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## Getting to a Citizens' Constitutional Convention: Legal Questions (Without Answers) Concerning the People's Ability to Reform California's Government Through a Constitutional Convention

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**GETTING TO A CITIZENS’  
CONSTITUTIONAL CONVENTION:  
LEGAL QUESTIONS (WITHOUT ANSWERS)  
CONCERNING THE PEOPLE’S ABILITY TO  
REFORM CALIFORNIA’S GOVERNMENT  
THROUGH A CONSTITUTIONAL  
CONVENTION**

*Steven Miller\**

*In 2009 and 2010, a reform organization named Repair California worked to place on the November 2010 general election ballot a pair of propositions that would have called for a citizens’ constitutional convention to substantially revise the California Constitution. The movement for reform eventually dissipated, and the propositions did not make it to the 2010 ballot. However, the call for a citizens’ convention presented novel legal questions, including whether voters could call for a convention at all, whether a convention could be called in a single election by two complementary ballot measures, whether delegates could be selected rather than elected, and whether voters could limit the scope of the convention to prevent ancillary issues from sidetracking the structural issues Repair California had hoped to address. This Article briefly surveys these and other questions raised by the call for a citizens’ convention and discusses how proposition drafters hoped to resolve them.*

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\* Steven Miller is Senior Counsel with the San Francisco law firm of Hanson Bridgett, LLP where he practices government and public agency law. I would like to thank John Grubb of the Bay Area Council, whose vision influenced the entire constitutional convention project, and whose infectious enthusiasm for a worthwhile cause made frequent challenges a pleasure to endure.

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## I. INTRODUCTION

Jim Wunderman, the President and CEO of the Bay Area Council—“a business-sponsored, public-policy advocacy organization for the nine-county Bay Area”—published an op-ed piece in the August 21, 2008, *San Francisco Chronicle* asserting that “our California government is not only broken, it has become destructive to our future.”<sup>1</sup> The dysfunction of government had risen to such a level, Wunderman decried, that the “drastic measure[]” of a convention to rewrite the California Constitution offered the only hope.<sup>2</sup>

Wunderman’s editorial was initially met with considerable enthusiasm and ultimately resulted in an organization called Repair California preparing and circulating for signature two related ballot measures calling for a citizens’ constitutional convention.<sup>3</sup> As a lawyer for Repair California, I was the principal drafter of the two ballot measures.

Drafting Repair California’s ballot measures required filtering policy decisions and political pressures through a legal risk analysis process. Many of these political and policy issues arose quickly and needed to be decided in a matter of days. The legal ramifications of these decisions were sometimes only of secondary importance—Repair California needed to balance the political reality of making a decision with the risk that the decision could cause legal problems in the future. As many of the legal issues surrounding a constitutional convention are novel, unknown future legal risk inevitably took a backseat to practical and immediate political benefit. As a result, we always assumed that calling for the first constitutional convention in 131 years<sup>4</sup> would raise some legal questions that only the courts could answer.

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1. Jim Wunderman, *California Government Has Failed Us*, SFGATE, (Aug. 21, 2008), [http://articles.sfgate.com/2008-08-21/opinion/17123410\\_1\\_constitutional-convention-new-government-california-constitutional-revision-commission](http://articles.sfgate.com/2008-08-21/opinion/17123410_1_constitutional-convention-new-government-california-constitutional-revision-commission).

2. *Id.*

3. Jim Wunderman, Initiative Constitutional Amendment: Citizen’s Constitutional Convention Act (Oct. 28, 2009), [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i863\\_initiative\\_09-0066.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i863_initiative_09-0066.pdf); Jim Wunderman, The Call for a Citizens’ Limited Constitutional Convention (Oct. 28, 2009) [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i864\\_initiative\\_09-0067.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i864_initiative_09-0067.pdf) (last visited Nov. 9, 2010).

4. The last constitutional convention in California was in 1879. See *1878–1879 Constitutional Convention Working Papers*, CAL. SEC’Y OF STATE, <http://www.sos.ca.gov/>

As I write this Article almost three years later, enthusiasm for reform has fizzled such that not only did Repair California's proposal for a citizens' constitutional convention die without having qualified for the November 2010 ballot, but many competing reform ideas that were perhaps inspired by Repair California also mostly expired. Immediate concern over the state's ever-deepening budget crises has largely displaced more visionary efforts to reform long-term underlying structural problems plaguing California's system of government. Therefore, there will be no judicial answers to some of the fundamental legal questions raised by Repair California's proposed convention.

In this Article, I do not discuss the pros and cons of holding a constitutional convention in the first place. Rather, I start from the assumption (rendered moot at this point by history) that a constitutional convention is a good idea. Nor does this Article purport to provide in-depth scholarly analysis of the complex constitutional questions underlying the constitutional convention movement. Rather, this Article provides a practitioner's perspective on five key issues that presented themselves as we worked to draft Repair California's now-failed initiative measures. My hope is that the following overview will be useful to those seeking to understand Repair California's proposal, with an eye toward improving on it and trying in the future to chart a more successful path to a constitutional convention.

## II. CAN THERE *EVER* BE A CITIZENS' CONSTITUTIONAL CONVENTION?

Article XVIII, section 2, of the California Constitution reads, in part: "The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution."<sup>5</sup>

A threshold issue with Repair California's citizens' convention was that the constitution does not envision such a concept. Repair California initially assumed that in today's initiative-happy environment anyone could put anything on the ballot. But in fact,

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archives/collections/1879/ (last visited Oct. 14, 2010) (providing a record of the convention activities).

