpractice insurance premiums – a system that will not change because of an adjustment of the malpractice cap.¹⁶⁵ Proposition 103 gave the California State Insurance Commissioner the power to regulate many types of insurance rates, including medical malpractice insurance.¹⁶⁶ In 2012, the Insurance Commissioner found that California’s medical malpractice insurers were charging doctors too much in premiums and ordered several of the largest insurers to return \$52 million in premiums they overcharged California physicians.¹⁶⁷

2. *Raising the Medical Malpractice Cap Will Not Lead to the Closure of Community Health Centers*

Proponents assert that indexing the malpractice cap for inflation will not increase the malpractice insurance costs of community health centers because health centers and free clinics are protected under the Federal Tort Claims Act (FTCA).¹⁶⁸ Under the FTCA, individuals injured by the negligent acts of federal employees may seek and receive compensation from the federal government.¹⁶⁹ Therefore, health centers and free clinics are no longer liable for medical malpractice and have no need to buy medical malpractice insurance.¹⁷⁰

¹⁶¹ *Id.*

¹⁶² *Frequently Asked Questions, YES ON 46 SAVES LIVES*, <https://www.yeson46.org/frequently-asked-questions/> (last visited September 5, 2014) [“FREQUENTLY ASKED QUESTIONS”].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Op-Ed Bob Pack, *Prop. 46: When Health Care Kills*, *CAPITOL WEEKLY* (Oct. 6, 2014), <http://capitolweekly.net/health-care-medical-prop-46-negligence-pack/>.

¹⁶⁸ FREQUENTLY ASKED QUESTIONS *supra* note 162.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

3. *Proposition 46 is About Patient Safety, Not Profits for Attorneys*

Proponents of Proposition 46 argue that patient safety is the primary objective of Proposition 46 and that attorneys' fees are incidental.¹⁷¹ Medical malpractice litigation deters physicians and hospitals from committing medical errors and encourages them to gather and analyze information about past errors, thereby reducing the future costs associated with such errors.¹⁷² The deterrent effect of patient protection laws can save the health care system from these human financial losses;¹⁷³ increased attorneys' fees are merely incidental to the incentive for doctors and hospitals to fix bad behavior for fear of strong financial repercussion for malpractice.¹⁷⁴ Further, proponents point out that MICRA's strict attorneys' fees structure is left entirely in place by the initiative.¹⁷⁵

4. *Although Current Law Allows Unlimited Economic Damages, There is Still a Need for a Higher Cap on Noneconomic "Pain and Suffering" Damages*

The cap on noneconomic damages prevents people from getting fair compensation.¹⁷⁶ Economic damages are limited to wage loss and future medical bills, which means that if the victim does not have wages or if the victim dies, there can be no economic damages.¹⁷⁷ This largely has an effect on children, the disabled, the elderly, and stay-at-home moms.¹⁷⁸ With a \$250,000 cap, you can rarely find an attorney to take the case, especially when it can cost \$100,000 or more to do the background work and provide expert witnesses.¹⁷⁹ This means the most vulnerable among us can recover at most \$250,000, while those with higher incomes have other avenues for financial redress.¹⁸⁰

Although most States have limits on noneconomic damages in medical negligence cases, California's cap of \$250,000 is among the lowest in the nation.¹⁸¹ Only two States, Kansas and Montana, have a fixed cap as low as California's.¹⁸² Four other States have a basic cap of \$250,000 on noneconomic damages that can be raised under certain circumstances such as gross negligence, serious, permanent, or catastrophic harm, or where justice requires.¹⁸³ Caps in other

¹⁷¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 32.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ John Wildermuth, *Patient Safety, Malpractice Cost at Issue in Proposition 46*, SF GATE (Sept. 18, 2014), <http://www.sfgate.com/politics/article/Patient-safety-malpractice-costs-at-issue-in-5765482.php> ["PATIENT SAFETY"].

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ FREQUENTLY ASKED QUESTIONS, *supra* note 162.

¹⁸¹ *In Depth on Measure Proposition 46: Drug and Alcohol Testing of Doctors. Medical Negligence Lawsuits*, LEAGUE OF WOMEN VOTERS OF CAL., EDUCATION FUND, <https://cavotes.org/vote/election/2014/november/4/ballot-measure/proposition-46/more> (last visited Oct. 4, 2014).

¹⁸² *Id.*

¹⁸³ *Id.*

States range up to \$750,000. At least seventeen States have no caps at all on noneconomic damages.¹⁸⁴

5. *Proposition 46 Will Save Lives By Cracking Down on Prescription Drug Abuse*

Proposition 46 would require all doctors and pharmacists to register with and use CURES. Checking this database will reduce the number of doctor shopping addicts who harm themselves and others.¹⁸⁵ The Journal of the American Medical Association found that doctors are the biggest suppliers for chronic prescription drug abusers, and called for the mandatory usage of State prescription drug databases.¹⁸⁶ Further, a 2012 Los Angeles Times investigation found that drugs prescribed by doctors caused or contributed to nearly half of recent prescription overdose deaths in Southern California.¹⁸⁷ Prescription drug addiction is the nation's fastest growing form of drug abuse.¹⁸⁸ Unfortunately, less than one in ten physicians bother to use CURES.¹⁸⁹

6. *Proposition 46 Will Save Lives By Protecting Patients From Impaired Doctors*

California's medical board estimates 18 percent of doctors suffer substance abuse during their lifetime.¹⁹⁰ Proposition 46 would help by mandating random testing of physicians.¹⁹¹ Drug testing is required for pilots, bus drivers, and other safety workers – but it is not required for doctors.¹⁹² A decade ago, Dr. Stephen Loyd was hooked on prescription painkilling drugs.¹⁹³ “I worked impaired every day,” Dr. Loyd says.¹⁹⁴ “Looking back, it scares me to death, what I could have done.”¹⁹⁵ Drug testing can save lives.¹⁹⁶ That is why random drug testing of doctors is supported by leading medical safety experts, consumer advocates, the Inspector General of the federal agency responsible for overseeing health care, and by doctors who themselves have abused drugs.¹⁹⁷

¹⁸⁴ *Id.*

¹⁸⁵ Op-Ed Holly Stewart, *Marin Voice: Proposition 46 is About Patient Care and Rights*, MARIN INDEPENDENT J. (Oct. 9, 2014), http://www.marinij.com/opinion/ci_26695938/marin-voice-proposition-46-is-about-patient-care.

¹⁸⁶ Consumer Watchdog, Troy and Alana Pack Patient Safety Act Fact Sheet, *available at* <http://www.consumerwatchdog.org/resources/mar24flyer.pdf> [“Consumer Watchdog”].

¹⁸⁷ *Id.*

¹⁸⁸ Pack, *supra* note 167.

¹⁸⁹ *Id.*

¹⁹⁰ J.G. Preston, *Doctors, Health Care Officials, Medical Ethicist Call for Doctor Drug Testing to Protect Patients*, PROTECT CONSUMER JUSTICE.ORG (Jul. 23, 2014), <http://www.protectconsumerjustice.org/doctors-health-care-officials-medical-ethicist-call-for-doctor-drug-testing-to-protect-patients.html>.

¹⁹¹ Pack, *supra* note 167.

¹⁹² NOVEMBER 2014 VOTER GUIDE, at 32.

¹⁹³ Pack, *supra* note 167.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 32.

¹⁹⁷ *Id.*

B. Opposing Arguments

As of September 8, 2014, Proposition 46 opponents had raised over \$56.3 million.¹⁹⁸ Among those supporters are the California Medical Association Physicians' Issues Committee, contributing \$5,064,542, Cooperative of American Physicians Independent Expenditure Committee, contributing \$5,000,000, NorCal Mutual Insurance Company, contributing \$5,000,000, The Doctors Company, contributing \$5,000,000, Kaiser Foundation Health Plan, Inc., contributing \$3,000,000, California Hospitals Committee on Issues, contributing \$2,500,000, and Medical Insurance Exchange of California, contributing \$2,500,000.

1. Proposition 46 Jeopardizes People's Access to Their Trusted Doctors

Opponents assert that if Proposition 46 passes and California's medical liability cap goes up, you could also lose your trusted doctor because many doctors will be forced to leave California to practice in States where medical liability insurance is more affordable.¹⁹⁹ Opponents argue that even respected community clinics, including Planned Parenthood, warn that specialists like OB-GYNs will have no choice but to reduce or eliminate vital services, especially for women and families in underserved areas.²⁰⁰ Not only are opponents concerned about doctors leaving the State, they are worried about doctors coming to the State.²⁰¹ If a medical student has just graduated from medical school and has upwards of \$200,000 in school related debt, they are far more likely to practice in an area with lower medical malpractice insurance costs.²⁰²

2. Proposition 46 Threatens People's Personal Privacy

Opponents argue that the provision of Proposition 46 that forces doctors and pharmacists to use the CURES database significantly jeopardizes the privacy of patients' personal prescription medical information.²⁰³ Currently, CURES does not have sufficient capacity to handle the higher level of use that is expected to occur when providers are required to register beginning in 2016, yet Proposition 46 provides no funding to improve functionality or security, and contains no security standards to protect patient information.²⁰⁴ This makes patient information even more vulnerable to hacking, breach and unauthorized access.²⁰⁵ Additionally, the CURES database expands the number of people who will have access to private health information, including non-medical professionals for reasons that have nothing to do with

¹⁹⁸ *California Proposition 46, Medical Malpractice Lawsuits Cap and Drug Testing of Doctors (2014)*, § 3.3 Donors, BALLOTPEdia, [http://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_\(2014\)](http://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_(2014)) (last visited September 8, 2014).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Proposition 46 Debate, McGeorge School of Law*, (Oct. 1, 2014) (statement of Hal Dasinger, Vice President of Government Relations, The Doctors Company).

²⁰² *Id.*

²⁰³ *Prop. 46 Threatens the Privacy of Your Personal Health Information, VOTE NO ON 46*, <http://www.noon46.com/get-the-facts/threats-to-personal-privacy/> (last visited September 12, 2014).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

medical history.²⁰⁶ For example, law enforcement, investigatory agencies, and the courts could access patient prescription records for investigations that don't even relate to prescription drug abuse and, in many cases, even where the patient is not the subject of the investigation.²⁰⁷

3. Opponents of Proposition 46 Are Not Necessarily Opposed to Drug Testing of Doctors, But Such a Law Should Be Drafted Judiciously

Proponents of Proposition 46 have openly admitted that the provision for random alcohol and drug testing of doctors was added as a political sweetener.²⁰⁸ The initiative sponsors were very smart when they tried to cover up a very controversial policy measure (indexing the noneconomic damages cap) with a very popular one (drug testing of doctors).²⁰⁹ In fact, when likely voters were polled on what parts of the proposition they would support, 68 percent were in favor of requiring random drug and alcohol testing of doctors, while 25 percent were opposed.²¹⁰ Respondents were far less enthusiastic about the increased cap: 42 percent of likely voters approved, while 47 percent opposed it.²¹¹

Opponents of Proposition 46 ask voters to look at the details of how Proposition 46 works.²¹² It applies to physicians in hospitals, but not those who are operating on their own.²¹³ It does not include nurses.²¹⁴ It calls for an immediate suspension for doctors who test positive or who fail to get tested within twelve hours of an adverse event – which can be impractical or impossible at times, especially in rural areas.²¹⁵ Such a rigid requirement could leave patients without health care until the California Medical Board has a chance to review the evidence.²¹⁶

4. Proposition 46 is Costly for Consumers

Opponents argue that trial lawyers, who are out to profit from medical lawsuits, carelessly threw together Proposition 46 without any concern for the taxpayer's pocketbook, privacy, health, or health care.²¹⁷ If medical malpractice awards go up, health insurance

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Poorly Crafted State Proposition 46 Puts Doctors on Defense*, SF GATE (Sept. 13, 2014), <http://www.sfgate.com/opinion/article/Poorly-crafted-state-Proposition-46-puts-doctors-5751918.php>.

[*"Poorly Crafted State Proposition 46 Puts Doctors on Defense"*]

²⁰⁹ Melanie Mason, *Poll: Weak Support for Prop. 46 Targeting Medical Malpractice*, L.A. TIMES (Sept. 13, 2014), <http://www.latimes.com/local/politics/la-me-pol-poll-malpractice-20140913-story.html> - [page=1](#).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Poorly Crafted State Proposition 46 Puts Doctors on Defense*, *supra* note 208.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Oppose Proposition 46, A Costly Threat To Your Personal Privacy Californians Can't Afford*, VOTE NO ON 46, <http://www.noon46.com/get-the-facts/why-voters-should-oppose/> (last visited September 12, 2014).

companies will raise their rates to cover their increased costs.²¹⁸ If Proposition 46 is passed, medical lawsuits and jury awards will skyrocket, and the taxpayer will be the one to pay the costs.²¹⁹

5. *The CURES Database Is Not Ready For “Prime Time”*

If Proposition 46 is passed, prescribers of medicine and pharmacists will be required to register and begin using CURES on November 5, 2014 - the day after the vote.²²⁰ There are currently 30,000 users of the CURES database, a number which will increase to 200,000 when all prescribers and pharmacists are required to register.²²¹ Currently, CURES is undergoing updates to accommodate the 200,000 users required to register on January 1, 2016 (in accordance with SB 809), but the updates are an ongoing process.²²² We do not have the luxury of discussing what the CURES database will be able to handle next year, as Proposition 46 mandates usage of the CURES system by all 200,000 prescribers/pharmacists the day after the vote if the initiative is passed.²²³ Based upon the schedule for the needed updates of the CURES system to accommodate such traffic, CURES will not be ready to handle the increase in traffic on November 5, 2014.²²⁴

Proponents have argued that as long as a prescriber of medication “tries” to access the CURES system, their medical licenses will not be at risk.²²⁵ But opponents argue this is just not true.²²⁶ There is nothing in the text of Proposition 46 that says what happens when a prescriber of medication attempts to use the CURES system but is unable to access it.²²⁷ The text is clear: “Licensed health care practitioners and pharmacists shall access and consult the electronic history...”²²⁸ Therefore, if a patient is in need of medication but the CURES system does not respond, the physician will be faced with a dilemma: prescribe the medicine and run the risk of putting their medical license at risk, or deny the patient medication and violate their Hippocratic oath.²²⁹ Proposition 46 also imposes a presumption of negligence on the prescriber/pharmacist if they do not access and consult the CURES database.²³⁰ Therefore, since Article 2, Section 10 of

²¹⁸ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 33.

²¹⁹ *Id.*

²²⁰ *Informational Hearing on Proposition 46*, (statement of Alicia Wagon, Legal Counsel for California Medical Association).

²²¹ *Id.* (statement of Arwen Flint, Assistant Chief at Attorney General’s Office).

²²² *Id.*

²²³ *Id.* (statement of Alicia Wagon, Legal Counsel for California Medical Association).

²²⁴ *Id.* (statement of Arwen Flint, Assistant Chief at Attorney General’s Office).

²²⁵ *Id.* (statement of Bob Pack, Author of Proposition 46).

²²⁶ *Id.* (statement of Alicia Wagon, Legal Counsel for California Medical Association).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Press Release, No On 46 Campaign, New Video Raises Troubling Questions About Whether Gov’t Website Will Be Ready To Meet Prop 46 Mandate (Sept. 3, 2014), *available at* <http://www.prnewswire.com/news-releases/no-on-46-campaign-new-video-raises-troubling-questions-about-whether-govt-website-will-be-ready-to-meet-prop-46-mandate-273831121.html> [“No On 46 Press Release”].

²³⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 70.

the California Constitution requires the CURES provisions of Proposition 46 to go into effect the day after the election, doctors would be forced to use CURES or be presumed negligent.²³¹

VII. CONCLUSION

Proposition 46 will have major fiscal effects on the California budget. The goal of protecting the safety of patients by increasing the MICRA cap on noneconomic damages in professional negligence claims, requiring alcohol and drug testing of doctors, and mandating use of the CURES system by all health care professionals comes at a price. As mentioned earlier, increasing the malpractice cap will result in an increase in government spending by hundreds of millions of dollars annually.²³² This large number will be offset to a degree if malpractice claims decrease as a result of doctors taking added precautions to avoid malpractice claims.²³³ Although doctors have an incentive to avoid claims that could see them paying out up to four times more for noneconomic damages, malpractice claims will likely increase because of the attractively high awards, which was arguably the primary reason MICRA was implemented in 1975.

Requiring prescribers of medication and pharmacists to register with CURES and to use the system should help identify “doctor shoppers,” which would result in lower prescription drug costs. Eliminating some of the abuse of prescription medication will also allow government resources to be used elsewhere (like law enforcement and social services). However, there is a big question as to what will happen the day after the election with CURES if Proposition 46 passes. The system is not due for an upgrade until August 2015, and there is currently a 30-day turn around on getting new users registered. If Proposition 46 passes, prescribers of medication and pharmacists are required to check CURES. What is going to happen when a large number of these prescribers and pharmacists cannot access the system?

Opponents argue that MICRA was passed in reaction to a health care crisis in California regarding excessively high jury awards in malpractice cases.²³⁴ It would appear that if Proposition 46 were passed, the problems that MICRA was intended to solve could likely return. Malpractice insurance premiums will rise, but proponents of the initiative allege that this will not be to the detriment of doctors.²³⁵

If Proposition 46 is passed, it is difficult to say with certainty what effects it will have on California, because California would be the first State to implement the alcohol/drug testing requirement of doctors.²³⁶ Whether you are a proponent or opponent of Proposition 46, it is undeniable that the passing of the initiative will have profound effects on future generations in California.

²³¹ No On 46 Press Release, *supra* note 229.

²³² NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 30.

²³³ *Id.* at 29.

²³⁴ MICRA: A Brief History, *supra* note 8.

²³⁵ FREQUENTLY ASKED QUESTIONS, *supra* note 162.

²³⁶ Nagourney, *supra* note 81.

Proposition 47:
The Safe Neighborhoods and School Act

Initiative Statute

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McGeorge School of Law

By

Selena Farnesi

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2015

B.A. Anthropology, California State University, Fresno, 2012

B.S. Philosophy, California State University, Fresno, 2012

&

Emily Reynolds

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016

B.A. Journalism, University of Massachusetts, Amherst, 2009

I. EXECUTIVE SUMMARY

Proposition 47 would (1) reduce a number of non-violent and non-serious property and drug crimes that are currently felonies¹ or wobblers² to misdemeanors, (2) reduce a number of theft-related wobblers to misdemeanors, (3) allow people convicted of felonies addressed by the initiative to petition for resentencing or reclassification of their conviction as a misdemeanor, whether they are currently serving their felony sentence or have already completed it, and lastly, (4) split the cost savings generated by the initiative between trauma recovery services for victims, K-12 schools, and mental health and substance abuse treatment programs.

A “yes” vote on initiative 47 would mean that six offenses would be lowered to mandatory misdemeanors, reducing prison sentences and saving \$150,000 a year which would then go into truancy and prevention programs.³ In addition it would likely release close to 10,000 prisoners who would qualify for shorter sentences.

A “no” vote would mean that those same six offenses would keep their current charging standards, ranging from misdemeanors to felonies.

II. THE LAW

A. Existing Law

Proposition 47 is proposing to change the penalties and classifications for six non-violent property and drug offenses. Some of the offenses are felonies, some misdemeanors, and others are considered wobblers. Proposition 47 would make them all mandatory misdemeanors.⁴

1. *Petty Theft*

Theft of money or property can be charged as either a misdemeanor or a felony based on the circumstances, but is generally a misdemeanor when the value is between \$50 and \$950.⁵ However, it can be charged as a felony based on the circumstances.⁶

¹ Felonies are the most serious offenses. In California they are punishable by death or imprisonment in the California state prison system. Many felony offenses are straight felonies. A straight felony can only be charged and sentenced as a felony, including but not limited to rape and murder. CAL. PENAL CODE § 17.

² A wobbler is a crime that the prosecutor may elect to file as either a California misdemeanor or a felony based on the facts of the case and a person’s criminal history. CAL. PENAL CODE § 17.

³ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2014, at 72, available at <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf#page=74> [“NOVEMBER 2014 VOTER GUIDE”].

⁴ MAC TAYLOR & MICHAEL COHEN, OFFICE OF ATTORNEY GENERAL, FISCAL IMPACT ESTIMATE REPORT (2014), available at <https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report%2813-0060%29.pdf?> [“FISCAL IMPACT ESTIMATE REPORT (2014)”].

⁵ CAL. PENAL CODE § 490-490.1.

⁶ FISCAL IMPACT ESTIMATE REPORT (2014), *supra* note 4.

Under current law, the theft of certain property can be considered a felony. In addition, petty theft can be charged as a felony if certain circumstances are met. For example, a defendant may be charged with a felony if they have at least three prior convictions for theft related crimes. A felony may also be found if there is only one prior theft conviction combined with a conviction for a serious, violent, or sex offense.⁷

2. *Shoplifting*

A misdemeanor is usually found for shoplifting when the property is valued at \$950 or less. However, shoplifting may be charged as the more serious crime of felony burglary.⁸ A defendant may be charged with burglary instead of shoplifting, which is a more serious offense.⁹

3. *Receiving Stolen Property*

It is considered a wobbler crime if someone receives stolen property.¹⁰ Being charged with possession of stolen property may be charged as receiving stolen property as well.¹¹

4. *Writing Bad Checks*

A person may be convicted of either a misdemeanor or felony for writing bad checks in two circumstances.¹² The first is when a bad check is written in the amount of more than \$450. The second is when a check is written for less than \$450, but the person writing the check already has convictions on their record for forgery related crimes.¹³

5. *Check Forgery*

Forging a check, no matter for what amount of money, is a crime.¹⁴

6. *Drug Possession*

Possession of most controlled substances is a wobbler.¹⁵ The most notable exception is marijuana, which is not charged as a felony.

B. Proposed Law

Proposition 47 aims to make all six offenses mandatory misdemeanors, but there would be exceptions. Offenders who have committed particular severe crimes such as murder, and

⁷ *Id.*

⁸ *Id.*

⁹ CAL. PENAL CODE § 459.

¹⁰ FISCAL IMPACT ESTIMATE REPORT (2014), *supra* note 4.

¹¹ *Id.*

¹² CAL. PENAL CODE § 476(a).

¹³ FISCAL IMPACT ESTIMATE REPORT (2014), *supra* note 4.

¹⁴ *Id.* § 473 (Deering 2014).

¹⁵ CAL. HEALTH & SAFETY CODE §§ 11350, 11357, 11377.

certain sex and gun felonies, will not be eligible to take advantage of the reduced charges and sentences.¹⁶

1. *Petty Theft*

Under Proposition 47, petty theft would be a mandatory misdemeanor. However, there would be exceptions. Based on the defendant's criminal history, they may still be charged with a felony.¹⁷ Proposition 47 would add section 490.2 to the California Penal Code.¹⁸ The additional section mandates that theft of property where the value does not exceed \$950 would be considered petty theft and would be charged as a misdemeanor. The initiative focuses on the dollar amount rather than the type of property.

Penal Code Section 666 creates a petty theft enhancement so that any person convicted of three or more theft-related crimes¹⁹ and who is subsequently convicted of petty theft can be charged with a felony as opposed to a misdemeanor. The initiative removes this enhancement. Instead of the enhancement, which mandates a felony, a person with three or more prior theft related crimes will be charged with a misdemeanor.

The proposition does make an exception, leaving the original language and effect of the statute in place in certain situations. People who are required to register pursuant to the Sex Offender Registration Act²⁰ or who have a prior violent or serious felony conviction under California Penal Code 667(e)(2)(C)(iv) and who have a prior theft-related conviction remain unaffected by the proposition.

2. *Shoplifting*

Shoplifting property valued at less than \$950 under this initiative would always be considered shoplifting and never considered burglary.²¹ It would become a mandatory misdemeanor.

¹⁶ FISCAL IMPACT ESTIMATE REPORT (2014), *supra* note 4.

¹⁷ NOVEMBER 2014 VOTER GUIDE, *supra* note 3.

¹⁸ *Id.* at 72.

¹⁹ Theft-related crimes are defined as "petty theft, grand theft, a conviction pursuant to subdivision (d) or (e) of Section 368, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense." *California Petty Theft & Shoplifting Laws*, SHOUSE CALIFORNIA LAW GROUP (2014), <http://www.shouselaw.com/petty-theft.html>.

²⁰ A person convicted of any of the following California sex offenses must register under the Sex Offender Registration Act, Penal Code 290: most acts involving California rape under the Penal Code 261 sections and Penal Code 243.4 sexual battery; most acts involving minors, such as Penal Code 288 lewd acts with a minor, Penal Code 272 contributing to the delinquency of a minor, acts relating to Penal Code 311 child pornography, Penal Codes 266h and 266i pimping and pandering with a minor, Penal Codes 269 and 288.5 aggravated and/or continuous sexual assault of a child, and Penal Code 285 incest; forced acts involving Penal Code 288a oral copulation, Penal Code 286 sodomy, and Penal Code 289 acts of penetration with a foreign object; and Penal Code 314 indecent exposure.

²¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 71.

Section five of the initiative addresses California Penal Code Section 459. Currently Penal Code Section 459 treats burglary²² of property from any building the same, be it a garage, home, or commercial building. Section five creates section 459.5 of the Penal Code, which redefines entering a commercial establishment where the total value of property taken or intended to be taken is less than \$950 as shoplifting instead of burglary. It further requires that on these facts the person be charged with shoplifting, and may not be charged with burglary or theft of the same property.

Proposition 47 mandates that shoplifting be charged as a misdemeanor unless the person being charged has one or more prior convictions under section 667(e)(2)(C)(iv) of the Penal Code.²³ There are no enhancements for repeat offenses.²⁴

3. *Receiving Stolen Property*

The proposition would change the charge for receiving stolen property valued under \$950 to a mandatory misdemeanor instead of a wobbler.²⁵

Section nine of the initiative amends Penal Code section 496, which addresses buying or receiving stolen property.²⁶ Currently, when a person buys or receives stolen property, anything with a value of less than \$950 is a wobbler. It can be charged as a misdemeanor or a felony, while anything over \$950 must be charged as a felony. The initiative amends section 496 to remove the wobbler so that anything under \$950 must be charged as a misdemeanor unless the person being charged has one or more prior convictions under Penal Code Section 667(e)(2)(C)(iv). There are no enhancements for repeat offenses.

4. *Writing Bad Checks*

This proposal would increase the maximum amount of money that defines a misdemeanor for writing bad checks. It would change from a wobbler to a mandatory misdemeanor for those who write a bad check worth less than \$950.²⁷ However, a defendant could still be charged with a felony if he or she has three or more convictions for certain crimes related to forgery.²⁸

²² At common law, burglary was defined as breaking and entering into another's dwelling at night with the intent to commit a felony. The modern definition is breaking and entering into any building with the intent to commit a felony.

²³ The "Super Strike" offenses in section 667(e)(2)(C)(iv) of the Penal Code are sexually violent offenses, child molestation, homicide or attempted homicide, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, and any serious or violent felony punishable by life imprisonment for death.

²⁴ The enhancement of a criminal penalty means the increase of punishment, such as by increasing a jail sentence. An enhancement for repeat offenses means the increase of punishment based on the fact that the person has committed the same offense again. Black's Law Dictionary (9th ed. 2009).

²⁵ FISCAL IMPACT ESTIMATE REPORT (2014), *supra* note 4.

²⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 72.

²⁷ FISCAL IMPACT ESTIMATE REPORT (2014), *supra* note 4.

²⁸ *Id.* at 71.

Section seven of the initiative amends section 476(a) of the Penal Code, which currently outlines the sentencing guidelines for a person who, with the intent to defraud, delivers a check for payment knowing that there are not sufficient funds to support the transaction. Currently, using a bad check with a value below \$450 is a misdemeanor, unless the person has a prior conviction for a similar offense.²⁹ The initiative would amend Penal Code section 476(a) so that using a bad check with a value below \$950 would be a misdemeanor, unless a person has three priors for similar offenses.

5. *Check Forgery*

Section six of the initiative amends section 473 of the Penal Code so that “forgery³⁰ would be punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170.”³¹

Currently, forgery is a wobbler, but under the initiative’s amendments it would be a straight misdemeanor, so long as the amount being forged was less than \$950.³² There would be one exception. An offender could still be charged with a felony if he or she commits identity theft in connection with forging a check.³³ There are no enhancements for repeat offenses.

6. *Drug Possession*

Possession of a controlled substance would become a mandatory misdemeanor. The initiative does not propose changes to marijuana possession as it is currently charged as a misdemeanor or an infraction depending on the amount possessed.³⁴

Sections 11-13 of the initiative would amend section 11350 of the Health and Safety Code.³⁵ The initiative makes simple drug possession a misdemeanor.³⁶

²⁹ CAL. PENAL CODE § 476(a).

³⁰ When people hear the word “forgery,” they think of faking someone else’s signature or handwriting. But the legal definition of California forgery is much broader than that. The legal definition of forgery is the creation of a new, false document for your own benefit and gain. *California “Forgery” Laws Penal Code 470 PC*, SHOUSE CALIFORNIA LAW GROUP (2014), <http://www.shouselaw.com/forgery.html>.

³¹ Section 1170(h) of the Penal Code would be amended to read: “If the sentence is not recalled, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years. If recall and resentencing is not granted under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant’s sentence.”; NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 72–73.

³² THE SAFE NEIGHBORHOODS AND SCHOOLS ACT, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN (Dec. 19, 2013), available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

³³ LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 47 CRIMINAL SENTENCES. MISDEMEANOR PENALTIES. INITIATIVE STATUTE., (July 17, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-47-110414.pdf>.

³⁴ *Id.*

³⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 72–73.

Proposition 47 also amends section 11357 of the Health and Safety Code, which is the marijuana counterpart of section 11350 of the Health and Safety Code as discussed above. Additionally, the initiative makes some format changes so that the sections will read with parallel structure should the initiative be passed.

C. Exceptions

Proposition 47 will not apply to “sex offenders or anyone with a prior violent felony conviction for crimes such as rape, murder, and child molestation.”³⁷ Inmates may only be released if they are no longer a threat to public safety.³⁸

D. Retroactive Application

In addition, Proposition 47 is retroactive, which would mean that some convicted felons could be resentenced and others could have their records reclassified if they petition the court.³⁹ An offender currently serving a sentence for one of the crimes that the initiative reclassifies as a misdemeanor may apply to be resentenced by the court. They would have three years to apply for resentencing.⁴⁰

Section 14 of the initiative adds section 1170.18 to the California Penal Code.⁴¹ Section 1170.18 creates a resentencing petition process for persons who are currently serving or have finished serving sentences on any of the charges addressed in the initiative.

Persons currently serving sentences on a conviction addressed by the initiative can petition to have their charge reduced to a misdemeanor and their sentence amended to match the guidelines set by the initiative.⁴² Persons who have completed a sentence on a conviction addressed by the initiative can petition to have their conviction reclassified as a misdemeanor.⁴³

The initiative gives the power to review petitions for resentencing to judges and creates an “unreasonable risk of danger”⁴⁴ standard of review.⁴⁵ People petitioning for resentencing who pose an unreasonable risk of danger to the public should be denied resentencing, while persons who are not a threat should have their resentencing request granted.

³⁶ Drug possession refers to any controlled substance or narcotics that are used without a written prescription. *Id.*

³⁷ *Id.* at 70.

³⁸ *Yes on 47 Fact Sheet*, CAL. FOR SAFE NEIGHBORHOODS AND SCHOOLS (July 1, 2014), available at <http://www.safetyandschools.com>.

³⁹ Cal. Proposition 47 at § 14(j) (2014).

⁴⁰ *Id.*

⁴¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 73.

⁴² Cal. Proposition 47 at § 14 (f) (2014).

⁴³ *Id.*

⁴⁴ See drafting issue section of this paper for more information.

⁴⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 73.

“The court does not have to grant the resentencing if it believes that the applicant will likely commit one of the severe crimes specified in the measure. This option would not be available to those who have committed severe crimes, which include murder and certain sex and gun felonies. Those that are resentenced would be subject to a year of supervision on state parole.”⁴⁶

E. Other Changes Proposed by Proposition 47

Proposition 47 has been titled “The Safe Neighborhoods and Schools Act,”⁴⁷ selected to highlight the way the initiative mandates that the money saved through implementation of the initiative will be put towards K-12 schools, as well as prevention and treatment programs.⁴⁸ The initiative has three distinct and identifiable goals. First, it aims to ensure that prison spending is focused on violent and serious offenses. Second, the initiative aims to maximize alternatives⁴⁹ for non-serious and nonviolent crimes. Lastly, a goal of the initiative is to invest money in prevention and support programs in K-12 schools, invest in victim services programs, and invest in mental health and drug treatment programs.⁵⁰

Though not specifically listed as a goal of the statute, the Findings and Declaration Clause does ensure that sentencing requirements for dangerous crimes like rape, murder, and child molestation are not changed.⁵¹

F. Funding Appropriation

Proposition 47 creates the Safe Neighborhoods and Schools Fund. The initiative directs the Director Department of Finance to calculate the amount of money saved by Proposition 47.⁵² That sum would then be moved from the General Fund to the Safe Neighborhoods and Schools Fund where it would be apportioned out to three different entities for grant programs.

Ten percent of the fund would be given to the Victims Compensation and Government Claims Board⁵³ to be spent on trauma recovery centers that provide services to victims of crime.

⁴⁶ LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 47 CRIMINAL SENTENCES. MISDEMEANOR PENALTIES. INITIATIVE STATUTE., (July 17, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-47-110414.pdf>.

⁴⁷ THE SAFE NEIGHBORHOODS AND SCHOOLS ACT, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN (Dec. 19, 2013), available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

⁴⁸ See Section 4 of The Safe Neighborhoods and Schools Act for more information.

⁴⁹ Probation, fines, community service, work training, education courses and rehabilitation classes are some examples of alternatives to prison sentences.

⁵⁰ See Section 4 of The Safe Neighborhoods and Schools Act for more information.

⁵¹ *Id.*

⁵² Estimates show that enacting the initiative should save \$150-\$250 million annually, after adjustment period. LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 47 CRIMINAL SENTENCES. MISDEMEANOR PENALTIES. INITIATIVE STATUTE., (July 17, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-47-110414.pdf>.

⁵³ The Victims Compensation and Government Claims board runs the California Victim Compensation Program (CalVCP) which provides compensation for victims of violent crime. CalVCP provides eligible victims with reimbursement for many crime-related expenses. CalVCP funding comes from restitution

Twenty-five percent of the funds would go to the State Department of Education. Those funds would be used by public agencies that work to decrease truancy and improve graduation rates of students in K-12 schools by supporting students who are at risk of dropping out and/or students who are victims of crime. The remaining 65 percent would go to the Board of State and Community Corrections⁵⁴ to support mental health treatment and substance abuse treatment programs.

Proposition 47 also requires an audit of the grant programs that are established as a result of the initiative every two years.

Any costs that the Department of Finance may incur calculating the funds saved by the initiative, or running audits of the programs, would be taken out of the Safe Neighborhoods and Schools fund prior to it being distributed.⁵⁵ Finally, the initiative mandates that no more than five percent of the funds awarded to any entity may be used for administrative costs.⁵⁶

G. Standard Sections in an Initiative

Sections 15-18 in the Proposition are standard for most propositions.⁵⁷ They allow the legislature to amend the measure so long as the amendments remain consistent with the purpose of the initiative.⁵⁸ If one section is found to be invalid, the rest of the proposition would still be given effect. These sections also direct courts to look at the initiative in a broad way. Should a provision be challenged in court, judges are instructed to read and interpret the initiative broadly, in a way that makes the changes actually create the intended effect.

III. UNINTENDED CONSEQUENCES AND DRAFTING ISSUES

A. Sends new people to prison, while goal is to reduce prison population

Proposition 47 is written in a way that creates a small subset of people who could go to prison on misdemeanor convictions where they would not go to prison under the current law. This is probably a drafting error or oversight given that a likely goal of the initiative is to reduce prison populations.

Under current law, petty theft with no prior theft related convictions is a misdemeanor.⁵⁹ It is only when you have three or more theft related convictions that petty theft becomes a

paid by criminal offenders through fines, orders, penalty assessments and federal matching funds. *See generally About the Board*, CAL. VICTIM COMPENSATION PROGRAM, <http://www.vcgc.ca.gov/board/> (last visited Oct. 26, 2014).

