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Report

Don't Judge an Initiative by Its Title: A Report on the Titles of California Ballot Measures

By

Debbie Kim

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2012
B.A., English, University of Southern California, May 2007*

I. INTRODUCTION

Each election year, Californians are asked to vote on matters of public policy, including state constitutional amendments, state statutes, and other statewide initiatives. The initiative process is the channel through which the people get their voice heard and initiate changes in the laws that govern them. Courts have described the initiative and referendum power as “one of the most precious rights of our democratic process.”¹ But how do voters decide which way they are going to vote on an issue? And where do they obtain the necessary information on which their decisions are based?

This report focuses on the single most important part of an initiative in terms of voter education, the ballot title (also referred to as “ballot title and summary”).² The title is both the first and last piece of information that voters see before casting their votes.³ First, this report will provide some background information about the statutory requirements involved in preparing the unofficial and official titles of a proposed initiative measure, as well as the issues that arise. Then, this report will discuss the two sides involved and the role of the judiciary, with a comparison of past ballot titles. Last, this report will explore how voters learn about ballot measures and whether the wording of ballot titles actually influences their choices.

II. EXISTING LAW

A. Background

The California Constitution reserves to the people “the powers of initiative and referendum,” whereby voters can bypass the legislative process to effect policy change.⁴ “The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.”⁵ However, direct democracy does not operate independently. First, the Attorney General has the power to prepare a title and summary for proposed initiative measures as provided by law.⁶ Then, an initiative measure “may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors”⁷ The Attorney General, along with the Secretary of State, is involved in the initiative process both prior to a petition being circulated for signatures and prior to

¹ Perry v. Brown, 52 Cal.4th 1116, 134 Cal.Rptr.3d 499 (2011).

² See *Preparation of a Ballot Title and Summary*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jan. 2002), <http://www.ncsl.org/legislatures-elections/elections/preparation-of-a-ballot-title-and-summary.aspx>.

³ Roger Gafke & David Leuthold, *The Effect on Voters of Misleading, Confusing, and Difficult Ballot Titles*, 43 PUB. OP. Q. 394 (1979); see also Craig M. Burnett & Vladimir Kogan, *The Case of the Stolen Initiative: Were the Voters Framed?* 1, 2 (Apr. 15, 2011) (unpublished working paper for American Political Science Association), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643448.

⁴ CAL. CONST. art. IV, § 1.

⁵ CAL. CONST. art. II, § 8(a).

⁶ CAL. CONST. art. II, § 10(d).

⁷ CAL. CONST. art. II, § 8(b).

an initiative measure being placed on the ballot.⁸ As Table 1 below shows, out of the twenty-four total with initiative and referendum powers, California is one of the fifteen states where the power to draft ballot titles and summaries is assigned to an elected official.⁹ In the other nine states, the title is either written by the proponent (subject to the approval of an elected official) or a special Ballot Title Board,¹⁰ or a combination of both.

Table 1. Who Writes the Official Ballot Title and Summary?

	Proponents (Approved by Elected Official)	Elected Official	Commission	Mixture of Proponents and Elected Officials
Number of States	5	15	3	1
Percent of States with Initiative	20.8%	62.5%	12.5%	4.2%

In some states, different parties are responsible for drafting the title of an initiative on the circulating petition and on the official ballot.¹¹ In California, both are prepared by the Attorney General.¹² Although California is not among the states that allow proponents to draft initiative titles on circulating petitions or on the ballot,¹³ a proponent’s “unofficial title”¹⁴ is still included as part of the full text of the proposed measure. In fact, it is the proponents’ unofficial title that usually becomes the popular name of a ballot measure, along with its assigned proposition number.¹⁵ This gives proponents the opportunity to highlight the benefits of a proposal and de-emphasize its costs in their titles. Likewise, elected officials who oppose an initiative measure may use their power to construct a title and summary that emphasizes the costs and underplays the expected benefits.¹⁶ As a result, voters are left to sort through divergent and often misleading information in initiative titles.

B. The Proponents’ Unofficial Title

1. The Drafting Process

In drafting the text of a proposed initiative measure, proponents may seek the help of the Legislative Counsel or their own private counsel, or choose to draft the text

⁸ See generally ELEC. CODE §§ 9001 *et seq.*, 9050 *et seq.*

⁹ See Burnett & Kogan, *supra* note 3, at 5 tbl.1.

