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## The Blessings and Curses of Piecemeal Reform

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## ESSAY: THE BLESSINGS AND CURSES OF PIECEMEAL REFORM

*Thad Kousser\**

*Although many expected 2010 to be the year of comprehensive constitutional change in California, plans for calling a constitutional convention in the state collapsed. Instead, interest groups and legislators—whose goals were disjointed and often diametrically opposed—worked to pass five separate “piecemeal reforms” amending the constitution. This Essay examines the process of piecemeal reform, drawing on California history, jurisprudence in the state, and the experiences of other states to lay out the benefits as well as the costs of this approach to constitutional change. It concludes by suggesting an alternative approach to reform that seeks to capture the blessings while avoiding the curses of the piecemeal process.*

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## I. INTRODUCTION

The year 2010 was supposed to be the year of comprehensive constitutional reform<sup>1</sup> in California. With influential columnist Dan Walters calling the state “ungovernable”<sup>2</sup> and former state librarian Kevin Starr warning that California might become the “first failed state in America,”<sup>3</sup> the magnitude of California’s constitutional crisis seemed to necessitate a far-reaching revision of its governing plan. A majority of voters favored making “fundamental changes” to the constitution.<sup>4</sup> The Repair California campaign, an outgrowth of the prominent business group called the Bay Area Council, held a series of well-attended town hall meetings across the state throughout 2009. It also proposed a concrete plan to place a call for a citizens’ constitutional convention on the November 2010 ballot.<sup>5</sup> The convention call was backed by Governor Arnold Schwarzenegger, endorsed by reform groups such as Common Cause, and enthusiastically embraced by the state’s major newspapers.<sup>6</sup> This

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1. I use the term “reform” here in the neutral fashion often employed by political scientists. Abandoning the hope that every well-intentioned reform will bring positive effects, but refraining from placing “reform” in quotation marks to signify the belief that all attempts at governmental progress are hopeless, I simply use “constitutional reform” to indicate any proposed change of electoral and governing structures.

2. For but one example of the enunciation of this verdict, see Dan Walters, *Candidates’ Promises Defy Reality*, SACRAMENTO BEE, June 13, 2010, at A3.

3. Starr is quoted in Paul Harris, *Will California Become America’s First Failed State?*, OBSERVER (London), Oct. 4, 2009, at 32, available at [www.guardian.co.uk/world/2009/oct/04/california-failing-state-debt](http://www.guardian.co.uk/world/2009/oct/04/california-failing-state-debt) (quoting Kevin Starr).

4. CAL. OP. INDEX, A DIGEST SUMMARY CALIFORNIA VOTERS OPINION ABOUT STATE CONSTITUTIONAL REFORM AND RELATED ISSUES 1 (2009), available at <http://www.field.com/fieldpollonline/subscribers/COI-09-Oct-CA-Constitution-Reform.pdf>. The October 2009 Field Poll, jointly designed by the Field Poll and a group of academics at Stanford, U.C. Berkeley, U.C. San Diego, and CSU Sacramento (including the author) asked a random sample of 1,005 registered voters in California a series of twenty questions regarding constitutional reform. When they were asked “Do fundamental changes need to be made to the state constitution or are fundamental changes not needed?,” 51 percent of respondents said changes needed to be made, 38 percent said fundamental changes were not needed, and 11 percent were undecided or had no opinion. See CAL. OP. INDEX, *supra*. Unless otherwise noted, the public opinion data cited below draws on this survey.

5. Press Release, Repair Cal., California Constitutional Convention Campaign Put On Hold (Feb. 12, 2010) (on file with author); *California Constitutional Convention*, REPAIR CAL., [http://www.repaircalifornia.org/about\\_california\\_convention.php](http://www.repaircalifornia.org/about_california_convention.php) (last visited Oct. 21, 2010).