5. CAL. CONST. art. XVIII, § 2.

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under article XVIII, section 2, before a convention may be held, the legislature, by a two-thirds vote, must ask the people if there should be a convention, and the people must vote yes.<sup>6</sup> The measure calling for a convention can *only* be placed on the ballot by the legislature.

It seemed clear that the legislature would never act.<sup>7</sup> In order to call for a citizens' convention, therefore, a two-step process would be required. The first step (what we began to refer to as "Prop 1") would require passage of a constitutional initiative modifying article XVIII, section 2, of the constitution to allow the people to place on the ballot the question of whether to call a convention without a two-thirds vote of the legislature. The irony was not lost on us that we had to rely on the initiative process in order to call a convention to revise the constitution—including specifically reforming the initiative process. The second step (what we called "Prop 2") would be the measure asking that question itself—the call for a constitutional convention. Prop 2 would not alter the constitution, but would instead be a statutory initiative that would include many details from Repair California's proposal.

As discussed below, Repair California had additional policy concerns that dictated additional modifications to article XVIII, section 2. A fundamental question raised by the final version of Prop 1 was whether those modifications meant that the proposed measure was itself a constitutional revision that could not be enacted through an initiative. This all-important question is discussed in Part VI below, after consideration of the proposed modifications themselves.

### III. A SINGLE-ELECTION STRATEGY

Repair California did not want to amend article XVIII, section 2, at one election and then, if Prop 1 passed, call for a convention at the next. Requiring two separate elections to put before the people the

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6. An interesting historical footnote: In 1934, the legislature placed on the ballot, using article XVIII, section 2, procedures (i.e., by a two-thirds majority vote of both houses), the question of whether there should be a constitutional convention. The measure passed and therefore, under the constitution and as set forth in the measure, the legislature had the duty to "provide for" the convention. The legislature never acted and a convention was never held.

7. AB 4 was introduced on December 1, 2008, by Assembly Member Blakeslee but was never heard by any committee and died of natural causes under article IV, section 10(c)'s, command that "any bill introduced during the first year of the biennium of the legislative session that has not been passed by the house of origin by January 31 of the second calendar year of the biennium may no longer be acted on by the house."

question of whether to call a constitutional convention would increase significantly the cost of the process. Given the enormous cost of mounting a modern-day campaign, a two-election scenario might present such a significant hurdle that a voter-led call for a convention would be derailed altogether. In addition, Repair California wanted to take as much advantage as possible of the economic crisis that began in 2008 and that it believed would fuel political support for its cause. It felt it essential that the call for the convention itself happen at the November 2010 general election.

An important legal issue thus was whether Props 1 and 2 could appear on the same ballot. The problem was that without the constitutional authority provided by Prop 1's modification, only the legislature could call for a convention. When voters went to the polls on November 2, 2010, Prop 1 would not yet have passed and the people therefore might not have the authority even to vote on Prop 2.

Ordinarily an initiative is susceptible to a pre-election challenge on the basis that the voters lack the power to adopt the measure at the time it was presented to them.<sup>8</sup> Such would be the case if Prop 1's effectiveness were unknown when voters cast their votes on Prop 2. The safest course of action would have been to adopt a two-election strategy and wait until Prop 1 passed before putting Prop 2 on the ballot. But Repair California determined this proposal politically unacceptable.

We saw the single-election strategy as a significant legal obstacle and assumed it would be one that those seeking to derail the convention would seize upon through a pre-election challenge to Prop 2. But we formulated a creative, and relatively untested, legal solution to the problem so as to allow the voters to approve both Props 1 and 2 at a single election.

In order to solve the single-election problem, we added language to Prop 1 such that it would apply retroactively if enacted. The amended constitutional provision empowering voters to call for a convention would therefore technically be in effect on the same election day when voters would also have been asked to adopt Prop 2, which would call for the constitutional convention itself. The language we included in Prop 1 read:

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8. *AFL-CIO v. Eu*, 686 P.2d 609, 613–16 (1984).

This measure, if passed, shall be deemed operative and in effect on the entire day of the election at which it is passed, and shall allow the people to consider the question of whether to call for a constitutional convention at the same election as the one at which the people vote on this measure.<sup>9</sup>

Like most of the issues surrounding the convention, there was no precedent based on a similar factual situation, making it impossible to predict with certainty how a court would react to a retroactive constitutional amendment. Nevertheless, we felt it likely that a single-election approach would withstand judicial scrutiny because (a) it was consistent with the plain meaning of the constitution, (b) it was supported by established judicial precedent, and (c) it furthered the strong public policy of popular sovereignty enshrined in the constitution.

*A. The Constitution on Its Face Does Not Prevent  
Retroactive Application*

Article XVIII, section 4, states that “unless the measure provides otherwise,” a constitutional initiative takes effect the day after the election at which it passed.<sup>10</sup> On its face, section 4 therefore acknowledges that a measure may state an effective date other than the day after the election. This clause is ordinarily invoked to provide for an effective date *later* than the day after the election, but nothing in section 4’s express language commands such an interpretation.<sup>11</sup> Nor does retroactive application of a constitutional amendment offend other constitutional provisions.<sup>12</sup>

We believed that based on a plain-language reading of the constitution, there was no reason why we could not draft Prop 1—granting voters the power to call for a constitutional convention—so as to take effect retroactively. As such, it would grant voters on

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9. *Inactive Initiative Measure 09-0066*, *supra* note 3.