¹⁰ See NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ As referred to by the Attorney General. *Active Initiative Measures*, STATE OF CAL. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., <http://ag.ca.gov/initiatives/activeindex.php>.

¹⁵ See L. Tobe Liebert, *Research California Ballot Measures*, 90 LAW LIBR. J. 27, 46 (1998).

¹⁶ See Burnett & Kogan, *supra* note 3, at 8.

themselves.¹⁷ A number of coalitions are involved in the drafting process, such as current and ex-elected officeholders, private individuals, business and labor interests, nonprofit and trade organizations, and citizen groups.¹⁸ The drafting process and length of time varies depending on who is paying for the initiative and any deadlines for getting on the election ballot.¹⁹ The main goal that proponents seek to achieve is addressing and relieving the concerns of the opposition, thus increasing support for the initiative.²⁰ During this time, proponents decide on the unofficial title and develop the language of their proposed measure.²¹ Though the proponents' title is "not official and will likely differ from the official title and summary ultimately prepared by the Attorney General,"²² it is placed at the beginning of the text of the initiative measure (usually under the heading "Section 1: Title") with the words "This measure shall be known and may be cited as []"²³

Once the proposed initiative measure has been written, proponents must submit a draft of the initiative measure to the Attorney General with a written request that a circulating title and summary of the chief purpose and points of the initiative measure be prepared.²⁴ No petition for proposed initiative measure may be circulated for signatures prior to the date the Attorney General sends the official title and summary to the proponents.²⁵

2. Issues of Ballot-Title Shopping

"Ballot-title shopping" is a technique employed by some ballot measure proponents whereby they file multiple versions of an initiative and obtain different titles and summaries, which they then test through polls or surveys to determine which tend to increase voter support.²⁶ With this information, proponents can use the most favorable

¹⁷ *Statewide Initiative Guide*, CAL. SEC'Y OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/initiative-guide.htm> (last updated Apr. 2011).

¹⁸ Charlene W. Simmons, *California's Statewide Initiative Process*, CAL. RESEARCH BUREAU, CAL. STATE LIBRARY 1, 8 (May 1997), available at www.library.ca.gov/crb/97/06/97006.pdf; see also Telephone interview with Ashlee Titus, Associate Attorney, Bell, McAndrews & Hiltachk, LLP (Feb. 21, 2012) (law firm specializing in campaign, election and administrative law and litigation).

¹⁹ Telephone interview with Ashlee Titus, *supra* note 18.

²⁰ *Id.*

²¹ *Id.*

²² CAL. SEC'Y OF STATE, *supra* note 17.

²³ See, e.g., STATE OF CAL. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., *supra* note 14 (most proposed initiative measures include, as Section One, the "Title" with the words "This measure shall be known and may be cited as the"); see also CAL. SEC'Y OF STATE, *supra* note 17; see generally CAL. SEC'Y OF STATE, *Official Voter Information Guide: Past Voter Information Guides*, <http://voterguide.sos.ca.gov/past/> (last updated Nov. 2, 2010).

²⁴ CAL. ELEC. CODE § 9001(a); see also CAL. SEC'Y OF STATE, *supra* note 17.

²⁵ CAL. ELEC. CODE § 9014; see also CAL. SEC'Y OF STATE, *supra* note 17.

²⁶ Craig M. Burnett, Elizabeth Garrett & Mathew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 318-19 (2010); see also William A. Lund, *What's in a*

wording when they circulate petitions for signatures.²⁷ Ballot-title shopping is a concern not only because of its misuse of state services and public resources,²⁸ but also because of its potential to mislead voters.

In California, ballot-title shopping is a fairly common practice.²⁹ Since proponents can amend the text of initiatives³⁰ and there is no limit on the submission of multiple versions of an initiative, proponents can first gauge the public's opinion of the nuanced titles and summaries in order to determine which version of an initiative might fare the best in a petition drive, raise the most money from potential contributors, or ultimately garner the necessary votes to pass at the ballot.³¹ Also, these types of expenditures on ballot-title shopping are not publicly disclosed, unless performed by political action committees,³² so voters may not even know that they occur.

C. The Attorney General's Official Title and Summary

1. The Role of the Attorney General

Since the Attorney General prepares both the circulating title and the ballot title, they are prepared in the same manner and subject to the same provisions.³³ If an initiative measure would affect the revenues or expenditures of the state or local government, the title and summary must also reflect the estimated amount of any increase or decrease in revenue or costs to the state or local government if the proposed initiative is adopted.³⁴ After receipt of the final version of a proposed initiative measure, including any fiscal estimate or opinion or any amendments, the Attorney General provides a copy of the title and summary to the Secretary of State.³⁵

Name? The Battle over Ballot Titles in Oregon, 34 WILLAMETTE L. REV. 143, 156 (1998) (referring to the problem of ballot-title shopping in Oregon).