⁵⁴ *See generally Home*, BOARD OF ST. & COMMUNITY CORRECTIONS CAL., <http://www.bscc.ca.gov/> (last visited Oct. 26, 2014).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ CAL. PENAL CODE § 476(a).

felony.⁶⁰ The initiative will increase the value limit in the definition of petty theft to \$950 so more thefts will be classified as petty thefts. Additionally the initiative gets rid of the theft-related convictions consideration, so no matter how many theft-related priors a person has, their new theft will still be a misdemeanor. These actions function to make penalties for theft less severe and to reduce prison time on theft convictions.

However, the initiative only makes these changes for people without a “super strike”⁶¹ prior under Penal Code 667(e)(2)(C)(iv). For anyone with a “super strike” prior the petty theft will be a wobbler, meaning it could be charged as a felony. Then under section 1170(h)(3), a person who has a “super strike” must serve their felony sentence in prison. This has the effect of automatically sending anyone with a “super strike” prior to prison, for a misdemeanor crime.

For example, imagine a person has only one prior for murder. That person is convicted of shoplifting \$100 in clothes from Target. Under the current law, this would be petty theft without any theft related prior and it would be charged as a misdemeanor. Under Proposition 47, because the prior is a “super strike,” the petty theft can be charged as a felony for which the person will have to serve mandatory time in prison. Thus, the initiative would have sent someone to prison who would not have had to go otherwise, counter to its objectives.

Proposition 47 has the same effect for certain controlled substance crimes. Currently, possession of controlled substances is a misdemeanor, regardless of a prior conviction. The initiative, however, amends the current law to make possession of controlled substances a wobbler if the person has a “super strike” prior conviction. Again, since section 1170(h)(3) requires that people with “super strike” priors have to serve their felony sentence in prison, this will have the effect of sending a new group of people to prison.

B. Excludes some people from resentencing

The initiative includes provisions on resentencing that will allow people who are currently serving prison sentences on convictions of crimes affected by the initiative to petition the court to change their felony convictions to misdemeanor convictions.⁶² This will have the effect of reducing their prison sentence.

Since the language that accomplishes this only applies to a person who is, “currently serving a *sentence* for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this Act,”⁶³ it excludes anyone who is on probation because a grant of probation is not a sentence.⁶⁴ This is most likely a drafting error or oversight

⁶⁰ Russell Cooper & Erica Scott, *Proposition 36: Three Strikes Law, Repeat Felony, Offenders, Penalties*, CAL. INIT. REV., (Fall 2012), available at <http://www.mcgeorge.edu/Documents/Publications/californiaInitiativeReviewNov2012.pdf>.

⁶¹ *Supra* note 23

⁶² THE SAFE NEIGHBORHOODS AND SCHOOLS ACT, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN (Dec. 19, 2013), available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

⁶³ *Id.*

⁶⁴ *Id.*

because a person who received a grant of probation instead of a felony sentence on the same crime is likely less of a threat than someone who received a prison sentence.

That said, if this issue was brought into court by a felon on probation, it is likely that a judge would construe the initiative broadly pursuant to section 18, which says that the “act shall be liberally construed to effectuate its purpose.”⁶⁵ Interpreting the initiative broadly may allow for a reclassification of the crime so long as the person in question meets the criteria but it remains unstated in any clear way by the text of the statute.⁶⁶

C. Broad use of the word “code”

The initiative, in its resentencing guidelines, says, “As used throughout this Code, ‘Unreasonable risk of danger to public safety’ means an unreasonable risk that the petitioner will commit a new violent felony.”⁶⁷ The issue here is that it says “as used throughout this Code.” Instead of applying the definition of unreasonable risk to just this new section, the initiative applies that language to the entire California Penal Code.

The language, “unreasonable risk of danger to public safety” is used in the code in section 1170.126 of the Penal Code, which sets the standards for reviewing resentencing petitions under Proposition 36⁶⁸ (another California initiative passed in 2012). This means that the standard for review of Proposition 36 petitions for resentencing and the standard for reviewing petitions for resentencing under this initiative would become the same.⁶⁹

This is likely a drafting error or oversight. Because Proposition 36 addresses the resentencing of “super strikes” whereas this initiative addresses the resentencing of nonviolent, non-serious felonies specifically excluding “Super Strike” crimes had no intention of making changes to Prop 36, it is likely that the drafters did not intent to make changes to the Proposition 36 standard.

It is unknown at this time how this drafting error might be addressed. A likely solution may be legislation to amend the language and differentiate the standards for reviewing petitions for resentencing between Proposition 36 and Proposition 47. Another may be asking a court to interpret the statute in a way that makes these different pursuant to Section 18 of Proposition 47.⁷⁰

⁶⁵ *Id.* at 15

⁶⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 74.

⁶⁷ THE SAFE NEIGHBORHOODS AND SCHOOLS ACT, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN (Dec. 19, 2013), available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

⁶⁸ Proposition 36 modifies elements of California's "Three Strikes" Law, which was approved by the state's voters in 1994. In 2004, voters rejected Proposition 66, which like the 2012 measure was an attempt to change some aspects of the original "Three Strikes" Law. *California Proposition 36, Changes in the “Three Strikes” Law (2012)*, BALLOTEDIA [http://ballotpedia.org/California_Proposition_36_Changes_in_the_Three_Strikes_Law_\(2012\)](http://ballotpedia.org/California_Proposition_36_Changes_in_the_Three_Strikes_Law_(2012)) (last visted Sept. 10, 2014).

⁶⁹ Cal. Penal Code § 1170.126; NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 74.

⁷⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 74.

IV. CONSTITUTIONAL ANALYSIS

An initiative may be challenged on constitutional grounds. Some potential problems with Proposition 47 would be the effect it may have on state power, following the single-subject rule, and the effect on search and seizure practices. Specifically, the potential for police to make a warrantless arrest for crimes they did not witness and searches incident to arrest.

A. State Power

The Supreme Court interprets the United States Constitution as providing the federal government with enumerated powers.⁷¹ This means that the power has to be spelled out and explicitly given to the federal government. If it is not directly spelled out in the Constitution, then the power resides with the states.⁷² This interpretation is codified in the Tenth Amendment, which reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and to the people.”⁷³

As such, the states retain what is referred to as “police power,” which means that the states have the power to make laws regarding the health, safety, and welfare of their citizens. This initiative is well within the police power of the states and so, should not pose a constitutional conflict.⁷⁴ The Supreme Court expressly explained that “Selecting the sentencing rationale is generally a policy choice to be made by state legislatures, not federal courts.”⁷⁵

B. Single-Subject Rule

Initiatives are allowed on the ballot so long as they follow certain rules and requirements. One of those requirements is that an initiative may only cover a single subject.⁷⁶ All of its parts must be reasonably germane to each other, and to the general purpose or object of the initiative.⁷⁷

Proposition 47 covers six different sections of the penal code, but each section that is affected by the initiative shares the common thread of addressing sentencing of a nonviolent crime. As such, the initiative may be read to cover one single subject, comprehensive criminal justice reform. Furthermore, the California Supreme Court has allowed comprehensive criminal justice initiatives in the past. These initiatives have addressed comprehensive reform of gang sentencing and juvenile sentencing.⁷⁸

Similarly, Proposition 47 addresses the single subject of reforming sentencing for some minor offenses so it would meet the single subject rule standard.

⁷¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁷² *Id.*

⁷³ U.S. CONST. amend. X.

⁷⁴ *Barbier v. Connolly*, 113 U.S. 27 (1884).

⁷⁵ *Ewing v. California*, 538 U.S. 11, 25 (2003).

⁷⁶ CAL. CONST. art. II, § 8(d).

⁷⁷ *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990); *Manduley v. Superior Court*, 27 Cal. 4th 537 (2002).

⁷⁸ *Id.*

C. Effect on Search and Seizure Practices

1. Warrantless Arrest Under the Fourth Amendment

While there is likely no constitutional conflict with the initiative, there might be constitutional implications in terms of lawful/constitutional searches and seizures. The Fourth Amendment protects citizens from unreasonable search and seizures.⁷⁹ An arrest of a person is considered a seizure under the Fourth Amendment. Every time someone is arrested, in any state, the conduct of that arrest must meet constitutional standards – it must be reasonable.⁸⁰

The Supreme Court has considered and ruled on a series of cases that have created rules that govern when an arrest is reasonable versus when it is unreasonable.⁸¹ In general, an arrest is always reasonable if the arresting officer has obtained an arrest warrant. If the officer does not have an arrest warrant then the officer may only arrest in certain situations.

An officer may make a warrantless arrest if the officer has probable cause⁸² to believe that the person has committed a felony and the arrest occurs in public. The officer does not have to witness the crime being committed.⁸³ If the officer wishes to make a warrantless arrest of an individual they believe has committed a misdemeanor, they may not do so unless the officer has actually witnessed the misdemeanor occur and makes the arrest at that same time.⁸⁴

Since the initiative changes certain felonies to misdemeanors, there are constitutional implications for when officers will be able to perform warrantless arrests. While Proposition 47 itself, would not change U.S. criminal procedure, the standard for seizure is broader when the crime is a felony versus when the crime is a misdemeanor.⁸⁵ As such, recategorizing crimes from felonies to misdemeanors has an effect on U.S. criminal procedure even though one is explicitly stated in the proposition's language. For example, under the current law an officer can arrest a person without a warrant for theft or drug possession.⁸⁶ Under the initiative the officer would have to actually see the person stealing or see the person holding drugs to make a warrantless arrest because those crimes will be recategorized as misdemeanors.⁸⁷

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⁷⁹ U.S. CONST. amend. IV.

⁸⁰ The Fourth Amendment only prohibits unreasonable searches and seizures, so as long as the seizure is reasonable there is no constitutional violation.

⁸¹ *Whren v. United States*, 517 U.S. 806 (1996); *Atwater v. City of Lago Vista* 532 U.S. 318 (2001).

⁸² An officer has probable cause if, “whether considering the totality of the circumstances there is a fair probability of finding evidence of a crime at a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

⁸³ *Whren v. United States*, 517 U.S. 806 (1996).

⁸⁴ *Atwater v. City of Lago Vista* 532 U.S. 318 (2001).

⁸⁵ *Whren v. United States*, 517 U.S. 806 (1996).

⁸⁶ *Id.*

⁸⁷ *Atwater v. City of Lago Vista* 532 US 318 (2001).

2. Search Incident to Arrest Under the Fourth Amendment

Additionally, the Supreme Court has ruled that an officer can search a person “incident to arrest.”⁸⁸ This means that if a person is arrested, the officer can search that person without a search warrant simply because they are arrested. In the Supreme Court’s view, the fact that the person is arrested gives the Officer probable cause, which makes the search reasonable, and therefore not a violation of the Fourth Amendment.⁸⁹

With more misdemeanors there will be less warrantless arrests, which in turn will mean fewer searches incident to arrest. For example, under the current law, in a situation where someone is reported for stealing a gun, an officer can arrest an individual who fits the description of the thief and is near the scene of the theft because the officer has probable cause to believe that person has committed a felony and the arrest is occurring in public.⁹⁰ Once arrested, the officer can search the person. During the search the officer may find the gun, or drugs, or other illegal items. Everything recovered would be the product of a lawful and constitutional search and could be used as evidence in court.⁹¹

The way Proposition 47 would work with the Supreme Court’s search and seizure jurisprudence could mean that the reported gun theft, in the example above, is a misdemeanor, so the officer could only make the warrantless arrest if he actually saw the person steal it, as opposed to it being reported. Since there could be no lawful arrest there could also be no search. The initiative categorizes the crime as a misdemeanor, so now the officer would need to request an arrest warrant, or search warrant, or both, depending on the situation – and a judge has to review and grant that request in order for the action to be constitutional.

V. PUBLIC POLICY CONSIDERATIONS

A. Supporting Arguments

1. Consistent With Other Initiatives Recently Passed by California Voters

In 2000, California voters passed the Substance Abuse and Crime Prevention Act through the initiative process.⁹² The act permanently changed state law to allow qualifying defendants convicted of non-violent drug possession offenses to receive a probationary sentence in lieu of going to prison. As a condition of probation, defendants are required to participate in and complete a licensed and/or certified community drug treatment program⁹³. If the defendant fails

⁸⁸ *Arizona v. Gant*, 556 U.S. 332, 343 (2009).

⁸⁹ *Id.* at 346.

⁹⁰ *Whren v. United States*, 517 U.S. 806 (1996).

⁹¹ *Arizona v. Gant*, 556 U.S. 332, 346 (2009).

⁹² *Proposition 36 Official Title: Drugs. Probation and Treatment Program*, CAL. VOTER FOUND., <http://www.calvoter.org/voter/elections/archive/2000/general/propositions/36.html> (last visited Oct. 4, 2014).

⁹³ *California Proposition 36, Probation and Treatment for Related Offences (2000)*, BALLOTEDIA, http://ballotpedia.org/California_Proposition_36_Probation_and_Treatment_for_Drug-Related_Offenses_%282000%29 (last visited Sept. 10, 2014).

to complete this program or violates any other term or condition of their probation, then probation can be revoked and the defendant may be required to serve an additional sentence which may include going to prison.⁹⁴ The focus of the act is putting rehabilitation over prison.

The current initiative shares the same goals; it focuses on decriminalizing drug possession and sentencing people found in possession of illegal substances in a way that promotes rehabilitation. In addition, it funnels money to mental health and substance abuse rehabilitation programs.⁹⁵

In the last cycle of propositions in 2012, the voters of California also passed Proposition 36, which was an initiative to amend the three strikes law.⁹⁶ This was separate and different from the Proposition 36 passed in 2000.

The initiative, which passed with almost 70 percent of the vote, focused on revising the three strikes law to impose life sentences only when the new felony conviction is serious or violent. It also authorized re-sentencing for offenders currently serving life sentences if their third strike was not serious or violent and the judge determined that the re-sentencing would not pose an unreasonable risk to public safety.⁹⁷

In this way, this initiative is complementary to Proposition 36 of 2012. Both focus on reducing prison sentences and have resentencing provisions. Additionally, both are focused on maintaining sentences for felons with convictions for murder, rape, or child molestation, ensuring that it is only nonviolent and non-serious crimes that are affected.

2. *Will Help California Meet the United States Supreme Court Ruling to Reduce Prison Populations*

In 2009, a three-judge panel issued an injunction mandating that California reduce its prison population.⁹⁸ The panel ruled that the prisons were operating with unconstitutionally poor care for mental and physically ill inmates.⁹⁹ At the time of the ruling, the problem was not new. The original case actually grew out of a series of lawsuits on the same subject, prison conditions, dating back twenty years.¹⁰⁰

⁹⁴ *Id.*

⁹⁵ THE SAFE NEIGHBORHOODS AND SCHOOLS ACT, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN (Dec. 19, 2013), available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

⁹⁶ Russell Cooper & Erica Scott, *Proposition 36: Three Strikes Law, Repeat Felony, Offenders, Penalties*, CAL. INT. REV., (Fall 2012), available at <http://www.mcgeorge.edu/Documents/Publications/californiaInitiativeReviewNov2012.pdf>.

⁹⁷ *California Proposition 36, Probation and Treatment for Related Offences (2000)*, BALLOTEDIA, http://ballotpedia.org/California_Proposition_36_Probation_and_Treatment_for_Drug-Related_Offenses_%282000%29 (last visited Sept. 10, 2014).

⁹⁸ *Brown v. Plata*, 131 S.Ct. 1910 (2011).

⁹⁹ *Id.*

¹⁰⁰ Some of the conditions overcrowding at more than 144%, suicidal inmates being held in telephone-booth sized cages with no toilets, inmates living in makeshift housing in gymnasiums and other common areas, inmates sleeping on bunk beds stacked three people high, prison doctors conducting examination in shower or bathroom stalls, lack of running water, and medical examinations in full view of other inmates.

The case was appealed all the way to the Supreme Court. In 2011, in a 5-4 decision, the Supreme Court declared “A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”^{101,102}

Since then, California has worked to reduce its prison population by moving inmates from prison to county jails, or putting them in private for profit prisons in other states.¹⁰³ These efforts have helped to meet the Supreme Court’s mandate but have not fully accomplished it.¹⁰⁴ Just this year, another three-judge panel reviewed California’s efforts and agreed to extend the deadline for meeting the Supreme Court’s mandate to 2016.¹⁰⁵

Proposition 47 will allow people currently serving sentences in prisons to apply for resentencing making their prison sentence shorter.¹⁰⁶ Additionally, it changes the way we sentence nonviolent, non-serious crimes so that people who are committing thefts or are charged with drug possession are not taking up beds in our prison system, where the most dangerous of criminals belong.

3. Will Save Taxpayers Money

California is currently spending about \$235 million dollars to house prisoners out of state.¹⁰⁷ The initiative will reduce the amount of people in prison by approximately 10,000 within the first three years,¹⁰⁸ meaning the state will have less need to house prisoners in for profit out of state prisons.

The Legislative Analyst’s Office (LAO) has reviewed the state’s plan to meet the Supreme Court’s mandate, which includes contracting for out of state prison beds, and has found

See generally Heather MacDonald, *California’s Prison-Litigation Nightmare*, CITY JOURNAL (Autumn 2013), http://www.city-journal.org/2013/23_4_california-prisons.html.

¹⁰¹ *Brown v. Plata* 131 S.Ct. 1910, 1928 (2011).

¹⁰² Justice Anthony Kennedy wrote the opinion for the majority while Justice Antonin Scalia wrote the dissent. Both opinions used passionate language, revealing a sharp divide between the Justices. Scalia called the ruling “perhaps the most radical injunction issued by a court in our nation’s history” and argued that it would lead to the release of a “staggering number “of felons. *Brown v. Plata* 131 S.Ct. 1910, 1950 (2011).

¹⁰³ *Capacity Challenges in California’s Jails*, PUB. POL’Y INST. CAL. (Sept. 2012), http://www.ppic.org/main/publication_quick.asp?i=1034.

¹⁰⁴ Associated Press, *California Gets Two More Years to Cut Prison Numbers*, USA TODAY, Feb. 10, 2014, <http://www.usatoday.com/story/news/nation/2014/02/10/california-prison-numbers/5369333/>.

¹⁰⁵ THE 2014–2015 BUDGET: ADMINISTRATION’S RESPONSE TO PRISON OVERCROWDING ORDER, LEGISLATIVE ANALYST’S OFFICE (February 28, 2014), *available at* <http://www.lao.ca.gov/reports/2014/budget/three-judge-panel/three-judge-panel-022814.aspx>.

¹⁰⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 73.

¹⁰⁷ *Id.*

¹⁰⁸ *California Proposition 47, Safe Neighborhoods and Schools Act*, BALLOTEDIA, [http://ballotpedia.org/California_Proposition_47_Reduced_Penalties_for_Some_Crimes_Initiative_\(2014\)](http://ballotpedia.org/California_Proposition_47_Reduced_Penalties_for_Some_Crimes_Initiative_(2014)) (last visited Oct. 5, 2014).

that it will likely “achieve compliance in the short run, but is costly and less certain in the long run.”¹⁰⁹ This initiative is a step towards actually addressing the issue, in a long term and sustainable way, as oppose to paying to move the issue out of state.

The initiative is in line with the LAO’s suggestion to increase rehabilitation programs, to incentivize the state and counties to reduce prison population, and to focus on long-term compliance. In fact, the LAO recommends reclassifying certain misdemeanors, felonies, and wobblers as misdemeanors, which is exactly what the initiative does.¹¹⁰

In addition, lawsuits over prison conditions cost the taxpayers money. The California Department for Corrections and Rehabilitation’s (CDCR) legal team is funded by tax dollars. When prisoners challenge prison conditions and bring lawsuits against CDCR they have a right to counsel.¹¹¹ In most cases private counsel represent them and are paid for their work by tax dollars, not by the prisoners themselves. In practice, taxpayers are funding both sides of the lawsuit.

In the case of the redistricting, the expense is astronomical.¹¹² The law suits spread out over twenty years, culminating in a Supreme Court ruling in 2011. Even after the ruling, legal bills did not cease because each order was preceded by a furious exchange of motions and was followed by more motions over compliance. From 1997 to 2009 alone, excluding payments to experts, prison-overcrowding litigation cost taxpayers \$38 million.¹¹³

The initiative puts fewer people in prison, meaning the state is more likely to stay compliant with the injunction. Therefore the state can expect to see a reduction in prison condition based lawsuits all together.

4. *Dedicates Hundreds of Millions of Dollars to Good Causes*

The objective and nonpartisan LAO studied the initiative and concluded that it would save “hundreds of millions of dollars annually.”¹¹⁴ The money that is saved by the initiative will be spent in three areas.

¹⁰⁹ THE 2014–2015 BUDGET: ADMINISTRATION’S RESPONSE TO PRISON OVERCROWDING ORDER, LEGISLATIVE ANALYST’S OFFICE (February 28, 2014), *available at* <http://www.lao.ca.gov/reports/2014/budget/three-judge-panel/three-judge-panel-022814.aspx>.

¹¹⁰ *Id.*

¹¹¹ Don Thompson, *California Inmate Lawsuits Cost State \$200 Million*, HUFFINGTON POST (Feb. 11, 2013), http://www.huffingtonpost.com/2013/02/11/california-inmate-lawsuits_n_2661250.html.

¹¹² In a review of California’s prison litigation history, investigative journalist, Heather Mac Donald wrote for the City Journal, “California has long been the epicenter of prison litigation, but for cataclysmic force and sheer staying power, nothing beats two massive and now inextricably intertwined class-action lawsuits.” Heather MacDonald, *California’s Prison-Litigation Nightmare*, CITY JOURNAL (Autumn 2013), http://www.city-journal.org/2013/23_4_california-prisons.html.

¹¹³ *See generally id.*

¹¹⁴ THE 2014–2015 BUDGET: ADMINISTRATION’S RESPONSE TO PRISON OVERCROWDING ORDER, LEGISLATIVE ANALYST’S OFFICE (February 28, 2014), *available at* <http://www.lao.ca.gov/reports/2014/budget/three-judge-panel/three-judge-panel-022814.aspx>.

First, 65 percent of funds will go to mental health and substance abuse rehabilitation programs through the Board of State and Community Corrections.¹¹⁵ Then 25 percent of funds will be used for grants targeting reducing truancy, dropping out of school, and making sure that children who are victims of crimes receive the help and attention they need.¹¹⁶ The funds will go through the California Department of Education. Lastly, the Victims Compensation and Government Claims Board will receive the remaining ten percent to be spent on improving victim services.¹¹⁷

The money is allocated in a way that is focused on preventing criminal activity at different stages. The money will be used to help students stay in school because education reduces crime, to help people who have mental health or drug problems so that they can live crime free lives, and to support victims of crime.

5. *Works With Proposition 98 to Increase Funding to Schools Beyond the Allocated 25% of Saved Funds to the California Department of Education*

California Proposition 98, also called the "Classroom Instructional Improvement and Accountability Act," passed in 1988, requires a minimum percentage of the state budget to be spent on K-12 education and guarantees an annual increase in funding for K-12 education in the California budget. The proposition amended the California Constitution to mandate a minimum level of education spending based on three tests.¹¹⁸

Test one, used only from 1988 to 1989, requires spending on education to make up at least 39% of the state budget. The second test, used in years of strong economic growth, requires spending on education to equal the previous years spending plus per capita growth and student enrollment adjustment. The final test, used in years of weak economic growth guarantees prior years spending plus adjustment for enrollment growth, increases for any changes in per capita general fund revenues, and an increase by 0.5 percent in state general funds.¹¹⁹

Proposition 47 takes all of the funds saved by its implementation and directs them to the general fund.¹²⁰ This means that the total amount of money saved, which is estimated to be in the hundreds of millions of dollars,¹²¹ will be considered as part of the general fund when the legislature conducts the Proposition 98 tests and awards funds, increasing the amount of money awarded to K-12 education through Proposition 98.

¹¹⁵ PROPOSITION 98 SETS MINIMUM FUNDING GUARANTEE FOR EDUCATION, EDUC. SOURCE, POLICY BRIEF (March 2009), *available at* <http://www.cta.org/~media/Documents/Issues%20%20Action/School%20Funding/EdSource%20Prop%2098%20Primer%20Updated%20309.pdf?dmc=1&ts=20141026T1752520188>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ FISCAL IMPACT ESTIMATE REPORT (2014), *supra* note 4.

Then after these calculations are made, 25 percent of the funds are sent directly to the California Department of Education for grants as outlined in the initiative. Essentially, Proposition 47 gives two increases of funds to K-12 education.

Increasing spending on education and decreasing spending on prisons is consistent with budget recommendations from the LAO.

6. Increases Eligibility for Government Assistance Programs

Access to various government assistance programs can be limited based on prior felony convictions or drug convictions. Should Proposition 47 pass, more people would be convicted of misdemeanors instead of felonies, making them eligible to receive state aid for food and work programs. Although exact numbers at this time are not known, any increase in eligible population could mean an increase in costs to these programs.¹²² This could be seen as an argument for either side depending on political beliefs of the voter.

B. Opposing Arguments

1. Allows Criminals to Own Guns

When a person is convicted of a felony, his or her sentence includes a prohibition on owning a gun.¹²³ Misdemeanors do not have the same requirement. The initiative makes several crimes that were charged as felonies into misdemeanors. This has the effect of allowing people, who under current law would be prohibited from gun ownership, to legally own guns.

2. Stealing a Gun Becomes a Misdemeanor

Currently, under section 478(d)(2) of the Penal Code stealing a gun is a felony because of the nature of the item being stolen.¹²⁴ Anytime a gun is stolen no matter what the value of the gun, it is automatically charged as a felony.¹²⁵ The initiative refocuses the line between theft misdemeanors and theft felonies¹²⁶ on the value of the item rather than the type of item stolen. Under the initiative anything, or combination of things, stolen with a value of less than \$950 would be charged as a misdemeanor.¹²⁷

Because most handguns cost less than \$950, stealing a gun would be a misdemeanor and classified as a petty theft as oppose to a grand theft.¹²⁸

¹²² *Id.*

¹²³ CAL. PENAL CODE, Ch. 12 – Punishments.

¹²⁴ CAL. PENAL CODE § 478

¹²⁵ *Id.*

¹²⁶ A misdemeanor theft is also called petty theft, while a felony theft is also called grand theft. Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1996-1997).

¹²⁷ THE SAFE NEIGHBORHOODS AND SCHOOLS ACT, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN (Dec. 19, 2013), available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

¹²⁸ Op-Ed Jan Scully, Scott Jones & Chris Boyd. *Prop 47 Would Turn Criminals Loose*, SACRAMENTO BEE (Oct. 3, 2014), <http://www.sacbee.com/2014/10/03/6753330/viewpoints-prop-47-would-turn.html>.

To this end, opponents have said, “Current law provides that stealing a firearm is a felony. Every handgun is worth less than \$950. This measure opens the door for people who are going to steal a firearm for crime. If I’m going to steal a gun, I’m not going to steal it for my collection. I’m going to steal it to commit a crime.”¹²⁹ Additionally, because there is no enhancement for repeat offenses under the initiative a person could steal guns repeatedly and still be consistently charged with a misdemeanor.

Opponents argue that this result is counter to the initiative’s promise to “ensure that prison spending is focused on violent and serious offenses,”¹³⁰ since gun theft is likely to result in violent and serious offenses.

3. Negative Effect for Counties With Agricultural Communities

Currently, under 487(b)(1) of the Penal Code, stealing agricultural crops and livestock is a wobbler. This means that the court can consider what the items stolen are, what their value is, and the conditions under which they were taken.

If the crops are valued at more than \$250 then the crime can be charged as grand theft instead of petty theft. The current law makes this exception because of the type of item, similar to how the current law makes an exception for guns as discussed above.

Since the initiative fails to consider the type of item stolen and focuses only on the value of the item, the initiative could have a negative effect for agriculturally heavy counties. The initiative would change the law so that any theft of agriculturally related items would have to have a value of \$950 before it could be charged a grand theft.

Similarly, 487a makes theft of horses, cows, pigs and sheep grand theft regardless of the value of the animals, but under the initiative it would become petty theft unless the value exceeded \$950.

4. Potential Problems for Victims of Sexual Assault

Under current law, possession of most controlled substances can be charged either as a misdemeanor or a felony. Proposition 47 makes it a mandatory misdemeanor if someone is found in possession of drugs, including GHB and Rohypnol, common date rape drugs.¹³¹

According to John Lovell, the Government Relations Manager for the California Police Chiefs Association who is the opposition to the proposition, “There is a cavalier disregard for sexual assault victims. It takes possession of drugs used to facilitate sexual assault, date rape

¹²⁹ Interview with John Lovell, Government Relations Manager, California Police Chiefs Association (Sept. 9, 2014) (Notes on file with California Initiative Review).

¹³⁰ THE SAFE NEIGHBORHOODS AND SCHOOLS ACT, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN (Dec. 19, 2013), available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

¹³¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 3, at 72–73.

drugs, and it makes it a misdemeanor no matter how many times the criminal is caught with the drugs in his possession.”¹³²

5. *There is a Disincentive to Seek Drug Treatment*

Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, was passed by a majority of voters in the state.¹³³ It changed state law to allow those convicted of non-violent drug possession to choose to participate in a drug treatment program instead of serving a prison sentence.¹³⁴ Any felony conviction that they had would fall away upon completion of the treatment program.

Opponents believe that Proposition 47 will encourage those who are charged to plead out and never seek treatment because they will not be eligible to serve serious prison time.¹³⁵ “It disincentivizes anybody convicted of a drug offense from even wanting to seek treatment,” said Lovell.¹³⁶

C. Funding Information

Funding for the initiative has come from two main sources. Charles Feeney, a businessman who made a \$7.5 billion fortune establishing duty free shops in airports and B. Wayne Hughes, another businessman who made his \$3.5 billion fortune as the CEO of Public Storage. Feeney has contributed \$600,000 to the initiative while Hughes has donated \$250,000.

As of October 1, 2014, proponents of the initiative have raised \$3.5 million in support which included the donations from Feeney and Hughes.¹³⁷ Of the amount raised, \$938,000 was spent on collecting signatures.¹³⁸

As of July of this year the registered supporters for the initiative were the San Francisco District Attorney George Gascon, the Humboldt County District Attorney Paul Gallegos, San Diego Police Chief (Retired) Bill Landsdowne, and the Crime Survivors for Safety and Justice group.¹³⁹

¹³² Interview with John Lovell, Government Relations Manager, California Police Chiefs Association (Sept. 9, 2014) (Notes on file with California Initiative Review).

¹³³ *Proposition 36 Official Title: Drugs. Probation and Treatment Program*, CAL. VOTER FOUND., <http://www.calvoter.org/voter/elections/archive/2000/general/propositions/36.html> (last visited Oct. 4, 2014).

¹³⁴ CAL. PENAL CODE §§ 1210, 3063.1.

¹³⁵ Interview with John Lovell, Government Relations Manager, California Police Chiefs Association (Sept. 9, 2014) (Notes on file with California Initiative Review).

¹³⁶ *Id.*

¹³⁷ *California Proposition 47, Safe Neighborhoods and Schools Act*, BALLOTPEdia, [http://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_\(2014\)](http://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_(2014)) (last visited Oct. 5, 2014).

¹³⁸ *Id.*

¹³⁹ Rapper Jay-Z (real name Shawn Carter) is also a supporter of Proposition 47. Jay Z is no stranger to the politics game. In fact, he’s quite skilled in blurring the lines and using hip-hop as a vehicle to spread political messages. From his widely public support of President Obama to using his On The Run Tour

Funding for the opposition of the initiative has come from one main source and has been supplemented by a few additional sources. The funding for opposition has overwhelmingly come from the California State Lodge of Fraternal Order of Police Issues Committee.¹⁴⁰ In addition, the California Police Chiefs Association and LACPPOA Special Issues Committee have each donated \$5,000 while the California Peace Officers Association has donated \$4,500 and the California Correctional Supervisors Organization has donated \$3,000.¹⁴¹ In total, the opposition has raised \$43,500 under the Californians Against Prop. 47, Sponsored by California Public Safety Institute.¹⁴²

As of the same time the registered opposition included California Coalition Against Sexual Assault, California District Attorney Association, California Fraternal Order of Police, California Grocers Association, California Narcotics Officers Association, California Peace Officers Association, California Police Chiefs Association, California Retailers Association, California State Sheriffs Association, Crime Victims Action Alliance, and Crime Victims United.

VI. CONCLUSION

Proposition 47 would change six offenses from crimes that could be felonies to crimes that are mandatory misdemeanors. Those with a criminal history of serious or violent offenses would not be eligible to take advantage of the change in law.¹⁴³ The change would likely release 10,000 current inmates due to resentencing.¹⁴⁴ Due to this release, costs would increase for the courts and parole system for the next few years.¹⁴⁵ However, after the initial three years, these costs would fall below the costs now being incurred. Proposition 47 would also likely decrease the prison population by a few thousand people annually in the future.¹⁴⁶ The state would save between \$150 and \$200 million a year in prison costs, which would be distributed by grant to

stage Aug 3 at the Rose Bowl in California to support Proposition 47. During his “Hard Knock Life” performance, Jay took a moment to voice his support for building “more schools, less prisons.” (See generally Nicole Hardesty, *Jay Z Champions “Less Prisons, More Schools” On Stage In California*, URBAN DAILY (Aug. 5, 2014), <http://theurbandaily.com/2014/08/05/jay-z-supports-proposition-47-california/>).

¹⁴⁰ *California Ballot Measures*, VOTER’S EDGE, <http://votersedge.org/california/ballot-measures/2014/november/prop-47?jurisdictions=28.1.28-upper-ca.28.28-upper-ca&state=CA#.VDHREdF0yP->, (last visited Oct. 5, 2014).

¹⁴¹ *California Proposition 47, Safe Neighborhoods and Schools Act*, BALLOTEDIA, [http://ballotpedia.org/California Proposition 47, Reduced Penalties for Some Crimes Initiative \(2014\)](http://ballotpedia.org/California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014)) (last visited Oct. 5, 2014).

¹⁴² *Id.*

¹⁴³ THE SAFE NEIGHBORHOODS AND SCHOOLS ACT, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN (Dec. 19, 2013), available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

¹⁴⁴ Interview with John Lovell, Government Relations Manager, California Police Chiefs Association (Sept. 9, 2014) (Notes on file with California Initiative Review).

¹⁴⁵ FISCAL IMPACT ESTIMATE REPORT (2014), *supra* note 4.

¹⁴⁶ *Id.*

truancy prevention (25%), victim compensation (10%), and mental health and substance abuse treatment programs (65%).¹⁴⁷

¹⁴⁷ THE SAFE NEIGHBORHOODS AND SCHOOLS ACT, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN (Dec. 19, 2013), available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

Proposition 48:
Referendum on Indian Gaming Compacts

Referendum Statute

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McGeorge School of Law

By

Nicholas Kump

J.D. University of the Pacific, McGeorge School of Law to be conferred May 2015
B.A. Public Relations, University of Southern California, 2007

&

Charles Deyoe

J.D. University of the Pacific, McGeorge School of Law to be conferred May 2015
M.A. History, San Diego State University, 2009
B.A. History, San Diego State University, 2006

I. EXECUTIVE SUMMARY

Indian gaming has enabled some California Indian tribes to rise from abject poverty and political disenfranchisement to being one of the most influential interest groups in the state with large tribal government offices and large per capita payments to tribal members.¹ However, not all tribes have benefited equally from Indian gaming, with unemployment and government dependency still high on the reservations of many non-gaming tribes.² As a result, many tribes are looking outside their existing reservations to identify ways to take advantage of all the benefits Indian gaming has created for other tribes.³ Proposition 48 would, for the first time in California, approve an agreement between an Indian tribe and the State that would permit the tribe to operate a casino off of the tribe's existing reservation.⁴

Indian gaming in California is regulated by a combination of federal and state laws. At the federal level, Indian gaming is governed by the Indian Gaming Regulatory Act (IGRA).⁵ At the state level, California voters amended the California Constitution in 2000 to authorize Indian tribes to operate "Las Vegas-style" casinos featuring slot machines and house-banked card games⁶ on Indian reservations throughout the state.⁷ This amendment authorized the governor to negotiate compacts⁸ with tribes, subject to ratification by the Legislature, governing gaming

¹ JAY MICHAEL & DAN WALTERS WITH DAN WEINTRAUB, *THE THIRD HOUSE: LOBBYISTS, MONEY, AND POWER IN SACRAMENTO* 57–59 (2001).