10. CAL. CONST. art. XVIII, § 4.

11. *See id.*

12. Article I, section 9, provides that “[a] bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed.” CAL. CONST. art. I, § 9. None of these three prohibitions applied to the constitutional convention, as no one was being declared guilty of a crime without benefit of a trial, no ex post facto application of a penal statute was at issue, see *Conservatorship of Hofferber*, 616 P.2d 836, 849 (1980), and no contractual obligations would be affected by a retroactive application of the constitutional initiative, Prop 1.



election day the power to call for the constitutional convention through Prop 2.

*B. California Courts Confirm That Initiatives  
May Take Effect Retroactively*

The issue of a retroactive constitutional amendment does not appear to have been ever squarely before California courts, but courts have examined retroactive statutory initiatives.<sup>13</sup> One case of note, *Estate of Cirone v. Cirone*,<sup>14</sup> concerned Proposition 6, passed in 1982, by which the voters repealed the state's inheritance tax.<sup>15</sup> Proposition 6 provided that it was operative as of the date of its passage.<sup>16</sup> The respondent died on election day, but before the polls closed.<sup>17</sup> The question was whether respondent's estate was subject to the estate tax that had been repealed on the day he died.<sup>18</sup> The petitioner argued that Proposition 6's operative-date provision could not trump the constitutional statement that initiatives take effect the day after the election and that the measure's effective date should therefore be the day after the election.<sup>19</sup>

The *Estate of Cirone* court first emphasized the literal reading of the constitution discussed above in Section A.<sup>20</sup> The court further reasoned that "a retroactive law . . . is not inherently unconstitutional" and that there was therefore no constitutional bar to a retroactive application of Proposition 6.<sup>21</sup> Finally, the court found that although a law is not ordinarily retroactively applied unless necessary to effectuate its purpose, retroactive application of Proposition 6 was necessary to implement the measure's express provision concerning the effective date.<sup>22</sup>

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13. See, e.g., *Estate of Cirone v. Cirone*, 200 Cal. Rptr. 511 (1984).

14. *Id.*

15. *Id.* at 512.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 516. The use of the word "operative" in Proposition 6 and "effective" in the constitution is not significant. The *Estate of Cirone* court ruled that "the distinction between operative and effective date is not rigid, but should be liberally construed to achieve the purpose of the law involved." *Id.* In an abundance of caution, we nevertheless drafted Prop 1 to be "operative and in effect" retroactively.

20. *Id.*; *supra* Part III.A.

21. *Id.*

22. *Id.* (citing *DiGenova v. State Bd. of Educ.*, 367 P.2d 865, 869-70 (1962)).

We could not find a single example in which a court rejected the retroactive application of an initiative measure, statutory or constitutional, when (1) the text of the measure provided for such retroactivity and (2) the measure did not conflict with or offend other constitutional prohibitions. To the contrary, courts uniformly have held that retroactive measures do not offend the constitution.<sup>23</sup>

*C. Strong Public Policy Supported the  
Retroactive Application of Proposition 1*

We expected challenges to the constitutional convention; key to the defense of many of those challenges was the concept of popular sovereignty expressed in article II, section 1, of the California Constitution, which is discussed at some length in Part VI below. Compared to this core constitutional principle, establishing “all political power . . . in the people,”<sup>24</sup> we felt that the issue of whether Prop 1 could apply retroactively paled in comparison. If the people approved both Props 1 and 2, it struck us as unlikely, as a matter of public policy, that a court would frustrate the will of the people by relying on an essentially procedural argument to disallow the voters the right to call for a constitutional convention.

IV. SELECTING DELEGATES TO A CONVENTION

Article XVIII, section 2, of the constitution provides that “[d]elegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable.”<sup>25</sup> This requirement posed some significant political and policy issues for Repair California. First, electing delegates would mean that the convention would be further delayed—after a convention was called, there would need to be a separate election of delegates before the convention convened. Repair California did not want any delay and

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23. *See, e.g.*, *Chapman v. Farr*, 183 Cal. Rptr. 606, 608–09 (1982); *Roth Drug, Inc. v. Johnson*, 57 P.2d 1022, 1026 (Cal. Ct. App. 1936); *City of Los Angeles v. Oliver*, 283 P. 298, 302 (Cal. Ct. App. 1929). There is nothing special about initiatives that lead courts to permit them to take effect retroactively. In California, even judicial decisions ordinarily apply retroactively, unless the decision overrules controlling authority that parties might justifiably have relied on. *People v. Yartz*, 123 P.3d 604, 614 (Cal. 2005); *see also* *Burris v. Superior Court of Orange County*, 103 P.3d 276, 283 (Cal. 2005) (“The general rule that judicial decisions are given retroactive effect is basic in our legal tradition.”) (citing *Newman v. Emerson Radio Corp.*, 772 P.2d 1059, 1062 (Cal. 1989)).

24. CAL. CONST. art. II, § 1.

25. CAL. CONST. art. XVIII, § 2.

in fact hoped to seat convention delegates within six months of the November 2010 election.