²⁷ Lund, *supra* note 26; Burnett et al., *supra* note 26.

²⁸ See Bill Analysis of AB 436 (Saldana) for a Hearing in the Assembly Committee on Elections and Redistricting, Mar. 31, 2009, available at http://leginfo.ca.gov/pub/09-10/bill/asm/ab_0401-0450/ab_436_cfa_20090327_140712_asm_comm.html (proposing to increase fee to \$2,000 and noting that in 2007-08 proponents of Proposition 9 submitted four versions for titling but circulated only one).

²⁹ See Telephone interview with Ashlee Titus, *supra* note 18.

³⁰ Proponents may submit substantive changes up to fifteen calendar days after receipt of the measure by the Attorney General's Office or must submit a new proposal thereafter. *FAQs: Ballot Measures*, STATE OF CAL. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., <http://ag.ca.gov/initiatives/faq.php>.

³¹ Bill Analysis of AB 2357 (Saldana) for a Hearing in the Assembly Committee on Elections and Redistricting, Apr. 20, 2010, available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2351-2400/ab_2357_cfa_20100419_122215_asm_comm.html (noting that in 2010 a situation where seven similarly-worded initiative proposals were filed).

³² See Telephone interview with Ashlee Titus, *supra* note 18.

³³ CAL. ELEC. CODE § 9004(a) (referring to ELEC. CODE §§ 9050 *et seq.*).

³⁴ CAL. ELEC. CODE § 9005(a); see also CAL. SEC'Y OF STATE, *supra* note 17.

³⁵ CAL. ELEC. CODE § 9002(a); see also CAL. SEC'Y OF STATE, *supra* note 17.

Once the Secretary of State has received all requisite signatures and determined that an initiative measure will appear on the ballot at the next statewide election, the Secretary of State transmits a copy of the measure to the Attorney General, who then returns a ballot title and summary and ballot label³⁶ (for each measure to be submitted to the voters) for the ballot pamphlet.³⁷ The official ballot title and summary may differ from the legislative, circulating, or other title and summary of the measure,³⁸ though this generally does not happen, unless subject to court order.³⁹ In instances where the wording of the ballot title differs slightly from the circulating title, the changes are usually not significant and the information provided remains the same.⁴⁰ The only requirement is that the ballot title summarizes the chief purpose and points, including the fiscal impact, of any measure that appears on the ballot pamphlet⁴¹ and does not exceed 100 words.⁴²

2. The Difficulty of Neutrality

In providing the ballot title and summary, the Attorney General “shall give a true and impartial statement of the purpose of the measure in such language that the ballot title and summary shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.”⁴³ The main purpose of the title and summary requirements is to reasonably inform the public of the character and real purpose of the measure,⁴⁴ and to avoid misleading the public with inaccurate information.⁴⁵

However, in practice, removing politics from any elected position is near impossible.⁴⁶ State actors are neither disinterested nor completely impartial.⁴⁷ And since the official ballot information is not clearly associated with any particular political actor, voters may not be cognizant of this.⁴⁸ In fact, though the Attorney General is the party responsible for drafting initiative titles, about seven state employees in the Government Law Section and the Executive Section, including the Initiative Coordinator and other Deputy Attorneys General,⁴⁹ are the ones who handle the Attorney General’s duties

³⁶ CAL. ELEC. CODE § 9051(b) (the ballot label shall contain no more than 75 words and shall be a condensed version of the ballot title and summary including the financial impact summary).

³⁷ CAL. ELEC. CODE § 9050.

³⁸ See CAL. ELEC. CODE § 9051(a)(1).

³⁹ Telephone interview with Ashley Johansson, Initiative Coordinator, Office of the Attorney General, California Department of Justice (Apr. 4, 2012).

⁴⁰ *Id.*

⁴¹ See CAL. ELEC. CODE § 303.5(b).

⁴² See CAL. ELEC. CODE § 9051(a)(1).

⁴³ CAL. ELEC. CODE § 9051(c).

⁴⁴ *Lungren v. Superior Court*, 48 Cal.App.4th 435, 55 Cal.Rptr.2d 690 (3d Dist. 1996).