² Alison Owings, Op-Ed, *The Ka-Ching Doesn't Ring for Everyone / Indian Casinos are Thriving but They Haven't Made Most Indians Wealthy, and They Can't Solve the Myriad Problems that Exist on Reservations*, S.F. CHRONICLE, Feb. 11, 2007, <http://www.sfgate.com/opinion/article/The-ka-ching-doesn-t-ring-for-everyone-Indian-2618214.php>.

³ See *Controversial Applications in Process*, STAND UP FOR CAL., <http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process> (last visited Aug. 24, 2014) (listing dozens of proposals by tribes to acquire new land for economic development).

⁴ Greg Lucas, *State's First Off-Reservation Tribal Casino Poised for OK*, CAPITOL WEEKLY (June 24, 2013), <http://capitolweekly.net/states-first-reservation-tribal-casino-poised-ok/> (describing the impacts of the underlying statute that is subject to a referendum by Proposition 48). The tribe in this case though takes the position that the casino is not "off-reservation" because the tribe followed the "rule and letter of the law" in obtaining additional reservation land for its casino. *Facts vs. Faction: The North Fork Rancheria Project – Fact Sheet*, NORTH FORK RANCHERIA (Jan. 1, 2011), available at <http://www.northforkrancheria.com/files/NFR%20Project%20Fact%20vs%20Fiction%20312121.pdf>.

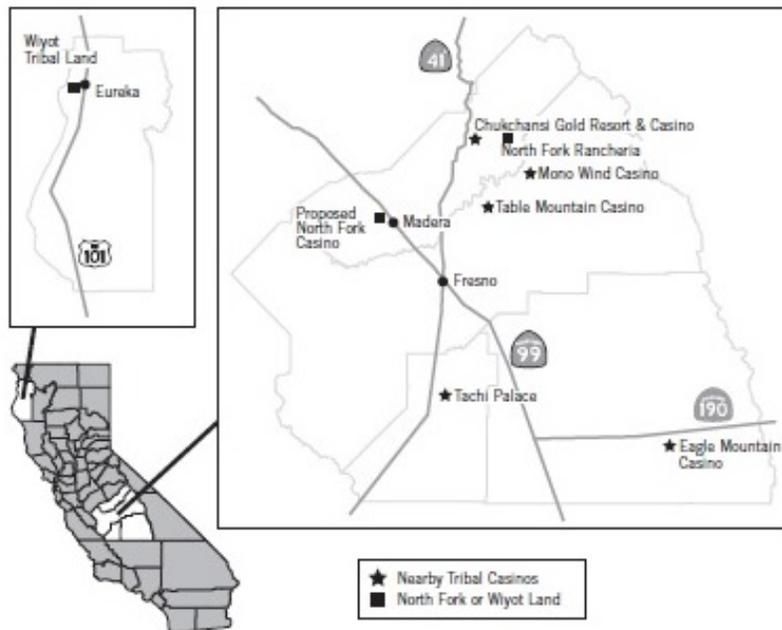
⁵ Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–2721. See *supra* Part II. A. for more information on IGRA.

⁶ House-banked game is defined in the California Penal Code and is distinguishable from a nonhouse-banked game because the house occupies the role of the banker rather than players betting against each other. CAL. PENAL CODE § 330.11.; see also *Sullivan v. Fox*, 189 Cal. App. 3d 673, 678 (1987) ("Banking game has come to have a fixed and accepted meaning: the 'house' or 'bank' is a participant in the game, taking on all comers, paying all winners, and collecting from all losers."). Blackjack and Baccarat are common examples of house-banked games and IGRA defines this type of game as class III gaming. 25 U.S.C. § 2703(8).

⁷ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY, MARCH 7, 2000, at 4–5, available at <http://vig.cdn.sos.ca.gov/2000/primary/pdf/2000ballot1.pdf>.

⁸ A compact, or tribal-state gaming compact, is an intergovernmental agreement between a tribe and State governing the conduct of gaming activities. 25 U.S.C. § 2710(d)(3)(A).

Figure 1
Location of Proposed North Fork Casino and Wiyot Tribal Land



operations at tribal casinos in accordance with federal law.⁹ California has negotiated and ratified compacts with seventy-one Indian tribes;¹⁰ as of 2014 there are sixty casinos operated by fifty-eight tribes throughout the state.¹¹

Proposition 48 is a referendum on the Legislature’s ratification of a compact between the North Fork Rancheria of Mono Indians (the North Fork Tribe) and the State of California.¹² The North Fork Tribe is a federally-recognized Indian tribe with its original reservation and government headquarters

located in North Fork, California.¹³ While this land is eligible for gaming,¹⁴ Proposition 48 would authorize the North Fork Tribe to build and operate a casino in a more lucrative location off of Highway 99 near Madera, California, thirty-six miles away from its reservation.¹⁵ Proposition 48 would also ratify a tribal-state gaming agreement with the Wiyot Tribe, which has

⁹ CAL. CONST. art. IV § 19(f).

¹⁰ The North Fork and Wiyot Compacts are not included in this total.

¹¹ *Ratified Tribal-State Gaming Compacts (New and Amended)*, CAL. GAMBLING CONTROL COMMISSION, <http://www.cgcc.ca.gov/?pageID=compacts> (last visited Sept. 13, 2014).

¹² See Figure 1 for proposed location of the North Fork Casino in relation to other casinos and cities. Figure 1 courtesy of the November 2014 Voter Guide. CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY NOVEMBER 4, 2014, at 43, available at <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf#page=74> [“NOVEMBER 2014 VOTER GUIDE”].

¹³ *Tribal Offices*, NORTH FORK RANCHERIA OF MONO INDIANS, <http://www.northforkrancheria.com/page.cfm?pageID=55> (last visited Aug. 24, 2014).

¹⁴ See U.S. DEP’T OF THE INTERIOR, RECORD OF DECISION: TRUST ACQUISITION OF THE 305.49-ACRE MADERA SITE IN MADERA COUNTY, CALIFORNIA, FOR THE NORTH FORK RANCHERIA OF MONO INDIANS § 2.1.3 (2012), available at <http://www.northforkeis.com/documents/rod/ROD.pdf> (explaining the original rancheria is technically eligible for gaming under IGRA but that the land is held in trust for individual tribal members rather than the tribe, the land is steep and remote, and there would be significant community opposition to building a casino there).

¹⁵ Letter from Larry Echohawk, Assistant Sec’y – Indian Affairs, U.S. Dep’t of the Interior, to Edmund G. Brown, Jr., Governor, State of Cal. at 6 (Sept. 1, 2011).

agreed to abstain from pursuing gaming activities on its eighty-eight-acre reservation near the Humboldt Bay National Wildlife Refuge in exchange for payments from the North Fork Tribe.¹⁶ Influential elected officials and organizations are on both sides of Proposition 48.¹⁷ Proponents of Proposition 48 contend the North Fork Tribe followed a procedure provided in federal law to acquire the land and a casino will allow the North Fork Tribe to be self-sufficient and bring thousands of jobs to a region with high poverty and unemployment. Opponents argue that the North Fork Compact breaks promises that Indian tribes made in 2000 to limit gaming to existing reservations. Both proponents and opponents of Proposition 48 are financially supported by out-of-state gaming interests whose genuine concerns for the welfare of Indian tribes, the California economy, and environmental impacts are questionable.¹⁸

California law requires the governor to develop the substance of a tribal-state gaming compact, and thus the Legislature is precluded from amending the compact terms when it ratifies the compact with a statute. As a result, a statute ratifying a tribal-state gaming compact is distinguishable from other statutes. Should Proposition 48 fail, the North Fork Tribe will undoubtedly seek legal relief and argue that the North Fork Compact should not have been subject to a referendum.

In addition to whether a compact can be the subject of a referendum, there are also other provisions in IGRA that could provide causes of action for the North Fork Tribe to secure a compact—and thus a lucrative casino—regardless of the outcome of Proposition 48.¹⁹ Some commentators have even suggested that in light of the Legislature’s authority to amend or repeal referendum statutes,²⁰ rejecting Proposition 48 would simply result in the governor and the North Fork Tribe negotiating a new compact for the Legislature to ratify.²¹ However, this simple

¹⁶ TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE WIYOT TRIBE (2012), available at http://gov.ca.gov/docs/Wiyot_Compact.pdf [“WIYOT COMPACT”].

¹⁷ For a detailed list of the proponents and opponents of Proposition 48 see *infra* notes 149 and 175.

¹⁸ The YES campaign is largely funded by Station Casinos LLC of Las Vegas and the NO campaign is largely supported by Wall Street banks with an interest in a casino that would compete with the North Fork Casino. *Campaign Finance: YES On Prop. 48. – All Contributions Received*, CAL. SECRETARY ST., [http://cal-](http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359411&session=2013&view=received)

[access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359411&session=2013&view=received](http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359411&session=2013&view=received) (last visited Sept. 13, 2014) (listing Station Casinos LLC as a major source of funding); *Campaign Finance: NO On Prop. 48. – All Contributions Received*, CAL. SECRETARY ST. [http://cal-](http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359207&session=2013&view=received)
[access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359207&session=2013&view=received](http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359207&session=2013&view=received) (last visited Sept. 13, 2014) (listing Brigade Capital Management, LLC and affiliated entities as major contributors).

¹⁹ *Infra* Part IV. B, C (explaining two possible methods through IGRA that could provide for a valid compact).

²⁰ CAL. CONST. art. II § 10(c) (“The Legislature may amend or repeal referendum statutes.”).

²¹ See Omid Shabani & Daniel Reid, *Proposition 94, 95, 96, 97: Referenda on Amendment to Indian Gaming Compact*, CAL. INIT. REV., (Fall 2008) available at <http://www.mcgeorge.edu/Documents/Publications/2008ReferendaonAmendmenttoIndianGamingCompact.pdf> (contending that voter rejection of tribal-state gaming compacts in 2008 would send the tribes and State “back to the negotiating table”). However, while courts have not considered the issue in the context of a referendum, courts are cautious about allowing the Legislature to contradict the will of California voters. See *In re Estate of Claeysens*, 161 Cal. App. 4th 465, 471 (2008) (repealing a legislatively-

solution of ratifying a newly-negotiated compact in 2015 seems unlikely given the political consequences of reversing the will of California voters with a statute that barely passed in the Assembly by one vote and then only after reconsideration was granted.²²

Even if voters approve Proposition 48, the opponents of the North Fork Compact still have several opportunities to challenge the North Fork Casino.²³ As a result, no matter what happens in November, Proposition 48 will likely not be the end of the story for the North Fork Tribe and its proposed casino. It will be just the latest chapter in California's history of Indian gaming.

II. THE LAW

A. Brief History of Indian Gaming in California

Modern Indian gaming in California has its roots in the early 1970s when the Rincon Band of Mission Indians adopted a tribal ordinance authorizing the establishment of a card room on the tribe's 3500-acre reservation in eastern San Diego County.²⁴ Fearing the reservation would become a "little Las Vegas," San Diego County officials sued in federal court arguing that the card room violated the County's gambling ordinance.²⁵ The district court found that the County had jurisdiction over the reservation, but the Ninth Circuit reversed the district court's decision on appeal in a 2-1 decision.²⁶

Throughout the 1970s and 80s other tribes in California opened small card rooms and bingo halls, including the Cabazon Band of Mission Indians in Riverside County. With local law enforcement and state officials looking for guidance on regulating these gaming operations, the Supreme Court defended the sovereign right of Indian tribes to govern themselves and the activities on their land in *Cabazon Band of Mission Indians v. County of Riverside* in 1986.²⁷ The court held that local and state governments did not have jurisdiction to enforce their gambling laws on Indian reservations in California.²⁸

enacted statute that conflicted with a voter-enacted statute and stating that "[a]ny doubts should be resolved in favor of the initiative and referendum power, and amendments that *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinance, where the original initiative does not provide otherwise").

²² Complete Bill History of AB 277, <http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml> (last visited Sept. 13, 2014). Additionally, Senate President Pro Tem Elect Kevin de León is not likely to support another compact for the North Fork Tribe after urging Governor Brown to stop submitting compacts for off-reservation casinos to the Legislature until a proper policy could be developed. Letter from Kevin de León, Senator, Cal. State Senate, to Edmund G. Brown, Jr., Governor, State of Cal. (July 29, 2013).

²³ *Infra* Part IV. D (describing the ongoing legal challenges to the North Fork Compact).

²⁴ *Rincon Band of Mission Indians v. San Diego Cnty.*, 324 F. Supp. 371, 373 (S.D. Cal. 1971) *rev'd*, 495 F.2d 1 (9th Cir. 1974).

²⁵ *Id.*

²⁶ *Rincon Band of Mission Indians v. San Diego Cnty.*, 495 F.2d 1 (9th Cir. 1974) (reversing on a procedural error after finding the district court lacked subject matter jurisdiction to hear the case).

²⁷ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

²⁸ *Id.* at 221–22.

In response to the *Cabazon* decision, Congress passed IGRA in 1988 and created a framework for the regulation of Indian gaming throughout the United States.²⁹ Under IGRA, tribes have a right to conduct gaming on Indian land³⁰ to the extent permissible under state law and states have an obligation to negotiate compacts in good faith with Indian tribes governing the proposed gaming activities.³¹

Following Congress' enactment of IGRA, many California tribes operated gaming establishments largely unregulated for several years. California Governor Pete Wilson asserted the state's interest to regulate gaming under IGRA in 1998 when he negotiated the first tribal-state gaming compacts with several California Indian tribes.³² The compacts, known as the Pala Compacts, strongly favored state interests, but eleven tribes joined to support the compacts in exchange for the right to operate Las Vegas-style casinos in California.³³ Other California tribes opposed the Pala Compacts, claiming that the compacts infringed on tribal sovereignty³⁴ due to the burdensome conditions imposed on tribes.³⁵ These tribes collected signatures to place Proposition 5 on the ballot in November 1998 to establish a compact process more favorable to tribal interests than the Pala Compacts. Accordingly, Proposition 5 sought to enact a statute allowing tribes to play a more active role in negotiating the terms of their compacts than under the Pala Compacts.³⁶

Proposition 5 was the most expensive initiative campaign ever at the time,³⁷ which included well-funded opposition from Nevada casino corporations including the same Station Casinos involved in Proposition 48 in 2014.³⁸ Voters passed Proposition 5,³⁹ but the California

²⁹ 25 U.S.C. § 2702.

³⁰ Defined in IGRA section 2703(4) as: “(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.”

³¹ *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1253 (9th Cir. 1994) *opinion amended on denial of reh'g*, 99 F.3d 321 (9th Cir. 1996).

³² Aaron Peardon, *Jackpot! A Legal History of Indian Gaming in California* at 124 (May 2011) (unpublished M.A. thesis, University of Nevada, Las Vegas).

³³ *Id.* at 127.

³⁴ The concept of tribal sovereignty recognizes that Indian tribes are dependent sovereign nations, with distinct political communities, although they are under the “protection and dominion of the United States.” *Picayune Rancheria of Chukchansi Indians v. Brown*, No. C074506, 2014 Cal. App. LEXIS 864, at *22 n.6 (Cal. App. 3d Dist. Sept. 24, 2014).

³⁵ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 3, 1998, at 22–23, available at http://librarysource.uchastings.edu/ballot_pdf/1998g.pdf.

³⁶ *See id.* at 20–21.

³⁷ Michelle DeArmond, *Indian Tribes Take Early Lead in Ballot Initiative Battle Over Tribal Casinos*, LAS VEGAS SUN, Nov. 3, 1998, <http://www.lasvegassun.com/news/1998/nov/03/indian-tribes-take-early-lead-in-ballot-initiative/>.

³⁸ *List of Contributions Received in Support of Proposition 5: Tribal-State Gaming Compacts*, CAL. SECRETARY ST., <http://www.sos.ca.gov/prd/bmgeneral98/prop5.htm> (last visited Sept. 30, 2014).

Supreme Court invalidated most of the statute holding that it conflicted with the California Constitution's prohibition against "Las Vegas-style" casinos.⁴⁰

Following the court's invalidation of Proposition 5, California voters amended the state's constitution in March of 2000⁴¹ through Proposition 1A.⁴² Amending the constitution addressed Proposition 5's conflict with the constitution by creating an exception in the constitution itself allowing for Indian gaming.⁴³ Proposition 1A also resulted in the approval of gaming compacts with fifty-seven tribes that the Legislature had ratified and governor negotiated, but which required the constitutional change to be effective.⁴⁴

The March 2000 ballot also contained a referendum on the eleven Pala Compacts, which the Legislature had ratified and compact opponents sought to reverse.⁴⁵ While voters approved Proposition 29 53.1 percent to 46.9 percent,⁴⁶ voters more strongly supported Proposition 1A 64.5 percent to 35.5 percent.⁴⁷ As a result, the eleven compacts approved by Proposition 29 were superfluous in light of the constitutional amendment in Proposition 1A and the compacts previously negotiated under the terms of Proposition 1A prevailed.⁴⁸

The years that followed saw a dramatic expansion of Indian gaming in California. In 2008, voters supported the Legislature's ratification of gaming compacts with four Indian tribes through the referendum process.⁴⁹ The referenda allowed each tribe to significantly increase the number of slot machines at its casino.⁵⁰ Today there are approximately 63,835 slot machines in

³⁹ 62.4 percent in support and 37.6 percent against. CAL. SEC'Y OF STATE, STATEMENT OF THE VOTE: GENERAL ELECTION NOVEMBER 3, 1998, at 85, *available at* <http://vote98.sos.ca.gov/Final/sov/SOV98.pdf>.

⁴⁰ *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 615 (1999). The court found one portion, the portion waiving the state's sovereign immunity, was still valid. *See infra* Part IV. C.

⁴¹ Prior to the passage of SB 202 (Chapter 558, Statutes of 2011), referendum and initiatives could be presented to the voters at the primary or general election. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 202, at 1 (Sept. 9, 2011). After July of 2011 referendum and initiatives can only be placed on the ballot for the general election. *Id.* at 2.

⁴² CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY, MARCH 7, 2000, at 4, *available at* <http://vig.cdn.sos.ca.gov/2000/primary/pdf/2000ballot1.pdf>.

⁴³ *Id.*

⁴⁴ The fifty-seven tribes included the eleven tribes that also had signed the Pala Compacts. *Id.*

⁴⁵ *Id.* at 78.

⁴⁶ CAL. SEC'Y OF STATE, STATEMENT OF THE VOTE: PRIMARY ELECTION MARCH 7, 2000, at 161, *available at* <http://www.sos.ca.gov/elections/sov/2000-primary/sov-complete.pdf>.

⁴⁷ *Id.* at 146.

⁴⁸ CAL. CONST. art. II § 10(b) ("If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.").

⁴⁹ Propositions 94, 95, 96, 97. The measures passed by near identical margins with Propositions 94 and 95 getting 55.6 percent of the vote and propositions 96 and 97 getting 55.5 percent. CAL. SEC'Y OF STATE, STATEMENT OF THE VOTE: PRIMARY ELECTION FEB. 5, 2008, at 62, 65 *available at* <http://www.sos.ca.gov/elections/sov/2008-primary/2008-sov.pdf>.

⁵⁰ Propositions 96 and 97 allowed the Sycuan Band of the Kumeyaay Nation and Agua Caliente Band of Cahuilla Indians to increase from 2000 to up to 5000 machines and propositions 94 and 95 allowed the Pechanga Band of Luiseño Mission Indians and Morongo Band of Mission Indians to increase from 2000 to up to 7500 slot machines. CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE

the state⁵¹ with the largest casino operating 4900 machines at Pechanga Resort & Casino in Temecula.⁵²

B. Factual Background of Proposition 48

Proposition 48 seeks to reverse the Legislature's ratification of the North Fork and Wiyot Compacts. Even before the North Fork Compact was subject to a referendum, the North Fork Tribe's casino project near Madera was a lightning rod for controversy.

The North Fork Tribe began its pursuit of a casino in 2004 with the announcement of a partnership with casino management corporation Station Casinos of Las Vegas.⁵³ The tribe applied to the United States Department of the Interior to take the land near Madera into trust for gaming in 2005⁵⁴ and the Secretary of the Interior approved the application in September 2011 through the two-part determination process authorized by IGRA.⁵⁵ The two-part determination process in IGRA allows tribes to open a casino on land other than existing reservation land.⁵⁶ This was the first time a tribe in California had successfully completed this process.⁵⁷ In September 2012, Governor Brown concurred with the Secretary of the Interior's decision to permit a casino for the North Fork Tribe near Madera,⁵⁸ as required by IGRA.⁵⁹

SUPPLEMENTAL: CALIFORNIA PRIMARY ELECTION, TUESDAY, FEBRUARY 5, 2008, at 12, 20, 28, 36, available at <http://vig.cdn.sos.ca.gov/2008/feb/lang/english-sup.pdf>.

⁵¹ *California Casinos*, 500 NATIONS, http://500nations.com/California_Casinos.asp (last visited Sept. 30, 2014).

⁵² *California's Largest Indian Casinos*, 500 NATIONS, http://500nations.com/California_Casinos_Largest.asp (last visited Sept. 30, 2014).

⁵³ *Project Overview*, NORTH FORK RANCHERIA OF MONO INDIANS, <http://www.northforkrancheria.com/page.cfm?pageID=21> (last visited Sept. 30, 2014).

⁵⁴ Trust land is land that the federal government holds title to for the benefit of an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation. 25 U.S.C. § 2201(4)(i).

⁵⁵ Press Release, U.S. Dep't of the Interior, Assistant Sec'y Echohawk Issues Four Decisions on Tribal Gaming Applications (Sept. 2, 2011).

⁵⁶ The two parts of the determination are: 1) the Department of the Interior determining that taking land into trust for a casino is in the best interest of the tribe and would not be detrimental to the surrounding community; 2) the governor concurring in that decision. 25 U.S.C. § 2719(b)(1)(A).

⁵⁷ The Estom Yumeka Maidu Tribe of the Enterprise Rancheria received approval at the same time through the same process. Press Release, U.S. Dep't of the Interior, Assistant Sec'y Echohawk Issues Four Decisions on Tribal Gaming Applications (Sept. 2, 2011). This process is controversial because the governor unilaterally has the authority to concur with the Secretary of the Interior's decision to permit Indian gaming on a proposed parcel of land. *Briefing Report: Making Tribal Land Gaming-Eligible Through the 'Two-Step Determination Process'*, REPUBLICAN CAUCUS CAL. ST. SENATE, <http://cssrc.us/content/briefing-report-making-tribal-land-gaming-eligible-through-two-step-determination-process> (last visited Sept. 13, 2014) ("The most controversial aspect of the two-part determination process arises over the governor's role in the concurrence.").

⁵⁸ Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Concurs with U.S. Dep't of the Interior Decision, Signs Compact with North Fork Rancheria (Aug. 31, 2012), available at <http://www.gov.ca.gov/news.php?id=17700>.

⁵⁹ 25 U.S.C. § 2719(b)(1)(A) (requiring the governor of the state where the land is located to concur with the findings of the Secretary of the Interior).

At the same time Governor Brown announced his concurrence allowing the North Fork Tribe to build a casino near Madera, he also announced that he had signed a compact with the North Fork Tribe governing gaming activities at the proposed casino.⁶⁰ Pursuant to the California Government Code,⁶¹ the Legislature ratified the North Fork Compact by passing AB 277 on June 27, 2013 and Governor Brown signed the bill on July 3, 2013.⁶²

On October 22, 2013, the Secretary of the Interior published notice that the North Fork Compact had “tak[en] effect” in accordance with federal law.⁶³ California Secretary of State Debra Bowen certified that a sufficient number of signatures had been submitted to qualify a referendum on AB 277 on November 20, 2013.⁶⁴

C. Existing Law and Proposition 48

Proposition 48 is a referendum on the November 2014 ballot regarding Indian gaming compacts enacted by AB 277 (Chapter 51, Statutes of 2013).⁶⁵ Proposition 48, and the underlying statute Chapter 51, Statutes of 2013, represents compacts ratified by the Legislature and negotiated by Governor Brown with the North Fork Tribe and Wiyot Tribe.⁶⁶ The Wiyot and North Fork Compacts are closely intertwined.⁶⁷ The North Fork Tribe’s compact authorizes the tribe to offer class III⁶⁸ gaming on land in Madera County outside of the North Fork Tribe’s existing reservation.⁶⁹ The Wiyot Tribe’s compact prohibits the tribe from constructing and operating a casino on tribal land in environmentally sensitive areas near Humboldt Bay.⁷⁰ In exchange, the Wiyot Tribe will receive between 2.5 and 3.5 percent of the

⁶⁰ Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Concurs with U.S. Dep’t of the Interior Decision, Signs Compact with North Fork Rancheria (Aug. 31, 2012), *available at* <http://www.gov.ca.gov/news.php?id=17700> (announcing both the concurrence to allow the federal government to take the land in Madera into trust and the signing of a compact with the North Fork Tribe).

⁶¹ CAL. GOV’T CODE § 12012.25 (explicitly requiring that ratification be by statute).

⁶² Complete Bill History of AB 277, http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0251-0300/ab_277_bill_20130703_history.html (last visited September 9, 2014).

⁶³ 78 Fed. Reg. 62649 (Oct. 22, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-10-22/pdf/2013-24350.pdf> (“This notice publishes the Class III Gaming Compact between the North Fork Rancheria of Mono Indians and the State of California taking effect.”).

⁶⁴ Press Release, Cal. Sec’y of State, Referendum Qualifies for November 2014 California Ballot (Nov. 20, 2013) <http://www.sos.ca.gov/admin/press-releases/2013/db13-052.htm>.

⁶⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 40.

⁶⁶ *Id.*

⁶⁷ *See id.* at 41–42 (explaining the relationship between the Wiyot and North Fork Compacts).

⁶⁸ Defined in IGRA section 2703(8) as all forms of gaming that are not class I or II, but understood to mean house-banked games such as blackjack and slot machines. For more information on house-banked games see *supra* note 6.

⁶⁹ TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE NORTH FORK TRIBE at Preamble & § 1 (2012), *available at* http://gov.ca.gov/docs/Final_Compact_-_North_Fork.pdf [“NORTH FORK COMPACT”].

⁷⁰ WIYOT COMPACT, *supra* note 16.

North Fork Tribe's revenue from the North Fork Casino.⁷¹ The Wiyot Compact a twenty-year term that expires on December 31, 2033.⁷²

Chapter 51, Statutes of 2013, includes specified exemptions from the requirements of the California Environmental Quality Act (CEQA).⁷³ However, the CEQA exemptions are limited to activities undertaken by the tribal government itself and do not extend to any intergovernmental agreements made with local governments for projects undertaken in support of tribal activities.⁷⁴ The North Fork Compact requires that the tribe complete a Tribal Environmental Impact Report studying the impact of a casino near Madera on environmental resources outside Indian land.⁷⁵ Thus, there will be an environmental review of the project, but a more limited review than would be required under CEQA.

Under the terms of the North Fork Compact, the tribe is allowed to build and operate a casino in Madera County with up to 2000 slot machines and no other tribe can build a casino within sixty miles of this facility.⁷⁶ The North Fork Tribe agreed to quarterly payments to the State Gaming Agency's Revenue Sharing Trust Fund, which supports the activities of non-gaming California Indian tribes.⁷⁷ The North Fork Compact authorizes the tribe to make deductions from its revenue prior to making payments into the Revenue Sharing Trust Fund for reimbursement to the State for services provided, the tribe's payment to the Wiyot Tribe, and mitigation payments to local agencies.⁷⁸

The North Fork Compact is extremely prescriptive, setting out explicit requirements for development and oversight of operations that encompasses state licensing, state inspections, dispute resolutions, compliance with state public health and safety law and regulations, and myriad other requirements.⁷⁹ The term of the North Fork Compact is twenty years expiring on December 31, 2033.⁸⁰

D. Effects of the Referendum

In the November 2014 General Election, California voters will decide whether the Legislature's ratification of the North Fork and Wiyot Compacts should stand. A YES vote will affirm the compacts. A NO vote will reverse the Legislature's ratification of the compacts. Referenda, by their very structure can be confusing to many voters, your authors included. However, voters who wish to affirm the compacts negotiated by Governor Brown and approved by the Legislature should vote YES. Those who want to reject the compacts should vote NO. In this paper we will refer to those groups who want voters to vote "No" and reject the compacts as

⁷¹ *Id.* § 4.1.

⁷² *Id.* § 7.2.

⁷³ CAL. GOV'T CODE § 12012.59 (b)(1)(A)–(F).

⁷⁴ *Id.* § 12012.59 (b)(1)–(b)(2).

⁷⁵ NORTH FORK COMPACT, *supra* note 69, at § 11.8.1.

⁷⁶ *Id.* § 4.7(b).

⁷⁷ *Id.* §§ 4.6, 5.1. For additional explanation of the fiscal impacts of Proposition 48 see *infra* Part V. C.

⁷⁸ *Id.* §§ 4.3, 5.7(a)–(h).

⁷⁹ *Id.* §§ 6–13.

⁸⁰ *Id.* § 14.2.

the opponents. Those groups that want voters to vote “Yes” and affirm the compacts will be referred to as the proponents.⁸¹

III. DRAFTING ISSUES

The language of Proposition 48 is not in dispute nor is it ambiguous. If passed, the referendum would affirm the North Fork and Wiyot Compacts as approved by the Legislature and Governor by AB 277 (Chapter 51, Statutes of 2013). If not approved, the referendum would overturn the ratification of the compacts.

IV. CONSTITUTIONAL AND STATUTORY ISSUES

The story of the North Fork Tribe and its proposed casino near Madera will not be over when polls close on November 4. The tribe will still have several options in court to obtain a compact if voters reject the compacts and Proposition 48 fails. First the tribe can argue that the statute ratifying the North Fork and Wiyot Compacts is not the proper subject of a referendum.⁸² Second, Proposition 48 cannot annul the Secretary of the Interior publishing a valid compact in the Federal Register, which is all that IGRA requires.⁸³ The North Fork Tribe can also argue that the State negotiated in bad faith so the Secretary of the Interior should impose a compact.⁸⁴ Finally, if Proposition 48 passes and voters approve the Legislature’s ratification of the compacts, the opponents of the North Fork Compact will have several causes of action as well.⁸⁵

A. Subjecting a Compact to a Referendum

AB 277 is distinguishable from other statutes that are normally subject to a referendum because AB 277 is the ratification of an agreement between two sovereign governments rather than a statute subject to amendments, hearings, and voting in policy committees.⁸⁶ The referendum process allows voters to affirm or reject statutes or parts of statutes enacted by the Legislature.⁸⁷

⁸¹ This simplification is necessary as technically the groups on the “No” side of Proposition 48, such as Stand Up for California and the Chukchansi Tribe, were the supporters of subjecting AB 277 to a referendum and obtained the signatures to put the North Fork and Wiyot Compacts on the ballot. However, in order to avoid the confusion that would result if we were to refer to “No” side as the proponents and the “Yes” side as the opponents, we will refer to the “No” side as the opponents and the “Yes” side as the proponents.

⁸² *Infra* Part IV.A.

⁸³ *Infra* Part IV.B.

⁸⁴ *Infra* Part IV.C.

⁸⁵ *Infra* Part IV.D.

⁸⁶ There are also implications with tribal sovereignty at issue here because the voters of California are dictating to a sovereign tribal government the terms of the activities on its land, but this discussion is outside the scope of this article.

⁸⁷ CAL. CONST. art. II § 9.

The question whether the North Fork Compact could properly be subject to a referendum was decided by the Madera County Superior Court in June 2014.⁸⁸ The court held that ratification of the North Fork Compact was a legislative act properly subject to the referendum process.⁸⁹ The North Fork Tribe has appealed the decision to the Fifth District Court of Appeal.⁹⁰ On appeal, the appellate court will consider whether the referendum power extends to statutes that merely ratify negotiated agreements.⁹¹

While California voters' initiative and referendum powers are expansive and protected by the California Constitution, the powers are still not unlimited. In *American Federation of Labor v. Eu*, the California Supreme Court held the voters' initiative power is restricted to the adoption or rejection of laws.⁹² The court went on to explain that a law must be "declared by some authority possessing sovereign power over the subject."⁹³ The court found the voters lacked the authority through initiative to compel the Legislature to adopt a resolution urging Congress to submit a balanced budget amendment to the state.⁹⁴

Similarly, in *People's Advocate, Inc. v. Superior Court*, the California Supreme Court held that the voters' initiative power did not extend to determining the process for the appointment of legislative leadership, how legislative committee assignments were made, and how legislative personnel were hired.⁹⁵ Rather, the court found that the rules and resolutions enacted by voter initiative were outside the scope of permitted subject matter that the people could legislate through the initiative.⁹⁶ The court concluded "[i]n sum, the people through the electorate have been given the power to make statutes, i.e. the power to make laws for all the people, but not the power to make rules for the selection of officers or rules of proceeding or rules which regulate the committees or employees of either or both houses of the Legislature."⁹⁷

In contrast, in *Legislature v. Eu*, the California Supreme Court held that constitutional provisions adopted through an initiative imposing term limits on legislators and reducing legislative funding levels were valid.⁹⁸ The statutes under review did "not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever

⁸⁸ *North Fork Rancheria of Mono Indians v. California*, No. MCV062850, (Madera Cnty. Super. Ct. June 26, 2014) (ruling on demurrers to cross-complainant's cross-complaint).

⁸⁹ *Id.* at 6–10.

⁹⁰ *North Fork Rancheria of Mono Indians v. California*, No. MCV062850, (Madera Cnty. Super. Ct. Sept. 4, 2014) (notice of appeal).

⁹¹ Cases in other jurisdictions have held that a legislature's approval of a compact is a legislative act because it is a policy decision that changes state law. *See e.g., Florida House of Representatives v. Crist*, 999 So.2d 601 (Fla. 2008); *Saratoga Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003).

⁹² *Am. Fed'n of Labor v. Eu*, 36 Cal. 3d 687 (1984).

⁹³ *Id.* at 711.

⁹⁴ *Id.* at 692.

⁹⁵ *People's Advocate, Inc. v. Superior Court*, 181 Cal. App. 3d 316, 334 (Ct. App. 1986).

⁹⁶ *Id.* at 326.

⁹⁷ *Id.*

⁹⁸ *Legislature v. Eu*, 54 Cal. 3d 492, 535 (1991).

laws it deems appropriate.”⁹⁹ In addition, the court found “[t]he challenged measure alters neither the content of those laws nor the process by which they are adopted.”¹⁰⁰

In the context of tribal-state gaming compacts, ratification takes the form of a traditional statute, yet the act taken by the Legislature is more like rule or resolution making. If the Government Code required a resolution rather than a statute to ratify a compact¹⁰¹ then it would be clear in light of the holding in *People’s Advocate* that voters lack the power to reverse the action of the Legislature by referendum. While ratification is simply a yes or no vote much like a resolution, the Legislature required ratification through a statute, suggesting that it intended a referendum to be possible. On its face, Proposition 48 does not change the internal structure of the Legislature and is essentially a measure that allows voters to reconsider a policy decision made by the Legislature through a statute. However, after carefully analyzing the meaning of ratification, the appellate court will need to consider whether ratification is more like compelling the Legislature to adopt a resolution and making rules for the Legislature, or more similar to a policy decision of a traditional statute.

These arguments regarding whether the compact could be subject to a referendum are intertwined with other questions of federal law discussed below.¹⁰² As a result, these arguments will likely also surface in federal question litigation¹⁰³ in federal court where the court may be less likely to follow California courts’ obligation to “jealously guard” the people’s right to a referendum under California law.¹⁰⁴

B. Effect of Publication of Compact in Federal Register

If the referendum fails and the Legislature’s ratification of the North Fork Compact is reversed, the North Fork Tribe may file a lawsuit arguing that its compact is effective and valid because the Secretary of the Interior published the compact in the Federal Register. By this reasoning, Proposition 48 is a superfluous exercise because the compact was effective after it was negotiated by Governor Brown, approved by the Legislature, and published by the Secretary of the Interior in the Federal Register.

IGRA specifies the procedure for a compact to be effective. Among other requirements not in contention here, IGRA permits class III gaming on Indian land if gaming is conducted in conformance with a tribal-state compact entered into by the tribe and state and approved by the Secretary of the Interior.¹⁰⁵ A compact takes effect under IGRA “only when notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary [of the

⁹⁹ *Id* at 292.

¹⁰⁰ *Id.*

¹⁰¹ Or even if the Government Code was silent and the ratification process was ambiguous.