Second, Repair California did not want to be restricted by the constitution's command that delegates represent "districts as nearly equal in population as may be practicable."<sup>26</sup> Practically, the reference to a district's population meant that delegates had to be sorted either by assembly, senate, or board of equalization districts—there are no other political boundaries in California that are determined by population. Repair California had no problem with proportional representation. But it wanted to involve local government—especially cities, counties, and school districts—in the delegate-selection process. It also wanted to honor the political reality of the dense populations of California's three largest cities—Los Angeles, San Diego, and San Jose.<sup>27</sup>

More fundamentally, however, Repair California was convinced that any election process would be unduly influenced by the political problems it felt were partly to blame for the state's dysfunction and would produce a result that essentially mirrored the legislature—and would therefore be as paralyzed and ineffective as it considered that body to be.<sup>28</sup> The lengthy and heated conversations on the pros and cons of various methodologies of (s)electing delegates is beyond the scope of this Article. Repair California ultimately made the policy/political decision to utilize a unique method of determining delegates involving a complex combination of random delegate selection by the state auditor and appointment of delegates by delegate-selection committees made up of elected officials from local government.

Article XVIII, section 2, requires that "[d]elegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable."<sup>29</sup> Repair California's proposed methodology not only would have violated the

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26. *Id.*

27. *E-1 Population Estimates for Cities, Counties and the State with Annual Percent Change—January 1, 2009 and 2010*, CAL. DEP'T OF FIN. (May 2010), <http://www.dof.ca.gov/research/demographic/reports/estimates/e-1/2009-10/>.

28. Because Repair California wanted to insulate the convention as much as possible from the legislature, it also modified article XVIII, section 2, to remove sole power in the legislature to "provide for" the convention. Prop 2 detailed how a convention would be paid for and the procedures it would follow—leaving no role for the legislature.

29. CAL. CONST. art. XVIII, § 2.

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requirement that delegates be elected but also would have conflicted with the requirement that delegates represent districts as nearly equal in population as practical. Repair California did not want to be limited to any established districts as a basis for determining proportionality. Article XVIII, section 2, therefore had to be modified in order to reach Repair California's goals. Each additional modification to article XVIII, section 2, raised the likelihood that the modifications might be held to be an impermissible revision (see Part VI below). But beyond the revision issue, Repair California's proposed delegate-selection model presented additional legal unknowns.

The application of the Voting Rights Act to Repair California's complicated delegate-selection model could well be the topic of an entire article on its own. I discuss briefly only two key considerations we wrestled with. First was the question of whether section 2 of the Voting Rights Act would apply to Repair California's complex delegate-selection process. Section 2 of the Voting Rights Act focuses on the discriminatory result of an electoral process in order to ensure that the electoral process is equally accessible to minority voters.<sup>30</sup> We concluded that section 2 arguably would not even apply to a process like Repair California's, in which delegates were selected and not elected. The more significant Voting Rights Act issue concerned section 5 of the Act.

Section 5 of the Act requires that the U.S. Department of Justice pre-clear any attempt to change "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ."<sup>31</sup> Given that the last constitutional convention was in 1879, we did not know whether modifying article XVIII, section 2, to allow selection of delegates was a change to a voting practice such that pre-clearance would be required.

However, if section 5 of the Act required pre-clearance of Repair California's non-electoral method of delegate selection, we thought such pre-clearance would likely be forthcoming, especially as no benchmark existed against which to compare Prop 2's newly created method of delegate selection. The support for this argument lies in the Department of Justice regulations, which provide:

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30. 42 U.S.C. § 1973 (2006); *see* *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

31. 42 U.S.C. § 1973c.

Where at the time of submission of a change for Section 5 review there exists no other lawful practice or procedure for use as a benchmark . . . [the] preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.<sup>32</sup>

So long as we could show that delegate selection was not designed with any discriminatory purpose, we believed that Repair California's delegate-selection process would comply with the Department of Justice regulations and could withstand a challenge under section 5 of the Voting Rights Act. Repair California's method relied mostly on random selection, which could not reflect any discriminatory purpose and would in fact arguably result in greater minority representation than an election<sup>33</sup> (minority turnout might well be low in any special election called for the sole purpose of electing delegates). The selection of almost all the remaining delegates under Repair California's methodology would be by local government officials. Such local government officials are often elected in non-partisan contests.<sup>34</sup> Because of the argument that there is lower minority turnout in non-partisan elections than in partisan ones,<sup>35</sup> giving non-partisan local government officials delegate-selection power could implicitly indicate a discriminatory purpose. However, the plan to empower local government officials had the strong political support of local minority groups, whose support we thought would be useful in allaying any concerns the Department of

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32. 28 C.F.R. § 51.54(b)(4) (2010).

33. See J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1009 (1995) ("The Supreme Court's recognition of vote dilution claims under Section 2 of the Act bespeaks a realistic recognition that community leaders may deliberately minimize the influence of minorities by concentrating minority voters overwhelmingly in a single district or distributing them among many such districts.").

34. See JOHN L. KOREY, CALIFORNIA GOVERNMENT 40 (Carolyn Merrill et al. eds., 5th ed. 2009) ("Of the thousands of elected federal, state, and local offices in California, over 99 percent are nonpartisan.").