⁴⁵ *Zaremborg v. Superior Court*, 115 Cal.App.4th 111, 8 Cal.Rptr.3d 723 (1st Dist. 2004).

⁴⁶ Joel Fox, *Ballot Measure Titles and Summaries Should Not Be Written by Attorneys General*, FOX & HOUNDS (Jan. 31, 2012), <http://www.foxandhoundsdaily.com/2012/01/ballot-measure-titles-and-summaries-should-not-be-written-by-attorneys-general/>.

⁴⁷ Burnet et al., *supra* note 26, at 318.

⁴⁸ *Id.*

⁴⁹ Telephone interview with Ashley Johansson, *supra* note 39.

relating to ballot initiative titles.⁵⁰ Much like proponents' ability to tailor the unofficial title and text of their initiative measure, the issue of attorneys general writing "political slants" into titles and summaries applies to both major parties and is nothing new.⁵¹

In recent years, the Attorney General, who is a partisan elected official, has been accused of giving descriptions positive or negative spins.⁵² For example, some critics argue that Attorney General Kamala Harris' title and summary for Governor Brown's tax increase measure "could not have been more flattering if they were written from the governor's talking points."⁵³ Whereas, the title and summary of two pension reform measures "could not have been cast more darkly - and, on some key points, deceptively - if they were written by the public-employee unions that oppose them."⁵⁴

III. THE PROPONENTS V. THE ATTORNEY GENERAL

A. Scope of Judicial Review

The number of challenges to the wording of ballot titles and summaries has increased substantially since the 1990s.⁵⁵ Though this can be attributed to the widening use of initiatives, the increase is also due to a greater recognition of the potential influence of ballot information on voters' decisions.⁵⁶ While proponents can challenge the title given to a proposed initiative measure even before it qualifies for the ballot, opponents lack standing to assert a challenge until the initiative has actually qualified for the ballot.⁵⁷

The Attorney General's title and summary must be true and impartial, yet it will not be held insufficient except where there is clear and convincing evidence that the challenged ballot materials in question are false, misleading, or inconsistent with the

⁵⁰ *Services & Information: Career Opportunities*, STATE OF CAL. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., <http://oag.ca.gov/careers/descriptions>.

⁵¹ Fox, *supra* note 46; *see, e.g.*, John Diaz, *Attorney General's Role in the Initiative Process: Loading the Ballot Language*, SFGATE (Jan. 29, 2012) <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/01/27/INLN1MNSBO.DTL&ao=all#ixzz1kxYkL7s4> (in 1996, Republican Attorney General Dan Lungren accused of intentionally failing to include the measure's purpose in its title and summary and including misleading terms); Robert Salladay, *Lockyer is Accused of Stacking Deck Against Initiatives*, L.A. TIMES, Aug. 1, 2005, at A1, available at <http://articles.latimes.com/2005/aug/01/local/me-initiatives1> (in 2005, allegations that Democratic Attorney General Bill Lockyer used his powers in the initiative process to undermine Governor Schwarzenegger's proposals by approving unfairly worded titles and descriptions and rigorously applying technical requirements).

⁵² Dan Walters, *California Politicians Use Power to Fix the Ballot Game*, THE SACRAMENTO BEE (Jan. 30, 2012), <http://www.sacbee.com/2012/01/30/v-print/4224246/dan-walters-california-politicians.html>.

⁵³ Diaz, *supra* note 51.

⁵⁴ *Id.*; *see also* Walters, *supra* note 52.

⁵⁵ Burnett et al., *supra* note 26, at 318.

⁵⁶ *Id.*

⁵⁷ CAL. ELEC. CODE § 9106; *Songstad v. Superior Court*, 93 Cal.App.4th 1202, 1208 (3d Dist. 2001).

requirements of the Election Code.⁵⁸ If reasonable minds may differ as to its sufficiency, the ballot initiative title and summary prepared by the Attorney General must be upheld because all legitimate presumptions should be indulged in favor of the propriety of the Attorney General's actions.⁵⁹

B. Examples of Ballot Title Litigation

Given the presumption in favor of the Attorney General and the substantial deference given to the Attorney General's actions, challenges to ballot titles and summaries in California often fail.⁶⁰ Here are some specific examples of past ballot title litigation.