¹⁰² *Infra* Part IV.B (questioning whether legislative approval and publication in the Federal Register finalized the compact).

¹⁰³ Federal question jurisdiction is ability of a federal court to hear a case because it involves a question of federal law.

¹⁰⁴ *Rossi v. Brown*, 9 Cal. 4th 688, 695 (1995).

¹⁰⁵ 25 U.S.C. § 2710(d)(1).

Interior] in the Federal Register.”¹⁰⁶ The North Fork Tribe’s argument would hinge when exactly a compact is entered into and effective.

The argument that a compact is *per se* valid because the Secretary of the Interior published it in the Federal Register was rejected by the Tenth Circuit in *Pueblo of Santa Ana v. Kelly (Pueblo)*.¹⁰⁷ In that case, the tribe argued that the compacts were valid because the Secretary of the Interior published the compacts in the Federal Register even though the New Mexico Supreme Court had invalidated the compacts.¹⁰⁸ Despite this argument, the court held that because the Governor of New Mexico did not have authority to validly “enter into” the compacts, the underlying compacts were invalid and the publication in the Federal Register did not cure the flaws.¹⁰⁹ The court made clear that a valid compact is a two-step inquiry: “(1) the compacts must be validly ‘entered into’ under applicable state law and (2) they must be ‘in effect’ pursuant to Secretarial approval and notice.”¹¹⁰

While *Pueblo* would seem to preclude the North Fork Tribe from arguing the validity of their compacts based on their publication in the Federal Register, the North Fork Tribe can argue its compact is distinguished from the *Pueblo* case. Unlike the compacts in *Pueblo*, there has been no determination from California’s Supreme Court that the North Fork Compact is invalid, and thus, the North Fork Tribe can argue that the compact was validly entered into pursuant to state law. The North Fork Compact was not void *ab initio* as the *Pueblo* compacts were.

Also importantly, California Secretary of State Debra Bowen did not certify Proposition 48 for the ballot until November 20, 2013,¹¹¹ nearly a month after the North Fork Compact appeared in the Federal Register on October 22, 2013.¹¹² The span of time in which the North Fork Compact was “in effect” before Proposition 48 qualified for the ballot makes a stronger argument that publication in the Federal Register was all the North Fork Tribe needed to make the compact effective.

However, in fulfilling her duty to transmit the North Fork and Wiyot Compacts to the Department of the Interior, California Secretary of State Debra Bowen made the Department of the Interior aware of the possible referendum on the statute ratifying the compacts.¹¹³ Secretary of State Debra Bowen stated that California statutes, including Chapter 51 ratifying the

¹⁰⁶ *Id.* at § 2710(d)(3)(B).

¹⁰⁷ *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997).

¹⁰⁸ *Id.* at 1548.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1553. These same two requirements are also provided in the North Fork Compact itself in section 19.1, which states that the compact is not effective until it is ratified in accordance with state law and notice of approval is published in the Federal Register.

¹¹¹ Press Release, Cal. Sec’y of State, Referendum Qualifies for November 2014 California Ballot (Nov. 20, 2013) <http://www.sos.ca.gov/admin/press-releases/2013/db13-052.htm>.

¹¹² 78 Fed. Reg. 62649 (Oct. 22, 2013) available at <http://www.gpo.gov/fdsys/pkg/FR-2013-10-22/pdf/2013-24350.pdf>.

¹¹³ Letter from Debra Bowen, Sec’y of State, State of Cal., to Paula Hart, Dir., Office of Indian Gaming (July 16, 2013).

compacts, did not become effective until January 1, 2014¹¹⁴ or if a referendum qualified, the day after the election.¹¹⁵ Consequently, the North Fork Tribe and the Department of the Interior had notice that the compacts did not necessarily go into effect after publication in Federal Register.

As the court in *Pueblo* stated, IGRA “does not define what is necessary for a tribe and state to ‘enter[] into’ a compact,” rather state law determines the required procedure.¹¹⁶ The California Constitution provides that the governor negotiates compacts and the Legislature then ratifies them.¹¹⁷ Although the California Constitution is silent on the ratification procedures, the California Government Code provides that compacts “shall be ratified by statute” and goes on to describe that a majority is required in each house along with the governor’s signature.¹¹⁸ As described above,¹¹⁹ the North Fork Compact was negotiated by Governor Brown and approved by a majority of both the Assembly and Senate before it was signed by Governor Brown and published in the Federal Register. The North Fork Tribe will argue that this process was faithfully followed and as a result the compact was validly “entered into” as required by IGRA.

The opponents of Proposition 48 will argue that the compact was not validly “entered into” because the California Constitution allows for a referendum to reverse a statute passed by the Legislature.¹²⁰ Article II, section 9, of the California Constitution defines the referendum power as “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.”¹²¹ As a result, the compact will not be validly “entered into” until the voters have decided whether to affirm the statute.¹²²

The opponents will point out that other compacts have been passed as urgency measures, which precludes the referendum process.¹²³ If the Legislature had sought to similarly exempt the North Fork Compact, it could have done so by passing an urgency measure.

¹¹⁴ CAL. CONST. art. IV § 8(c) (Absent an urgency clause, “a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute . . .”).

¹¹⁵ Letter from Debra Bowen, Sec’y of State, State of Cal., to Paula Hart, Dir., Office of Indian Gaming (July 16, 2013).

¹¹⁶ *Pueblo*, 104 F.3d at 1546.

¹¹⁷ CAL. CONST. art. IV § 19(f).

¹¹⁸ CAL. GOV’T CODE § 12012.25(c).

¹¹⁹ *Supra*, Part II. A.

¹²⁰ CAL. CONST. art. IV § 1 (“The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.”).

¹²¹ CAL. CONST. art. II § 9.

¹²² *Id.* at § 10(a) (stating that a statute subject to a referendum does not go into effect until the day after the election).

¹²³ Compacts with the Shingle Springs Band of Miwok Indians and Pinoleville Pomo Nation were passed as urgency statutes. CAL. GOV’T CODE § 12012.53 available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_3051-3100/ab_3072_bill_20080926_chaptered.pdf (noting that the statute is an urgency statute); CAL. GOV’T CODE § 12012.551 available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1401-1450/ab_1418_bill_20111002_chaptered.pdf (noting that the statute is an urgency statute).

Ultimately, the opponents will rely on the Tenth Circuit’s statement in *Pueblo* that the Secretary of Interior’s approval of a compact in the Federal Register “cannot, under [IGRA], vivify that which was never alive.”¹²⁴ The court will have to decide if the referendum process can “un-ratify” a compact or whether the approval by the Legislature was sufficient ratification regardless of Proposition 48.

C. An Alternative Compact Process Through IGRA

If Proposition 48 fails and voters reverse the Legislature’s ratification of the North Fork Compact, the North Fork Tribe may seek to invoke a provision in IGRA that allows the Secretary of the Interior to impose a compact without ratification by the Legislature. IGRA provides two avenues for a tribe to obtain a compact authorizing class III gaming. First, the tribe may request the state negotiate a compact in good faith and the tribe and state may voluntarily enter into a compact governing gaming activities.¹²⁵

If the first method is unsuccessful,¹²⁶ a tribe can sue the state seeking a determination that the state did not negotiate in good faith and compel the Secretary of the Interior to impose a compact.¹²⁷ If a tribe obtains a declaration from a federal court that the state failed to negotiate in good faith, the court will order the state and the tribe to conclude a compact within sixty days.¹²⁸ Should the tribe and state not conclude a compact within sixty days, the tribe and state will each provide their last, best offer for a compact to a court-appointed mediator.¹²⁹ The mediator will select a compact from the two options submitted, and the state will have sixty days to consent to the compact.¹³⁰ If the state fails to consent, the Secretary of the Interior works with the tribe to impose gaming procedures consistent with the compact selected by the mediator.¹³¹

As a preliminary matter, California waived its sovereign immunity, opening the state to a lawsuit arising from the state’s failure to conduct good faith negotiations with a tribe.¹³² Many states have not waived their sovereign immunity in suits related to compact negotiations, precluding tribes from seeking this remedy provided in IGRA.¹³³

¹²⁴ 104 F.3d at 1557.

¹²⁵ 25 U.S.C. § 2710(d)(3)(A).

¹²⁶ Which would be the case if the voters reject the North Fork Compact.

¹²⁷ 25 U.S.C. § 2710(d)(7)(A)(i). The purpose of this section in IGRA is to provide tribes an expeditious means to engage in class III gaming even if negotiations between the tribe and State break down. *Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1033 (2d Cir. 1990).

¹²⁸ 25 U.S.C. § 2710(d)(7)(B)(iii).

¹²⁹ *Id.* § 2710(d)(7)(B)(iv).

¹³⁰ *Id.* § 2710(d)(7)(B)(v),(vi).

¹³¹ *Id.* § 2710(d)(7)(B)(vii).

¹³² *Hotel Employees & Rest. Employees Int’l Union v. Davis*, 21 Cal. 4th 585, 615 (1999) (striking down an initiative that authorized various forms of tribal gaming, but finding the waiver of sovereign immunity portion was separable and remained in effect).

¹³³ Gregory R. Mulkey, *Texas v. United States: The Legality of the Secretarial Procedures Following Seminole Tribe of Florida v. Florida*, 33 AM. INDIAN L. REV. 525, 525 (2009).

The state has the burden of showing that the negotiations were conducted in good faith,¹³⁴ and if the court determines the state negotiated in good faith, the tribe's proposal fails.¹³⁵ Only one tribe in California has ever obtained a declaration from a court that the state negotiated in bad faith.¹³⁶ In that case, the court found bad faith after the state took a "hardline" approach to the negotiations and attempted to include provisions in the compact outside the scope of what IGRA permitted.¹³⁷

Before reaching the question of bad faith, the first hurdle for the North Fork Tribe is showing that the referendum is properly considered part of the negotiations.¹³⁸ After all, the actual negotiation process in which Governor Brown and the North Fork Tribe bargained to identify the mutually agreeable terms of the North Fork Compact concluded in 2012.¹³⁹ This is distinguishable from the *Rincon* case in which the governor was still conducting the negotiations so the court was able to immediately reach the question of good or bad faith. With the North Fork Tribe, it is the electorate acting in the place of the Legislature to ratify the compact negotiated by the governor.

IGRA provides that the state must "negotiate . . . in good faith to enter into . . . a compact,"¹⁴⁰ while California law creates the distinction between ratification and negotiation.¹⁴¹ A court would need to find that IGRA's broader directive of negotiating to enter into a compact includes the ratification, in which case the court can then consider the question of good or bad faith negotiations in the context of a referendum.

If the court is willing to consider the referendum as part of the negotiations, the court must next determine that the negotiations over the North Fork Compact are within the scope permitted by IGRA and were conducted in good faith. IGRA provides factors for courts to

¹³⁴ 25 U.S.C. § 2710(d)(7)(B)(ii)(II).

¹³⁵ *Texas v. United States*, 497 F.3d 491, 494 (5th Cir. 2007).

¹³⁶ Staff, *Rincon Band Becomes First California Tribe To Renegotiate Tribal-State Gaming Compact With Federal Courts*, INDIAN COUNTRY TODAY (Feb. 13, 2013), <http://indiancountrytodaymedianetwork.com/2013/02/13/rincon-band-becomes-first-california-tribe-renegotiate-tribal-state-gaming-compact>; *Rincon Band of Luiseño Mission Indians of Rincon Reservation v. Schwarzenegger (Rincon)*, 602 F.3d 1019 (9th Cir. 2010).

¹³⁷ *Rincon*, 602 F.3d at 1031, 1042.

¹³⁸ Some experts do not even consider this hurdle an obstacle and assume a state referendum is part of negotiations amounting to bad faith. See Marc Benjamin, *Outcome of Proposition 48 May Have No Bearing on North Fork Casino Project*, FRESNO BEE, Oct. 24, 2014, http://www.fresnobee.com/2014/10/24/4197065_outcome-of-proposition-48-may.html?rh=1 (quoting Michigan attorney Bryan Newland, a lawyer who worked for the Department of the Interior when the North Fork Tribe's application for federal trust land was approved, stating that ultimate approval is with the Department of the Interior and the North Fork Tribe has a right to sue for bad faith because they have a right to negotiate for class III gaming).

¹³⁹ Defining the parties in this litigation will create an awkward circumstance for Governor Brown and the California government. On the one hand, Governor Brown negotiated the North Fork Compact so he presumably would be content to see it implemented. On the other hand, if the voters rejected the compact, the attorney general would still have an obligation to defend the voters' ability under the referendum process to reverse legislation enacted by the Legislature.

¹⁴⁰ 25 U.S.C. § 2710(d)(3)(A).

¹⁴¹ CAL. CONST. art. IV § 19(f).

consider when determining whether negotiations were conducted in good faith.¹⁴² Those factors include: “the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.”¹⁴³

If the court is considering whether voters rejecting Proposition 48 is bad faith, the opponents of the North Fork Compact should argue that the voters’ rejection was not bad faith because the voters rejected the compact for permissible reasons under IGRA. The opponents superficially included these reasons in the November 2014 Voter Guide but would have been able to make this argument much stronger if the voter guide had expressly stated that voters should reject the North Fork Compact because of adverse impacts to other casinos and public safety concerns. The opponents note the casino will bring crime and pollution to the Central Valley,¹⁴⁴ but the arguments are largely focused on the expansion of Indian gaming off of existing reservations and other similar arguments.¹⁴⁵ While these broad policy arguments could be considered the “public interest,” the connection is much more tangential—and thus a larger leap for a court to make—than explicitly stating specific criminal consequences and other public safety impacts.

On the other side, the North Fork Tribe would need to show the exact opposite—that voters rejected the compacts for impermissible reasons. In *Rincon*, the court found bad faith because the taxes the state sought were outside the scope of the negotiations authorized by IGRA.¹⁴⁶ However, the North Fork Tribe’s argument for bad faith is much less certain because notwithstanding the voter guide, there is no way to know why voters vote in a particular way. Moreover, the referendum is not part of the traditional negotiation process so there is no provision in the compact that the tribe can point the court to as constituting bad faith. Although the State backing out of a ratified agreement would seem to be bad faith,¹⁴⁷ the possibility of a referendum undoing the ratification would not be a surprise to the North Fork Tribe considering referenda have occurred in the past.¹⁴⁸

¹⁴² 25 U.S.C. § 2710(d)(7)(iii).

¹⁴³ *Id.* § 2710(d)(7)(iii)(I).

¹⁴⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46 (this is the only mention of crime in the entire argument against Proposition 48 and is contained in the quote from Madera County Supervisor Dave Rogers).

¹⁴⁵ *Id.* at 47 (The first line of the opponents’ argument against Proposition 48 states “Keep Indian gaming on tribal reservation land only.”).

¹⁴⁶ *Rincon*, 602 F.3d at 1033. The scope of permissible negotiations is delineated in IGRA and includes: (i) application of laws related to licensing class III gaming; (ii) enforcement of laws; (iii) reimbursal of the State for costs of regulating class III gaming; (iv) taxation by the tribe; (v) remedies for breach of contract; (vi) standards for operation and maintenance of the casino; and (vii) any subjects directly related to the operation of gaming activities. 25 U.S.C. § 2710(d)(3)(C)(i)–(vii).

¹⁴⁷ Timm Herdt, *What Prop. 48 Will and Won't Decide*, CONTRA COSTA TIMES, Oct. 22, 2014, http://www.contracostatimes.com/opinion/ci_26779849/timm-herdt-what-prop-48-will-and-wont (“The federal law requires states to negotiate tribal compacts in good faith; renegeing on a signed compact would seem to be the definition of bad faith.”).

¹⁴⁸ Referenda on tribal-state gaming compacts have been on the ballot twice since 2000. Proposition 29 (2000) (eleven Pala Compacts); Propositions 94, 95, 96, 97 (2008) (compacts with the Sycuan Band of the Kumeyaay Nation, Agua Caliente Band of Cahuilla Indians, Pechanga Band of Luiseño Mission Indians, and Morongo Band of Mission Indians).

Importantly, the burden is on the state to show good faith and not on the tribe to show bad faith.¹⁴⁹ In *Rincon*, the state attempted to overcome its burden by arguing that the provisions in the compact providing revenue to the state general fund were not bad faith because they should be considered “other subjects that are directly related to the operation of gaming activities”¹⁵⁰ and thus within the scope negotiation permitted by IGRA. The court rejected this argument and emphasized the limited nature of the negotiations.¹⁵¹ Accordingly, the state will rely heavily on the court considering the public interest as a factor in overcoming its burden of proving the negotiations were not bad faith.

Ultimately, if the North Fork Tribe can overcome the question of whether the referendum is part of the negotiation process, the tribe has a compelling argument that the voters’ rejection was bad faith because it was outside the scope of IGRA. If Proposition 48 is rejected by voters and the North Fork Compact is not ratified, this litigation is likely to be a component of the proponents’ post-election legal strategy.

D. Other Causes of Action

If voters approve Proposition 48 and the Legislature’s ratification is not reversed, the opponents will still have multiple causes of action to challenge the North Fork Compact. However, these claims are all outside the scope of the validity of the referendum and speak more to the validity of the North Fork Compact itself and the procedure used for the taking the land for the proposed casino into trust.

The following cases are noted below to demonstrate that the North Fork Casino is not finalized by the outcome of Proposition 48 as it will be months or years before these cases are resolved.

Picayune Rancheria of the Chukchansi Indians v. Edmund G. Brown, Jr., Case No. C074506 in the California Third District Court of Appeal – on September 24, 2014 the appellate court issued its opinion and held that the governor is not a public agency under CEQA, so the governor was not required to complete an environmental impact report prior to his decision to transfer land to the federal government for the North Fork Casino. As of this writing, the decision is not finalized and the petitioner has not appealed.

Stand Up For California! v. Dept. of the Interior, Case No. 1:12-cv-02039 in the D.C. District Court – alleging the decision by the Department of the Interior to take land into trust for a casino for the North Fork Tribe was arbitrary and capricious and violated the National Environmental Protection Act.

Stand Up For California! v. Brown, Case No. F069302 in the California Fifth District Court of Appeal – alleging that Governor Brown violated the California Constitution’s

¹⁴⁹ 25 U.S.C. § 2710(d)(7)(B)(ii)(II).

¹⁵⁰ *Rincon*, 602 F.3d at 1033–34.

¹⁵¹ *Id.*

separation-of-powers by making a policy decision to concur with the Department of the Interior's decision to take the land into trust for the North Fork Casino.

If the voters approve Proposition 48 and affirm the North Fork and Wiyot Compacts, these continuing legal challenges may still result in judicial invalidation of the compacts. These ongoing legal challenges demonstrate the intensity of the opposition to the compacts. Although the proponents may succeed if the voters affirm the compacts, the opponents may ultimately triumph if they can convince a court to overturn the compacts on other grounds.

V. PUBLIC POLICY ISSUES

A. Supporters of the Compacts

The proponents of this referendum, who support the compacts and urge a yes vote, argue that the compacts negotiated by Governor Brown and approved by the Legislature are advantageous to both the tribes and California.¹⁵² First, the construction and operation of a casino will create thousands of direct and indirect jobs.¹⁵³ Second, the proponents contend that the casino will generate new state and local revenue.¹⁵⁴ Third, the proponents argue that approval of the compacts, in their current form, respects the concept of local control.¹⁵⁵ Finally, the approval of the compacts will result in the protection of a scenic wildlife area.¹⁵⁶

The supporters of the compacts, who urge a yes vote on the referendum, assert that the construction and operation of the casino will result in thousands of new jobs including—temporary construction jobs, long term operations jobs, and indirect jobs in the local community.¹⁵⁷ The proponents note that “[t]he project will create over 4000 jobs as the result of hundreds of millions of dollars in private investment, boosting state and local economies.”¹⁵⁸

Robby Hunter, President of the California State Building and Construction Trades Council is quoted by the proponents in support of the project: “Voting YES guarantees good jobs for Californians and new economic opportunities for one of our state's poorest regions.”¹⁵⁹ In addition, the Central California Hispanic Chamber of Commerce “support[s] the North Fork gaming compact to help bring jobs and business to Madera, Fresno, and the entire San Joaquin

¹⁵² Proponents include Governor Edmund G. Brown, Jr., Republican state and local legislative representatives, cities of Madera and Chowchilla, numerous local chambers of commerce, the Madera Co. Sheriff, labor groups, environmental groups, ethnic groups and chambers of commerce, state and local Democratic organizations and clubs and over 70 California tribal groups. *Who Supports It, YES ON PROP 48*, <http://www.voteyes48.com/who-supports-it/> (last visited Sept. 6, 2014).

¹⁵³ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Valley.”¹⁶⁰ These statements demonstrate the broad support from diverse business and labor groups for the referendum and approval of the project.¹⁶¹

Second, the supporters of the compacts assert that the construction and operation of a casino in Madera County will generate new revenue for both the state and local governments.¹⁶² The supporters contend that “[v]oting YES provides crucial funding for public safety, schools, parks, roads and other public services.”¹⁶³ Madera County Sheriff John Anderson states, that if passed, “[t]his project will fund local sheriff, police, fire, and other first responders.”¹⁶⁴

The Legislative Analyst’s Office states, that if approved, Madera County will receive a onetime payment of \$6.9 million to \$17.9 million and annual payments over the life of the compact of \$3.8 million.¹⁶⁵ The City of Madera, if the referendum is successful, will receive a onetime payment between \$6.3 to \$10.3 million and annual payments of \$1.1 million once the casino is open for the term of the compact.¹⁶⁶ The Madera Irrigation District will receive annual payments of \$47,500 with a provision increasing that amount if water usage is higher than anticipated.¹⁶⁷ In addition, the North Fork Tribe is required to make annual payments of \$3.5 million to other local governments for the life of the compact.¹⁶⁸

Third, the supporters argue that this project respects local control of economic development and urban planning.¹⁶⁹ Tom Wheeler, Chairman of the Madera County Board of Supervisors, stated in support of Proposition 48: “Our region will benefit economically from this project. We can’t allow New York hedge-fund operators with financial ties to a competing casino to determine our economic future. Vote YES to protect local control.”¹⁷⁰ The supporters make this claim based on the Chukchansi Tribe’s partnership with Brigade Capital—an out-of-state hedge fund operator and investment advisor with offices in New York City and Zurich, Switzerland.¹⁷¹

However, while local control is an argument used by proponents because the North Fork Tribe and local governments negotiated agreements related to the casino, Stations Casinos LLC

¹⁶⁰ *Id.*

¹⁶¹ *Who Supports It*, YES ON PROP 48, <http://www.voteyes48.com/who-supports-it/> (last visited September 6, 2014).

¹⁶² NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 44.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 46.

¹⁷⁰ *Id.*

¹⁷¹ Ian Lovett, *Tribes Clash as Casinos Move Away From Home*, N.Y. TIMES, March 3, 2014 http://www.nytimes.com/2014/03/04/us/tribes-clash-as-casinos-move-away-from-home.html?_r=0 (“The Chukchansi and their Wall Street backers — Brigade Capital Management, an investment firm [and others] have spent more than \$2 million to place a question on the statewide ballot in November about whether the North Fork tribe should be allowed to build its casino.”).

of Las Vegas has been a major contributor to the Yes on Proposition 48 campaign.¹⁷² The casino corporation has an agreement to manage the North Fork Casino and stands to profit significantly if the casino is approved. The contributors to the Yes on Proposition 48 campaign also include the statewide Democratic Central Committee.¹⁷³

Fourth, the supporters of the compacts assert that voting yes of Proposition 48 will result in the protection of scenic wildlife areas. The supporters state “[a] YES vote avoids potential casino construction in the Sierra foothills near Yosemite and near the Humboldt Bay National Wildlife Refuge.”¹⁷⁴ Dan Cunning, representing the Yosemite Sierra Visitors Bureau, argues, “[a] yes vote on Proposition 48 protects two of California’s most environmentally precious areas.”¹⁷⁵ The State expressed concern about the negative environmental impact upon the Humboldt Bay National Wildlife Refuge if the Wiyot Tribe were to build on land the tribe owns near the refuge.¹⁷⁶ These concerns were significant enough that the State included a provision in the Wiyot Compact prohibiting the Wiyot Tribe from building a casino near the refuge in exchange for 2.5 to 3.5 percent of the annual slot machine net revenue from the North Fork Tribe’s casino.¹⁷⁷

The supporters of the compacts contend that voters who wish to create thousands of jobs in the Central Valley, generate state and local revenue for governments in Madera County, protect local control of development, or protect scenic wildlife areas should vote yes on Proposition 48 and allow the Legislature’s approval of the compacts to stand.

B. Opponents of the Compacts

The opponents of Proposition 48 urge the voters to overturn the ratification of the compacts for three fundamental reasons.¹⁷⁸ First, the compacts set a precedent that could result in a massive increase in off-reservation gambling while breaking the tribes’ promise in 2000 to limit Indian gaming to existing tribal land.¹⁷⁹ Second, the North Fork Compact will result in more pollution and negative social impacts in the Central Valley.¹⁸⁰ Finally, the North Fork

¹⁷² For a more detailed overview of contributors for and against the Proposition 48 see *supra* note 18.

¹⁷³ *Campaign Finance: YES On Prop. 48. – All Contributions Received*, CAL. SECRETARY ST., <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1359411&session=2013&view=received> (last visited Sept. 13, 2014).

¹⁷⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46.

¹⁷⁵ *Id.*

¹⁷⁶ WIYOT COMPACT, *supra* note 16, at Preamble.

¹⁷⁷ *Id.* § 4.1.

¹⁷⁸ There is no complete list of groups and individuals who have formally opposed Proposition 48 on the opponents’ website; however, included in the Arguments Against Proposition 48 in the November 2014 voter Guide are the following individuals and organizations: Senator Diane Feinstein, Fresno County Supervisor Henry Perea, Manuel Cunha, Jr., President of Nisei Farmers League, Gary Archuleta, Tribal Chairman Mooretown Rancheria, Madera County Supervisor, David Rogers, and Stand Up For California. NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 46–47.

¹⁷⁹ *Id.* at 47.

¹⁸⁰ *Id.*

Compact will not result in new money being given by the tribe to the state general fund or schools.¹⁸¹

The opponents of the compacts assert that the approval of this compact will set a precedent of tribes “reservation shopping,” where rural tribes in remote areas will seek to have urban land, far from their historic reservations, taken into trust to build and operate new casinos.¹⁸² The opponents state that Proposition 48, if passed, would “allow the North Fork Tribe to build an off-reservation, Vegas-style 2,000 slot machine casino more than an hour’s drive from the tribe’s established reservation land, closer to major freeways and Central Valley communities.”¹⁸³ In addition, several major newspapers have editorialized that these compacts will result in a massive shift in California’s Indian gaming policy that will likely result in the growth of Indian gaming outside of traditional, recognized, Indian land.¹⁸⁴

Additionally, the opponents of the compacts argue that when voters originally approved Indian gaming in 2000, it was with the understanding that such gaming was limited to existing Indian land and the approval of off-reservation casinos such as the North Fork Tribe’s breaks that understanding.¹⁸⁵ “Years ago, California Indian Tribes asked voters to approve limited casino gaming on Indian reservation land. They promised Indian casinos would ONLY be located on the tribes’ original reservation land.”¹⁸⁶ In addition, “[w]hile most tribes played by the rules, building on their original reservation land and respecting the voters’ wishes, other tribes are looking to break these rules and build casino projects in urban areas across California.”¹⁸⁷ Therefore, voters who want to continue the original, voter-approved policy of allowing tribes to build and operate casinos on their traditional, rural reservations and take a position against expansion into urban, more densely populated areas, should vote no on Proposition 48.¹⁸⁸

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ The newspapers quoted in the oppositions’ argument against Proposition 48 include the Fresno Bee, Bakersfield Californian, Los Angeles Times, and San Diego Union Tribune. *Id.* The San Francisco Chronicle, Sacramento Bee, Modesto Bee, Orange County Register, and San Jose Mercury News also recently editorialized specifically against Proposition 48. Editorial, *Time to Draw the Line on ‘Reservation Shopping’*, S.F. CHRONICLE, Sept. 7, 2014 <http://www.sfgate.com/opinion/article/Time-to-draw-the-line-on-reservation-shopping-5736926.php>; Editorial, *Vote No on Proposition 48, Enough Gambling Expansion*, SACRAMENTO BEE, Sept. 7, 2014 <http://www.sacbee.com/2014/09/07/6683079/endorsements-vote-no-on-proposition.html>; Editorial, *Prop. 48 Would Build Casino in Madera; We Don’t Need It*, MODESTO BEE, Sept. 7, 2014 http://www.modbee.com/2014/09/07/3522787_prop-48-would-build-casino-in.html?rh=1; Editorial, *Expanding Tribal Casinos a Bad Bet for California*, ORANGE COUNTY REGISTER, Sept. 18, 2014 <http://www.ocregister.com/articles/indian-635600-gaming-casino.html>; Editorial, *Keep a Lid on Indian Casinos*, SAN JOSE MERCURY NEWS, Oct. 8, 2014, http://www.mercurynews.com/opinion/ci_26688978/mercury-news-editorial-keep-lid-indian-casinos.

¹⁸⁵ *Home*, STOP RESERVATION SHOPPING, <http://stopreservationshopping.com/> (last visited September 6, 2014).

¹⁸⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 47.

¹⁸⁷ *Id.* at 46.

¹⁸⁸ *Id.* at 47.

The opponents of the compacts also argue that approving the compact and allowing the North Fork Tribe to develop a casino and resort near Madera will result in negative social and environment impacts in Madera County.¹⁸⁹ Opponents also argue that Proposition 48 is “opposed by Central Valley businesses, farmers, and community leaders because it means MORE air pollution, MORE traffic, and the loss of open space.”¹⁹⁰ In addition, the operation of a casino and resort in this location will create a “greater burden on an already limited water supply.”¹⁹¹ The opponents argue that voters who value the current environmental quality of Madera County, the larger Central Valley, and ultimately California, should vote no on Proposition 48.

Finally, the opponents of Proposition 48 contend that the Wiyot and North Fork Compacts fail to increase revenue for the general fund and schools.¹⁹² The opponents note that “[u]nlike prior Indian gaming compacts this deal provides NO money for California’s schools and NO additional money for our state general fund.”¹⁹³ Therefore, voters who believe that former compacts requiring tribes to pay a percentage of their gaming revenue to the general fund and schools was an advantageous policy should vote no on Proposition 48.

While “reservation shopping” and social impacts are concerns expressly listed by opponents of Proposition 48 in the voter guide, the identity of the major financial backers of the No on Proposition 48 campaign suggests other motives. The financial backers of the No on Proposition 48 include the Picayune Rancheria of Chukchansi Indians (Chukchansi Tribe) and the Table Mountain Rancheria, which both operate casinos whose revenue would be significantly impacted by a new casino in the region.¹⁹⁴ The financial backers also include hedge fund manager Brigade Capital, which is the financial backer of the Chukchansi Tribe’s casino.¹⁹⁵ This list of supporters suggests that the actual financial backers of the campaign are more concerned with protecting their own investments than the concerns expressed in the voter guide.

The opponents of the compacts contend that voters who are concerned about the potential spread of Indian gaming beyond traditional reservations into populated urban areas, the environmental quality in Madera County and the Central Valley, or the lack of revenue to the state should vote no on the referendum and reject the North Fork and Wiyot Compacts.

C. Fiscal Impact of Proposition 48

The economic benefits to the State of California of a casino and resort in Madera County are uncertain.¹⁹⁶ According to the Legislative Analyst’s Office, the economic impact will depend on several factors including the size and type of casino constructed, the extent to which the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Sudhin Thanawala, *California Tribe's Casino Plan to Go Before Voters*, ASSOCIATED PRESS, October 4, 2014, <http://www.sfgate.com/news/article/California-tribe-s-casino-plan-to-go-before-voters-5801482.php>

¹⁹⁵ *Id.*

¹⁹⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 44 (stating that fiscal effects are “uncertain” and “depend on several factors”).

casino impacts the revenue of other tribal and nontribal revenue generating activities, and the manner in which payments to state and local governments are implemented.¹⁹⁷

Although the North Folk Tribe is required to make payments to the State, these payments are compensation for the State's expenditures related to regulatory monitoring and transportation improvements.¹⁹⁸ While opponents compare the North Fork Compact to previous compacts providing for payments to the state general fund,¹⁹⁹ the absence of payments to the state general fund is consistent with IGRA, which only authorizes payments to the state for direct reimbursement of expenses incurred by the state.²⁰⁰

The lack of payment to the state general fund is also consistent with the federal policy that Indian casinos are for the economic development of the tribes, their self-sufficiency, and strengthening of tribal governments rather than as a revenue stream for a state.²⁰¹ According to the Legislative Analyst's, any changes in revenue for the state will come at the expense of other gambling enterprises and from a shift in other forms of discretionary spending.²⁰²

The direct economic impact upon local governments is clear—there will be large onetime payments in the first year the casino is in operation followed by much smaller annual payments for the life of the North Fork Compact.²⁰³ Madera County as well as the City of Madera will receive onetime payments between \$16 million and \$35 million in compensation for services to the casino once the casino is in operation.²⁰⁴ In addition, the compact will result in Madera County, the City of Madera, and the Madera Irrigation District receiving about \$3.5 million a year for the duration of the compact.²⁰⁵ Also, both the state and the local governments will experience a decrease in direct tax revenue as tribal land is not subject to state and local taxes.²⁰⁶ However, the Legislative Analyst's Office classifies this loss of revenue as “not significant.”²⁰⁷

There will also be an increase in economic activity in the region, and commensurate increase in local and state tax revenue, as more people come into Madera County and spend money on goods and services.²⁰⁸ Indian casinos generally stimulate local economies and a

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See supra*, Part V.B.

²⁰⁰ 25 U.S.C. § 2710(d)(3)(C)(i)–(vii) (specifying what provisions may be included in tribal-state gaming compacts).

²⁰¹ *Id.* § 2702 (stating the purposes of IGRA); *see also Rincon*, 602 F.3d at 1042) (holding the State negotiated in bad faith when it tried to use the tribe's casino as a revenue stream for the State by attempting to require the tribe pay a percentage of net win directly to the State general fund).

²⁰² NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 45.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

Madera casino will likely do so as well.²⁰⁹ However, this increased activity will most likely be redirected from other surrounding counties rather than be truly new revenue.²¹⁰

The economic benefit of this compact for the North Fork Tribe is unknown, but is likely significant. However, any revenue generated by the North Fork Tribe comes at the direct expense of the Chukchansi Tribe and their Chukchansi Gold Resort & Casino in the mountains above Highway 99.²¹¹ The Chukchansi Tribe estimates a 40 percent loss in revenue from the North Fork Tribe's casino in Madera County, which will purportedly result in the closing of the Chukchansi Gold Resort & Casino.²¹² Chairman Reggie Lewis of the Chukchansi Tribe describes the impact as a “devastating economic blow to my people from which I do not know how we will recover.”²¹³

VI. CONCLUSION

To its opponents, Proposition 48 represents much more than one casino, for one tribe, in the Central Valley—it represents whether California voters are willing to allow an expansion of Indian gaming off of existing reservations and closer to urban areas. To the North Fork Tribe and those most closely tied to the success of the tribe's casino near Madera, Proposition 48 represents an opportunity to join other tribes in the state as wealthy and influential political entities.

Regardless of the outcome in November, litigation is sure to follow. If voters reject Proposition 48, the North Fork Tribe is sure to contend that the compacts should never have been subject to the referendum process, and if Proposition 48 passes, opponents are sure to claim that Governor Brown never had the authority to approve the land transfer for the North Fork Tribe.

For voters on the outside looking in though, it is important to put the measure into its proper context. The Fresno Bee succinctly frames the issue: “There are no angels in this fight. A Las Vegas casino corporation wants to expand, while a New York hedge fund wants to protect its investment. Some tribes would benefit, and others might lose.”²¹⁴ It is up to the voters to determine who those winners and losers will be.

²⁰⁹ See Amy Quinton, *Study Shows California Tribal Gaming Casinos Have Big Economic Impact*, KPBS (Aug. 8, 2012), <http://www.kpbs.org/news/2012/aug/08/study-shows-california-tribal-gaming-casinos-have/> (describing the overall economic impact of tribal casinos on communities).

²¹⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 12, at 45.