35. See Richard L. Engstrom & Michael D. McDonald, "Enhancing" Factors in At-Large Plurality and Majority Systems: A Reconsideration, 12 ELECTORAL STUD. 385 (1993); see also Devin Bent, *Partisan Elections and Public Policy: Response to Black Demands in Large American Cities*, 12 J. BLACK STUD. 291 (1982) (arguing that partisan elections result in substantially higher gains for substantive minority goals); Letter from Loretta King, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to James P. Cauley III, Esq., (Aug. 17, 2009), available at [http://www.justice.gov/crt/voting/sec\\_5/ltr/1\\_081709.php](http://www.justice.gov/crt/voting/sec_5/ltr/1_081709.php).

Justice might have had about any discriminatory intent implicit in Repair California's delegate-selection model.

A final note on one unique aspect of the delegate-selection issue: Repair California's delegate-selection model included a category of delegates Prop 2 called Indian Tribe Delegates. Indian Tribe Delegates would make up four of the approximately 460 total convention delegates. The exact amount would depend on population estimates determined by the state's Department of Finance's demographic research unit. These four delegates would be selected by the state's federally recognized Indian Tribes. Calling out four Indian Tribe Delegates raised some interesting legal questions, in particular concerning California's Proposition 209 restrictions on preferential treatment for "any individual or group on the basis of race, sex, color, ethnicity, or national origin . . . ." <sup>36</sup>

In drafting Prop 2 so as to best insulate it against a Proposition 209 challenge, we relied on the important legal distinction between "Native American" and "Indian Tribes." We reasoned that the term "Indian Tribes," unlike the term "Native American," did not refer to a racial or ethnic group subject to Proposition 209 at all. Rather, the federally recognized Indian Tribes are political organizations that exist without regard to any of Proposition 209's categories. <sup>37</sup> The terms "Indian" and "Indian Tribe" are defined in federal law. <sup>38</sup> Indian Tribe Delegates would not be selected on the basis of their individual statuses as Native Americans, or any of the other prohibited categories in Proposition 209. Rather, they would be selected by the federally recognized Indian Tribes to serve as their representatives.

We found no Proposition 209 case law on point regarding preferences for Indian Tribes. However, the California attorney general has recently opined that under some circumstances, the

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36. CAL. CONST. art. I, § 31. There existed other potential challenges to the mandatory requirement of "Indian Tribe" delegates. We prepared some creative legal arguments to counter all we could think of. As the measures died before any challenge could be brought, these arguments were never used, or even well developed.

37. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974) (holding employment preference for Indians in the Bureau of Indian Affairs did not constitute invidious racial discrimination in part because "the preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. . . . In this sense, the preference is political rather than racial in nature").

38. 25 U.S.C. § 450b (d)-(e) (1994).

“political” classification of Indian Tribes is outside the scope of Proposition 209’s racial classifications.<sup>39</sup> In addition, the U.S. Supreme Court has indicated that under some circumstances, Indian Tribes are a “political” rather than a “racial” classification.<sup>40</sup>

#### V. CAN A “RUNAWAY” CONVENTION BE PREVENTED?

Repair California did not have a pre-ordained set of issues it wanted the convention to address. On the other hand, and critical to the political success of the movement, Repair California needed to ensure that the convention would not get sidetracked by issues that could have made the end result unpalatable to a majority of the voters. Repair California felt that core structural governance problems were at the heart of California’s problems. It also needed, for political reasons, to focus the convention on those structural issues. Certain issues were so politically inflammatory that Repair California would not have received support for a convention if there had been a possibility of a runaway convention that was held hostage by single-issue constituencies.

Prop 2 therefore called out four permissible areas of structural revision and enumerated a list of topics prohibited from consideration by the delegates. While there were many policy discussions that led to Repair California’s decision regarding limiting the convention’s scope, I focus here only on the underlying legal questions of whether and how the initiatives could limit the convention’s scope and, even if they could, what would happen if the convention delegates decided to ignore those limitations.

We found a paucity of California legal authority on the topic. In other states, however, courts have recognized limits to the subject matter of constitutional conventions if the people have approved those limitations.<sup>41</sup> Absent any authority to the contrary and given the prudential nature of a scope-limiting provision, we therefore drafted Prop 1 to allow the people, when calling for a convention, to

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39. 93 Op. Cal. Att’y Gen. 19 at 13 (2010). The California Attorney General later points out that “courts have recognized that membership in a tribe and Indian ancestry are not necessarily coextensive concepts.” *Id.* at 37 n.47.

40. *Id.* at 13; *see also Morton*, 417 U.S. at 553 (applying similar arguments with regard to Proposition 209 to an analysis under federal anti-discrimination law).

41. ROBERT WILLIAMS & G. ALAN TARR, CTR. FOR STATE CONSTITUTIONAL STUDIES, THE LAW OF LIMITED STATE CONSTITUTIONAL CONVENTIONS, *available at* <http://camlaw.rutgers.edu/statecon/njtaxconvpapers/report7.pdf>.

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also describe any limits on the convention's scope. Of course, this resulted in even more modifications to article XVIII, section 2 and further raised the specter of Prop 1 being held to be an impermissible revision.