6. John Grubb, *Californians Have the Opportunity to Fix State*, S.F. CHRON., Jan. 3, 2010, at E2 (discussing the state’s major newspapers’ positive response to the idea of having a constitutional convention); George Skelton, *Gov. Gets Second Wind as a Reformer*, L.A. TIMES, Feb. 26, 2009, at B1 (“Gov. Arnold Schwarzenegger says he ‘absolutely’ loves the idea of holding a constitutional convention to overhaul state government.”); *California’s Constitution—*

appeared to be Californians' golden opportunity to revamp the political structure of the Golden State in a coordinated, wide-ranging leap of reform. Yet the campaign for a convention collapsed as quickly as it rose. Repair California generated grassroots excitement, but failed to generate the money necessary to gather enough signatures to reach the ballot or the funds to run a serious statewide campaign. By February 2010, it abandoned its proposal for comprehensive change. The state will instead be taking small steps, if any, toward change.

A series of propositions that aim at making piecemeal reform soon filled the void that this collapse left in the state's constitutional conversation. A collection of five initiative constitutional amendments (ICAs) appeared on the November 2010 ballot. Backed by more narrow interests and often in conflict with one another, these piecemeal reforms addressed issues ranging from the voting thresholds required for passing budgets or raising fees to the redistricting process to the protection of city finances from state raids. Amendments that would alter legislative term limits and restructure the state's budget process appear to be headed to the ballot in 2012.<sup>7</sup> More of the ideas backed by California Forward, the cautious reform group that outlasted the incandescent Repair California, may appear in future elections. The sum of all of their parts could bring change as profound as what might emerge from a constitutional convention, but the prospects for passage of any one of them is far from certain. Is this any way to rewrite a constitution?

Many observers complain that it is not, bemoaning the lost opportunity to make changes commensurate with the magnitude of the state's challenges.<sup>8</sup> Others voice their concern with the role that moneyed interests play in pushing piecemeal changes designed for

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*Time For Overhaul, Common Sense*, CAL. COMMON CAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=5288637> (last visited Oct. 20, 2010) ("The Board of California Common Cause has voted unanimously to support the call for a California Constitutional Convention.").

7. For analysis of pending propositions and previews of future reforms, see *Ballot Measures*, CALIFORNIACHOICES.ORG, <http://californiachoices.org/ballot-measures-2010-11> (last visited Nov. 20, 2010).

8. See CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 26 (2d ed. 2008) ("Piecemeal reforms . . . are politically tempting because they create the impression that a single solution can resolve a complex problem. However, the complexity and diversity of the current problems . . . require a broader set of reforms.").

their authors' advantage onto the ballot.<sup>9</sup> Such complaints are not new: observers have long been dissatisfied with the state's halting history of reform. In their thoughtful critique of the history of constitutional reform in California, Joe Mathews and Mark Paul see the series of half-steps in the past creating a "[n]ew mess built upon old mess."<sup>10</sup>

Is the piecemeal path down which our state is currently headed a dead end, or can it lead to lasting and rational reform? This Essay analyzes the blessings and curses of piecemeal reform through the lenses of constitutional law, political science, and comparative historical study. It is grounded in the specifics of California institutions, legal doctrine, and today's public opinion but yields lessons that may apply to reform more generally. At any rate, the analysis moves beyond the here and now by taking its lessons from other states and from other eras of California's history.

I begin by laying out the three routes that can lead to constitutional change in California: calling a constitutional convention; crafting legislative reform; and, in the piecemeal approach, placing a constitutional amendment on the ballot. First, I review the basic steps in each path, the legal constraints placed on them, and the political dynamics that shape their eventual outcomes. Comparing the processes at the beginning facilitates a later discussion of what might be lost or gained by taking one particular route.

Then, I focus on the current piecemeal approach, laying out the blessings that this much-maligned process can bring. It can make a venerable constitutional law theory—"Brandeisian experimentation"—a reality. One-at-a-time reforms may solve the political problem that has doomed many comprehensive conventions in other states and in California's other eras: their proposed reforms fail at the ballot box when they are brought down by the least popular part of their package. Polling evidence shows that California's proposed constitutional convention was vulnerable to that fate.<sup>11</sup> By contrast, the piecemeal approach gives voters a menu of constitutional options

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9. *See id.* at 14–15.

10. *See* JOE MATHEWS & MARK PAUL, CALIFORNIA CRACKUP: HOW REFORM BROKE THE GOLDEN STATE AND HOW WE CAN FIX IT 18 (2010).