1. Proposition 209 (1996)

In *Lungren v. Superior Court*,⁶¹ opponents of the proposition complained that title and summary of the "California Civil Rights Initiative" never mentioned the words "affirmative action" - which it proposed to ban.⁶² Instead, Attorney General Dan Lungren used what they regarded as the more ambiguous term of prohibiting "preferential treatment."⁶³ Still, the court held that the Attorney General complied with Elections Code sections 9051 and 9052 by devising a title to Proposition 209 that essentially recited its operative words and that he was not required to include language stating that purpose was to prohibit affirmative action programs.⁶⁴

2. Proposition 8 (2008)

In *Jansson v. Bowen*,⁶⁵ supporters of the proposition challenged the wording of the title of the "California Marriage Protection Act." Specifically, they argued that the use of the word "eliminates" in the official ballot title drafted by Attorney General Jerry Brown: "Eliminates the Right of Same-Sex Couples to Marry" was argumentative and prejudicial.⁶⁶ This ballot title was different from the circulating title "Limit on Marriage" that appeared on the signature petitions to qualify Proposition 8 for the ballot.⁶⁷ Nevertheless, proponents sought more positive language that avoided the elimination of a

⁵⁸ CAL. GOV. CODE § 88006; *Yes on 25, Citizens for an On-Time Budget v. Superior Court*, 189 Cal.App.4th 1445, 2010 WL 3100091 (3d Dist. 2010).

⁵⁹ *Id.*; see *Lungren v. Superior Court*, 48 Cal.App.4th 435, 55 Cal.Rptr.2d 690 (3d Dist. 1996) (further holding that it is immaterial whether the attorney general supports or opposes the measure); see also *Brennan v. Board of Supervisors*, 125 Cal.App.3d 87, 96 (3d Dist. 1981).

⁶⁰ *Burnett et al.*, *supra* note 26, at 319.

⁶¹ *Lungren v. Superior Court*, 48 Cal.App.4th 435 (3d Dist. 1996).

⁶² See *Diaz*, *supra* note 51.

⁶³ *Id.*

⁶⁴ *Lungren*, 48 Cal.App.4th at 443.

⁶⁵ *Jansson v. Bowen*, Case No. 34-2008-00017351 (Cal. Super. Ct. Sacramento) (Aug. 7, 2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1597_ruling_on_proposition_8.pdf.

⁶⁶ *Id.*

⁶⁷ See *id.* at 2-3; see also *Burnett & Kogan*, *supra* note 3, at 15 (title appearing on circulating signature petitions was "Limit on Marriage.").

right, but that more closely mirrored the language of the proposition, such as “Only Marriage Between a Man and a Woman is Valid or Recognized in California.”⁶⁸ The court deferred to the Attorney General’s opinion of the purpose and effect of the measure and held that the proponents did not show clear and convincing proof that the ballot arguments were false or misleading.⁶⁹

3. Propositions 1A (2009)

The Legislature has also recognized that ballot title wording affects outcomes and has demanded involvement in the title drafting process when it places a measure on the ballot.⁷⁰ In *Howard Jarvis Taxpayers Ass'n v. Bowen*,⁷¹ opponents argued that the ballot language for a measure aimed to close the state’s substantial budget gap was “misleading” and “advocacy language.”⁷² The court agreed ruling that the title must use the word “changes” rather than “reforms” with respect to its effect on the budget process, and deleting “unsustainable” as a modifier to describe state spending because the word carried too much emotional impact.⁷³ Though the measure was placed on the ballot by the legislature, the court clarified that the Legislature does not have the power to specify the ballot title to be used.⁷⁴

4. Proposition 23 (2010)

Proponents of Proposition 23, a ballot initiative to suspend California's 2006 Global Warming Solutions Act, filed suit against Attorney General Jerry Brown for what they called “false, misleading and unfair” language.⁷⁵ Specifically, the language stated that the measure “Suspends Air Pollution Control Laws Requiring Major Polluters to Report and Reduce Greenhouse Gas Emissions”⁷⁶ Proponents argued that the title and summary should not refer to “air pollution control laws” because it did not apply to multiple laws, only the Global Warming Solutions Act.⁷⁷ In addition, it should not refer

⁶⁸ *Id.*

⁶⁹ *Id.* at 8.

⁷⁰ Burnett et al., *supra* note 26, at 319.