Even assuming we could legally limit the convention's scope, it was less clear how to prevent the delegates from ignoring those restrictions and exceeding the scope. After all, we were putting such faith in the doctrine of popular sovereignty: Were we being two-faced by now stating that delegates could not determine on their own what topics to consider? Our answer to this question was that while the people, through an election, could impose limits on the convention, the concept of popular sovereignty did not extend to the selected delegates—whose actions could be limited by the will of the people who had placed them in their seats in the first place by calling for the convention.

On this point, we found little definitive judicial guidance. We included language in both Props 1 and 2 indicating that the limitations on scope were to be judicially enforceable. It seemed to us that judges were the right people to decide whether a proposed revision exceeded the convention's permissible scope. In addition, we thought that empowering the courts in this fashion might improve the odds of a court viewing a scope-limiting provision as an amendment and not a revision. In so doing, we also hoped to delay any legal battle over whether a proposed constitutional revision exceeded the permissible scope until after the convention had completed its business. Repair California's fundamental concern was to see a convention happen, and it was prepared to take a wait-and-see attitude toward what the results of such a once-in-a-lifetime opportunity might be.

We anticipated that political pressures on the delegates, as well as the knowledge that their work could be subject to judicial enforcement if they exceeded their permitted boundaries, would constrain delegates who would not want to see their hard work blocked at the end of the convention process. In addition, the convention was structured so as to be under the guidance, and to some extent the leadership, of the Fair Political Practices Commission. We hoped the commission would provide oversight that would keep the convention on track and within its permissible boundaries. Finally, the convention mandated by Prop 2 called for



maximum transparency and prescribed considerable public input. Such input could also serve as a practical constraint on a runaway convention.

#### VI. REVISION VERSUS AMENDMENT

As discussed above, Repair California at first proposed modifying article XVIII, section 2, to allow the question of whether to hold a convention to be placed on the ballot by initiative and not only by a two-thirds vote of the legislature. But policy determinations resulted in the need for Prop 1 to propose significant additional modifications to article XVIII, section 2, to accommodate Repair California's proposal. As finally drafted, Prop 1 intended to accomplish the following: (1) the people could place on the ballot the question of whether there should be a convention without the need for a two-thirds vote of the legislature; (2) the question of whether there should be a convention could specify limits to the convention's scope, and (3) the question of whether there should be a convention could specify that delegates were to be selected instead of elected. The final language of Prop 1 therefore proposed a modification of article XVIII, section 2, as follows:

(a) The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention. ~~Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable.~~

(b) *The question of whether to call a convention to revise the Constitution may be placed on the ballot for any state-wide election by the same process set forth in Article 2, Section 8 for a statutory initiative measure, so long as no convention has convened within ten years of such an election.*

(c) *Whether submitted as set forth in paragraph (a) or (b), the question of whether to call a convention to revise the Constitution (1) may prescribe judicially enforceable limits on the areas of the Constitution to be considered for revision, and the manner in which the convention is to be*

*provided for if a majority of voters vote yes on the question, (2) may authorize the convention to propose both a revision and a series of separate amendments to the Constitution; and (3) shall specify a fair method for selecting or electing citizens to be delegates to a constitutional convention.*<sup>42</sup>

(Strike-through and italicized language reflects language to be stricken from and added to section 2 respectively.)

A fundamental question raised by the final version of Prop 1, perhaps the single most important legal issue facing Repair California, was whether it was an amendment to or a revision of the constitution. The constitution is clear that the people may amend the constitution by initiative,<sup>43</sup> but that a revision of the constitution may not be enacted by initiative but may *only* be enacted either through a constitutional convention or by a measure placed on the ballot by a two-thirds vote of both houses of the legislature and approved by a majority of the voters.<sup>44</sup> But the constitution nowhere defines “amendment” or “revision” or explains the difference between the two.

The California Supreme Court, however, has provided considerable interpretive guidance.<sup>45</sup> The court has essentially defined the boundaries of a permissible amendment in the negative—in other words, an amendment is any constitutional modification that does *not* cross the line into an impermissible revision. The court looks to two factors to determine where that line is—quantitative and qualitative.<sup>46</sup>

“[A]n enactment which is so extensive in its provisions as to change directly the ‘substantial entirety’ of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision . . . .”<sup>47</sup> The classic example of a quantitative revision is *McFadden v. Jordan*.<sup>48</sup> In that case, an initiative proposed

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42. This language reflects certain policy decisions that are not the focus of this brief Article; for instance, the limiting language that would only allow a convention every ten years and the use of the word “fair” in the last sentence both were the result of policy/political decisions that nonetheless had some legal implications.

43. CAL. CONST. art. XVIII, § 3.

44. CAL. CONST. art. XVIII, §§ 1, 2, 4.

45. See e.g., *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

46. *Id.* at 89.