²¹¹ Letter from Reggie Lewis, Chairman, Picayune Rancheria of the Chukchansi Indians, to Cal. Legislators (May 2, 2013).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Editorial, *Vote ‘No’ on Prop. 48 — Stop Highway 99 Casino*, FRESNO BEE, Sept. 6, 2014, <http://www.fresnobee.com/2014/09/06/4108812/our-viewvote-no-on-prop-48-stop.html#storylink=cpy>.

Legislatively Referred Advisory Questions on the Ballot:

The Struggle For Proposition 49

Report

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McGeorge School of Law

By

Meryl Balalis

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Rhetoric, Willamette University 2013

&

Brandon Bjerke

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Politics & History, Saint Mary's College of California 2013

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.¹ In November 1892, voters approved a legislatively referred advisory question that United States senators should be elected directly by a vote of the people.² 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.³ 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.⁴ 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.⁵ In this election, the Secretary of State made it clear

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

² *Id.*

³ U.S. CONST. amend. XVII.

⁴ *Id.*

⁵ 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.⁶ Voters rejected the advisory questions⁷, directing their elected officials not to divert gas taxes and thus participating in the legislative process.

9	DIVERTING GASOLINE TAX FUNDS FOR BIENNIUM ENDING JUNE 30, 1933. Question submitted to electors by Legislature as follows:	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	
10	DIVERTING GASOLINE TAX FUNDS FOR BIENNIUM ENDING JUNE 30, 1935. Question submitted to electors by Legislature as follows:	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.⁸ Voters answered with a majority *Yes*.⁹

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.¹⁰ The court held that the initiative was invalid because it did not adopt a state statute.¹¹ 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.¹²

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.

⁶ 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.

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

⁸ *Id.*

⁹ *Id.*

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

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

¹² *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.¹³ 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?¹⁴

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*.¹⁵ *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.¹⁶

The law at the time prohibited corporations and unions from funding speech that expressly advocates an “electioneering communication.”¹⁷ 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.¹⁸ *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.¹⁹

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

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

¹⁴ *Id.* at § 4(a).

¹⁵ S.B. 1272 (Lieu) (2013–2014).

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

¹⁷ *Id.* at 310.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 311.

²¹ *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.²² 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 49.²³

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.²⁴ The theory was that this would allow equal expression of opinion by citizens, regardless of wealth.²⁵ 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.²⁶

III. PROPOSITION 49'S ROAD TO THE BALLOT

Proposition 49 was introduced by Senator Lieu as Senate Bill 1272 in February 2014.²⁷ It was named the "Overturn *Citizens United* Act."²⁸ 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.²⁹ 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.³⁰

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

²² 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>.

²³ *Id.*

²⁴ S.B. 1272 (Lieu) at § 4(b) (2013-14).

²⁵ *Id.*

²⁶ S.B. 1272 (Lieu) (2013-14).

²⁷ *Id.* at § 1.

²⁸ *Id.*

²⁹ *Id.* at §2(b).

³⁰ S.B. 1272 (Lieu) (2013-14).

³¹ *Id.*

³² 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>.

³³ *Id.*

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

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.³⁶

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.³⁷ Senators in opposition cited the additional costs that the advisory question would impose, which are not in the budget.³⁸

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.”³⁹ Lieu and others warned that the *Citizens United* holding grants those same rights to corporations.⁴⁰ Assembly analysis also pointed to California’s past experience with advisory questions.⁴¹

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.⁴² 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

³⁴ *Id.*

³⁵ *Id.*

³⁶ 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.

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ 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.

⁴⁰ *Id.*

⁴¹ *Supra* Sec. II Background: Past Advisory Questions in California.

⁴² *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.”⁴³

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.”⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷ The court believes advisory questions would confuse or frustrate voters because the advisory question has no legal effect.⁴⁸

The court ordered California Secretary of State Debra Bowen to refrain from taking further action to place Proposition 49 on the November 2014 ballot.⁴⁹ 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.⁵⁰

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.⁵¹

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.⁵² The Legislature refers to it as an “advisory

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

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

⁴⁵ *Id.*

⁴⁶ *Id.* at 1.

⁴⁷ *Id.*

⁴⁸ *Id.*

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

⁵⁰ *Id.*

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

⁵² *Id.* at 2.

question,” while the Howard Jarvis Taxpayer’s Association refers to it as an “opinion poll.”⁵³ 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.⁵⁴

Proposition 49 asks Congress to propose a federal constitutional amendment regarding campaign spending.⁵⁵ If such an amendment is proposed, Proposition 49 asks the California Legislature to ratify it.⁵⁶ 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”⁵⁷ 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.⁵⁸ The first is a state constitutional amendment.⁵⁹ The second is a statute authorizing issuance of bond debt.⁶⁰ The third is an amendment or repeal of previously enacted initiative or referendum measures.⁶¹ 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.”⁶²

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

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.⁶⁴

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.⁶⁵ 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

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

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

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

⁵⁹ CAL. CONST. art. XVIII, §§ 1, 4.

⁶⁰ *Id.* art. XVI, § 2.

⁶¹ *Id.* art. II, § 10, subd. (c).

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

⁶³ CAL. CONST. art. II, § 8.

⁶⁴ *Id.*

⁶⁵ *Id.*

opposed to a direct democracy.⁶⁶ 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.⁶⁷

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.⁶⁸

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 65.⁶⁹ The electorate approved the amendment with over 74% of voters stating *Yes* to the advisory question.⁷⁰ 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?⁷¹

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 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).

⁶⁹ *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).

⁷⁰ *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).

⁷¹ 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.⁷² 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,⁷³ 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.⁷⁴

The Colorado Supreme Court has read this provision, like the California Supreme Court has read its provision, to liberally protect the electors' power.⁷⁵ 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.⁷⁶ 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.⁷⁷ 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-166.⁷⁸ 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

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

⁷³ *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).

⁷⁴ COLO. CONST. Art. V § 1.

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

⁷⁶ *Id.* at 507.

⁷⁷ *Id.* at 507.

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

substantive portions of the ballot measure.⁷⁹ 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.⁸⁰ 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.⁸¹

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

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.⁸³ The court held that “the people of the state of Montana may pass as an initiative a law that states policy.”⁸⁴

The Montana court reasoned that state precedent required the reserved powers of the people to be broadly construed to maintain power in the people,⁸⁵ just as California precedent demands.⁸⁶ 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.⁸⁷ 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-166.⁸⁸

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.⁸⁹ The Michigan Constitution states:

⁷⁹ 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.

⁸⁰ Montana Initiative 166 (2012).

⁸¹ MONT. CONST. Art. V sec. 1.

⁸² MONT. CONST. Art. III sec. 4.

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

⁸⁴ *Id.* at 9.

⁸⁵ *Id.*

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

⁸⁷ *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.

⁸⁸ *Rickert*, 2013 Mont. Dist. LEXIS at 13.

⁸⁹ *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.⁹⁰

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.⁹¹

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.⁹² The court held that nothing in the Michigan Constitution explicitly prohibited the use of advisory questions.⁹³ 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.⁹⁴ 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.⁹⁵

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.⁹⁶ 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.

⁹⁰ MICH. CONST. Art. II §9

⁹¹ *Id.*

⁹² *Killeen*, 153 Mich. App. at 376.

⁹³ *Id.* at 379.

⁹⁴ *Id.* at 381.

⁹⁵ *Id.*

⁹⁶ *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.”⁹⁷

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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ The California Supreme Court found these decisions to be persuasive enough to adopt this narrow view and apply it to the California Constitution.¹⁰² 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.¹⁰³ Supporters however, in asserting Colorado’s view that “a declaration of public policy of general applicability” is *legislative*,¹⁰⁴ 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.

⁹⁷ *Id.* at 708.

⁹⁸ *Id.* at 720 (Lucas, J. dissenting).

⁹⁹ *Id.* at 707–08.

¹⁰⁰ *Id.* at 710–11.

¹⁰¹ *Id.*

¹⁰² *Id.* at 714.

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

¹⁰⁴ *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.¹⁰⁵ In California, by explicit statutory grant, local governments including cities, counties and other special districts are allowed to place advisory questions on the ballot.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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.

¹⁰⁵ See *supra* Section IV.2.

¹⁰⁶ CAL. ELEC. CODE § 9603 (1994).

¹⁰⁷ U.S. CONST. amend. X.

¹⁰⁸ 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.

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.¹⁰⁹

The ability of the people to grant themselves additional powers of direct democracy should not be forgotten. As the reservation explicitly allows constitutional amendments,¹¹⁰ 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,¹¹¹ 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

¹⁰⁹ 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>.

¹¹⁰ CAL. CONST. art. II, § 8.

¹¹¹ 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.

Measure L:
Sacramento Checks and Balances Act of 2014

Report

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By

Christine Dugger

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Political Science, San Diego State University, 2005

&

Amanda Kelly

J.D., University of the Pacific School of Law, to be conferred May 2016
B.A., Broadcast Journalism and English, University of Southern California, 2005

I. EXECUTIVE SUMMARY

Most cities are structured through one of two different forms of government: “council-manager” and “strong-mayor.”¹ In council-manager cities, the mayor and each council member has equal strength in developing policy.² The city manager handles the day-to-day community operations, including making all personnel decisions.³ The strong-mayor system is modeled after state and federal governments, so the mayor leads as a governor or the president would, and the city council acts as the legislature.⁴ As a result, the mayor does not have a vote, but does have veto power.⁵ Most large city governments, including New York City, Los Angeles, Chicago, and San Francisco, have a strong-mayor form of government.⁶

Measure L, which is on the ballot in the city of Sacramento, aims to change the government structure from council-manager to strong-mayor.⁷ Revisions under Measure L would include removing the mayor’s vote on the city council, but giving the mayor veto power over ordinances and the city budget; vesting power akin to that of a chief executive officer in the mayor, rather than the city manager; conferring the power to make personnel decisions, including appointing and removing the city manager, to the mayor; and imposing term limits on the mayor and council members.⁸

Proponents state a strong-mayor government would create more accountability, place checks and balances on the government, and help modernize Sacramento.⁹ Opponents, however, insist putting the ultimate power over city government into the hands of one elected official will make it easier for special interests to influence decision making.¹⁰ In addition, they feel the “system is working well...if it’s not broken, don’t break it.”¹¹ This article will discuss

¹ STRONG MAYOR-COUNCIL INSTITUTE, STRUCTURES, <http://strongmayorcouncil.org/structures.html> (last visited Sept. 13, 2014).

² Cal. City Mgmt. Foundation and Int’l City/County Mgmt. Ass’n, *Council-Manager or “Strong Mayor”: The Choice is Clear* (2001), <https://icma.org/Documents/Document/Document/302618>.

³ *Id.*

⁴ *Structures*, STRONG MAYOR-COUNCIL INSTITUTE, <http://strongmayorcouncil.org/structures.html> (last visited Sept. 13, 2014).

⁵ *Id.*

⁶ STRONG MAYOR-COUNCIL INSTITUTE, TOP 25 CITIES (2012) available at http://strongmayorcouncil.org/images/City_List_Top_25_2011_Publication.pdf.

⁷ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf.

⁸ CITY OF SACRAMENTO, IMPARTIAL ANALYSIS OF MEASURE L PREPARED BY SACRAMENTO CITY ATTORNEY 1–2 (2014), available at http://portal.cityofsacramento.org/~media/Files/City-Clerk/Elections/MeasureL_ImpartialAnalysis.pdf [“IMPARTIAL ANALYSIS”].

⁹ CITY OF SACRAMENTO, ARGUMENT IN FAVOR OF MEASURE L, available at http://portal.cityofsacramento.org/~media/Files/City-Clerk/Elections/MeasureL_For.pdf [“IN FAVOR”].

¹⁰ CITY OF SACRAMENTO, REBUTTAL TO ARGUMENT IN FAVOR OF MEASURE L, available at http://portal.cityofsacramento.org/~media/Files/City-Clerk/Elections/MeasureL_RebuttalAGAINST.pdf [“REBUTTAL TO FAVOR”].

¹¹ “*Strong Mayor*” Forum, Sierra Curtis Neighborhood Ass’n (Sept. 22, 2014) [“Forum”] (statement of council member Steve Hansen) (notes on file with the *California Initiative Review*).

Sacramento’s current government, the history of strong-mayor in Sacramento, how Measure L would change the law, constitutional and charter implications of the initiative, and public policy considerations.¹²

II. CURRENT LAW

In California, all incorporated cities are what are known as “general law” cities, unless the electorate of a city opts to be what is called a “charter city.”¹³ Sacramento is a charter city.¹⁴

A. Charter Cities

In operation, a city’s charter is analogous to a state’s or country’s constitution.¹⁵ A city charter provides both broad authority and vestment of powers in a governing body, as well as acts as “an instrument of limitation on the broad power of charter cities over municipal affairs.”¹⁶ The city’s electorate must approve the charter and any revisions.¹⁷ Only conflicting provisions in the state or federal constitutions, or any state statute on a matter of statewide concern can preempt the laws contained in a city’s charter.¹⁸

The California Constitution grants cities the authority to adopt a charter.¹⁹ Once a charter is adopted, a charter city has the power to create and regulate a police force and conduct municipal elections, and broad authority over its governmental structure, including all aspects of employment.²⁰

The 482 incorporated cities in California have either one of two forms of municipal governmental structure: the “council-manager” structure or the “strong-mayor” structure.²¹ General law cities must operate under the council-manager structure.²² While charter cities have the option of adopting either structural format, of California’s 120 charter-cities, “only five use the true strong-mayor form.”²³

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¹² *Infra* Sections II–VI.

¹³ CAL. CONST. art. XI, § 3.

¹⁴ See EILEEN TEICHERT AND MATTHEW RUYAK, PROPOSED 2012 CHARTER REVISION ANALYSIS 6 (2012), available at http://www.cityofsacramento.org/cityattorney/documents/StaffReport1_17_12.pdf [“2012 ANALYSIS”] (stating the charter “operates as a ‘Constitution’”).

¹⁵ See *id.* at 7 (stating the charter “operates as a ‘Constitution’”).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ CAL. CONST. art. XI, § 3.

²⁰ 2012 ANALYSIS, *supra* note 14, at 7.

²¹ *Id.*

²² CAL. GOV’T CODE § 34409 (West 2014).

²³ 2012 ANALYSIS, *supra* note 14, at 7.

B. Current Sacramento Charter Law

Like all city charters, Sacramento's presiding document identifies a governing body, and vests widespread powers in it.²⁴

1. *The City Council: Article III*

In its most-current version, Sacramento's charter vests authority in the nine-member city council to act as the governing body of the city.²⁵ The council comprises eight members, each elected from one of eight districts within the city limits.²⁶ The ninth member of the council is the mayor.²⁷ The city council is the legislative body within municipal government, and is vested with various powers including the power to propose and adopt city ordinances to be contained within the municipal code, reapportion and redistrict council-seat districts, conduct investigations into the affairs of city government, and conduct legislative business at public meetings.²⁸ Currently, council members are not subject to any term limits.²⁹

2. *The Mayor: Article IV*

The mayor is the "presiding officer of the city."³⁰ While he or she is a voting member of the council, the mayor also assumes the leadership role in relations between city government and the citizens of Sacramento.³¹ In effect, the mayor of Sacramento is seemingly intended as a position that will guide the council in the administration of its legislative duties, ensuring the priorities of the city's citizens are furthered, all while maintaining a position of equal-footing with other members of the council.³² The charter also grants specific powers and duties to the mayor, including that he or she may propose ordinances and resolutions for the council to consider and shall appoint and may remove members of boards, commissions, and advisory agencies.³³ The mayor is elected to a term of four years.³⁴ Currently, there are no term limits for this office.³⁵

3. *The City Manager: Article V*

Under the charter, the city manager is vested with the role and responsibility of being the city's chief executive officer, overseeing the numerous departments that make up Sacramento's municipal government.³⁶ In essence, the city manager is responsible for the city's day-to-day

²⁴ SACRAMENTO, CAL. CHARTER, art. II §§ 10, § 20–21.

²⁵ *Id.*, art. III, § 20–21.

²⁶ *Id.*, art. III, § 21.

²⁷ *Id.*

²⁸ *Id.*, art. III, §§ 24–25, 31–32, 34.

²⁹ *Id.*, art. III, § 26.

³⁰ *Id.*, art. IV, § 40.

³¹ *Id.*, art. IV, § 40(b)(2).

³² *Id.*, art. IV, § 40(b)(2)–(5).

³³ *Id.*, art. IV, § 40(b)(6)–(7).

³⁴ *Id.*, art. IV, § 42–43.

³⁵ *Id.*, art. IV, § 43.

³⁶ *Id.*, art. V, § 61(b).

administration.³⁷ In addition, the charter vests in the city manager various powers and duties, including the responsibility to ensure that all laws and ordinances are enforced; to act as an advisor to the city council; to oversee and manage contracts, leases, and permits that the city council enters into for goods and services; and to propose the annual city budget.³⁸

Sacramento's charter anticipates the need for separation of powers because it expressly prohibits the council from circumventing the city manager to work with any part of city government under the manager's direction and supervision, including any attempts to appoint or hire any city officer or employee.³⁹ Similarly, the charter provides for checks on the authority of the city manager through its grant of investigatory power to the city council.⁴⁰ In order to remove the city manager from office, at least six city council members must approve his or her termination.⁴¹

4. *The Annual Budget: Article IX*

Under the existing charter, the city manager develops and proposes the city's budget for presentation to the city council not less than 60 days prior to start of each fiscal year.⁴² The city council then considers the budget recommendations during public hearings, and ultimately votes by resolution to adopt a budget for the upcoming fiscal year.⁴³

III. HISTORY OF STRONG-MAYOR

A. Strong-Mayor Government in Other Cities

Many city government structures were originally based on the executive and legislative branches of the federal government, but moved toward council-manager governance in the wake of a number of mayoral corruption scandals in the early 1900s.⁴⁴

Since the early 1990s, cities with more than 100,000 residents have steadily adopted strong-mayor systems.⁴⁵ One reason is that growing cities have growing numbers of interest groups, and it is easier to have one person as a point-of-contact for those groups.⁴⁶

³⁷ 2012 ANALYSIS, *supra* note 14, at 17.

³⁸ SACRAMENTO, CAL. CHARTER, art. V, § 61(a), (c), (g), (i).

³⁹ *Id.*, art. V, § 62.

⁴⁰ *Id.*, art. V, § 62(a).

⁴¹ *Id.*, art. V, § 63.

⁴² *Id.*, art. IX, § 111(a).

⁴³ *Id.*

⁴⁴ J.T. Long, *A Short History of the Strong Mayor in California*, PUBLIC CEO (Sept. 3, 2009), <http://www.publicceo.com/2009/09/a-short-history-of-the-strong-mayor-in-california/>.

⁴⁵ *Structural Trends*, STRONG MAYOR-COUNCIL INSTITUTE, <http://strongmayorcouncil.org/structuraltrends.html> (last visited Sept. 13, 2014).

⁴⁶ Lisa Nisenson, *Romper Room: The Strong Mayor Versus Strong City Manager Debate*, THIS WEEK IN SARASOTA (July 27, 2012), <http://www.thisweekinsarasota.com/2012/07/romper-room-the-strong-mayor-versus-strong-city-manager-debate/>.

Not all cities have embraced the trend.⁴⁷ Columbia, South Carolina voters defeated a strong-mayor initiative last year despite support from the governor, Chamber of Commerce, and other mayors across the state.⁴⁸ Large cities like Baltimore, Dallas, Indianapolis, Phoenix, and San Antonio maintain their council-manager systems.⁴⁹ El Paso, Texas abandoned its strong-mayor system in 2004, while Topeka, Kansas and Cedar Rapids, Iowa chose to adopt council-manager governance when replacing their commission governments.⁵⁰ Portland retains a council-manager form of government because voters there think “shared leadership is better than centralized power.”⁵¹

In California, five cities have adopted a strong-mayor system: Fresno, Los Angeles, Oakland, San Diego, and San Francisco.⁵² Their structures vary; for example, Fresno and Oakland still have a city manager, while the other cities place all management decisions in the mayor’s hands.⁵³

There is mixed feedback regarding California’s strong-mayor systems.⁵⁴ Critics of Oakland’s system assert the charter is vague and creates uncertainty regarding which public official has responsibility over certain departments.⁵⁵ Former Fresno mayor Karen Humphrey regrets her role in that city’s adoption of a strong-mayor system.⁵⁶ On the other hand, San Diego’s strong-mayor governance successfully made it through a five-year trial period.⁵⁷ Voters permanently adopted the structure in 2010, but made some changes, including adding a ninth council seat to prevent tie votes.⁵⁸ There have, however, been abuses of power in San Diego since that permanent adoption.⁵⁹

⁴⁷ Pat Lynch, *Strong Mayor*, EAST SACRAMENTO PRESERVATION (Sept. 22, 2014), <http://eastsacpreservation.org/strong-mayor/>.

⁴⁸ *Id.*

⁴⁹ STRONG MAYOR-COUNCIL INSTITUTE, TOP 25 CITIES (2012) available at http://strongmayorcouncil.org/images/City_List_Top_25_2011_Publication.pdf.

⁵⁰ *Structural Trends*, STRONG MAYOR-COUNCIL INSTITUTE, <http://strongmayorcouncil.org/structuraltrends.html> (last visited Sept. 13, 2014).

⁵¹ Lynch, *supra* note 47.

⁵² J.T. Long, *A Short History of the Strong Mayor in California*, PUBLIC CEO (Sept. 3, 2009), <http://www.publicceo.com/2009/09/a-short-history-of-the-strong-mayor-in-california/>.

⁵³ *Id.*

⁵⁴ See, e.g., J. Douglas Allen-Taylor, *Undercurrents: Oakland’s ‘Strong-Mayor’ Charter Ambiguous as to Mayor’s Duties*, BERKELEY DAILY PLANET (Feb. 11, 2010, 9:46 AM), <http://www.berkeleydailyplanet.com/issue/2010-02-11/article/34636?headline=Undercurrents-Oakland-s-Strong-Mayor-Charter-Ambiguous-As-to-Mayor-s-Duties--By-J.-Douglas-Allen-Taylor-> (voicing concerns that the mayor’s power is unclear).

⁵⁵ *Id.*

⁵⁶ *Forum*, *supra* note 11 (statement of council member Steve Hansen).

⁵⁷ *A History of San Diego Government*, OFFICE OF THE CITY CLERK, <http://www.sandiego.gov/city-clerk/aboutus/history.shtml> (last visited Oct. 5, 2014).

⁵⁸ *Id.*

⁵⁹ Monica Garske, R. Stickney, and Gene Cubbison, *Former San Diego Mayor Bob Filner Sentenced*, NBC SAN DIEGO (Dec. 9, 2013, 8:17 PM), <http://www.nbcsandiego.com/news/local/Former-Mayor-Bob-Filner-to-Be-Sentenced-Monday-234905381.html>.

Despite the opinions on each side regarding the effectiveness of a strong-mayor structure in other California cities, research has shown the system to be equally as effective as council-manager governance.⁶⁰ Both forms of government generally champion citizens' needs in equal ways.⁶¹ No form of government is perfect, but both can be successful as long as those elected put the needs of the people first.⁶²

B. Sacramento's Prior Strong-Mayor Governments

In 1849, the electorate of the soon-to-be formed City of Sacramento voted to adopt the Sacramento City Charter, thereby establishing Sacramento as a municipality.⁶³ The charter reflected voters' desires to move away from the alcalde court system, which the Treaty of Guadalupe Hidalgo established, and to implement a form of governance more reflective of the democratic process in the local governments of the eastern states from which they had emigrated.⁶⁴ The form of government created was analogous to today's strong-mayor form of government.⁶⁵ Borrowing from the Spanish tradition, the 1849 charter created a "council-alcalde" system.⁶⁶ An "alcalde" is a traditional municipal magistrate who had both judicial and administrative functions.⁶⁷ In the modern Spanish language, *alcalde* is the equivalent of the English word *mayor*.⁶⁸

The council-alcalde form of government in Sacramento was brief; the Legislature passed a law in 1858 that consolidated city and county governments into one municipal system.⁶⁹ In

⁶⁰ Sam Sturgis, *Strong Mayor, Weak Mayor, No Mayor—In Terms of Policy, It May Not Matter Much*, CITY LAB (July 31, 2014), <http://www.citylab.com/politics/2014/07/strong-mayor-weak-mayor-no-mayor-in-terms-of-policy-it-may-not-matter-much/375347/>.

⁶¹ *Id.*

⁶² Lisa Nisenson, *Romper Room: The Strong Mayor versus Strong City Manager Debate*, THIS WEEK IN SARASOTA (July 27, 2012), <http://www.thisweekinsarasota.com/2012/07/romper-room-the-strong-mayor-versus-strong-city-manager-debate/>.

⁶³ Kathryn Gaeddert, Introduction, *For the Record: Catalog of the Public Records, City of Sacramento 1849–1982, Sacramento County, 1848–1982*, CENTER FOR SACRAMENTO HISTORY, at 3 (Mar. 1, 1982), available at <http://pdf.oac.cdlib.org/pdf/samcc/forrecor.pdf>.

⁶⁴ *Id.*

⁶⁵ Interview with Phil Isenberg, former mayor, City of Sacramento, in Sacramento, Cal. (Oct. 2, 2014) ["Isenberg interview"] (notes on file with the *California Initiative Review*); *Your City in Action! The City of Sacramento Charter Revision*, LIBRARY BUZZ (Aug. 20, 2009), <http://apps.lib.csus.edu/blogs/blog/2009/08/20/your-city-in-action-the-city-of-sacramento-charter-revision/>.

⁶⁶ Isenberg interview, *supra* note 65; *Your City in Action! The City of Sacramento Charter Revision*, LIBRARY BUZZ (Aug. 20, 2009), <http://apps.lib.csus.edu/blogs/blog/2009/08/20/your-city-in-action-the-city-of-sacramento-charter-revision/>.

⁶⁷ *Alcalde*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/13206/alcalde> (last visited Oct. 5, 2014).

⁶⁸ *Id.*

⁶⁹ Isenberg interview, *supra* note 65; NELLIE MAY HENDERSON COLE, *CONSOLIDATION OF SACRAMENTO CITY AND COUNTY GOVERNMENT, 1858–1863* (1958).

1863, that radical change was overturned, and Sacramento returned to a mayor-council form of governance, which lasted until 1911.⁷⁰

Although the city governance change several times throughout the century, it took until 1989 for a citizen commission to recommend a strong-mayor system in Sacramento, along with a return to a consolidated city and county government.⁷¹ Thus, the “new” concept of a strong-mayor system in Sacramento is actually not new at all, but rather reflects the ebb and flow of ideas regarding forms of governance.⁷²

C. Recent Sacramento Strong-Mayor Proposals

Prior to Measure L, there were three strong-mayor proposals, beginning with a version Sacramento Mayor Kevin Johnson advocated for shortly after taking office in 2008.⁷³

1. 2009 Citizen Initiative

In 2009, the city council voted to support a citizen-proposed strong-mayor initiative if enough citizen support was gathered through petition circulation to place it on the June 2010 ballot.⁷⁴ The measure would have given the mayor power akin to that of a chief executive officer. The mayor would have taken on the duties of the city manager, including preparing budgets and appointing and removing the city manager, clerk, treasurer, and attorney, as well as most other city employees.⁷⁵ The mayor no longer would have been a member of the city council, but would have been able to veto council decisions.⁷⁶ To ensure that there would not be a tie vote in city council decisions, a ninth district would have been added.⁷⁷

At the same time that the council voiced its support for the initiative, the council recognized that the measure, as drafted, could have been unconstitutional.⁷⁸ The initiative would have altered nine articles of the Sacramento City Charter.⁷⁹ The breadth of these changes would

⁷⁰ Isenberg interview, *supra* note 65; *Your City in Action! The City of Sacramento Charter Revision*, LIBRARY BUZZ (Aug. 20, 2009), <http://apps.lib.csus.edu/blogs/blog/2009/08/20/your-city-in-action-the-city-of-sacramento-charter-revision/>.

⁷¹ Ed Salzman, *Mayors Move to Power in California City Halls*, L.A. TIMES (July 23, 1989), http://articles.latimes.com/1989-07-23/opinion/op-115_1_city-council-member.

⁷² Isenberg interview, *supra* note 65.

⁷³ Craig Powell, *Welcome Back, Strong Mayor*, INSIDE PUBLICATIONS (Nov. 30, 2013), <http://www.insidepublications.org/index.php/inside-city-hall/522-welcome-back-strong-mayor> [“Powell”] *Mayor Kevin Johnson*, CITY OF SACRAMENTO, <http://portal.cityofsacramento.org/Mayor-Council/Districts/Mayor> (last visited Sept. 1, 2014).

⁷⁴ EILEEN TEICHERT, STRONG MAYOR INITIATIVE LEGAL ISSUES AND OPTIONS 3 (2009), *available at* http://sacramento.granicus.com/MetaViewer.php?view_id=22&clip_id=2085&meta_id=184461 [“TEICHERT”].

⁷⁵ *Id.* at 3–4.

⁷⁶ *Id.* at 4.

⁷⁷ *Id.*

⁷⁸ *Id.* at 3.

⁷⁹ *Id.* at 7.

have amounted to a city charter revision, rather than an amendment.⁸⁰ Since the California Constitution does not allow a city to revise its charter through the initiative process unless its city council places the measure on the ballot, the proposed initiative could have been found unconstitutional.⁸¹ Despite a warning from the city attorney regarding the possible unconstitutionality of the measure, it was placed on the ballot.⁸²

As a result, Bill Camp of the Sacramento Central Labor Council filed suit for a preliminary injunction to prevent a vote on the initiative before its constitutionality was adjudicated.⁸³ The parties ultimately agreed that the initiative the electorate proposed was beyond voters' power, so city officials removed it from the ballot, but the council did create a charter review committee to make recommendations for future charter revisions.⁸⁴

2. 2010 Council Proposal

When the citizen-driven initiative was enjoined, the city council did consider placing a new charter revision on the June 2010 ballot.⁸⁵ That version would not have given the mayor power to appoint the city attorney and other employees.⁸⁶ However, it would still have limited the number of terms to which the mayor and council members could be elected and given the mayor appointment power for the city manager position.⁸⁷ The revisions would have had a "sunset," or expiration date, without voter re-approval.⁸⁸ The city council did not vote to place the measure on the ballot, much to Mayor Johnson's disappointment, because members said the mayor had not presented any evidence that the existing council-manager system was not working.⁸⁹

⁸⁰ *Id.* at 5, 7–10.

⁸¹ *Id.* at 5, 10.

⁸² *Camp v. Sacramento*, No. 34-2009-00065404, at 3 (Cal. Super. Ct. Sacramento Jan. 21, 2010) (order granting preliminary injunction).

⁸³ *Id.*

⁸⁴ *Camp v. Sacramento*, No. 34-2009-00065404 (Cal. Super. Ct. Sacramento filed Dec. 15, 2010) (stipulated judgment); WILLIAM EDGAR ET AL., SACRAMENTO CHARTER REVIEW COMMITTEE FINAL REPORT 24 (2009), http://www.cityofsacramento.org/charter/documents/CRC_Final_Report.pdf ["EDGAR"].

⁸⁵ KUNAL MERCHANT, REPORT BACK: CHARTER REFORM PACKAGE 2 (2010), available at http://sacramento.granicus.com/MetaViewer.php?view_id=22&clip_id=2205&meta_id=191740.

⁸⁶ Kathleen Haley, *Johnson Aims to Put Strong Mayor Plan on November Ballot*, SACRAMENTO PRESS (Feb. 16, 2010, 2:02 PM), <http://sacramento.press.com/2010/02/16/johnson-aims-to-put-strong-mayor-plan-on-november-ballot/>.

⁸⁷ *Id.*

⁸⁸ KUNAL MERCHANT, REPORT BACK: CHARTER REFORM PACKAGE 1 (2010), available at http://sacramento.granicus.com/MetaViewer.php?view_id=22&clip_id=2205&meta_id=191740.

⁸⁹ Nick Miller, *Sacramento City Council Approves Strong Mayor Vote for 2014 at Drama-Free Meeting (Boring! So Let's Watch an Old Video of K.J. Chewing out his Colleagues)*, SACRAMENTO NEWS & REVIEW (Nov. 6, 2013, 2:34 PM), <http://www.newsreview.com/sacramento/pageburner/blogs/post?oid=11973042>; *Sacramento Council Votes Against Strong-Mayor Plan*, RECORDNET.COM (June 23, 2010, 8:42 AM), http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100623/A_NEWS/100629945.

3. 2012 Expanded Council Proposal

After the initial attempts to place a measure on the 2010 ballot did not move forward, Mayor Johnson introduced a different proposal in 2012, which similarly did not make it to the ballot.⁹⁰ The new mayoral powers that would have been granted were largely the same, but the plan would have added a ninth council district and council seat, as well as created an “at-large” council member position, bringing the total number of council seats to ten.⁹¹ The at-large member would have been elected city-wide, just like the mayor, and would have cast votes on behalf of the entire city since the mayor would no longer be able to vote.⁹² Because there would have been an even number of council members, however, the mayor would have been able to cast tie-breaker votes.⁹³

4. 2014 Measure L

For the latest iteration, Sacramento Tomorrow took over the movement to promote a strong-mayor government in the city.⁹⁴ The group and its 28 advisory committee members worked to create a new proposal, and planned to reach out to the community for feedback.⁹⁵ Very little feedback was sought, however, and voters did not have a chance to review the group’s recommendations.⁹⁶

In November 2013, the Sacramento City Council approved a resolution to place a revision to the city charter on the November 2014 ballot.⁹⁷ That resolution ultimately became Measure L.⁹⁸ The resolution is very similar to Mayor Johnson’s last proposal, but with slight changes, including a limit of three terms for the mayor, rather than two.⁹⁹ Four council members—Angelique Ashby, Steve Cohn, Jay Schenirer, and Allen Warren—and Mayor Johnson voted in support, while council members Darrell Fong, Steve Hansen, Kevin McCarty, and Bonnie Pannell opposed the resolution.¹⁰⁰ Council member Hansen is now leading the charge against Measure L with support from former Sacramento mayors Anne Rudin and Heather Fargo, the League of Women Voters, and the Democratic Party of Sacramento County,

⁹⁰ See Powell, *supra* note 73 (stating that the court stopped the first proposal in 2009 and the city council did not support proposals in 2010 and 2012).

⁹¹ Antonio Harvey, *City Council Votes Against Strong Mayor, For Charter Commission*, SACRAMENTO OBSERVER (Feb. 8, 2012), <http://sacobserver.com/2012/02/city-council-votes-against-strong-mayor-for-charter-commission/>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Powell, *supra* note 73.

⁹⁵ *Id.*

⁹⁶ *Id.*; Interview with Matthew Ruyak, Assistant City Attorney, City of Sacramento, in Sacramento, Cal. (Sept. 3, 2014) (notes on file with the *California Initiative Review*).

⁹⁷ SACRAMENTO CITY COUNCIL RES. NO. 2013–0362, at 3 (2013).

⁹⁸ Ryan Lillis, *Sacramento Councilman Steve Hansen to Lead Opposition to Strong-Mayor Plan*, SACRAMENTO BEE (Aug. 19, 2014, 12:00 a.m.), <http://www.sacbee.com/2014/08/19/6637677/sacramento-councilman-steve-hansen.html> [“Lillis-Hansen”].

⁹⁹ Powell, *supra* note 73.

¹⁰⁰ SACRAMENTO CITY COUNCIL RES. NO. 2013–0362, at 3 (2013).

while Mayor Johnson has found allies in state Senator Darrell Steinberg, former Sacramento mayor Phil Isenberg, former New York City Mayor Michael Bloomberg, and several unions.¹⁰¹

IV. PROPOSED LAW

Measure L seeks to enact significant changes to the roles of the city council, mayor, and city manager, as well as how the budget is proposed and approved.¹⁰²

A. The City Council: Article III

Measure L would reduce the size of the city council from nine to eight council members, removing the mayor as a member.¹⁰³ As such, this new composition of council members has the potential to lead to ties on ordinances and other measures that come before the body for a vote.¹⁰⁴ Measure L does not provide a provision to remedy tie votes that result from a council of eight members.¹⁰⁵

The council would also be required to elect a president and vice president from amongst its members.¹⁰⁶ In the mayor's absence from the city, the president and vice president would serve as mayor in their respective order, and would assume all the vested rights and powers of the mayor with the significant exceptions of "the power of any veto or any other discretionary privilege that is enjoyed" by the mayor.¹⁰⁷

The enactment of Measure L would impose term limits on council members.¹⁰⁸ Specifically, each city council member would only be permitted to serve three, four-year terms.¹⁰⁹ This change would not apply retroactively to terms already served by existing council members.¹¹⁰

¹⁰¹ Lillis-Hansen, *supra* note 98; CITY OF SACRAMENTO, ARGUMENT AGAINST MEASURE L, *available at* http://portal.cityofsacramento.org/~media/Files/City-Clerk/Elections/MeasureL_Against.pdf ["AGAINST"]; CITY OF SACRAMENTO, REBUTTAL TO ARGUMENT AGAINST MEASURE L, *available at* http://portal.cityofsacramento.org/~media/Files/City-Clerk/Elections/MeasureL_Against.pdf ["REBUTTAL TO AGAINST"].