11. *See, e.g., infra* notes 83–87 and accompanying text.

to pick and choose from as they please. It also avoids opening up the Pandora's box of tenuously related issues such as immigration and same-sex marriage which many Californians view as fair game in a convention and which drives voter opinion on many rules of government.

Yet there are plentiful reasons to be concerned about piecemeal reform. One of the curses is simply that legal doctrine limits the scope of constitutional change through the initiative process, although that doctrine has been interpreted in ways that rarely constrain constitutional change in California. Another worry is that reforms authored by warring factions may clash and distort each other's effects. In contrast, a comprehensive approach allows constitutional designers to take seriously political science findings that institutional changes are by nature complex. One of their unintended consequences might be that the interaction between two reforms alters the effects of each. Further, the realities of funding propositions in the state today present a catch-22 for reformers: it is more difficult to find funding for broad, general-interest reform efforts than for narrow proposals, but when those narrow proposals qualify for the ballot, they fare poorly with voters, who see them as helping a single interest. Finally, the record of tight margins of victory for many major piecemeal reforms raises concerns about a razor's-edge majority imposing rules on a voting minority that often contains many of California's racial- and ethnic-minority voters.

To conclude, I present another potential path to reform—a series of bipartisan, single-subject logrolls—that seeks to capture the blessings while avoiding the curses of the piecemeal approach. I provide examples of three such logrolls that could make significant, ideologically balanced changes to California's constitution.

## II. THREE ROUTES TO CONSTITUTIONAL CHANGE

The process of constitutional change in California can begin in any of three ways. These distinct avenues to reform can be pursued separately or simultaneously. First, legislators (or perhaps voters) can call a constitutional convention, a gathering of delegates who could present a wide-ranging set of proposals. Second, legislators—acting, if they like, on the recommendations of a constitutional revision commission that they have appointed—may propose major changes to the constitution. Both of these processes can be used to offer

“revisions” to the constitution, making fundamental changes to the state’s governing structure. More limited changes to the constitution can be made in the third piecemeal process: legislators themselves or citizen groups can author constitutional “amendments.”

I emphasize the key difference between a revision and an amendment. This distinction has been drawn by the California Supreme Court since 1894.<sup>12</sup> A revision brings “changes in the nature of our basic governmental plan”<sup>13</sup> or a “far-reaching change in our governmental framework.”<sup>14</sup> While often a matter of contentious judicial interpretation,<sup>15</sup> the line between a revision and amendment is what divides wholesale from piecemeal reform.

Most importantly, no matter where change originates, voters are the final arbiters, as a majority of voters must approve the products of each process at a statewide election. This roadblock stands in the way of each avenue to reform, making political calculations paramount for those with serious interests in successful reform. My comparison of these processes keeps in mind the electoral forces that bear on all three processes. Each path also faces its own practical and legal constraints, which I point out briefly in the following sections.

#### *A. Route #1: Calling a Constitutional Convention*

The most obvious path toward rewriting a constitution, calling a convention, can also be the most complicated and politically perilous. Currently, California’s constitution sets forth a clear convention process.<sup>16</sup> With a two-thirds vote in each house, state legislators can ask voters to call a convention. If a majority of voters at the next statewide general election support this call, the legislature has six months to provide for a convention and elect delegates from districts of equal population.

Despite the apparent simplicity of these provisions and the Golden State’s near-constant appetite for reform, California has only held one convention (in 1878–79) since drafting its original

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12. *See* *Livermore v. Waite*, 36 P. 424 (Cal. 1894).

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

14. *Raven v. Deukmejian*, 801 P.2d 1077, 1080 (Cal. 1990).

15. *See* Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1539 (2009).