47. *Id.*

48. *McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948).

to repeal or substantially alter at least fifteen of the constitution's articles and included more than 21,000 words.<sup>49</sup> The court invalidated the measure as an impermissible revision—before the voters even had a chance to vote—due to the sheer quantity of the proposed changes.<sup>50</sup>

However, “even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a [qualitative] revision . . . .”<sup>51</sup> The court has found that a small quantitative change may nevertheless be a qualitative revision if it makes a fundamental change in the basic nature of the governmental plan or framework established by the constitution.<sup>52</sup>

There seemed to be little chance that a court would find Prop 1, which modified a single section of a single constitutional article, a quantitative revision. But more troubling was the question of whether a court would see Prop 1 as crossing over the line into territory of an impermissible revision under the qualitative analysis. Though the issue has been before the court not infrequently,<sup>53</sup> the court has only once struck down an initiative on the basis that it was a qualitative revision.<sup>54</sup>

That one case, *Raven v. Deukmejian*,<sup>55</sup> concerned a criminal justice measure (1990's Proposition 115) that sought, among other things, to provide that numerous state constitutional provisions granting rights to criminal defendants should not be construed to afford greater rights than those afforded by analogous provisions of the U.S. Constitution.<sup>56</sup> The court found that the measure would effectively limit its own authority and instead vest power to interpret the state constitution in the federal courts.<sup>57</sup> This limit on the state judicial branch's power, the court held, was such a substantial

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49. *Id.* at 790–96.

50. *Id.* at 788.

51. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1286 (Cal. 1978).

52. *Strauss*, 207 P.3d at 100.

53. *See id.* at 84–98.

54. *Id.* at 100.

55. *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990).

56. *Id.* at 1081.

57. *Id.* at 1086–87.

alteration of the basic structure of government that it rose to the level of a revision.<sup>58</sup>

Though far from certain, we were optimistic that a court following *Raven* and *Strauss* would not find Prop 1 to be a revision. The analysis below follows Repair California's three main modifications to article XVIII, section 2, discussed above.

*A. Allowing the People to Place on the Ballot the Question of Whether There Should Be a Convention*

The California Constitution makes clear that the people are the ultimate source of constitutional power:

"All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."<sup>59</sup>

"The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum."<sup>60</sup>

Given the above two constitutional commandments, what could be a more fundamental exercise of the people's political power than voting to hold a constitutional convention? Moreover, the California Supreme Court has ruled time and again that the initiative power must be liberally construed and that reasonable doubts should be resolved in favor of the exercise of this power.<sup>61</sup>

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58. *Id.* Significantly, the court, in expressly rejecting the suggestion that any of the other, more specific constitutional changes made by Proposition 115 constituted a revision, stated, "The additional constitutional changes effected by Proposition 115, involving such isolated matters as postindictment preliminary hearings, joinder of cases, use of hearsay, reciprocal discovery, and the People's right to due process and a speedy, public trial, cannot be deemed matters which standing alone, or in the aggregate, substantially change our preexisting governmental framework." *Id.* at 1086; *see also Strauss*, 207 P.3d at 94.

59. CAL. CONST. art. II, § 1.

60. CAL. CONST. art. IV, § 1.

61. *See, e.g.,* *Indep. Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 185 (Cal. 2006) (citing *Associated Home Builders Inc. v. City of Livermore*, 557 P.2d 473 (1976) and *Carlson v. Cory*, 189 Cal. Rptr. 185 (1983)); *see also* *Santa Clara Cnty. Local Transp. Auth. v. Guardino*, 902 P.2d 225 (Cal. 1995) (stating that the initiative power must be "liberally construed" but nevertheless finding initiative-passed transportation tax unconstitutional for not having received a two-thirds majority vote of the electorate as required for special taxes); *Legislature of Cal. v. Deukmejian*, 669 P.2d 17, 27 (Cal. 1983) ("Although the initiative power must be construed liberally to promote the democratic process[,] when utilized to enact statutes, those statutes are subject to the same constitutional limitations and rules of construction as are other statutes." (citation omitted)).

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[The initiative is] one of the most precious rights of our democratic process. It has long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it. In response to this broad constitutional reservation of power in the people, the courts have consistently held that the Constitution's initiative and referendum provisions should be liberally construed to maintain maximum power in the people. Any doubts should be resolved in favor of the exercise of these rights.<sup>62</sup>

The strongest argument Repair California had—and one that lay at the heart of many of the issues surrounding the constitutional convention—was the doctrine of popular sovereignty expressed in article II. If the constitution gives all political power to the people, and if the constitution grants the people the right to alter or reform the government when the public good may require it, then surely the people ought to be able to decide whether to grant themselves the power to place on the ballot the question of whether there should be a convention without a two-thirds vote of the legislature. In any event, a qualitative revision requires a fundamental change in the constitutional framework.<sup>63</sup> Allowing the people to place on the ballot the question of whether there should be a constitutional convention would not alter the existing constitutional rules that (1) the people would vote on whether there should in fact be a convention (namely, Prop 2) and (2) at the end of the process the people would vote on whether to approve the revision itself. The only arguable change to the constitutional framework would be a relatively insignificant and procedural one, namely that the legislature would not have the sole power to *start* the constitutional convention process—all the remaining steps necessary to approve and hold a convention (not to mention ultimate approval of the work of a convention) would not be altered by allowing the people to ask the initial question: Should there be a constitutional convention?

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62. *Indep. Energy Producers Ass'n*, 136 P.3d at 185–86 (quoting *Associated Home Builders, Inc.*, 557 P.2d at 477 (citations omitted) (internal quotation marks omitted)).

63. *See, e.g., Strauss v. Horton*, 207 P.3d 48, 99–101 (Cal. 2009) (citing *Legislature of Cal. v. Eu*, 816 P.2d 1309, 1318–20 (1991)).