¹⁰² SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf.

¹⁰³ *Id.* § 21 (amending SACRAMENTO, CAL. CHARTER, art. III, § 21 and adding SACRAMENTO, CAL. CHARTER, art. IV, § 47).

¹⁰⁴ *Forum, supra* note 11 (statements of council member Steve Hansen and Nancy Miller, partner, Miller & Owen).

¹⁰⁵ *Id.*

¹⁰⁶ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 21 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (amending SACRAMENTO, CAL. CHARTER, art. IV, § 45).

¹⁰⁷ *Id.* § 19 (amending SACRAMENTO, CAL. CHARTER, art. IV, § 45).

¹⁰⁸ *Id.* § 7 (amending SACRAMENTO, CAL. CHARTER, art. III, § 26).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

In addition, Measure L seeks to add two requirements relating to community interaction and involvement.¹¹¹ First, Measure L would require that the city council hold at least two of its city council meetings per year outside of its chambers.¹¹² The purpose of this requirement is to “improve citizen involvement and accessibility to [council] meetings.”¹¹³ The revision would also require voter approval for increases in council member compensation that exceed five percent.¹¹⁴ Second, Measure L would require the city council to establish by ordinance a “Neighborhood Advisory Committee,” with the intended purpose of “considering the interests of the city’s neighborhoods.”¹¹⁵ The text of Measure L does not elaborate on the intended duties or responsibilities of this committee, and thus it is not clear what the scope of this newly-established body would be.¹¹⁶

B. The Mayor: Article IV

Under Measure L, the position of mayor would be transformed from being a largely symbolic “presiding officer,” to the role of the city’s chief executive officer.¹¹⁷ In addition, the basic description of the mayor’s role would be expanded to provide that he or she “shall have the executive and administrative authorities, powers, and responsibilities of the city as provided herein, including but not limited to the power and duty to execute and enforce all laws, ordinances, and polices of the city.”¹¹⁸ Measure L would make specific changes to the mayor’s “authorities, powers, and responsibilities,” as they relate to the city’s annual budget, the mayor’s place and role within the governance structure, the mayor’s administrative powers, and the mayor’s interaction and community involvement.¹¹⁹ A mayor would be limited to three, four-year terms.¹²⁰ This limit, however, would not apply retroactively to the current mayor’s previously-served terms.¹²¹

1. The Mayor’s Interaction with the City Council

As discussed above,¹²² Measure L would remove the mayor as a voting member of the city council, thereby reducing the number of council members from nine to eight.¹²³ In the mayor’s new role, he or she would retain the right, but would not be obligated, to “attend and be

¹¹¹ *Id.* §§ 11, 16 (amending SACRAMENTO, CAL. CHARTER, art. III, §§ 31, 38).

¹¹² *Id.* § 11 (amending SACRAMENTO, CAL. CHARTER, art. III, § 31).

¹¹³ *Id.*

¹¹⁴ *Id.* § 10 (amending SACRAMENTO, CAL. CHARTER, art. III, § 29).

¹¹⁵ *Id.* § 16 (adding SACRAMENTO, CAL. CHARTER, art. III, § 38).

¹¹⁶ *Id.*; Interview with Steve Hansen, council member, City of Sacramento, in Sacramento, Cal. (Sept. 30, 2014) [“Hansen interview”] (notes on file with the *California Initiative Review*).

¹¹⁷ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 17 (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (amending SACRAMENTO, CAL. CHARTER, art. IV, § 40).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* § 18 (amending SACRAMENTO, CAL. CHARTER, art. IV, § 43).

¹²¹ *Id.*

¹²² *Supra* Part IV.A.

¹²³ *Id.* § 21 (amending SACRAMENTO, CAL. CHARTER, art. III, § 21).

heard” at city council meetings.¹²⁴ The mayor would not have a right to vote on matters before the council.¹²⁵ Because the mayor is no longer a member of the council, the newly composed council of eight members presents the opportunity for tie votes on ordinances and other measures that come before the body.¹²⁶ Measure L, however, does not provide a remedy for how tie votes will be broken.¹²⁷

2. *The Annual Budget*

Measure L would transfer the responsibility and power to propose the city’s annual budget from the city manager to the mayor.¹²⁸ The mayor would be required to propose an annual budget to the city council no later than 90 days before the start of each fiscal year.¹²⁹ Following the city council’s review, alteration of, and passage of a budget, under Measure L, the mayor would possess line-item veto power, which means that he or she would have the power to unilaterally strike specific portions of the council’s approved budget in part or in entirety.¹³⁰

3. *New Executive Powers – The Mayoral Veto Power*

In addition to the mayor’s existing authority to propose ordinances and resolutions for the city council to consider, Measure L would give the mayor veto power over any ordinances the council passed.¹³¹ This mayoral veto power is akin to the veto power of other executive heads, such as the president and the governor.¹³²

Measure L would limit the mayor’s veto power.¹³³ Specifically, the mayor would not have veto power over “urgency” ordinances—those that would either take effect immediately upon adoption or less than 30 days after adoption—relating to an election, an emergency, or an ordinance adopted pursuant to a state law.¹³⁴ In addition, the mayor would lack veto power over

¹²⁴ *Id.* § 17 (amending SACRAMENTO, CAL. CHARTER, art. IV, § 40(b)(4)).

¹²⁵ *Id.*

¹²⁶ *Forum, supra* note 11 (statements of council member Steve Hansen and Nancy Miller, partner, Miller & Owen).

¹²⁷ *Id.*

¹²⁸ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 17 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (amending SACRAMENTO, CAL. CHARTER, art. IV, § 40(b)(6)).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*; SACRAMENTO, CAL. CHARTER, art. IV, § 40(b)(5).

¹³² AGAINST, *supra* note 101.

¹³³ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 21 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (adding SACRAMENTO, CAL. CHARTER, art. IV, § 47).

¹³⁴ *Id.*; SACRAMENTO, CAL. CHARTER, art. III, § 32(g).

ordinances adopting the recommendations of the Independent Citizens' Redistricting Commission, which Measure L's revisions would create.¹³⁵

The mayor would be required to review all adopted ordinances and resolutions and approve or veto them within ten days of the city council's adoption.¹³⁶ If the mayor were to take no action on a measure, it would be deemed approved.¹³⁷ If the mayor were to exercise the veto power, however, he or she must include an explanation of the basis for that decision.¹³⁸ The council would have 30 days to reconsider a vetoed matter, but could only override the mayor's veto if the reconsidered ordinance or resolution receives at least six council votes in favor of its adoption.¹³⁹

4. *City Manager Appointment*

A significant new authority under Measure L would be the mayor's right to appoint the city manager, a power currently vested in the city council.¹⁴⁰ While the city council's right to confirm the appointee would restrict this power, the mayor's ability to remove the city manager would not be subject to any outside approval and would not require good cause.¹⁴¹ Furthermore, Measure L would require the mayor to hold an open meeting at which citizens may ask questions regarding the qualifications of the candidates for city manager before making an appointment.¹⁴²

5. *Community Interaction*

If enacted, Measure L would require that the mayor address the citizens of Sacramento on an annual basis through a "State of the City" address.¹⁴³ Similar to the executive addresses of the president and governors, the mayor's State of the City statement would not just address the

¹³⁵ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 21 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (adding SACRAMENTO, CAL. CHARTER, art. IV, § 47); *Id.* § 6 (2013) (amending SACRAMENTO, CAL. CHARTER, art. III, § 25).

¹³⁶ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 21 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (adding SACRAMENTO, CAL. CHARTER, art. IV, § 47(c)(2)).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* (adding SACRAMENTO, CAL. CHARTER, art. IV, § 47(c)(2)–(3)).

¹⁴⁰ *Id.* § 7 (amending SACRAMENTO, CAL. CHARTER, art. IV, § 40(b)(8)); SACRAMENTO, CAL. CHARTER, art. V, § 60.

¹⁴¹ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 7 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (amending SACRAMENTO, CAL. CHARTER, art. IV, § 40(b)(8)).

¹⁴² SACRAMENTO, CAL. CHARTER, art. V, § 60.

¹⁴³ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 7 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (amending SACRAMENTO, CAL. CHARTER, art. IV, § 40(b)(2)).

general status of city government, but would also include the mayor's policy recommendations for the coming year.¹⁴⁴ Measure L would also require the mayor to host and participate in at least two "town hall" meetings each year as a means of receiving public input.¹⁴⁵ Measure L does not indicate how the mayor should utilize such public input in formulating ordinances or policy.¹⁴⁶

C. The City Manager: Article V

Measure L seeks to significantly alter the role and authorities prescribed to the city manager.¹⁴⁷ No longer appointed by the city council, the city manager would be appointed by the mayor, with confirmation by the council.¹⁴⁸ Specifically, the city council would have ten business days to either confirm or reject a mayoral city manager appointee.¹⁴⁹ Failure to confirm or reject would constitute approval.¹⁵⁰

Measure L most dramatically seeks to alter the process by which the city manager may be removed from office.¹⁵¹ If approved by the voters, under Measure L the city manager would be subject to dismissal per the mayor, without council notification or approval.¹⁵² This proposed change is in stark contrast to the charter's current procedure for removal of the city manager, which prohibits such action unless at least six members of the city council vote in favor of such removal.¹⁵³ The current charter specifies that no city manager may be removed within the first twelve months of his or her term of office, except for cause.¹⁵⁴ This provision would no longer exist if Measure L is enacted.¹⁵⁵

Functionally, the overall role of the city manager in citywide government would be dramatically altered from the position's current status.¹⁵⁶ No longer would the city manager be the city's chief executive officer, but would become the city's chief administrative officer.¹⁵⁷ Similarly, the charter's overall description of the position's purpose would be amended to read that the city manager is "acting on the mayor's behalf and in furtherance of the mayor's powers" when he or she carries out the position's duties.¹⁵⁸

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* (noting that there are no parameters for use of town hall feedback).

¹⁴⁷ *Id.* § 22 (amending SACRAMENTO, CAL. CHARTER, art. V, § 60).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* § 25 (deleting SACRAMENTO, CAL. CHARTER, art. V, § 63).

¹⁵⁴ SACRAMENTO, CAL. CHARTER, art. V, § 63 (citing "incompetence, malfeasance, misfeasance or neglect of duty" as reasons for removal in the first year).

¹⁵⁵ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 25 (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (deleting SACRAMENTO, CAL. CHARTER, art. V, § 63).

¹⁵⁶ *Id.* § 23 (amending SACRAMENTO, CAL. CHARTER, art. V, § 61).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

D. The Annual Budget: Article IX

In addition to transferring the power to propose the budget from the city manager to the mayor, Measure L would establish the Office of the Independent Budget Analyst.¹⁵⁹ The city council would be responsible for appointing the head of that office, whose duties would be “to assist and advise the city council in conducting budgetary inquiries and in making budgetary decisions.”¹⁶⁰ The independent budget analyst would be subject to removal by the council, at any time with or without cause.¹⁶¹

The city council would be required to hold a minimum of two public hearings on the proposed budget within a specified timeframe.¹⁶² Upon the city council’s request, the independent budget analyst would provide an unbiased analysis of the mayor’s proposed budget.¹⁶³ Once these procedures are complete, the city council would be required to adopt a budget no less than 30 days before the start of each fiscal year.¹⁶⁴

As discussed previously, the mayor would have the ability to approve or veto the budget, or exercise a line-item veto.¹⁶⁵ The only limitation placed on the mayor’s line-item veto power would be the restriction that he or she may not veto any portion of the proposed budget relating to the city council’s own internal expenditures.¹⁶⁶ Once the mayor’s review of the budget was complete, any sections approved would become effective immediately.¹⁶⁷

Measure L would clarify that the city’s annual budget may be amended, revised, or modified at any point during the fiscal year, so long as such an amendment, revision, or modification follows the procedure outlined above.¹⁶⁸

E. Other Major Charter Changes

Measure L would also add several significant sections to the charter related to ethics and government transparency.¹⁶⁹

¹⁵⁹ *Id.* § 17 (amending SACRAMENTO, CAL. CHARTER, art. IV, § 40(b)(4)); *Id.* § 29 (amending SACRAMENTO, CAL. CHARTER, art. IX, § 111).

¹⁶⁰ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 29 (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (amending SACRAMENTO, CAL. CHARTER, art. IX, § 111(a)).

¹⁶¹ *Id.*

¹⁶² *Id.* (amending SACRAMENTO, CAL. CHARTER, art. IX, § 111(b)(1)).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (amending SACRAMENTO, CAL. CHARTER, art. IX, § 111(b)(2)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (amending SACRAMENTO, CAL. CHARTER, art. IX, § 111(b)(3)).

¹⁶⁹ *See, e.g., id.* § 5 (amending SACRAMENTO, CAL. CHARTER, art. III, § 24(a)) (appointing an independent redistricting commission).

1. Reapportionment and Redistricting

Measure L seeks to establish a nine-member independent redistricting commission to establish the boundaries of city council districts, thereby removing that power from the city council.¹⁷⁰ The city council would have to pass an ordinance that establishes the commission, denotes qualifications required of members, and establishes a process by which members shall be appointed to serve on the commission no later than 180 days after voters approve Measure L.¹⁷¹ The city council and the mayor would be precluded from taking part in any commission member appointments.¹⁷² Upon conclusion of a regular United States census, the commission would examine council district boundaries to ensure compliance with population regulations, and adopt modifications to those boundaries, if necessary.¹⁷³ Under the existing charter, this is a duty the city council holds.¹⁷⁴ Furthermore, any boundary modifications the commission made would be sent to the council, and the council would be required to adopt the commission's findings without making changes to them.¹⁷⁵

2. Ethics and Transparency

Measure L would require the city council to take two direct actions to ensure ethical conduct and transparency.¹⁷⁶ Specifically, the city council would be required to adopt a "Code of Ethics and Conduct" and a "Sunshine Ordinance."¹⁷⁷

a. Code of Ethics and Conduct

If approved, Measure L would require the city council to develop and adopt a "Code of Ethics and Conduct," for all city officials and appointed members of boards, commissions, and committees.¹⁷⁸ The council would be required to adopt this code of conduct within 180 days of Measure L's passage.¹⁷⁹ Aside from the requirement that the code include a procedure for removing any elected official or appointed member from office who "substantially violates" the code, no other substantive details of what the code would or should contain are included in Measure L's text.¹⁸⁰ Similarly, the text of Measure L also does not stipulate any consequences if the council fails to adopt a code of ethics.¹⁸¹

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ SACRAMENTO, CAL. CHARTER, art. III, § 24(a).

¹⁷⁵ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 6 (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (amending SACRAMENTO, CAL. CHARTER, art. III, § 25).

¹⁷⁶ *Id.* § 14 (adding SACRAMENTO, CAL. CHARTER, art. III, § 36).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Hansen interview, *supra* note 116.

Measure L would also require the city council to adopt an ordinance establishing an ethics committee for the purpose of the ongoing review and monitoring of the “Code of Ethics and Conduct.”¹⁸² In creating this committee, the council would have the discretion to determine the required qualifications and conditions of service of future committee members, including any compensation for service, reimbursement for expenses, terms of office, and methods for appointment and removal from office, so costs are currently unknown.¹⁸³ Measure L clarifies that this newly established ethics committee “is not a board, commission, or advisory agency for purposes of Article XV or § 40.”¹⁸⁴ Article XV of the charter defines what boards, commissions, and advisory agencies are, and delegates powers and responsibilities.¹⁸⁵ Section 40 delegates the power to appoint or remove members of boards, commissions, and advisory agencies to the mayor.¹⁸⁶ Thus, Measure L’s articulation that the ethics committee is not a board, commission, or advisory agency seems to have been included simply to make clear that it will not have substantive powers.¹⁸⁷

b. Sunshine Ordinance

In addition, if Measure L is approved, the city council would be required to adopt a so-called “Sunshine Ordinance” within 180 days of its passage.¹⁸⁸ The stated purpose of this ordinance would be to “liberally provide for the public’s access to city government meetings, documents, and records.”¹⁸⁹ It is not apparent how Measure L’s Sunshine Ordinance would differ from existing open government laws, as Measure L does not specify the precise content of the future ordinance.¹⁹⁰

The preeminent existing law that requires transparency in local government proceedings is the Ralph M. Brown Act (the Brown Act), which the Legislature approved in 1953.¹⁹¹ The Brown Act statutorily guarantees the public’s right of access to local government meetings.¹⁹² The Brown Act also places significant restrictions on how local governments may convene to

¹⁸² SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 15 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (adding SACRAMENTO, CAL. CHARTER, art. III, § 37).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ SACRAMENTO, CAL. CHARTER, art. XV, §§ 230-232.

¹⁸⁶ SACRAMENTO, CAL. CHARTER, art. IV, § 40.

¹⁸⁷ Hansen interview, *supra* note 116.

¹⁸⁸ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 14 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (adding SACRAMENTO, CAL. CHARTER, art. III, § 36).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ BILL LOCKYER, CALIFORNIA STATE ATTORNEY GENERAL, THE BROWN ACT: OPEN MEETINGS FOR LOCAL LEGISLATIVE BODIES 37 (2003), *available at* http://caag.state.ca.us/publications/2003_Main_BrownAct.pdf.

¹⁹² *Id.* at 1; CAL. GOV’T CODE § 54953.

conduct public business as a means of ensuring the public's right of access to such proceedings.¹⁹³

Because Measure L does not specify the exact provisions of the Sunshine Ordinance, it is unclear at this time if the intention is that the ordinance should exceed the requirements of existing law.¹⁹⁴ It should be noted, however, that local governments do have the ability to impose requirements of open government and transparency that exceed the requirements of the Brown Act.¹⁹⁵

3. *Voter Authorization Provisions*

Finally, Measure L also includes provisions requiring prior voter authorization for future changes to certain sections of the charter.¹⁹⁶ For example, the proposed amendments related to reapportionment and redistricting, if passed, could only be amended if a majority of the voters held as such in a regular election.¹⁹⁷ The rest of Measure L's proposed changes would "sunset," or expire, on December 31, 2020, and would be automatically repealed and removed from the charter.¹⁹⁸ However, Measure L would require the council to place a measure on the ballot at an election no later than November 3, 2020 to allow voters to consider whether to make Measure L's changes permanent.¹⁹⁹

V. CONSTITUTIONAL AND CITY CHARTER IMPLICATIONS

A. Single-Subject Rule

The California Constitution imposes a single-subject rule on all initiatives put before the electorate.²⁰⁰ This rule applies to all initiatives, whether they are put on the statewide ballot or a local ballot.²⁰¹ The single-subject rule says an initiative is permissible only if "all of its parts are reasonably germane to each other, and to the general purpose or object of the initiative."²⁰² This rule, however, applies only to *initiatives*, and not to other types of ballot measures.²⁰³

The California Constitution provides two ways to amend a city charter with the voters for approval: (1) by an initiative qualified for the ballot through the procedures outlined in the

¹⁹³ CAL. GOV'T CODE § 54954.

¹⁹⁴ Hansen interview, *supra* note 116.

¹⁹⁵ CAL. GOV'T CODE § 54953.7.

¹⁹⁶ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 30 (2013), *available at* http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf.

¹⁹⁷ *Id.* § 30(B).

¹⁹⁸ *Id.* § 30(C).

¹⁹⁹ *Id.*

²⁰⁰ CAL. CONST. art. II, § 8(d).

²⁰¹ *Hernandez v. Los Angeles*, 167 Cal. App. 4th 12 (2008).

²⁰² *Senate v. Jones*, 21 Cal. 4th 1142 (1999).

²⁰³ CAL. CONST. art. XI, § 3(b); *Hernandez*, 167 Cal. App. 4th at 23.

California Election Code *or* (2) by a ballot measure sponsored by the governing body of a municipality.²⁰⁴

By definition, an initiative is “the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.”²⁰⁵ The California Election Code sets forth the initiative process whereby the electorate may draft and approve laws.²⁰⁶ An initiative may only be put before the electorate for approval after satisfying various requirements, including having the Secretary of State certify its language and obtaining a specified number of signatures when the initiative is circulated for pre-ballot approval.²⁰⁷

Similarly, the California Constitution vests power in a city’s governing body to propose by ballot measure ordinances and changes to a city’s charter.²⁰⁸ The distinctive differences between the power vested in the electorate and the power vested in a governing body are the name attributed to each proposal (‘*initiative*’ for the former, ‘*ballot measure*’ for the latter) and in the process by which such proposals make it to the ballot.²⁰⁹

Thus, given the clear language of the Constitution, a ballot measure proposed by a city’s governing body is *not*, by definition, an initiative.²¹⁰ Because Measure L’s origin lies with the city council and not the electorate, it is by definition a ballot measure, and is therefore not subject to the limitations of the single-subject rule.²¹¹

B. Charter Revision versus Charter Amendment

A city’s charter may be changed via one of two methods: by amendment or by revision.²¹² Whether a change is an amendment or a revision is determined by how substantial the proposed change would be.²¹³ Furthermore, a charter amendment may be proposed by the electorate through the initiative process or by a ballot measure sponsored by the city’s governing body.²¹⁴ Conversely, a charter revision may only be proposed by the city’s governing body through a ballot measure.²¹⁵

“Although the Constitution does not define the terms ‘amendment’ or ‘revision,’ the courts have developed some guidelines” for their interpretation.²¹⁶ An amendment is a less substantial change; one that does not substantially alter the Constitution (or a charter) in any

²⁰⁴ CAL. CONST. art. XI, § 3(b); *Hernandez*, 167 Cal. App. 4th at 21.

²⁰⁵ CAL. CONST. art. II, § 8(a).

²⁰⁶ CAL. ELEC. CODE §§ 9255–9269 (West 2014).

²⁰⁷ *Id.*; CAL. CONST. art. II, § 8(b)–(c).

²⁰⁸ CAL. CONST. art. XI § 3(b); CAL. CONST. art. XVIII, §§ 1–2.

²⁰⁹ CAL. CONST. art. II, § 8(a) (defining the initiative power); CAL. CONST. art. XI, § 3(b) (vesting right to adopt, amend, or revise a charter).

²¹⁰ CAL. CONST. art. II, § 8(a).

²¹¹ CAL. CONST. art. XI, § 3 (b); *Hernandez*, 167 Cal. App. 4th at 21–22.

²¹² CAL. CONST. art. XI, § 3(a).

²¹³ *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990).

²¹⁴ CAL. CONST. art. XI, § 3(b); CAL. CONST. art. II, § 8(a).

²¹⁵ CAL. CONST. art. XI, § 3(b).

²¹⁶ *Raven*, 52 Cal. 3d at 350.

meaningful quantitative or qualitative fashion.²¹⁷ Conversely, a revision is a more substantial, far-reaching change.²¹⁸ The courts have developed a two-part test for determining whether a proposed change is simply an amendment, or if it rises to the level of a revision.²¹⁹ That test measures both the quantitative and qualitative effects that the proposed measure would have on a charter, and if the effect of either category is substantial, the courts will find the proposed measure to be a revision.²²⁰

The same provision of the California Constitution that authorizes a city to *adopt* a charter also authorizes the governing body of a city to *amend* or *revise* the city's charter.²²¹ Conversely, only the power to amend a charter, not revise it, is given to the voters.²²² Thus, a revision to a city's charter may only be accomplished when a city's governing body votes to place the revision on the ballot, and it is subsequently approved by the voters.²²³ This is why the original attempt to place a citizen-proposed strong-mayor initiative on the ballot was deemed unconstitutional, because it constituted a substantial revision, not a simple amendment.²²⁴ Because Measure L also seeks to accomplish a revision to city's charter, it was properly placed on the ballot as a ballot measure sponsored by the city council, not through the initiative process.²²⁵

VI. PUBLIC POLICY CONSIDERATIONS

Measure L's main support comes from the group "Sacramento Tomorrow," which includes developer Angelo Tsakopoulos and Mayor Kevin Johnson.²²⁶ Council member Steve Hansen, who represents central Sacramento, Land Park, and part of Natomas, leads "Stop the Power Grab," the coalition of Measure L opponents.²²⁷ Both sides are passionate about their arguments for and against the measure.²²⁸ Neither side, however, has undertaken a fiscal analysis of the measure. As a result, there are open questions regarding how much different portions of the revision will cost.²²⁹

Proponents admit the "city is well-served by its city manager and current form of government," but believe Measure L would be an improvement.²³⁰ Opponents are not swayed;

²¹⁷ *Id.* (reasoning that substantial changes can amount to a revision, not a mere amendment).

²¹⁸ *Id.*

²¹⁹ *Id.* at 351.

²²⁰ *Id.*

²²¹ CAL. CONST. art. XI, § 3(b).

²²² *Id.* art. XVIII, § 3.

²²³ *Id.* §§ 1–2, 4.

²²⁴ *Camp v. Sacramento*, No. 34-2009-00065404, at 3 (Cal. Super. Ct. Sacramento Jan. 21, 2010) (order granting preliminary injunction).

²²⁵ CAL. CONST. art. XVIII, § 1.

²²⁶ YES ON MEASURE L, <http://yesonmeasurel.org/> (last visited Sept. 12, 2014).

²²⁷ *Lillis-Hansen*, *supra* note 98.

²²⁸ *See* IN FAVOR, *supra* note 9; AGAINST, *supra* note 101.

²²⁹ *See* YES ON MEASURE L, <http://yesonmeasurel.org/> (last visited Sept. 12, 2014); STOP THE POWER GRAB, <http://stopthepowergrab.org/> (last visited Sept. 13, 2014).

²³⁰ *Forum*, *supra* note 11 (statement of Nancy Miller, partner, Miller & Owen).

with recent successes under the current structure, like the development of the new Kings basketball arena, they seek more concrete proof that a strong-mayor system would be better able to accomplish similar tasks.²³¹ This section will examine the arguments on both sides of Measure L.²³²

A. The City Council: Article III

Under the strong-mayor government, the city council would continue to have eight members elected from districts each representing one-eighth of the city, but the mayor would no longer have a council seat or vote.²³³ Some argue the mayor could get the authority to cast a tie-breaker vote, since there will be an even number of council members.²³⁴ Those opposing Measure L insist allowing the mayor to vote in the event of a tie is inappropriate.²³⁵

At this time, however, there is no protocol in event of a tie under Measure L.²³⁶ A vote of four-to-four would mean an ordinance would not pass.²³⁷ Proponents say this probably will not be a problem, or will only be a minor issue, although admit both sides are speculating.²³⁸ They point out that five votes will be required just as in the existing system.²³⁹ But, five votes under the proposed system require the support of 62.5 percent of the council, rather than just over 55 percent, which opponents say is higher than appropriate.²⁴⁰ It is interesting to note that if Sacramento already had a five-vote requirement and a non-voting mayor, Measure L would not be on the ballot since the five-four vote would have been a tie without the mayor's vote.²⁴¹

Although each member's representation and vote would not change, they would lose some of their authority.²⁴² For example, the city council would no longer appoint the city manager, and the mayor would be able to veto city council-approved ordinances and budgets.²⁴³ Because the mayor will have more power at the expense of the city council as a whole, Measure L opponents assert council members will have difficulty serving their constituents in the most

²³¹ *Id.* (quoting council member Steve Hansen as saying “we got the arena going in less than a year”); Hansen interview, *supra* note 116.

²³² *Infra* Parts A–E.

²³³ REBUTTAL TO AGAINST, *supra* note 101.

²³⁴ Cosmo Garvin, *Sacramento Tomorrow's Strong-Mayor Plan is a Mess*, SACRAMENTO NEWS & REVIEW (Oct. 10, 2013), <http://www.newsreview.com/sacramento/sacramento-tomorrow-39-s-strong-mayor-plan-is/content?oid=11693509>.

²³⁵ *Id.*; SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf.

²³⁶ *Forum*, *supra* note 11 (statement of Nancy Miller, partner, Miller & Owen).

²³⁷ *Id.*

²³⁸ Isenberg interview, *supra* note 65.

²³⁹ *Forum*, *supra* note 11 (statement of Nancy Miller, partner, Miller & Owen).

²⁴⁰ Hansen interview, *supra* note 116.

²⁴¹ *Forum*, *supra* note 11 (statement of council member Steve Hansen).

²⁴² See IMPARTIAL ANALYSIS, *supra* note 8, at 1 (noting the city council loses appointment power and can be overridden with a mayoral veto).

²⁴³ *Id.*

positive way.²⁴⁴ They decry the shift in power away from nine people to one person—the mayor.²⁴⁵

There is an emphasis on interaction between the city council and community through Measure L’s creation of a Neighborhood Advisory Committee.²⁴⁶ The text of the measure, however, leaves the details of this committee completely open.²⁴⁷ Supporters insist this was to make Measure L more comprehensible and ensure it did not get bogged down with minor details as past versions did.²⁴⁸ Opponents are a little more cynical.²⁴⁹ They call the committee and other components of the measure that require future ordinances “sweeteners,” saying each could be implemented by ordinance now, without a vote on Measure L, if they were truly important.²⁵⁰ They believe way the measure is written, however, makes the committee seem as if it will be non-substantive because it is not a “commission,” which would have the power to make changes.²⁵¹ Still, supporters maintain that the committee will be an integral part of the city government because its meetings will be open to the public and the city council may take its suggestions under advisement.²⁵²

Measure L’s opponents do not believe it is necessary to change the power structure because the city council and mayor have worked together to achieve so many positive things, including creating a budget surplus and keeping the Kings in Sacramento.²⁵³ Supporters assert, however, that balancing the budget, creating jobs, and reducing crime would be streamlined with a strong-mayor system.²⁵⁴

B. The Mayor: Article IV

In Sacramento’s current council-manager system, the mayor is a “figurehead,” attending ribbon cuttings and promoting the city for tourism.²⁵⁵ Yet, citizens expect the mayor to solve

²⁴⁴ REBUTTAL TO FAVOR, *supra* note 10.

²⁴⁵ Hansen interview, *supra* note 116.

²⁴⁶ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 16 (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (adding SACRAMENTO, CAL. CHARTER, art. III, § 38).

²⁴⁷ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 16 (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (adding SACRAMENTO, CAL. CHARTER, art. III, § 38).

²⁴⁸ *Forum*, *supra* note 11 (statement of Daniel Conway, chief of staff, Mayor Kevin Johnson).

²⁴⁹ *See id.* (statement of Heather Fargo, former mayor, City of Sacramento).

²⁵⁰ *See id.*

²⁵¹ Hansen interview, *supra* note 116.

²⁵² *Forum*, *supra* note 11 (statement of Nancy Miller, partner, Miller & Owen).

²⁵³ REBUTTAL TO FAVOR, *supra* note 10.

²⁵⁴ REBUTTAL TO AGAINST, *supra* note 101.

²⁵⁵ *See* Ryan Lillis, *Kevin Johnson Stakes Legacy on Boosting Mayor’s Clout*, SACRAMENTO BEE (Sept. 28, 2014, 12:00 AM), <http://www.sacbee.com/2014/09/28/6741253/kevin-johnson-stakes-legacy-on.html> (discussing mayor’s limited power).

citywide problems and take responsibility for government decisions.²⁵⁶ Measure L supporters, including former mayor Phil Isenberg, believe the measure will bring the mayor's duties and abilities better in line with public expectations.²⁵⁷

1. *From Figurehead to CEO*

Measure L proponents decry the fact that the city manager—currently the equivalent of a chief executive officer—is not elected.²⁵⁸ That is why they want the elected mayor to take on CEO-type duties, including managing police and fire services.²⁵⁹ But, the mayor may not have any business or management experience, which is why cities hire professional managers.²⁶⁰ Therefore, Measure L is a hybrid, where the city can benefit from the manager's expertise and the mayor's accountability, according to supporters.²⁶¹

Consolidation of power could also make city departments more effective, according to supporters, because the mayor would have a greater ability to hold them accountable than the city manager can while he or she is beholden to the varied interests of council members.²⁶² Opponents see this as an opportunity for the mayor to do whatever he or she wishes with city services, without any accountability until, possibly, the next election.²⁶³

The term limits imposed on the mayor would, according to supporters, provide a check on the mayor's power.²⁶⁴ The city manager is unelected, but Measure L proponents prefer placing that much power into the hands of someone who can be removed through an election or, if he or she is reelected, at the end of a set number of terms.²⁶⁵ Some opposed to Measure L do not believe a vote every four years is enough to balance the amount of power that would be vested in the mayor.²⁶⁶ Others do not like term limits because placing an artificial limit on the time an official can be in office “inappropriately constrains the options of the electorate.”²⁶⁷

2. *Mayoral Veto Power*

Although the mayor would be able to veto city council decisions, Measure L proponents note that this does not give ultimate power to the mayor because the veto can be overridden.²⁶⁸

²⁵⁶ Isenberg interview, *supra* note 65.

²⁵⁷ *Id.*

²⁵⁸ IN FAVOR, *supra* note 9.

²⁵⁹ *Id.*

²⁶⁰ *Forum*, *supra* note 11 (statement of Heather Fargo, former mayor, City of Sacramento).

²⁶¹ *Id.* (statement of Daniel Conway, chief of staff, Mayor Kevin Johnson).

²⁶² Jeffery Cassity, *Opinion: Sacramento Would be Better with a “Strong Mayor”*, SACRAMENTO PRESS (Nov. 29, 2013, 7:47 PM), <http://sacramentoexpress.com/2013/11/29/opinion-sacramento-would-be-better-with-a-strong-mayor/>.

²⁶³ AGAINST, *supra* note 101.

²⁶⁴ IN FAVOR, *supra* note 9.

²⁶⁵ See Stu Woo, “*Weak*” Mayor Seeks Assist to Reshape Sacramento, WALL ST. J. (Dec. 5, 2009, 12:01 AM), <http://online.wsj.com/articles/SB125997450276377729> (quoting Mayor Kevin Johnson).

²⁶⁶ REBUTTAL TO FAVOR, *supra* note 10.

²⁶⁷ EDGAR, *supra* note 84.

²⁶⁸ IN FAVOR, *supra* note 9.

But, six members, or 75 percent of the council, would have to vote to override the veto, which would give the mayor more power than any Governor or the President because the supermajority required is larger than that at the State or Federal level.²⁶⁹

How a mayor may use the veto power is unknown, but supporters say it removes any “temporary block to council actions, or conversely, a temporary block to the mayor’s actions.”²⁷⁰ Former mayor Phil Isenberg speculated that it will be reserved for fundamental issues.²⁷¹ Now, there is an incentive for the mayor and city council to not make sweeping, and perhaps controversial, decisions because one would need the support of four others.²⁷² Veto power may thus encourage more change.²⁷³

The community may not want the mayor to have this power; a citizen-run committee engaged to make recommendations regarding a strong-mayor government in Sacramento voted overwhelmingly to condemn mayoral veto power.²⁷⁴ Of course, Measure L opponents also feel it is an inappropriate amount of power to vest in one person.²⁷⁵

3. Appointment Power

Measure L proponents emphasize the positive checks and balances that would occur if the mayor appointed the city manager with council concurrence and a public meeting about the proposed city manager’s qualifications.²⁷⁶ Those against Measure L, however, stress the fact that the mayor can remove the city manager at will can cut against these checks and balances.²⁷⁷

The mayor’s appointment power under Measure L would be more limited than under past strong-mayor proposals in Sacramento.²⁷⁸ This revision, however, still divides city employees into those responsible to the mayor and those who answer to the city council, which could make the city’s hierarchy confusing.²⁷⁹ Community members who prefer the current council-manager government see advantages in a “unified structure...[with] a single consolidated group of professional staff under the direction of the city manager, who is responsible to the full city council,” including the mayor.²⁸⁰

²⁶⁹ AGAINST, *supra* note 101.

²⁷⁰ Isenberg interview, *supra* note 65.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ EDGAR, *supra* note 84 (showing a vote of 10–1 against granting veto power).