⁷¹ *Howard Jarvis Taxpayers Ass'n v. Bowen*, Case No. 34-2009-80000182-CU-WMGDS (Cal. Super. Ct. Sacramento) (Mar. 5, 2009), *available at* <http://www.sos.ca.gov/elections/ccrov/pdf/2009/march/09029jh.pdf>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Howard Jarvis Taxpayers Ass'n v. Bowen*, 192 Cal.App.4th 110, 116, 120 Cal.Rptr.3d 865, 869 (3d Dist. 2011) (“the Legislature cannot dictate the ballot label, title and official summary for a statewide measure unless the Legislature obtains approval of the electorate to do so prior to placement of the measure on the ballot.”). *Cf.* CAL. ELEC. CODE § 9003 (when the Attorney General is the proponent of a proposed measure, title and summary is prepared by the Legislative Counsel).

⁷⁵ Margot Roosevelt, *Proposition 23 Backers Sue Over Ballot Language*, L.A. TIMES, July 29, 2010, <http://articles.latimes.com/2010/jul/29/local/la-me-climate-ballot-20100729>.

⁷⁶ Op-Ed., *Proposition Neutrality*, L.A. TIMES, Aug. 5, 2010, <http://articles.latimes.com/2010/aug/05/opinion/la-ed-prop23-20100805>.

⁷⁷ Roosevelt, *supra* note 75.

to “major polluters” because power plants and refineries were not the only institutions affected by the law, which covers emissions from universities and other private companies and citizens.⁷⁸ The court agreed that the Attorney General used misleading and prejudicial language, and required him to delete these words and describe the measure accurately before sample ballots were printed and distributed.⁷⁹

C. Survey of Past Ballot Titles

Even when there is no challenge to the title of a ballot measure, there is still great divergence between the proponents’ unofficial title and the Attorney General’s official title and summary. This puts a greater burden on voters to recognize and discern the differences when evaluating ballot measures. The following table compares the titles of past ballot titles compiled from the full text of measures from 1996 to the present (made available on the Secretary of State’s website).⁸⁰

Table 2. Comparison of Past Ballot Titles

Proposition	Proponents’ Title	Attorney General’s Title
Proposition 215 (1996)	“Compassionate Use Act of 1996”	Medical Use of Marijuana.
Proposition 8 (1998)	“Permanent Class Size Reduction and Educational Opportunities Act of 1998”	Public Schools. Permanent Class Size Reduction. Parent-Teacher Councils. Teacher Credentialing. Pupil Suspension for Drug Possession. Chief Inspector's Office.
Proposition 35 (2000)	“Fair Competition and Taxpayer Savings Act”	Public Works Projects. Use of Private Contractors for Engineering and Architectural Services.
Proposition 38 (2000)	“The National Average School Funding Guarantee and Parental Right to Choose Quality Education Amendment”	School Vouchers. State-Funded Private and Religious Education. Public Schoolfunding.
Proposition 85 (2006)	“Parents’ Right to Know and Child Protection Initiative”	Waiting Period and Parental Notification Before Termination of Minor’s Pregnancy.
Proposition 89 (2006)	“California Clean Money and Fair Elections Act of 2006”	Political Campaigns. Public Financing. Corporate Tax Increase. Campaign Contribution and Expenditure Limits.
Proposition 8 (2008)	“California Marriage Protection Act”	Eliminates Right of Same–Sex Couples to Marry.

⁷⁸ *Id.*

⁷⁹ Ed., *Rebuke of Jerry Brown Good News for Prop. 23*, THE ORANGE COUNTY REGISTER, Aug. 3, 2010, <http://www.ocregister.com/opinion/brown-260575-news-law.html> (last updated Aug. 5, 2010, 2:27 P.M.).

⁸⁰ *Voter Information Guides*, CAL. SEC’Y OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/voter-information-guides.htm>.

Proposition 23 (2010)	“California Jobs Initiative”	Suspends Implementation of Air Pollution Control Law (AB 32) Requiring Major Sources of Emissions to Report and Reduce Greenhouse Gas Emissions that Cause Global Warming, Until Unemployment Drops to 5.5 Percent or Less for Full Year.
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With the exception of bond acts,⁸¹ the titles of most ballot measures differ depending on whether they are drafted by proponents or the Attorney General. As the chart shows, the titles drafted by proponents are positive, yet usually vague and overly broad. Moreover, they offer very little information as to the subject addressed by the ballot measure. Though some do include in the title a topic of the full text of the proposed law, the measure may also make changes to other topics not alluded to by the proponents’ title. Thus, instead of looking at the success rate of these ballot measures and attempting to draw causal conclusions as to the effectiveness of their ballot titles, the focus should be placed on how voters learn about ballot measures and make their decisions.