It struck us as not insignificant that the one case in which the Supreme Court of California found a ballot measure to be a revision, *Raven*, concerned perceived limits on judicial power.<sup>64</sup> Prop 1 would not affect the power of the judiciary in any way. In fact, it arguably would not affect the balance of power of any of the branches of government—it would only give to the people a power that would also still remain with the legislature (which could always call for a convention itself under Prop 1’s modified article XVIII, section 2) but that the legislature was not exercising. Of all the changes Prop 1 proposed, allowing the people to ask whether to have a convention seemed to us the least controversial.

### *B. Limiting Scope*

As discussed in Part V above, Prop 1 proposed to modify article XVIII, section 2, to allow the people to limit the convention’s scope when calling for a convention. We found no useful precedent that would allow us to predict with any certainty whether a court would find this to be a “far reaching” change in government that would amount to a revision.<sup>65</sup> But in the absence of any California precedent to draw on, we thought it probable that other states’ methodologies would persuade a court (see Part V, above) to conclude that limiting the convention’s scope was prudent and would, if anything, limit changes in government rather than promote the kind of far-reaching changes that might characterize the measure as a revision. While we anticipated a likely battle after the convention as to whether a proposed revision exceeded the permissible scope, we distinguished that issue from whether we could limit the scope in the first place.

### *C. Selecting Delegates*

As discussed in Part IV above, Repair California could not accept a process that involved the election of delegates to a convention, as is currently called for in the constitution.<sup>66</sup> We thought that the issue that raised the largest risk of a court finding Prop 1 to be a revision was the portion of the measure that eliminated

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64. *Raven v. Deukmejian*, 801 P.2d 1077, 1077 (Cal. 1990).

65. *See Brosnahan v. Brown*, 651 P.2d 274, 288–89 (Cal. 1982).

66. CAL. CONST. art. XVIII, § 2.

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the requirement for electing delegates and permitted an unspecified selection process instead. (The details of the process were contained in Prop 2 so that challenges to the particular methodology would be distinguished from challenges to the concept of delegate selection.) Especially when viewed in combination with Prop 1's other changes, we wondered whether a court would view removing the requirement that delegates be elected as fundamentally at odds with an electoral structure that is at the heart of so many of our democratic processes.

It is important to remember that Prop 1 did not prohibit the election of delegates. It only specified that the measure calling for a convention—namely, Prop 2—should specify the details of how delegates were to be elected or selected. The legal issue concerning whether such a change amounted to a revision did not necessarily have to do with the specifics of a particular delegate-selection model (which would be a challenge to Prop 2). Rather, the judicial focus would, we hoped, center on shifting the decision as to the methodology out of the constitution altogether. In other words, the question was not whether Prop 1 was a revision because it allowed delegates to be selected. Rather, the question was whether Prop 1 was a revision because it gave the people the power, when calling for a convention, to decide whether and how delegates were to be elected or selected. The policy and political determination *not* to elect delegates was so fundamental to Repair California's movement that providing a definitive answer to this significant question ultimately turned out not to be terribly important—electing delegates was such a non-starter that any legal risk was worth taking.

We had no ready legal solution to this problem beyond the popular sovereignty doctrine that we imagined would become the ultimate defense to almost any question having to do with the convention. A fundamental question that would have been for the courts to decide is what, if any, limits are there to the popular sovereignty theory.<sup>67</sup> We acknowledged that we would be testing the limits of this theory. But we placed our bets on a court bending over backward to further the intent of voters who had voted to call a convention to revise their own constitution.

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67. What such limits might be is a subject worthy of additional analysis but is beyond the scope of this brief Article.

*D. The “Back Door”*

While we could not answer with certainty the question of whether a court would find Prop 1 to be an impermissible revision, we did have a possible way of getting around the problem in the first place. We drafted Prop 1 to include a “back door” through which we hoped a court would allow the convention to proceed if necessary.

Prop 1 allowed the people to “authorize the convention to propose both a revision and a series of separate amendments to the Constitution.”<sup>68</sup> The inclusion of this phrase had two purposes: a practical future one and a preemptive legal one. The practical consideration was to give the convention maximum flexibility. If for some reason it could not—or deemed it prudent not to—arrive at a comprehensive revision, the convention could propose a series of amendments to be voted on separately like any other initiative. But more importantly, if a court struck down Prop 1 as being a revision (for instance, because of the delegate-selection issue), we intended to argue that delegates could still be selected for the purpose of a convention that would not revise the constitution but would instead propose a series of separate amendments. No representative body of elected delegates would be necessary for such a limited purpose as any individual can propose an amendment initiative.<sup>69</sup> We drafted the severability clause of Prop 1 expressly to indicate to a court hearing a challenge to the delegate-selection process that we intended the convention to take place even if it was not for the purpose of revising the constitution.

## VII. CONCLUSION

Funding necessary for a two-initiative signature-gathering effort dried up in the spring of 2010, and Repair California did not even manage to place Props 1 and 2 on the November 2010 ballot. There will be no constitutional convention in California in the foreseeable future. While my involvement was as an initiative drafter, I freely confess to being swept up by Repair California’s almost evangelical enthusiasm. In the hope that others will succeed where Repair California failed, I write this Article so that those who may follow in Repair California’s footsteps will have the benefit of our legal

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68. *Inactive Initiative Measure 09-0066*, *supra* note 3.

69. CAL. CONST. art. II, § 8(a).



analysis. A constitutional convention is a dream whose time may not yet have come.