²⁷⁵ Hansen interview, *supra* note 116.

²⁷⁶ YES ON MEASURE L, FACTS ON CHARTER REVISION, <http://yesonmeasurel.org/facts-on-charter-revision/> (last visited Sept. 12, 2014).

²⁷⁷ STOP THE POWER GRAB, <http://stopthepowergrab.org/> (last visited Sept. 13, 2014).

²⁷⁸ See TEICHERT, *supra* note 74 (listing appointment duties that would have been granted under the 2009 initiative).

²⁷⁹ EDGAR, *supra* note 84.

²⁸⁰ *Id.*

4. Community Interaction

Since under Measure L, the mayor would no longer be a voting member of the city council, opponents decry that the mayor can choose not to attend meetings.²⁸¹ They assert a mayor could theoretically never hear the concerns of Sacramento citizens if he or she did not go to city council meetings, and could make decisions based solely on meetings with private individuals or groups.²⁸² There could be “far less public access to the mayor.”²⁸³ This would also be a circumvention of the Brown Act if the mayor does not attend meetings for which public access is required under the act.²⁸⁴ Of course, even if a mayor does attend meetings, he or she is not required to take community comments made at those meetings under consideration when making decisions.²⁸⁵

Supporters of Measure L counter criticism about the omission of Brown Act standards by pointing to the power of the electorate to remove the mayor if he or she is not responsive to the people.²⁸⁶ Also, the mayor and council members alike will continue to engage members of the public outside of meetings, which very few citizens attend.²⁸⁷ That engagement, coupled with additions to mayoral power, may actually be more productive according to proponents, since members of the public often comment at meetings regarding topics over which the mayor and city council have no power.²⁸⁸ “Government provides an endless number of ways to comment,” and proponents point to the new comment forums available under Measure L, including two town hall meetings each year in which the mayor must participate.²⁸⁹

C. The City Manager: Article V

Supporters of Measure L stress that the city manager will still provide his or her expertise to the mayor, so Sacramento will still have professional guidance.²⁹⁰ They say the only issue is whether a voter believes the mayor should or should not direct the city manager.²⁹¹

²⁸¹ AGAINST, *supra* note 101.

²⁸² *Id.*

²⁸³ EDGAR, *supra* note 84.

²⁸⁴ Hansen interview, *supra* note 116.

²⁸⁵ See Julie Murphy, Letter to the Editor, *Strong Mayor: Is the Mayor's Office for Sale*, SACRAMENTO BEE (Sept. 6, 2014, 9:09 AM), <http://www.sacbee.com/2014/09/06/6684080/is-the-mayors-office-for-sale.html> (referring to “Michelle Rhee’s statement that her husband [Mayor Kevin Johnson] really doesn’t base his decision-making on public testimony at city council meetings”).

²⁸⁶ See IN FAVOR, *supra* note 9 (implying the mayor will make “superior...decisions” because of his or her accountability to the electorate).

²⁸⁷ *Forum*, *supra* note 11 (statement of Daniel Conway, chief of staff, Mayor Kevin Johnson).

²⁸⁸ Isenberg interview, *supra* note 65 (stating people want to comment on things the city does not manage and that “government in America is roughly the equivalent of public psychotherapy”).

²⁸⁹ *Id.*; SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 7 (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (amending SACRAMENTO, CAL. CHARTER, art. IV, § 40(b)(2)).

²⁹⁰ *Forum*, *supra* note 11 (statement of Daniel Conway, chief of staff, Mayor Kevin Johnson).

²⁹¹ Isenberg interview, *supra* note 65.

If the city manager is mayor-appointed, however, those against Measure L believe the manager will work to support only the mayor's goals, not those of the city council or the electorate.²⁹² Some have even said the city manager may become a de facto chief of staff to the mayor.²⁹³ Since the city manager would no longer have a one-year grace period during which he or she could not be removed, the person in that position could feel pressure to follow the mayor, regardless of the reason or outcome.²⁹⁴

One item that has not been addressed is whether the city manager's compensation will change if the position encompasses fewer duties. Former mayor Heather Fargo speculated that the city manager's pay will not decrease, but the mayor would probably get a raise so that he or she is not making less than the manager, who would be the mayor's subordinate.²⁹⁵

D. The Annual Budget: Article IX

The mayor would create and present the budget if Measure L is approved, which means either the budget would be more voter-influenced because the mayor is elected or the budget would be full of favors to friends and donors, depending on which side of the debate is speaking.²⁹⁶

It could be easier for special interests to influence just one person wielding budgetary power, rather than an entire city council.²⁹⁷ Since deep-pocketed donors have contributed to the campaign supporting Measure L—developer Angelo Tsakopoulos has donated \$100,000, the California Association of Realtors has contributed just under \$50,000, Niello Co. has backed the campaign with \$25,000, and Mark Friedman, a Kings owner, has given more than \$14,000—perhaps the monetary influence that opponents are worried about is already taking effect.²⁹⁸ “Access [to leaders] would be focused and limited to certain individuals” with a lot of money, according to Measure L's opposition.²⁹⁹ Yet supporters insist special interests will still need to work with all eight council members, although they recognize the measure will streamline a currently “sluggish bureaucracy where...to get something done, they often have to convince at least five city council members, which can take a lot of time and money.”³⁰⁰

As with any other council vote, the mayor would have veto power, and overriding that veto with a supermajority could prove difficult.³⁰¹ The creation of an independent budget analyst could provide a balance against the mayor's power.³⁰² If the analyst makes recommendations

²⁹² REBUTTAL TO FAVOR, *supra* note 10.

²⁹³ *Forum*, *supra* note 11 (statement of Steve Hansen, council member, City of Sacramento).

²⁹⁴ SACRAMENTO, CAL. CHARTER, art. V, § 63.

²⁹⁵ *Forum*, *supra* note 11 (statement of Heather Fargo, former mayor, City of Sacramento).

²⁹⁶ IN FAVOR, *supra* note 9; AGAINST, *supra* note 101.

²⁹⁷ AGAINST, *supra* note 101.

²⁹⁸ See Ryan Lillis, *Strong Mayor's About Clout*, SACRAMENTO BEE (Sept. 5, 2014, 7:46 PM), <http://www.sacbee.com/2014/09/05/6683295/sacramentos-power-players-line.html> (quoting Andrew Acosta as saying, “they'd rather have one conversation than eight” regarding the top donors).

²⁹⁹ *Id.* (quoting former Sacramento mayor Heather Fargo).

³⁰⁰ *Id.*

³⁰¹ AGAINST, *supra* note 101.

³⁰² IN FAVOR, *supra* note 9.

that the city council adopts, the mayor may be less likely to use a line-item veto against those recommendations or an overall veto against the budget.³⁰³ Although Measure L creates the analyst position, it fails to make recommendations regarding his or her qualifications and does not consider the cost of hiring a new department head.³⁰⁴ Therefore, it is unclear if an independent budget analyst will actually be appointed or whether the position is financially feasible if Measure L passes.³⁰⁵

E. Other Major Charter Changes

Measure L will require the city council to fill in some of the details left out of its text, but will also allow voters to alter the provisions during future general elections.³⁰⁶

1. Required Ordinances

Several of the main Measure L charter alterations require the council to pass a separate ordinance within six months of the measure's passage.³⁰⁷ These include the creation of committees for redistricting and ethics, as well as a Sunshine Ordinance.³⁰⁸ Proponents of Measure L did not prescribe the parameters of these programs in the measure because voters found prior versions of strong-mayor initiatives overwhelming when they included all of these details.³⁰⁹

This reasoning does not comfort opponents, who say the “trust us and wait” argument shows a lack of substance in the reforms.³¹⁰ Council member Hansen foresees a “delicate dance” to create ordinances substantive enough so that they have a purpose, but not too substantive so that they might be vetoed.³¹¹ Since the ordinances do not require a charter change, council member Hansen would prefer to create substantive ordinances that reform ethics, streamline governance, and change election rules without a measure half-heartedly commanding the city council to do so.³¹²

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³⁰³ See REBUTTAL TO AGAINST, *supra* note 101 (inferring “an unprecedented light of transparency” could mean the mayor would be less likely to not follow analyst recommendations).

³⁰⁴ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 29 (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf (amending SACRAMENTO, CAL. CHARTER, art. IX, § 111).

³⁰⁵ *Id.*

³⁰⁶ See, e.g., *id.* § 14 (providing for the creation on an ethics committee and Sunshine Ordinance).

³⁰⁷ *Id.*

³⁰⁸ *Id.* § 5 (amending SACRAMENTO, CAL. CHARTER, art. III, § 24(a)); *Id.* § 14 (adding SACRAMENTO, CAL. CHARTER, art. III, § 36).

³⁰⁹ *Forum*, *supra* note 11 (statement of Daniel Conway, chief of staff, Mayor Kevin Johnson).

³¹⁰ Hansen interview, *supra* note 116.

³¹¹ *Id.*

³¹² *Id.*

2. Amendment by Ballot

Measure L's charter changes can be amended through future initiatives or measures placed on the ballot, which could help to close any gaps that surface.³¹³ For example, if the measure passes and tie votes in the city council become a problem, voters can solve the issue with a general election ballot measure.³¹⁴ This was an issue that San Diego voters fixed when they permanently approved their city's strong-mayor system.³¹⁵

If Measure L passes, voters may also choose not to keep a strong-mayor government when the bill sunsets in 2020.³¹⁶ The provision is similar to how other cities adopted their strong-mayor systems.³¹⁷ Some feel that the sunset date provides false hope for those who dislike the form of governance; after all the arguments on Measure L, they say voters will be less likely to change the charter because they don't want a repeat of "this agony."³¹⁸ Opponents do not want the next six years to be an experiment, and assert that such a major change to the charter should be permanent or not happen at all.³¹⁹ A few cynics believe the sunset might be designed so that the strong-mayor system only benefits Mayor Johnson and not his successors.³²⁰

VII. CONCLUSION

Ultimately, the decision Sacramento voters make may not really alter the way the city government works.³²¹ Researchers have found the council-manager structure and the strong-mayor system are fairly equal in terms of ability to implement citizen-supported policies.³²² Both forms of government generally conform to their constituents' desires because they are equally responsive to their communities.³²³

³¹³ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 30 (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf.

³¹⁴ *Id.*

³¹⁵ *A History of San Diego Government*, OFFICE OF THE CITY CLERK, <http://www.sandiego.gov/city-clerk/aboutus/history.shtml> (last visited Oct. 5, 2014).

³¹⁶ SACRAMENTO, CAL. CITY COUNCIL RES. NO. 2013-0362, EXHIBIT A, § 30(C) (2013), available at http://portal.cityofsacramento.org/~media/Corporate/Files/City-Clerk/Elections/07142014_MeasureText_Charter.pdf.

³¹⁷ *See, e.g., A History of San Diego Government*, OFFICE OF THE CITY CLERK, <http://www.sandiego.gov/city-clerk/aboutus/history.shtml> (last visited Oct. 5, 2014) (showing San Diegans had to re-vote on the issue after five years to make the change permanent).

³¹⁸ *Forum*, *supra* note 11 (statement of Steve Hansen, council member, City of Sacramento).

³¹⁹ Hansen interview, *supra* note 116.

³²⁰ *Contra* Isenberg interview, *supra* note 65 (theorizing the sunset was instead included to make the measure more popular).

³²¹ Sam Sturgis, *Strong Mayor, Weak Mayor, No Mayor—In Terms of Policy, It May Not Matter Much*, CITY LAB (July 31, 2014), <http://www.citylab.com/politics/2014/07/strong-mayor-weak-mayor-no-mayor-in-terms-of-policy-it-may-not-matter-much/375347/>.

³²² *Id.*

³²³ *Id.*

Measure L’s proponents insist the revision would create a better, more modern form of government that will reduce “bureaucratic roadblocks.”³²⁴ Opponents recognize the popularity of Mayor Johnson and understand why voters would give him more governmental control, but fear the measure places too much power in the position, which voters may not like as much when a less-popular mayor is in charge.³²⁵

Regardless of the way they vote, voters should bear in mind that Measure L proposes a substantial revision to Sacramento’s existing charter, and the breadth of the proposal warrants careful consideration of the specific changes.³²⁶

³²⁴ REBUTTAL TO AGAINST, *supra* note 101.

³²⁵ REBUTTAL TO FAVOR, *supra* note 10; Michael Murphy, Letter to the Editor, *Measure L: Developer Dollars Support the Power Grab*, SACRAMENTO BEE (Sept. 4, 2014, 9:09 AM), <http://www.sacbee.com/2014/09/04/6678754/developer-dollars-support-the.html>

³²⁶ *See, e.g., supra* Sections IV–VI (discussing implications of the measure’s passage).

Strict, Stricter, and Strictest:
An Analysis of Prison Sentencing in California
Before and After “Three Strikes”

Report

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McGeorge School of Law

By

Vallerye Mosquera

J.D. University of the Pacific, McGeorge School of Law, to be conferred May 2015
M.S., Community and Regional Development, University of California, Davis, 2012
B.A., Biological Sciences, New College of Florida, 2004

&

Drew Wagner-Weir

J.D. University of the Pacific, McGeorge School of Law, to be conferred May 2015
B.S., Marine Transportation, California State University Maritime, 2008

I. INTRODUCTION

This report examines California's repeat offender law, known as Three Strikes, by exploring the law's history, passage, legality, and effects.¹ The purpose of this report is to inform the reader on an aspect of criminal justice that has generated significant debate and discussion. Specifically, because Three Strikes was passed and amended by the initiative process, the report will examine the role that initiatives have played throughout the law's existence. In addition, this report analyzes the various legal challenges and constitutional issues raised by the different provisions of the law.

Section II provides a general overview of the history, passage, and structure of the original Three Strikes law passed in 1994. Three Strikes was the culmination of a trend moving towards increasing the punishments levied against repeat offenders. Section III analyzes the legality and effects of Three Strikes. The law has generated significant legal controversy and has been litigated all the way to the United States Supreme Court.

Section IV provides an analysis of the major effects of Three Strikes, specifically, the effects on crime reduction and prison operation costs. Finally, Section V discusses Proposition 36, which amended Three Strikes in 2012. Proposition 36 made some slight but notable changes to Three Strikes, such as ensuring that individuals cannot be sentenced to life imprisonment based on the commission of a non-serious and non-violent felony. Section V also discusses Proposition 47, which will appear on the November 4th, 2014 ballot. Proposition 47 is limited in scope and its primary purpose is to redefine many non-serious and non-violent crimes as misdemeanors, thereby avoiding the mandatory sentence that would come with a third strike felony.

II. HISTORICAL BACKGROUND AND THE PASSAGE OF THREE STRIKES

The historical background is critical to a clear understanding of why Three Strikes was passed. Prior to 1994, California had gone through a number of sentencing reforms. Several key issues, such as lengthy sentences and prison conditions, emerged early in California's history.² Part A discusses California's sentencing structure prior to 1994 and the emergence of prison related issues. Part B provides a general overview of criminal justice initiatives that, starting in 1972, created a trend that Three Strikes followed. Finally, Part C discusses the drafting and passage of Three Strikes in both the California state legislature and through the initiative process.

A. Sentencing and Prisons Prior to 1994

1. Sentencing: Early Years, Indeterminate, and Determinate

California has gone through several different sentencing variations.³ Early in California's history the sentencing structure utilized total judicial discretion within statutory

¹ The term "Three Strikes" will be used throughout the report to refer to Assembly Bill 971 (March, 1994) and Proposition 184 (November, 1994), collectively.

² Kara Dansky, *Understanding California Sentencing*, 43 U.S.F. L. REV. 45, 51–52 (2008).

³ *Id.* at 45.

minimum and maximum terms limits.⁴ Criticisms of this early structure focused on the fact that prisoners “were suffering imprisonment under unjust or unreasonably long sentences.”⁵ Furthermore, the legislature had not provided any real means of reducing a sentence once it was imposed, and the only remedy was the gubernatorial pardon or clemency, which governors were reluctant to use because of political ramifications.⁶ The late 19th and early 20th centuries saw the development of probation and parole to combat prison overcrowding and lengthy sentences.⁷

Major sentencing reform came in 1917 with the passage of the Indeterminate Sentencing Act.⁸ The law’s goal was “to take from the trial judge the discretion of fixing definitely the term of imprisonment and to vest it in the prison authorities within prescribed limits.”⁹ Essentially, the law mandated that when a person was convicted of a crime, the judge either gave that person probation or sent that person to jail without making a decision on how long that person would be incarcerated. The length of incarceration was determined by the Board of Prison Directors, later known as the Adult Authority. The Board was constrained by the statutory limits.¹⁰

Finally in 1976, Governor Jerry Brown and the legislature enacted the Determinate Sentencing Law.¹¹ The Determinate Sentencing Law allows judges to use discretion in imposing one of three different prison terms provided by statute.¹² If the court finds an aggravating circumstance, then the court may sentence the person to the upper, or longer, prison term.¹³ California continues to utilize the determinate sentencing system, subject to compliance with mandatory sentencing under Three Strikes.¹⁴

2. *Prison Overcrowding: A Problem From the 19th Century*

California prison conditions, prison costs, and prison overcrowding have been major problems since California became a state.¹⁵ California’s oldest prison, San Quentin State Prison,

⁴ *Id.*

⁵ *Id.* at n.48 (citing Governor Frederick F. Low, Governor’s Message (Dec. 4, 1865)).

⁶ *Id.* at 55.

⁷ *Id.* at 56–57.

⁸ Paula A. Johnson, *Senate Bill 42—The End of the Indeterminate Sentence*, 17 SANTA CLARA L. REV. 133, 135 (1977) available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2258&context=lawreview>; Act of May 18, 1917, ch. 527, § 1, 1917 Cal. Stat. 665 (current version at CAL. PENAL CODE § 1160).

⁹ *Sentencing Under Indeterminate Sentencing*, 22A Cal. Jur. 3d Criminal Law: Post-Trial Proceedings § 426, (Aug. 1, 2014).

¹⁰ *Id.*

¹¹ Dansky, *supra* note 2, at 56–57. As clarification, the current Governor Jerry Brown was also governor in the 1970s before he became the California Attorney General and then Governor again.

¹² *Sentencing Under Determinate Sentencing Law*, 22A Cal. Jur. 3d Criminal Law: Post-Trial Proceedings § 386, (August 1, 2014).

¹³ *Id.*

¹⁴ *See, e.g., People v. Boyce*, 59 Cal. 4th 672 (2014) (providing a discussion of California’s current sentencing procedure in a criminal case).

¹⁵ Dansky, *supra* note 2, at 53.

was constructed in 1852. By 1858 there were 600 prisoners in a facility built with only 68 cells.¹⁶ In fact, it appears that most sentencing-related concepts, such as probation and parole, were implemented partially in response to prison overcrowding.¹⁷ Prison overcrowding and prison costs have been major concerns since California became a state, and while Three Strikes plays a role in those two issues, they existed before Three Strikes came into being.

B. Overview of Criminal Justice Initiatives from 1972 to 1994

Three Strikes was not the first time that California utilized the initiative process to affect sentencing as it relates to violent criminals and repeat offenders. In fact, Californians had used the initiative process at least once to address the issue prior to passage of Three Strikes.¹⁸ Although the initiative process has existed in California since 1911, the most active use of the initiative process in the criminal justice context began in 1972, with the passage of Proposition 17.

In 1972, the California Supreme Court held that the death penalty in California violated the state constitution.¹⁹ In response, the people passed Proposition 17, which amended the California Constitution to provide that statutes imposing the death penalty were not unconstitutional.²⁰ This appears to be the first time that California utilized the initiative process to directly address a criminal sentence. However, Proposition 17 appeared to lack force after the United States Supreme Court decided *Furman v. Georgia*,²¹ which struck down every current state death penalty statute in the United States. *Furman* was not a categorical bar to the death penalty.²² Instead, it was an attempt by the United States Supreme Court to regulate death penalty statutes to ensure that the death penalty was not imposed arbitrarily.²³ Nevertheless, after 1972, the initiative process began to play an ever-increasing role in prisons, sentencing, and punishment.

The initiative process reasserted itself once again in 1978 with the passage of Proposition 7.²⁴ In an attempt to create a constitutionally permissive death penalty law, California enacted a statute in 1977 that provided the death penalty in a murder case if a jury found that one of twelve special circumstances existed beyond a reasonable doubt.²⁵ Dissatisfied with what he considered

¹⁶ *Id.* Interestingly, according to the San Quentin State Prison website, during construction of the facility, prisoners slept on a ship called the Waban at night and labored on the prison during the day. *San Quentin State Prison*, CAL. DEPARTMENT CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/Facilities_Locator/SQ.html (last visited Sep. 12, 2014).

¹⁷ Dansky, *supra* note 2, at 60.

¹⁸ See Cal. Proposition 8 (1982).

¹⁹ *People v. Anderson*, 6 Cal. 3d 628 (1972).

²⁰ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 7, 1972, at 20, available at http://librarysource.uchastings.edu/ballot_pdf/1972g.pdf ["NOVEMBER 1972 VOTER GUIDE"].

²¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

²² Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1285 (1997).

²³ *Id.*

²⁴ *Id.* at 1310

²⁵ *Id.* at 1308.

a weak law, California State Senator John Briggs championed Proposition 7, which dramatically expanded the scope of California's new death penalty statute by "increasing the penalties for first and second degree murder" and "expanding the list of special circumstances requiring a sentence of death or life imprisonment without the possibility of parole."²⁶ What is striking about Proposition 7 is that it was a comprehensive law, which demonstrates the expanding role that initiatives began to have in sentencing and criminal justice.²⁷

In 1982, Proposition 8 was passed, also known as The Victim's Bill of Rights.²⁸ The initiative was not passed without significant controversy in terms of its scope and legality.²⁹ Proposition 8 addressed a wide range of issues such as restrictions on bail, habitual criminals, use of prior convictions in criminal proceedings, and restrictions on sentencing those over the age of 18 to the Youth Authority.³⁰ In fact, Proposition 8 added a number of sections to the Penal Code, including sections 667 and 1192.7, which would be amended and modified in 1994 by passage of Three Strikes.³¹ The habitual criminals section included enhancements for "any person convicted of a serious felony who previously has been convicted of a serious felony in this state."³² Proposition 8 also flexed the muscles of the initiative process by placing restrictions on how the law could later be amended.³³ While attaining a simple majority of both legislative houses allowed the legislature to lengthen enhanced sentences, amending the law required the two-thirds vote of both houses or an initiative approved by the electors.³⁴

There were predictions that the new bail restrictions, as well as the enhanced sentences, would have a direct impact on prison overcrowding and financial resources.³⁵ In fact, the California Attorney General at the time, who argued in favor of Proposition 8, highlighted that more convictions would result in more prisoners: "There is absolutely no question that the passage of this proposition will result in more criminal convictions [and] more criminals being sentenced to state prison."³⁶ Opponents argued that Proposition 8 would require millions of dollars in new court procedures without money to pay for them.³⁷

In short, it appears that Three Strikes was not the first time that the initiative process tackled the repeat offender issue. Propositions 7, 8, and 17 were not the only criminal justice

²⁶ *Id.* at 1311.

²⁷ See NOVEMBER 1972 VOTER GUIDE, *supra* note 20, at 20; CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 7, 1978, at 32, *available at* http://librarysource.uchastings.edu/ballot_pdf/1978g.pdf ["NOVEMBER 1978 VOTER GUIDE"].

²⁸ George Nicholson, *Victims' Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence*, 23 PAC. L. J. 815, 821 (1992).

²⁹ *Brosnahan v. Brown*, 32 Cal. 3d 236 (1982).

³⁰ CAL SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, JUNE 8, 1982, at 33, 56 *available at* http://librarysource.uchastings.edu/ballot_pdf/1982p.pdf ["JUNE 1982 VOTER GUIDE"].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 32.

³⁶ *Id.* at 34.

³⁷ *Id.* at 35.

propositions passed during the 1970s and 1980s, but they were the most significant in scope and purpose. Those propositions are significant because they represent a relatively sudden and controversial entrance of the initiative process into criminal procedure. They also demonstrate that Three Strikes was not the first time the state grappled with sentencing reform, prison overcrowding, and fiscal responsibility. Proposition 8 was a sweeping reform, and by adding numerous sections to the California Penal Code, it laid the foundation for the passage of Three Strikes in the next decade.

C. Three Strikes: Creation and Passage

Three Strikes can be viewed as a high water mark in the campaign to punish repeat offenders and sentence them to state prison. While the actual drafting of the 1994 Three Strikes laws appears to have its genesis in the tragic murder of a young woman and a twelve year old girl, the 1982 Victim's Bill of Rights had already taken a substantial step towards punishing repeat offenders.³⁸ However, it is helpful to view the passage of Three Strikes within the context of the times in which it was created. Therefore, this section provides a brief summary of events leading up to passage of the law.

The actual drafting of Three Strikes occurred because of the highly publicized murder of a young woman named Kimber Reynolds in 1992, who was shot in the head during an attempted robbery by a repeat offender.³⁹ Kimber's father, Mike Reynolds, approached Justice James A. Ardaiz, presiding justice for the Fifth District Court of Appeal, to enlist his help in drafting a law to reduce serious and violent crime.⁴⁰ A legislative committee rejected this first attempt, but Mike Reynolds shifted his focus and took the campaign to the people in the form of Proposition 184.⁴¹

Around the same time that Mike Reynolds was building support for Proposition 184 in 1993, tragedy struck again when another repeat offender kidnapped and murdered a twelve year old girl named Polly Klaas.⁴² Polly's death spurred overwhelming support for Mike Reynolds' initiative, which made it onto the November ballot in 1994.⁴³

The initiative process was not the only vehicle for a major law targeting repeat offenders. In fact, the text of Proposition 184 was virtually identical to the text of Assembly Bill 971, developed by the California legislature in the wake of Polly Klaas' murder.⁴⁴ Despite alternative

³⁸ *Id.* at 33, 56.

³⁹ Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. CRIM. L. & CRIMINOLOGY 395, 410 (1996).

⁴⁰ James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 1 (2000).

⁴¹ Vitiello, *supra* note 39, at 411.

⁴² Marc Klass, *About the KlaasKids Foundation For Children*, KLAAS KIDS FOUNDATION (Sep. 11, 2014), <http://klaaskids.org/about/>.

⁴³ Vitiello, *supra* note 39, at 418.

⁴⁴ David Esparza, *The "Three Strikes and You're Out" Law - A preliminary Assessment*, LEGISLATIVE ANALYST'S OFFICE (Sep. 11, 2014), available at http://www.lao.ca.gov/1995/010695_three_strikes/sc010695.html.

bills and “an atmosphere of political distrust,”⁴⁵ Assembly Bill 971 passed and became law in March of 1994.⁴⁶ In November of 1994, Proposition 184 passed, and both laws became known collectively as “Three Strikes.”

The deaths of Kimber Reynolds and Polly Klaas were not the only reasons that Three Strikes became law. Justice Ardaiz argued that Three Strikes was an attempt to prevent the commission of crime and deter the repetition of crime through reform in sentencing.⁴⁷ Basically, Three Strikes would serve as a powerful deterrent by sending the message that “further criminal behavior will result in severe consequences; disregard this message at your peril.”⁴⁸ Furthermore, Justice Ardaiz argued that the rate of recidivism⁴⁹ in California was well over 50 percent, the second highest rate in the nation.⁵⁰ Indeed, proponents of Proposition 184 argued that Three Strikes “keeps career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong.”⁵¹

Ultimately, political realities probably contributed significantly to the passage of Three Strikes both in the legislature and by the people. Governor Pete Wilson, up for reelection, was a major supporter of Three Strikes and spoke at Polly Klaas’ funeral, advocating for the new law.⁵² Additionally, the legal scholar Michael Vitiello argued that Mike Reynolds’ ability to sway the public and use the press silenced those who may have opposed Three Strikes or attempted to modify it.⁵³ Looking at California history, Three Strikes appears to be exactly the type of situation that paralyzed sentencing reform in the early years of statehood: elected politicians are reluctant to be viewed as soft on crime.⁵⁴

The 1994 debate surrounding Three Strikes was perhaps best described in the November 1994 Voter Guide. The analysis by the Legislative Analyst’s Office (LAO) states that passage of Three Strikes would result in additional state operating costs, reaching an annual cost of \$6 billion by 2026.⁵⁵ Furthermore, the state would incur a one-time \$20 billion dollar expense to build and expand prison facilities to accommodate the anticipated increase in prison populations.⁵⁶ Proponents argued that Three Strikes would save lives and taxpayer dollars by keeping violent prisoners in jail, and would relieve Californians of having to “pay the outrageous

⁴⁵ Vitiello, *supra* note 39, at 418. Professor Vitiello explains that “[f]ew in the legislature were willing to take on Reynolds or [Governor] Wilson who would have portrayed opponents as soft on crime, a tough label to wear in 1994.” *Id.*

⁴⁶ *Id.* at 418.

⁴⁷ Ardaiz, *supra* note 40, at 3.

⁴⁸ *Id.*

⁴⁹ Recidivism occurs when criminals return to society after prior convictions and then commit more crimes.

⁵⁰ Ardaiz, *supra* note 40, at 5.

⁵¹ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 8, 1994, at 36 available at http://librarysource.uchastings.edu/ballot_pdf/1994g.pdf [“NOVEMBER 1994 VOTER GUIDE”].

⁵² Vitiello, *supra* note 39, at 414.

⁵³ *Id.* at 418.

⁵⁴ Dansky, *supra* note 2, at 61.

⁵⁵ NOVEMBER 1994 VOTER GUIDE, *supra* note 51, at 34.

⁵⁶ *Id.* at 36.

costs of running career criminals through the judicial system’s revolving door over and over again.”⁵⁷ Opponents countered by stating that the prison system would be overwhelmed by non-violent offenders and the state would incur billions of dollars in increased expenses.⁵⁸

1. *Two Laws?*

As previously discussed, Three Strikes passed in both the legislature and through the initiative process. Why two laws? Functionally, there is not any textual difference between Assembly Bill 971 and Proposition 184.⁵⁹ The major difference is that Assembly Bill 971 amended Penal Code Section 667.5, whereas Proposition 184 created Penal Code Section 1170.12.⁶⁰ Importantly, both laws provided the same method for amendment: a two-thirds vote in both houses of the legislature or by a statute approved by the voters.⁶¹ Then what would happen if the legislature tried to amend section 667 of the Penal Code and not section 1170.12? Which law has priority? The legal answer to that question is beyond the scope of this report, and it does not appear that the issue has presented itself. Furthermore, given the fact that both amendment clauses in each law are identical, the legislature or the people would presumably amend both at the same time, which is exactly what happened with the passage of Proposition 36 in 2012.⁶²

2. *How Does Three Strikes Work?*

Three Strikes applies “strikes”—think baseball—to individuals who are convicted of serious or violent felonies.⁶³ Some well-known examples of serious or violent felonies are murder, robbery, and rape, but the total list is more expansive. If a person, who has one strike for having been previously convicted of a serious or violent felony, is subsequently convicted of *any* felony, whether or not it is serious or violent, that person receives double the required sentence for the new conviction, and receives a second strike.⁶⁴ If the same person, who now has two strikes, is convicted for *any* new felony, then that person receives a mandatory minimum term of 25 years, or three times the term otherwise required by law for the third conviction, whichever is longer—think “out.”⁶⁵ Keep in mind that a person can receive more than one strike arising out of a single criminal case. This occurs when a person is convicted of multiple felonies arising from

⁵⁷ *Id.*

⁵⁸ *Id.* at 37.

⁵⁹ *See id.* at 64-65; *see also* Official California Legislative Information Assembly Bill 971 (Sept. 11, 2014), available at http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_0951-1000/ab_971_bill_940307_chaptered.

⁶⁰ *Id.*

⁶¹ *See id.* There may be a constitutional issue with a law passed by a simple majority binding future legislatures with a supermajority provision. However, because Proposition 184 contains identical amendment restrictions, the question is probably moot.

⁶² CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 6, 2012, at 105, available at <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf> [“NOVEMBER 2012 VOTER GUIDE”].

⁶³ NOVEMBER 1994 VOTER GUIDE, *supra* note 51, at 33, 36.

⁶⁴ *Id.*

⁶⁵ CAL. PENAL CODE § 667(e)(2)(A). Prior to the passage of Proposition 36 in 2012, a third strike could result in a life sentence.

the same set of facts.⁶⁶ Furthermore, those people with at least one strike must be sent to state prison and cannot be sentenced to probation or an alternative treatment program. Finally, a person serving time in state prison under the Three Strikes *must* serve out the minimum sentence without the possibility of early release.⁶⁷

As will be discussed later in this report, the initiative process has been used to amend portions of the 1994 Three Strikes laws. However, the basic Three Strikes methodology persists today.

III. THE LEGALITY OF THREE STRIKES

Despite the broad support received for Three Strikes, there were several attacks to its constitutionality. This section outlines the key court decisions that upheld the law and interpreted the extent of judicial control over sentencing after Three Strikes. Part A discusses the U.S. Supreme Court cases that decided Three Strikes sentencing does not constitute cruel and unusual punishment. Part B outlines the California Supreme Court's interpretation of the judge's ability to reduce sentences even after a third strike felony conviction.

A. Constitutional Challenges: Cruel and Unusual Punishment

Some opponents of Three Strikes believed that the law constituted cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution.⁶⁸ Based on the severity of the mandatory sentencing,⁶⁹ even for non-violent third strikes, these opponents argued that the punishment was “grossly disproportionate” to many of the crimes that constituted the “third strike.”⁷⁰ In 2003, the opponents got their chance to challenge the constitutionality of Three Strikes before the U.S. Supreme Court in *Ewing v. California*⁷¹ and *Lockyer v. Andrade*.⁷²

1. *Ewing v. Andrade: Non-Serious and Non-Violent Third Strikes*

In *Ewing*, the Supreme Court considered the case of Gary Ewing, who stole three golf clubs from a golf course pro shop in 2000.⁷³ Priced at \$399 each, the value of the golf clubs

⁶⁶ See, e.g., *People v. Benson*, 18 Cal. 4th 24 (1998) (considering a case where the defendant was convicted of two felonies arising out of the same occurrence when defendant gained entry to the victim's apartment and repeatedly stabbed her with a knife).

⁶⁷ NOVEMBER 1994 VOTER GUIDE, *supra* note 51, at 56.

⁶⁸ See Michel Vitiello, “Three Strikes” and the Romero Case: *The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1643, 1647 (1997).

⁶⁹ Section 667(e)(2)(A) of the California Penal Code states that upon receiving a third felony conviction, defendants are required to serve at least twenty-five years and up to a life sentence.

⁷⁰ *Ewing v. California*, 538 U.S. 11, 28 (2003).

⁷¹ See *id.* The original trial court chose not to reduce the grand theft charge to a misdemeanor and also did not vacate Ewing's four prior felony convictions. As such, “Ewing was sentenced under the three strikes law to 25 years to life.” *Id.* at 21. The California Court of Appeal affirmed the decision, and the California Supreme Court denied review of the decision. *Id.*

⁷² See *Lockyer v. Andrade*, 538 U.S. 63 (2003).

⁷³ *Ewing*, 538 U.S. at 17–18.

totaled less than \$1,200 dollars.⁷⁴ Mr. Ewing was convicted of felony grand theft, which would have resulted in a sentence of 10 years or less,⁷⁵ except that he had four prior serious felony convictions.⁷⁶ Those prior felony convictions subjected him to the Three Strikes sentencing requirement of 25 years to life for this new, non-violent and non-serious felony conviction.⁷⁷

The Court held that “recidivism” statutes like the Three Strikes law in California did not sentence violators out of proportion to their “third strike” crime, and, therefore, are not unconstitutional.⁷⁸ Rather, from the Court’s perspective, these laws are “nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State’s judgment as to whether to grant him parole.”⁷⁹ The Court further described how state legislatures needed discretion in making sentencing decisions, instead of being impeded by the federal courts.⁸⁰ Indeed, although the Court noted the criticism of the Three Strikes law,⁸¹ it ultimately stated, “[t]his criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme.”⁸²

Finally, it is notable that the Court found that the rationale for the Three Strikes law was justifiable and that the outcomes of the law were impressive.⁸³ The Court stated that “[r]ecidivism is a serious public safety concern in California and throughout the Nation” and that after four years of the Three Strikes law in California, “the recidivism rate of parolees returned to prison for the commission of a new crime dropped by nearly 25 percent.”⁸⁴ Additionally, the Court seemed to consider evidence that parolees were leaving California because of the Three Strikes law to be a sign of its efficacy.⁸⁵

⁷⁴ *Id.* at 18.