IV. VOTER INFORMATION AND EDUCATION

According to some political scientists, the average voting citizen does not know very much about candidates, politics, or policy.⁸² In fact, voters know even less about the relevant facts and arguments concerning most ballot measures than they do about top candidates.⁸³

Although propositions do not provide voters with voting cues found on the ballot in candidate elections, such as gender, ethnicity, occupation, and partisan affiliation,⁸⁴ endorsements by knowledgeable and reliable organizations, or opposition from unfavorable ones, can provide voters effective cues when voting on initiatives or referenda.⁸⁵ However, not every ballot measure has meaningful support and opposition campaigns, and voters are often too busy to follow closely even those measures that do.⁸⁶ So how much do voters know or need to know before casting their votes? And does the wording of ballot titles influence their choices?

A. Empirical Data

⁸¹ See, e.g., *2000 California Primary Election Voter Information Guide: Ballot Measures*, CAL. SEC’Y OF STATE, <http://primary2000.sos.ca.gov/VoterGuide/> (titles of Propositions 12 through 16 in 2000).

⁸² See, e.g., Michael X. Delli Carpini and Scott Keeter, *What Americans Know About Politics and Why It Matters* (1996); Philip E. Converse, *Voting Systems and the Representation of Public Opinion*, in *HANDBOOK OF POLITICAL SCIENCE* 79 (F.I. Greenstein and N.W. Polsby eds., 1975).

⁸³ Burnett et al., *supra* note 26, at 307.

⁸⁴ *Id.* at 307.

⁸⁵ *Id.*

⁸⁶ *Id.* at 317.

In a study for the *Election Law Journal* to survey voter knowledge, over 1,000 random sample interviews were conducted at exit polls.⁸⁷ Specifically, respondents were asked about their knowledge of 2008's complicated renewable energy initiative, Proposition 7.⁸⁸ They were questioned about specific points addressed by the proposition to gauge how much they knew.⁸⁹ Results showed that most voters knew something about the proposition; however, a significant minority of voters knew nothing.⁹⁰ One explanation that was given is that voters do not have the information that they need or are not reminded to use the information they have at the time they cast their ballots.⁹¹

Notably, one study conducted by the University of Missouri, which asked voters about their use of information appearing on the ballot rather than facts and arguments provided in the voter information pamphlet, found that certain voters (such as those who had less information before entering the polling booth or who are less politically active) are more susceptible to confusion interfering with their ability to vote according to their policy preferences.⁹² Here, the authors focused specifically on the effect of misleading, confusing, and difficult ballot titles on voter decisions.⁹³ Nevertheless, voters often identify official voter information pamphlets as an important source of information to learn about initiatives and referenda.⁹⁴

B. Voter Information Guides

1. The Ballot and Ballot Pamphlet

Under the Political Reform Act of 1974,⁹⁵ the state ballot pamphlet “should be converted into a useful document so that voters will not be entirely dependent on paid advertising for information regarding state measures.”⁹⁶ Furthermore, the ballot pamphlet must contain, among other things, the official title and summary prepared by the Attorney General, arguments for and against the measure, and the complete text of each measure.⁹⁷ Yet, even if voters actually read the entire pamphlet or brought the pamphlet with them to consult as they voted, it is the ballot that provides information at

⁸⁷ *Id.* at 308.

⁸⁸ *See 2008 California General Election Voter Information Guide*, CAL. SEC'Y OF STATE, <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop7-title-sum.htm>>.

⁸⁹ *Id.* at 308-17.

⁹⁰ *Id.* at 313.

⁹¹ *Id.* at 317-18.

⁹² *See Gafke & Leuthold*, *supra* note 3, at 394, 399.

⁹³ *Id.*

⁹⁴ Burnett et al., *supra* note 26, at 318-19; *see also* Shaun Bowler and Todd Donovan, *Do Voters Have a Cue? Television Advertisements as a Source of Information in Citizen-Initiated Referendum Campaigns*, 41 EUR. J. POL. RES. 777, 781-82 (in California, nearly half of respondents in a 1997 Field Poll reported using guides as their main or secondary source of information for deciding how to vote on ballot measures).

⁹⁵ *See* CAL. GOV. CODE § 81002(d).