16. CAL. CONST. art. XVIII, § 2.



constitution in 1849.<sup>17</sup> This convention has variously been described as “the greatest civic disaster”<sup>18</sup> and as a distinctively Western document that “expanded the purview of state government, creating new laws and institutions.”<sup>19</sup> Despite receiving criticism for its lack of delegate diversity and the anti-immigrant policies it advanced, the 1878–79 convention did include important gains for labor and result in a new constitution passed by the voters.<sup>20</sup> More telling is the difficulty that elected leaders and reformers have had in bringing their subsequent calls for a convention to fruition. Four successive times—in 1898, 1914, 1928, and 1930—voters rejected calls for a convention that the legislature had placed on ballots.<sup>21</sup> When the voters finally supported a convention call as one of twenty-three propositions that appeared on the 1934 ballot, the legislature then failed to fund and convene it.<sup>22</sup> Since that time, reform advocates have not secured the necessary two-thirds majority in each house to put a convention call before the voters.<sup>23</sup>

Stymied in the legislature, the reform advocates who began Repair California in 2009 held a series of town hall meetings across the state to push for a ballot measure giving citizens the right to call a constitutional convention.<sup>24</sup> They crafted an ICA granting this right and began a drive to gather signatures to place it on the November 2010 ballot.<sup>25</sup> At the same time, they gathered signatures to qualify an initiative that would issue that call, convening a group of 464 delegates selected partially through appointments made by local government and partially by bringing randomly selected citizens

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17. MATHEWS & PAUL, *supra* note 10, at 51; *A Brief History of the California Constitution*, REPAIR CAL., [http://www.repaircalifornia.org/about\\_california\\_convention\\_cahistory.php](http://www.repaircalifornia.org/about_california_convention_cahistory.php) (last visited Oct. 20, 2010); see CTR. FOR GOVERNMENTAL STUDIES, *supra* note 8, at 37.

18. See MATHEWS & PAUL, *supra* note 10, at 22.

19. Amy Bridges, *Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States*, STUD. AM. POL. DEV., Spring 2008, at 58.

20. *Calling a Constitutional Convention*, CALIFORNIACHOICES.ORG, <http://www.californiachoices.org/node/148> (last visited Oct. 21, 2010).

21. *Id.*

22. Eugene C. Lee, *The Revision of California's Constitution*, 3 CAL. POL'Y SEMINAR 2–3 (1991).

23. See CTR. FOR GOVERNMENTAL STUDIES, *supra* note 8, at 209.

24. *California Constitutional Convention*, *supra* note 5.

25. Mike Aldax, *State Seeking Conventional Wisdom on Constitution*, S.F. EXAMINER (Nov. 27, 2009, 2:00 AM), <http://www.sfexaminer.com/local/State-seeking-conventional-wisdom-on-constitution-76349807.html>.

together to elect some of their own as delegates.<sup>26</sup> The *Los Angeles Times*<sup>27</sup> and other major newspapers backed this approach, but constitutional scholar Erwin Chemerinsky criticized it.<sup>28</sup>

The constitutionality of both measures was in doubt because the first may have constituted a constitutional revision impermissibly made through the amendment process, and the second may have run afoul of Voting Rights Act provisions.<sup>29</sup> Yet the constitutionality of the measures was never tested. Repair California's signature drive was crippled from the start: it faced a boycott from Sacramento's major signature-gathering firms, which feared that a convention might lead to restrictions on direct democracy, which would be bad for their businesses.<sup>30</sup> In any case, Repair California failed to raise sufficient funds from the members of the Bay Area Council, the business group that had spawned it, and abandoned its ballot drive in the spring of 2010.

Regardless of how a convention is called, it brings with it many potential benefits, while also posing challenging questions.<sup>31</sup> A convention would create a deliberative, transparent process that enables comprehensive reform. It would be open to public scrutiny, and the debate would force delegates to assemble a solid coalition behind any proposed change. The proposals that convention delegates made would not be limited by the single-subject rule that applies to piecemeal reform, as I later discuss, nor would the delegates be limited to amending rather than revising the

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26. *Id.*

27. Editorial, *A Plan That Works: Ballot Measures Proposed by Repair California to Set Up a Constitutional Convention Deserve Support*, L.A. TIMES, Jan. 3, 2010, at A25.

28. Erwin Chemerinsky, Op-Ed., *The Wrong Fix for California*, L.A. TIMES, May 28, 2009, at A27.

29. Video on Demand: Getting to Reform: Avenues to Constitutional Change in California—Comparing Avenues to Reform: Initiatives, Revision Commission, or Convention (The California Channel 2009), available at <http://www.calchannel.com/channel/viewvideo/772> (highlighting a debate between panelists Pamela S. Karlan of Stanford Law School, Christopher S. Elmendorf of the University of California, Davis, School of Law, and Richard Temple regarding the constitutional merits of the Repair California proposals).