⁷⁵ In his dissenting opinion, Justice Breyer notes that before the Three Strikes law, “no one like Ewing could have served more than 10 years in prison. We know that for certain because the maximum sentence for Ewing’s crime of conviction, grand theft, was for most of that period 10 years . . . We also know that the time that any offender actually served was likely far less than 10 years. This is because statistical data show that the median time actually served for grand theft (other than auto theft) was about two years, and 90 percent of all those convicted of that crime served less than three or four years.” *Ewing*, 538 U.S. at 44 (Breyer, J., dissenting) (emphasis in original).

⁷⁶ See *Ewing*, 538 U.S. at 18. Ewing had four prior serious and/or violent felony convictions: three burglaries and a robbery. *Id.* at 19.

⁷⁷ *Id.* at 18, 20.

⁷⁸ *Id.* at 21.

⁷⁹ *Id.* (quoting *Rummel v. Estelle*, 445 U.S. 263, 278, (1980)).

⁸⁰ *Id.* at 25 (“Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”).

⁸¹ *Id.* at 27–28 (citing FRANKLIN E. ZIMRING ET. AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA (2001); Vitiello, *supra* note 39, at 423).

⁸² *Id.* at 28 (“We do not sit as a ‘superlegislature’ to second-guess these policy choices.”).

⁸³ See *id.* at 26–27.

⁸⁴ *Id.* (citations omitted).

⁸⁵ *Id.* at 27 (referencing a report that found that “more than 1,000 net parolees left California” in the three years following the enactment of Three Strikes) (citing California Dept. of Justice, Office of the Attorney General, “Three Strikes and You’re Out”—Its Impact on the California Criminal Justice System After Four Years, p. 10 (1998)).

In summary, the Court held that in determining whether a sentence was “unconstitutionally disproportionate” to a crime, the court must look to both the “offense of conviction, or the ‘triggering’ offense” along with the prior felony convictions.⁸⁶ As such, Ewing’s sentence of 25 years to life was held to not be “grossly disproportionate to his conviction for felony grand theft and his prior serious felony offenses.”⁸⁷ With its decision, the Court not only upheld the constitutionality of three strikes laws similar to California’s, but it also broadened the boundaries of what constituted proportional sentencing under the Eighth Amendment.⁸⁸ Instead of considering only the crime of conviction in relation to the imposed sentence, now courts could consider a defendant’s “entire criminal history on the proportionality scales.”⁸⁹

2. *Lockyer v. Andrade: Habeas Corpus Context*

The same day that *Ewing* was decided, the Supreme Court issued a similar opinion in *Lockyer v. Andrade*.⁹⁰ In *Lockyer*, the respondent Mr. Andrade had been convicted of two counts of felony petty theft for stealing “approximately \$150 worth of videotapes from two different [Kmart] stores.”⁹¹ Mr. Andrade had at least three prior felony convictions that were either serious or violent, and, as such, these new felony convictions subjected him to the mandatory sentence of 25 years to life.⁹² In a somewhat unexpected application of the Three Strikes law, he was sentenced to “two consecutive terms of 25 years to life” instead of merely one term “because each of his petty theft convictions [] triggered a separate application of the three strikes law.”⁹³

Although Mr. Andrade was successful with his habeas corpus petition⁹⁴ in the Ninth Circuit Court of Appeals, the Supreme Court held that the Ninth Circuit’s decision was erroneous since Mr. Andrade’s sentence was not cruel and unusual punishment and that the California appellate court’s decision was not “contrary to, or an unreasonable application of, this Court’s clearly established law.”⁹⁵ In its decision, the Court gave little indication of what constitutes “clearly established Federal law” under the Eighth Amendment; it stated only that the

⁸⁶ *Id.* at 29.

⁸⁷ *Id.* at 30.

⁸⁸ Sara J. Lewis, Comment, *The Cruel and Unusual Reality of California’s Three Strikes Law: Ewing v. California and the Narrowing of the Eighth Amendment’s Proportionality Principle*, 81 DENV. U. L. REV. 519, 532 (2003).

⁸⁹ *Id.* at 532.

⁹⁰ *Lockyer*, 538 U.S. at 63.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ A habeas corpus petition is brought by detained individuals who argue that their detention is unlawful. For example, in *Lockyer v. Andrade*, the prisoner petitioner argued that he was being unlawfully detained because his sentence violated the U.S. Constitution. *Lockyer*, 538 U.S. at 63.

⁹⁵ *Lockyer*, 538 U.S. at 63. Under section 2254(d)(1) of the United States Code, a federal court can issue a writ of habeas corpus (determining that the person is “in custody in violation of the Constitution or laws or treaties of the United States”) in cases where the state court proceedings “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

grossly disproportionate test is applied in determining whether sentencing is unconstitutional.⁹⁶ The Court warned that this determination of “grossly disproportionate” sentencing would only be made in those cases that are “exceedingly rare and extreme.”⁹⁷

B. California Constitutional Challenge: Judicial Discretion

Judicial discretion in sentencing was a major issue that emerged after the passage of Three Strikes. While formally judges had broad power to reduce sentencing, the Three Strikes bill seemed to alter that power by allowing only prosecutors, and not judges, to “dismiss or strike” a prior felony conviction if it was “in the furtherance of justice.”⁹⁸ However, section 667(f) of the Penal Code—the provision that appeared to strip judicial discretion in sentencing—was worded in such a way as to make it unclear whether judges retained the ability to strike prior felony convictions on their own motion.⁹⁹

As a result of the ambiguity in the statutory language, some judges continued to act on their own to strike prior felony convictions. The *Romero* case, described below, confirmed that trial court judges maintain some judicial control over sentencing in California in spite of the Three Strikes law.

1. Judicial Discretion: People v. Superior Court (Romero)

In *Romero*, the California Supreme Court considered the authority of a San Diego trial court judge to strike two prior felony convictions for a defendant who was charged with possession of a controlled substance (0.13 grams of cocaine base).¹⁰⁰ The defendant had two prior serious felonies (burglary and attempted burglary – both close to a decade old) that could have increased his punishment to a life sentence, rather than the one to six years for the current charge and prior drug convictions.¹⁰¹ But the judge decided to strike the prior serious felonies, reasoning that judges retained the authority to do so without the prosecutor’s motion since it would otherwise be a violation of the state’s doctrine of separation of powers.¹⁰²

The Court of Appeals disagreed with the trial court judge and held that judges do not have the authority to strike prior felony allegations on their own motion based on the Three Strikes law.¹⁰³ The California Supreme Court reversed the decision of the Court of Appeals, finding that the legislature could curtail the judiciary’s role in sentencing but that it would violate the state constitution to “subject to prosecutorial approval the court’s discretion to dispose of a

⁹⁶ *Id.* at 72–73.

⁹⁷ *Id.* (internal quotation marks and citations omitted).

⁹⁸ CAL. PENAL CODE § 667(f)(2).

⁹⁹ *People v. Superior Court (Romero)*, 37 Cal. Rptr. 2d 364 (1995).

¹⁰⁰ *Id.* at 631.

¹⁰¹ *Id.*

¹⁰² *Id.* at 632. Under the California Constitution, the legislature reserves the “legislative power,” and the “people reserve to themselves the powers of initiative and referendum.” The judicial branch’s power, on the other hand, is “vested in the Supreme Court, courts of appeal, and superior courts.” CAL. CONST. art. IV, § 1; CAL. CONST. art. VI, § 1.

¹⁰³ *Romero*, 37 Cal. Rptr. 2d at 632.

criminal charge.”¹⁰⁴ The court’s decision addressed the interpretation of the Three Strikes bill, but it also affected the interpretation of the Three Strikes initiative since it held that restricting a judge’s authority in striking prior felony convictions would be unconstitutional.¹⁰⁵

2. *Discretion in Sentencing After Three Strikes and Romero*

After the affirmation of the *Romero* decision, there are two possible scenarios in which discretion can be exercised over sentencing in the case of a third strike felony charge.¹⁰⁶ First, the prosecution can decide to charge “wobbler” crimes—those crimes that could be considered either misdemeanors or felonies—as misdemeanors, thereby avoiding the “third strike felony” conviction.¹⁰⁷ Second, supported by the *Romero* decision, the prosecution or the judges themselves have the power to strike prior serious or violent felony convictions from consideration in the trial at issue.¹⁰⁸

The courts are still required to take into account the defendant’s “present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects” in determining if “the defendant may be deemed outside the scheme’s spirit, in whole or in part.”¹⁰⁹ Thus, judges continue to retain some authority to decide if a particular defendant should be subject to the mandatory sentencing of Three Strikes. But that sentencing is still obligatory if a prior strike is not vacated or if the prosecution does not reduce a “wobbler” felony to a misdemeanor.

IV. ERA OF STRICTER SENTENCING: OUTCOMES AND CRITICISM

The slogan of the Three Strikes campaign was to “keep[] career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong.”¹¹⁰ It further promised that it would “save[] lives and taxpayer dollars.”¹¹¹ The rationale for these last two outcomes was based on the idea that fewer crimes would be committed because “career criminals” would be locked-up and unable to commit crimes.¹¹² Additionally, proponents reasoned that stricter sentencing would cause would-be criminals to reconsider involvement in criminal activity.¹¹³

What have been the consequences of Three Strikes over the past two decades? This section provides some insight into that question. Yet, it is important to recognize that Three Strikes is a piece (albeit a large piece) of a larger criminal justice puzzle within California. In

¹⁰⁴ *Id.* at 640.

¹⁰⁵ *See id.* at 647.

¹⁰⁶ *Ewing*, 538 U.S. at 17.

¹⁰⁷ *Id.*

¹⁰⁸ *Romero*, 37 Cal. Rptr. 2d at 647–48.

¹⁰⁹ *People v. Williams*, 17 Cal. 4th 148, 161 (1998).

¹¹⁰ NOVEMBER 1994 VOTER GUIDE, *supra* note 51.

¹¹¹ *Id.*

¹¹² *See Vitiello*, *supra* note 68, at 1678 (citation omitted).

¹¹³ *See id.* at 1679 (citing Phil Wyman & John G. Schmidt, Jr., *Three Strikes You're Out (It's About Time)*, 26 U. WEST L.A. L. REV. 249, 257 (1995)).

addition to Three Strikes, there have been other significant changes to how criminals are prosecuted and sentenced in California: other sentencing enhancements, shifts in the parole system, and loosening of California evidence laws.¹¹⁴ Therefore, it is difficult to determine an *exact* causal link between Three Strikes and crime reduction and/or rising costs of California's prison population.¹¹⁵

Part A of this section examines the relation between crime reduction and Three Strikes. Next, Part B looks at the fiscal effects of an increased and aging prisoner population. Finally, Part C outlines the criticism against Three Strikes based on the treatment of juveniles and criminals with non-serious and non-violent three strikes.

A. Safer Streets as a Result of Stricter Sentences?

If the effectiveness of Three Strikes is judged based on the number of convicted criminals that were sentenced under the law, then it has been an overwhelming success.¹¹⁶ The dilemma arises in attempting to evaluate the reduction in crime attributable to Three Strikes. In 2004, Mike Reynolds, the primary proponent of Three Strikes, co-wrote a report that applauded the results of Three Strikes and cited a decrease in violent and property crimes as an indication of the law's positive results.¹¹⁷ Without a doubt, crime rates went down at a steady pace after Three Strikes went into effect; until 2011, when violent crime increased "slightly," and in 2012, when property crime increased "noticeably."¹¹⁸ However, legal scholars highlight the fact that crime rates began to drop before Three Strikes was passed, and they reason that the crime reduction after Three Strikes is merely a coincidence.¹¹⁹

At least one legal scholar contends that Three Strikes not only deters individuals from committing crimes that would constitute a third strike, but it also deters people from committing

¹¹⁴ James Austin, *The Effect of "Three Strikes and You're Out" on Corrections*, in *THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY* 155, 170–71 (David Shichor & Dale K. Sechrest eds., 1997).

¹¹⁵ See David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 *CORNELL J.L. & PUB. POL'Y* 557, 580 (2000).

¹¹⁶ See CAL. STATE AUDITOR, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: INMATES SENTENCED UNDER THE THREE STRIKES LAW AND A SMALL NUMBER OF INMATES RECEIVING SPECIALTY HEALTH CARE REPRESENT SIGNIFICANT COSTS 21 (2010), *available at* <http://www.bsa.ca.gov/pdfs/reports/2009-107.2.pdf> (stating that 25 percent of the California prison population is comprised of individuals sentenced under Three Strikes) ["CAL. STATE AUDITOR 2009 REPORT"]. By 2000, "4,468 offenders ha[d] been sentenced under the third strike provision and over 36,043 for a second strike offense." Schultz, *supra* note 115, at 557 (citing CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, "THREE STRIKES": FIVE YEARS LATER 6 (1999)).

¹¹⁷ *3-Strikes 1994 to 2004, A Decade of Difference*, *THREESTRIKES.ORG* (Mar. 31, 2004), http://www.threestrikes.org/tenyearstudy_pg3.html.

¹¹⁸ Magnus Lofstrom & Brandon Martin, *Crime Trends in California*, *PUB. POL'Y INST. CAL.* (Dec., 2013), *available at* http://www.ppica.org/main/publication_show.asp?i=1036.

¹¹⁹ See Schultz, *supra* note 115, at 573; Michael Vitiello, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 *LOY. L.A. L. REV.* 903, 904–08, n.4 (citations omitted).

crimes that count as a first or second strike (i.e., violent or serious felonies).¹²⁰ Critics, on the other hand, argue that people do not engage in a rational, cost-benefit analysis before committing crimes, but that they instead “make choices based on their own reference levels.”¹²¹ The premise behind this argument is that people who commit criminal acts often have “less than perfect information” about the repercussions for those crimes, have a limited view of their own future, and make decisions based on “their present desires and needs.”¹²²

B. Fiscal Effects: Cost of Incarceration

A 2004 RAND Corporation study predicted that the Three Strikes law would reduce crime, but that the law would nevertheless increase the prison population and bring with it the increased cost of \$5.5 billion per year.¹²³ A similar study found that more funds would be needed to handle the additional “capacity, health care costs for geriatric prisoners, and prison construction.”¹²⁴ This sub-section describes the actual costs to California of Three Strikes, including the costs associated with more prisoners and higher healthcare costs.

1. Prisoner Population

In 2009, the California State Auditor estimated that prisoners sentenced under Three Strikes will have increased costs to California by approximately \$19.2 billion by the end of their sentences, and that 25 percent of the prison population was made-up of individuals sentenced by the Three Strikes law (43,500 out of the total 171,500 prisoners).¹²⁵ Notably, \$7.5 billion of those increased costs will have been spent on prisoners who were convicted with a strike that was neither violent nor serious.¹²⁶

The issue with long mandatory sentencing is that even if fewer people end up committing crimes, there are still more people within the prison system over time.¹²⁷ As legal scholars have explained, the impact of sentencing one person to a minimum of 25 years is similar to sentencing

¹²⁰ Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two-and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159, 161–62 (2002).

¹²¹ Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1090–92 (2004) (citations omitted).

¹²² *Id.* at (citing Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 63 (2001)).

¹²³ See Linda S. Beres & Thomas D. Griffith, *Did “Three Strikes” Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 LOY. L.A. L. REV. 101, 131 n.81 (1998) (citing PETER W. GREENWOOD ET AL., RAND CORP., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY SENTENCING LAW 25–30 (1994)); See Vitiello, *supra* note 68, at 1686 (citing PETER W. GREENWOOD ET AL., RAND CORP., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW, n.137, at xi (1994)).

¹²⁴ Schultz, *supra* note 115, at 579 (citing CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, IMPACT OF “THREE STRIKES AND YOU'RE OUT” LAWS: WHAT HAVE WE LEARNED? 8 (1996)).

¹²⁵ CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 21.

¹²⁶ *Id.*

¹²⁷ FRANKLIN E. ZIMRING ET. AL., THREE STRIKES AND YOU'RE OUT IN CALIFORNIA: PUNISHMENT AND DEMOCRACY 18 (2001).

five offenders to a 5-year sentence, which creates large-scale impacts overtime.¹²⁸ However, an alternative argument is that the “three striker” recidivists would be in and out of the prison system regardless of whether the Three Strikes law was in effect.¹²⁹ The logic of this argument is that any additional costs or increases in the prisoner population are not necessarily tied to Three Strikes, since many of these individuals would still have contributed to prison costs without Three Strikes.¹³⁰ Yet, the California State Auditor estimates that the individuals convicted under Three Strikes receive an average of nine years more to their sentence than they would otherwise, indicating that the overall time spent in prison by these individuals is longer under Three Strikes.¹³¹

In 2011, the U.S. Supreme Court upheld a decision by a Three-Judge Court that California prisons were so overcrowded that it constituted cruel and unusual punishment under the Eighth Amendment.¹³² The decision mandated that California reduce its inmate population to 137.5 percent of design capacity by June 27, 2013.¹³³ The California legislature has since passed several laws as part of a comprehensive “realignment” effort to meet the judicial mandate.¹³⁴ Yet, the state has not been able to sufficiently reduce its prisoner population, and, as a result, the deadline has been extended several times with the most recent extension giving the state until the beginning of 2016.¹³⁵ California officials will need to continue to make reforms to the state prison system in order to comply with the mandate, but any changes to Three Strikes would be extremely difficult. The Three Strikes initiative and legislation both imposed amendment restrictions on the law, and, therefore, it is impossible to touch Three Strikes without a voter-approved initiative or by a statute passed by two-thirds of both houses of the legislature.¹³⁶

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¹²⁸ *Id.*

¹²⁹ *A Primer: Three Strikes After More Than a Decade*, LEGISLATIVE ANALYST’S OFFICE (Oct. 2005), http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm.

¹³⁰ *Id.*

¹³¹ See CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 1; see also Michael Vitiello, *Reforming Three Strikes’ Excesses*, 82 WASH. U. L.Q. 1, 16 (2004) (“[T]he impact of third-strike offenders began when, but for Three Strikes, the offenders would have been released, and the impact of prisoners sentenced under the Three-Strikes Law will culminate between 2009 and 2014 when the system will contain 20 years’ worth of sentenced offenders.”).

¹³² *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011).

¹³³ *Id.*

¹³⁴ *The Cornerstone of California’s Solution to Reduce Overcrowding, Costs, and Recidivism*, CAL. DEPARTMENT OF CORRECTIONS & REHABILITATION, <http://www.cdcr.ca.gov/realignment/> (last visited Sep. 12, 2014).

¹³⁵ Bob Egelko, *Court Gives California 2 Years to Lower Prison Population*, SF GATE (Feb. 11, 2014), <http://www.sfgate.com/crime/article/Court-gives-California-2-years-to-lower-prison-5221828.php>. By February 28, 2016, California must reduce its population from the current 117,500 individuals to 112,100. *Id.*

¹³⁶ See CAL. CONST. art II, § 10(c) (“The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.”).

2. Aging Prisoner Population

Not surprisingly, older prisoners require more medical care, which increases the cost per year spent on these “aging” prisoners.¹³⁷ The annual medical care of older prisoners ranges from approximately \$14,000 to \$44,000 more than their younger incarcerated counterparts.¹³⁸ The largest age group of individuals serving sentences under Three Strikes is in the age-range of 45 to 49 years old,¹³⁹ compared to the remaining prison population whose largest age group is in the range between 25 to 29 years old.¹⁴⁰ Indeed, 53 percent of the prisoner population convicted under Three Strikes is over the age of 40 years old.¹⁴¹ Still, as of 2011, less than 4 percent of prisoners in the Three Strikes category are over the age of 60 years old (the time at which medical care costs, on average, are greatest).¹⁴² But, some data predicts that by 2025 California will have to spend more than \$4 billion on prisoners who are over 60 years old.¹⁴³

Critics of Three Strikes also argue that aging prisoners should not be subject to the mandatory sentencing because they pose “a low risk of violence” to the community.¹⁴⁴ However, the California Supreme Court has held that Three Strikes prisoners are prohibited from being released early, even with “good-time credits,” meaning they must serve their entire sentence despite their potential old age or frailty.¹⁴⁵

C. Punishment for Low-Level Crime and Juvenile Convictions

Three Strikes has been criticized for its impact on individuals whose third strike is a non-

¹³⁷ Vitiello, *supra* note 131, at 16–17 (citing California's Aging Prison Population, Hearing Before the Senate Select Comm. on the California Correctional System of the California Senate Comm. on Public Safety 12 (written statement of professor Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School)).

¹³⁸ *Id.*

¹³⁹ DEP'T OF CORRECTIONS & REHABILITATION, DATA ANALYSIS UNIT, TABLE 6: SECOND AND THIRD STRIKERS IN THE ADULT INSTITUTION POPULATION (Apr. 6, 2011), available at http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Quarterly/Strike1/STRIKE1d1103.pdf [“DEP'T OF CORRECTIONS & REHABILITATION DATA”].

¹⁴⁰ CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 39.

¹⁴¹ *Id.*

¹⁴² DEP'T OF CORRECTIONS & REHABILITATION DATA, *supra* note 139; see CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 39 (showing that specialty medical care is the most expensive for those “striker” inmates over the age of 60 years old).

¹⁴³ See Vitiello, *supra* note 131, at n.116 (2004) (citing California's Aging Prison Population, Hearing Before the Senate Select Comm. on the California Correctional System of the California Senate Comm. on Public Safety 11,13 (written statement of professor Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University Law School)).

¹⁴⁴ *Id.* (citations omitted).

¹⁴⁵ *In re Cervera*, 16 P.3d 176, 179–81 (Cal. 2001) (holding that 25-year sentences under Three Strikes cannot be reduced based on the 20 percent good time credits rule in California). Proposition 36 in 2012 made slight changes to the law, and now judges are allowed to provide early release to third strike offenders serving life sentences, as long as their third strike was non-violent and non-serious and they do not pose a threat to society.

violent and non-serious crime,¹⁴⁶ and for those individuals whose prior strikes were committed when they were juveniles.¹⁴⁷ Under Three Strikes, certain serious or violent felonies committed as juveniles are considered first or second strikes.¹⁴⁸ Additionally, although felonies that are non-serious or non-violent do not count as first strikes, they do constitute a second or third strike and subject a third strike offender to mandatory sentencing.¹⁴⁹

A 2009 report found that 53 percent of all prisoners serving time under Three Strikes had been convicted for non-serious and non-violent felonies.¹⁵⁰ As described above, third strike crimes include crimes like grand theft where the total value of stolen items is \$1,200 or less.¹⁵¹ The original proponents of Three Strikes claimed that the law would put murderers and rapists behind bars.¹⁵² But the fact that the majority of prisoners sentenced under the law have been convicted for non-violent crimes raises skepticism of the actual scope and efficacy of the law in deterring and incarcerating *violent* criminals.

Another five percent of all the “striker” prisoners were subject to Three Strikes because they had one or more juvenile offenses that counted as a felony strike.¹⁵³ Part of the concern in counting juvenile crimes as strikes is due to the fact that minors in California do not always have the benefit of jury trials and bail, and, therefore, they are not protected by the same procedural safeguards available to adults.¹⁵⁴ Additionally, the juvenile system tends to focus more on rehabilitation rather than punishment, which critics have found to be contradictory to the rigid punitive nature of Three Strikes.¹⁵⁵ In response to these concerns, Three Strikes proponents would likely point to the fact that juvenile crimes only count against an offender if they were committed when the juvenile was 16 years or older, and that at such an age the juveniles should be more responsible for their crimes.¹⁵⁶

V. INITIATIVE RESPONSE TO THREE STRIKES

After Three Strikes passed in 1994, the initiative process attempted to address a wide range of criminal justice issues. Between 1994 and 2004, the initiative process addressed issues relating to sentencing, the definition of murder, and non-violent drug possession offenses.

¹⁴⁶ See e.g. Lisa E. Cowart, Comment, *Legislative Prerogative vs. Judicial Discretion: California’s Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 638–29 (1998).

¹⁴⁷ Schultz, *supra* note 115, at 579.

¹⁴⁸ CAL. PENAL CODE § 667(d)(3).

¹⁴⁹ *Id.* § 667(e)(2)(A).

¹⁵⁰ CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 23.

¹⁵¹ See *Ewing*, 538 U.S. at 18 (grand theft of \$1,200 in golf clubs); *Lockyer v. Andrade*, 538 U.S. 63, 63 (2003) (petty theft of \$150 in videotapes).

¹⁵² NOVEMBER 1994 VOTER GUIDE, *supra* note 51.

¹⁵³ CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 23.

¹⁵⁴ Schultz, *supra* note 115, at 579; Amanda K. Packel, *Juvenile Justice and the Punishment of Recidivists Under California’s Three Strikes Law*, 90 CAL. L. REV. 1157, 1179 (“[T]he California Supreme Court [has] upheld the use of juvenile adjudications as strikes without any acknowledgement that it was attaching permanent criminal consequences to a nonjury proceeding.”).

¹⁵⁵ Packel, *supra* note 154, at 1179.

¹⁵⁶ See CAL. PENAL CODE § 667(d)(3) (requiring that a juvenile be at least 16 years or older for their crimes to count as a strike).

A. Limited Reform and a Failed Attempt at Reform

Proposition 36, passed in the year 2000 (not to be confused with a different and distinct Proposition 36 passed in 2012), actively discussed reducing the prison population by removing non-violent drug possession offenders and placing them in treatment programs.¹⁵⁷ However, the text of Proposition 36 clearly indicated that the law did not apply to people sentenced under Three Strikes, except in a limited number of circumstances.¹⁵⁸ Furthermore, the law restricted its treatment provisions to those who had remained out of custody for a number of years and were basically convicted only of simple non-violent drug possession.¹⁵⁹ One of the justifications of taking non-violent drug offenders out of prison was to make room for serious or violent criminals.¹⁶⁰

Proposition 66, which was on the ballot in 2004, would have made major changes to Three Strikes by requiring a second and third strike felony to be serious or violent in order to make Three Strikes applicable to the person convicted.¹⁶¹ However, Proposition 66 failed to pass, and a similar initiative was not presented until 2012.

B. Amending Three Strikes and Reducing Prison Populations

Three Strikes underwent modest reform in 2012. Proposition 36, the Three Strikes Reform Act of 2012, amended numerous sections of the Penal Code, including sections 667 and 1170.12.¹⁶² Under Proposition 36, the indeterminate life sentence for a non-violent and non-serious third strike is now only imposed on those who committed certain crimes with firearms and/or those with a prior conviction for a sexually violent offense, child molestation, homicide, solicitation to commit homicide, specific murder of a police officer, or possession of a weapon of mass destruction.¹⁶³ Further changes give judges discretion to release prisoners serving a life sentence for non-violent and non-serious third strikes, as long as the judge determines they are not a threat to society.¹⁶⁴

Thus, Proposition 36, while making significant changes to the imposition of a life sentence, does not alter the basic structure of Three Strikes, and 25-year sentences are still

¹⁵⁷ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 7, 2000, available at <http://vote2000.sos.ca.gov/VoterGuide/pdf/ballotpamphlet.pdf> [“NOVEMBER 2000 VOTER GUIDE”].

¹⁵⁸ *Id.* at 23-24.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 26.

¹⁶¹ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 2, 2004, available at http://librarysource.uchastings.edu/ballot_pdf/2004g.pdf [“November 2004 Voter Guide”].

¹⁶² CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 6, 2012, at 105–10, available at <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf>. [“NOVEMBER 2012 VOTER GUIDE”].

¹⁶³ CAL. PENAL CODE § 667.

¹⁶⁴ Russell Cooper & Erica Scott, *Proposition 36: Three Strikes law. Repeat Felony Offenders. Penalties.*, 11 CAL. INIT. REV. 11, 103 (Fall 2012).

imposed for a wide range of non-violent and non-serious felony third strikes. The findings and declarations of Proposition 36 state that murderers, rapists, and child molesters will still serve their full sentences, but certain offenders with a third strike for crimes like shoplifting or simple drug possession will not receive mandatory life sentences.¹⁶⁵

The arguments put forth by proponents and opponents of Proposition 36 echoed the issues raised in 1994. The LAO portion of the voter guide claimed that Proposition 36 would save the state money by reducing prison populations and reducing parole expenses, totaling up to \$90 million annually.¹⁶⁶ Proponents argued several main points: make the punishment fit the crime; save California millions of dollars each year; and make room in prison for dangerous felons.¹⁶⁷ Opponents stated that dangerous felons would be summarily released from prison and that law enforcement overwhelmingly rejects Three Strikes reform.¹⁶⁸

It may take a number of years for the positive or negative effects of Proposition 36 to fully develop. One concrete change that has taken place is demonstrated by the Stanford Three Strikes Project, which claims that over 1,000 persons have been resentenced and released under Proposition 36 since its implementation.¹⁶⁹

C. Proposition 47: Reduced Penalties for Some Crimes Initiative

Proposition 47, on the 2014 ballot, is not an attempt to comprehensively reform Three Strikes, but rather to prevent low-level criminals from being subject to a mandatory 25-year sentence. In keeping with Three Strikes and Proposition 36, those individuals who have been convicted for murder, rape, some sex offenses, or some gun crimes will not be eligible for a reduced sentence under Proposition 47.¹⁷⁰

Proposition 47's main aim is to redefine many non-serious and non-violent crimes as misdemeanors, thereby avoiding the mandatory sentence that would come with a third strike felony.¹⁷¹ Indeed, in a 2009 report, it was found that 53 percent of all prisoners serving time under Three Strikes had been convicted for non-serious and non-violent felonies.¹⁷² For critics, these statistics confirm that Three Strikes disproportionately punishes low-level criminals, rather than targeting the reduction of violent crime. For supporters, these numbers only show that the law is working by imprisoning repeat offenders that cannot control their criminal urges.

¹⁶⁵ NOVEMBER 2012 VOTER GUIDE, *supra* note 162, at 50.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 52.

¹⁶⁸ *Id.* at 53.

¹⁶⁹ *Stanford Three Strikes Project*, STANFORD L. SCH., <https://www.law.stanford.edu/organizations/programs-and-centers/stanford-three-strikes-project> (last visited Sept. 11, 2014).

¹⁷⁰ CAL SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 4, 2014, at 34, available at <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf#page=70> ["NOVEMBER 2014 VOTER GUIDE"].

¹⁷¹ *Id.*

¹⁷² CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 23.

If Proposition 47 passes, low-level crimes—such as the theft of \$150 in videotapes at issue in *Lockyer*¹⁷³—would be considered misdemeanors and no longer carry the 25-year mandatory penalty required if they were third strike felonies.¹⁷⁴ However, the initiative places a \$950 cap on the amount of money that can be involved if the crime is to be classified as a misdemeanor instead of a felony.¹⁷⁵ Therefore, the theft of \$1,200 in golf clubs at issue in *Ewing*¹⁷⁶ would still constitute a felony under the law proposed by Proposition 47. According to the LAO, there would be “several thousand” current inmates whose sentences would be reduced by Proposition 47, but they do not provide an estimate of the exact number of inmates who would be effected by the new law.¹⁷⁷

Although Proposition 47 is not proposing comprehensive reform, it is notable that Proposition 47 appears to be part of a growing trend to reshape and reduce the current prison population. Proposition 47 is discussed in detail under that section of this volume of the California Initiative Review.¹⁷⁸

VI. CONCLUSION

In the last two decades, Three Strikes has made a significant impact on California’s criminal justice system.¹⁷⁹ The enhanced sentencing structure is the culmination of a series of laws aimed at punishing repeat offenders.¹⁸⁰ In 1994, the passage of Three Strikes was secured by the political realities and public support for harsher punishments after the tragic murders of a young woman and a twelve-year old girl.¹⁸¹ While Three Strikes’ supporters claim credit for the general trend of crime reduction in California,¹⁸² critics remain skeptical that Three Strikes has actually deterred criminals or reduced crime.¹⁸³ Additionally, the fiscal impact of Three Strikes has been substantial, with an estimated \$19.2 billion additional funds needed to operate California prisons.¹⁸⁴

Despite attempts to reform or overturn the law through legal challenges and the initiative process, Three Strikes weathered the storm for eighteen years until 2012 with the approval of Proposition 36.¹⁸⁵ However, Proposition 36 did not provide wholesale reform or invalidation of

¹⁷³ *Lockyer*, 538 U.S. at 63.

¹⁷⁴ CALIFORNIANS FOR SAFE NEIGHBORHOODS AND SCHOOLS, <http://safetyandschools.com/> (last visited Sept. 12, 2014).

¹⁷⁵ *Id.*

¹⁷⁶ *Ewing*, 538 U.S. at 18.

¹⁷⁷ *Proposition 47, Criminal Sentences. Misdemeanor Penalties. Initiative Statute*, LEGISLATIVE ANALYST’S OFFICE (Nov. 4, 2014), <http://www.lao.ca.gov/ballot/2014/prop-47-110414.aspx>.

¹⁷⁸ Emily Reynolds & Selena Farnesi, *Safe Neighborhoods and Schools Act*, CAL. INIT. REV., (Fall 2014).

¹⁷⁹ See CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 21 (2010) (stating that 25 percent of the California prison population is comprised of individuals sentenced under Three Strikes).

¹⁸⁰ *Infra* Section III.

¹⁸¹ *Infra* Section III.

¹⁸² *3-Strikes 1994 to 2004, A Decade of Difference*, THREESTRIKES.ORG (Mar. 31, 2004), http://www.threestrikes.org/tenyearstudy_pg3.html.

¹⁸³ See Schultz, *supra* note 117, at 573; Vitiello, *supra* note 121, at 904-908, n.4 (citations omitted).

¹⁸⁴ CAL. STATE AUDITOR 2009 REPORT, *supra* note 116, at 21.

¹⁸⁵ *Infra* Section V.

Three Strikes, and the law is still very much alive and well in the California criminal justice system today.¹⁸⁶

Now, Proposition 47 seeks to address the issue of long-term, mandatory sentencing under Three Strikes for non-serious and non-violent third strike felonies. If Proposition 47 passes, many low-level crimes would be considered misdemeanors and no longer carry the 25-year mandatory penalty required if they were third strike felonies.¹⁸⁷ However, there is a \$950 maximum crime amount that delineates a “felony” from a “misdemeanor.”

For the time being, the future of Three Strikes appears secure. Three Strikes supporters dislike the recent changes under Proposition 36 and reject the premise that any further modifications are needed through Proposition 47. But the fundamental nature of Three Strikes—lengthy, mandatory sentences for repeat offenders—remains intact.

¹⁸⁶ *Infra* Section V.

¹⁸⁷ CALIFORNIANS FOR SAFE NEIGHBORHOODS AND SCHOOLS, <http://safetyandschools.com/> (last visited Sept. 12, 2014).

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

Report

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McGeorge School of Law

By

Patrick Ford

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Philosophy, University of California, Santa Barbara, 2010*

&

Tiangay Kemokai

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2015
B.A., Political Science, Oral Roberts University, Tulsa, OK, 2008*

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.ppic.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.*

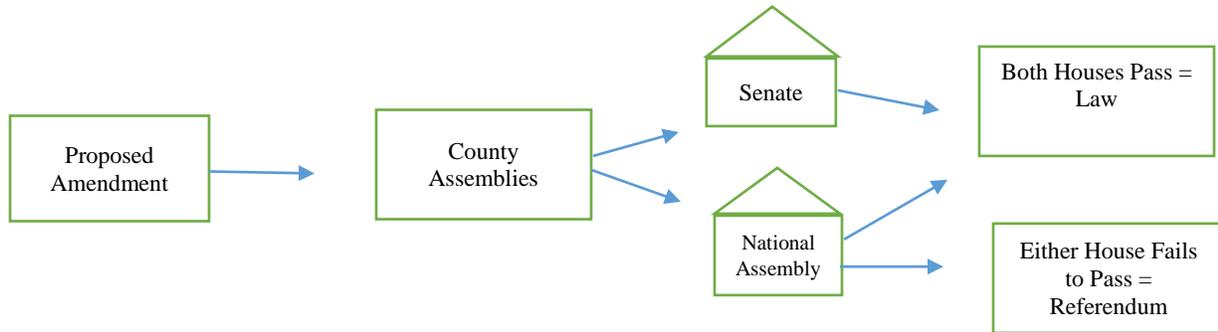
⁹⁰ CONSTITUTION, art. 257(1) (2010) (Kenya).

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.