⁹⁶ *Id.*

⁹⁷ *See* CAL. GOV. CODE § 88002.

the pivotal moment when voters cast their vote.⁹⁸ Since the ballot is an official statement that the state endorses, it has the capacity to be particularly influential to voters.⁹⁹ Every voter receives a ballot and it is the last thing they see before marking their choice.¹⁰⁰ And the most important part of any ballot measure, in terms of voter education, is the ballot title and summary since “[m]ost voters never read more than the title and summary of the text of initiative proposals.”¹⁰¹

2. The Ballot Title and Summary

In a recent research experiment for the American Political Science Association to determine whether the wording of ballot measure titles and summaries would influence voter behavior, over 6,000 subjects were asked how they would vote on different measures if they appeared on the ballot in the next election.¹⁰² What they did not know was that while they were randomly shown one version of a measure, there were actually two versions of each of the measures, which emphasized different aspects of the ballot title and summary.¹⁰³ One ballot measure used for the experiment was based on California’s Proposition 8 on same-sex marriage.¹⁰⁴ In fact, the first version with the title “Limit on Marriage” was actually prepared by Attorney General Jerry Brown in 2007 for circulation on signature petitions.¹⁰⁵ The second version was the title “Eliminates the Right of Same-Sex Couples to Marry” that appeared on the California ballot in 2008.¹⁰⁶

Table 3. Estimated Effects

3(a). Same-Sex Marriage			
	Limiting Marriage	Eliminating Right	Difference
Yes	55.6%	49.6%	-6.0%***

As Table 3 shows, 6% fewer respondents supported the constitutional amendment when the ballot title and summary indicated that the measure would “eliminate the right” of same-sex couples to marry.¹⁰⁷ Though the difference was not large enough to change the likely election result among the voters in the sample, overall, the changes to the ballot language produced significant differences in the reported vote intention.¹⁰⁸ Thus, this

⁹⁸ See Burnett et al., *supra* note 26, at 318.

⁹⁹ *Id.*

¹⁰⁰ Burnett & Kogan, *supra* note 3, at 7.

¹⁰¹ See NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 2.

¹⁰² Burnett & Kogan, *supra* note 3, at 12 (pool of subjects were a nationally representative sample in terms of demographic).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 15.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 15-16 tbl.3.

¹⁰⁷ *Id.* at 19.

¹⁰⁸ *Id.* at 19-20.

evidence suggests that negative wording in a ballot title can reduce voter support for the ballot measure.¹⁰⁹

V. CONCLUSION

The reality of the initiative process is that initiative measures are drafted by proponents with one common goal in mind (after qualifying an initiative for the ballot): to paint the initiative in the light most favorable to its adoption.¹¹⁰ Though government officials, including the Attorney General and the Secretary of State, have sought to promote impartiality through their involvement, drafting neutrality is more difficult than it seems. In fact, some have argued that the power to draft ballot titles and summaries should be delegated to a nonpartisan office, such as the Legislative Analyst's Office or the Office of Legislative Counsel.¹¹¹ However, this would not solve the problem, as lawsuits have also been filed against the Legislative Analyst's Office over its description of the financial impact of a measure¹¹² and the Legislative Counsel may be too closely aligned with lawmakers to be sufficiently impartial.¹¹³

Perhaps the best solution to address the possibility of misleading information is to increase voter knowledge. At the very least, voters should be cognizant of the fact that no one source of information tells the whole story about a ballot measure. Since few voters have the desire and the fortitude to read the lengthy text of initiatives, or even the long descriptions of the initiatives contained in the ballot pamphlet, the focus should be on providing more accessible information to voters,¹¹⁴ such as on the ballot itself.¹¹⁵ By increasing the title and summary word limit to slightly above 100 words, the ballot could offer more information without substantially increasing the demands on voters.¹¹⁶ After all, voters should know that even if different words are used to describe an initiative measure, it still does not change its effect if passed. So, in order to get the whole story, voters should not judge an initiative by its title.

¹⁰⁹ *Id.* at 20.

¹¹⁰ *See* Howard Jarvis Taxpayers Ass'n v. Bowen, 192 Cal.App.4th 110, 120 Cal.Rptr.3d 865 (3d Dist. 2011).

¹¹¹ *See* Burnett et al., *supra* note 26, at 323.

¹¹² *See* *Proposition Neutrality*, *supra* note 76.

¹¹³ *See* Burnett et al., *supra* note 26, at 323.

¹¹⁴ Burnett & Kogan, *supra* note 3, at 25.

¹¹⁵ *See* Burnett et al., *supra* note 26.

¹¹⁶ *See id.* at 320.