30. John Diaz, *A Sign of State's Dysfunction*, S.F. CHRON., Feb. 21, 2010, at E6; Lisa Vorderbrueggen, *Ballot Advocates Cry Foul: State Constitutional Convention Group Eyes Lawsuit*, CONTRA COSTA TIMES, Feb. 8, 2010, at 1A.

31. For a thorough discussion of state constitutional conventions, see the authoritative works of JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006) and G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* (1998).

constitution. A convention would also likely spark a larger civic debate about reform issues.

But calling a convention would also force Californians to grapple with an unfamiliar set of questions. Who should the delegates be, and would their proposals reflect what Californians want? Should the districts for delegates (or random selection mechanisms) count all California residents equally, or be restricted to legal residents or to voters? Might a convention veer away from governmental reform into the many policy areas covered by our current constitution, which addresses social issues such as same-sex marriage and contains entire articles on motor vehicle revenues and usury? With over a century gone by since California's last experiment with a convention, another trial would certainly bring unanticipated challenges in its implementation.

Success, of course, is not guaranteed to the product of the convention's labor. Delegates could propose a wholly new constitution, a package of revisions, or a series of separate revisions, but each would need to garner majority support in a statewide election. A nationwide study shows that, since 1930, there have been not only thirty-five successful conventions but also twenty-seven<sup>27</sup> failures that did not lead to any voter-approved reforms.<sup>32</sup> Would California's convention propose popular reforms, as Illinois's did in 1970,<sup>33</sup> or become mired in the pitfalls that doomed New York's 1967 attempt?<sup>34</sup>

### *B. Route #2: Revision Through the Legislature*

The second route to comprehensive revision goes directly through the legislature. With two-thirds votes in both the state assembly and the senate—and without consulting the governor—members of the legislature may place a revision on the ballot for

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32. Vladimir Kogan, *Lessons from Recent State Constitutional Conventions*, CAL. J. POL. & POL'Y, Jan. 2010, at 5.

33. REPAIR CAL., 1970 ILLINOIS STATE CONSTITUTION, available at <http://www.repaircalifornia.org/Docs/Illinois.pdf> (last visited Oct. 11, 2010); *Calling a Constitutional Convention*, *supra* note 20.

34. Peter Galie, Professor, Canisius Coll., Remarks at the Getting to Reform Conference: Avenues to Constitutional Change in California (Oct. 14, 2009), available at <http://www.californiachoices.org/sites/californiachoices/files/New%20York%201967.pdf>; *Calling a Constitutional Convention*, *supra* note 20.

voter approval.<sup>35</sup> Revisions may be crafted through either of two deliberative processes. Lawmakers have the option of convening a panel of experts, known as a constitutional revision commission, to review the state's current constitutional structure and recommend changes. Or they may simply delegate the task to a committee of their own members, as both houses did when they each created a Select Committee on Improving State Government in 2009 to consider reform measures.<sup>36</sup> Any proposal authored by a commission or a committee that receives two-thirds votes will be placed before voters at the next statewide election, where it must receive a simple majority of the vote in order to pass.

The fact that the 2009–10 session, held during a time of widely declared constitutional crisis, failed to produce a proposed revision (though it did generate two proposed amendments) demonstrates the political challenge that the two-thirds-vote requirement poses to this process. Because no single party has controlled the necessary supermajority in recent decades, constitutional reform requires a bipartisan deal. This has become increasingly difficult as voters and legislators in California have polarized along partisan lines and as the widening ideological chasm between the parties makes cross-party compromises less frequent.<sup>37</sup> On the other hand, in the rare case that a revision attracts support from members of both parties, its bipartisan nature and endorsements bode well for its chances at the ballot box.

This dynamic is illustrated by the pattern of mixed success by the two constitutional revision commissions convened by the legislature over the past half-century. In 1963, the legislature launched a revision commission that, over the next decade, shepherded through major changes to the state constitution.<sup>38</sup> For example, the commission's work greatly trimmed the length of the

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35. CAL. CONST. art. XVIII, § 2.

36. Press Release, Cal. State Assembly Democratic Caucus, Steinberg, Bass Appoint Assembly and Senate Select Committees on Improving State Government (Sept. 3, 2009), available at [http://democrats.assembly.ca.gov/Issues/California\\_Reform/Press/20090903PR01.aspx](http://democrats.assembly.ca.gov/Issues/California_Reform/Press/20090903PR01.aspx).

37. Thad Kousser, *Does Partisan Polarization Lead to Policy Gridlock in California?*, CAL. J. POL. & POL'Y, Jan. 2010, at 1, 19; Seth E. Masket, *It Takes an Outsider: Extralegislatve Organization and Partisanship in the California Assembly, 1849–2006*, 51 AM. J. POL. SCI. 482, 482–83 (2007).

38. See Lee, *supra* note 22, at 4–7.

constitution and resulted in the creation of a professional, full-time state legislature. The ballot argument for the commission's 1966 Proposition 1A was signed by both gubernatorial candidates that year, Ronald Reagan and Pat Brown, and its bipartisan support helped it to pass by a three-to-one margin.<sup>39</sup> However, the revision commission had more trouble finding common ground on ways to reform the state's initiative process, where a conflict between business leaders and reformers stopped major changes to direct democracy from emerging from the legislature in the 1960s.<sup>40</sup>

In the face of a recession-induced public fiscal crisis in the early 1990s, the legislature convened another revision commission to recommend major reforms to the state constitution. After eighteen months of deliberations, the commission issued its final recommendations,<sup>41</sup> calling for broad changes to the state charter: lengthening legislative term limits, requiring the governor and lieutenant governor to run on the same ticket, and making certain elected posts—including the state treasurer and insurance commissioner—governor-appointed.<sup>42</sup> By the time the commission issued its recommendations in 1996, however, the economy had rebounded and the crisis in state politics had receded. The legislature showed little interest in constitutional reforms, choosing not to vote on the commission's recommendations.

Though it has more recent precedent, the commission approach shares many of the advantages as well as some of the drawbacks of a convention. Because revisions may be made through this process, it allows for fundamental changes to the state's governmental structure and operations. In addition, it permits public deliberation by a representative body and allows the experts—who are most familiar with various constitutional alternatives and their likely consequences—to propose reforms. Yet, because of this, critics point to the inherent conflict of interest in entrusting reform of a political system to the elected officials (or their appointees) who have thrived

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39. THAD KOUSSER, TERM LIMITS AND THE DISMANTLING OF LEGISLATIVE PROFESSIONALISM 13 (2005); Sherry Bebitch Jeffe, *A History Lesson on Part-Time Lawmaking*, L.A. TIMES, Aug. 8, 2004, at A2.

40. See *A Brief History of the California Constitution*, *supra* note 17.

41. CAL. CONSTITUTION REVISION COMM'N, FINAL REPORT AND RECOMMENDATIONS TO THE GOVERNOR AND THE LEGISLATURE 2 (1996).

42. *Id.* at 3–4.

under it.<sup>43</sup> Because legislative amendments and revisions require two-thirds of lawmakers to agree on any changes before presenting them to voters, a small minority of elected officials can block changes that many Californians might find appealing. The deals that emerge from the legislature must by the nature of this process include compromises, and though this elite agreement gives them a good chance at ultimate passage, it does not guarantee their mass appeal.

*C. Route #3: Amending the Constitution in Piecemeal Fashion*

Instead of revising the constitution through a deliberative process, reformers could seek piecemeal amendments. Such amendments can begin in one of two ways. They may be placed on the ballot by legislators through a two-thirds vote in each house, as happened with the successful Proposition 14<sup>44</sup> and the unsuccessful Proposition 15.<sup>45</sup> Legislators need not deliberate over these amendments, and, in fact, Proposition 14 reached the ballot—and later the constitution—as a concession made by Senator Abel Maldonado to a swing voter on an important budget deal.<sup>46</sup> The other path to piecemeal reform is the ICA, which can be authored by any average citizen possessing the resources to gather signatures equal in number to 8 percent of the vote in the last gubernatorial race.<sup>47</sup> In 2010, an ICA required 694,354 valid signatures.<sup>48</sup> The scale of this endeavor requires the use of paid signature-gathering firms that

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43. This criticism most often refers to the conflict of interest in redistricting, but legislators have also been far more reticent than voters to impose term limits and campaign finance regulations on themselves. See KOUSSER, *supra* note 39, at 12–14; John Phippen et al., *Election Reform and Direct Democracy: Campaign Finance Regulations in the American States*, 30 AM. POL. RES. 559, 559–60 (2002).

44. California Proposition 14 is now codified at CAL. CONST. art. II, §§ 5–6.

45. CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 2, 2010: OFFICIAL VOTER INFORMATION GUIDE 66–75 (2010) available at <http://cdn.sos.ca.gov/vig2010/general/pdf/english/complete-vig.pdf>; Jill Stewart, *Proposition 15 Fails Miserably Because California Voters Can't Stomach Paying to Elect Jerks*, LA WKLY. BLOGS (June 9, 2010, 10:16 AM), <http://blogs.laweekly.com/informer/election/prop-15-campaign-finance-fails/>.

46. Bob Egelko, *Open Primary Proposition Survives First Legal Challenge*, S.F. CHRON., Sept. 15, 2010, at C1.

47. CAL. CONST. art. II, § 8(a)–(b).

48. CAL. SEC'Y OF STATE, FEBRUARY 5, 2008 PRESIDENTIAL PRIMARY ELECTION—STATEMENT OF VOTE 19 (2008), available at [http://www.sos.ca.gov/elections/sov/2008\\_primary/17\\_initiative\\_ref\\_qual.pdf](http://www.sos.ca.gov/elections/sov/2008_primary/17_initiative_ref_qual.pdf) (noting the Initiative and Referendum Qualification Requirements for 2007–2010).

charge \$1–3 per signature, many of which turn out to be invalid.<sup>49</sup> Initiative campaigns thus typically submit 1.1 million signatures, making the effective cost of entry into this path of “citizen” reform at least \$2 million.<sup>50</sup>

Though it is costly, this path poses fewer barriers than other routes to reform since no political bargains are necessary. Any organized group with the resources to qualify an initiative can write the text as it pleases, dictating the terms of a bargain that they set before voters and, if the initiative is successful, reaping the rewards of their power to set the agenda.<sup>51</sup> For well-funded groups, this power is worth the price. The ballot for the California General Election on November 2, 2010, featured five ICAs, which qualified through ballot drives funded by unions;<sup>52</sup> the California League of Cities and other local government organizations;<sup>53</sup> business associations and taxpayer rights groups;<sup>54</sup> the independently wealthy Charles T. Munger, Jr.;<sup>55</sup> and an alliance between congressional candidates and the former *Mighty Morphin Power Rangers* producer

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49. John M. de Figueiredo et al., *Financing Direct Democracy: Revisiting the Research on Campaign Spending and Citizen Initiatives* 6 (Nat'l Bureau of Econ. Research, Working Paper No. 16356, 2010) (“With only 150 days to collect these names, nearly all initiative authors pay signature gathering firms \$1–3 per name to collect the requisite number of valid names.”); see *Initiative Fraud*, BALLOT INITIATIVE STRATEGY CENTER, [http://www.ballot.org/pages/signature\\_fraud/](http://www.ballot.org/pages/signature_fraud/) (last visited Nov. 4, 2010) (noting that signature-gathering firms “use an array of tactics, such as forgery, in order to falsely qualify an initiative onto the ballot”).

50. See John Howard, *The Death of Reform in the Capitol?: Absent Cash, Initiatives' Outlook Is Bleak*, CAPITOL WKLY. (Sacramento), Feb. 4, 2010, at A1 (noting that California campaigns typically require millions of dollars to gather enough signatures to qualify an initiative and that proponents of California initiatives commonly turn in a surplus of signatures to ensure that they have a sufficient number); Matthew Yi, *Effort Heats Up to Ban Same-Sex Marriage: Signatures Submitted for Ballot Measure*, S.F. CHRON., Apr. 25, 2008, at A1 (noting that in the battle over same-sex marriage, supporters of an initiative to ban it gathered over 1.1 million signatures in an effort to qualify on the November ballot); de Figueiredo et al., *supra* note 49, at 6 (discussing how signature-gathering firms charge between \$1 and \$3 per signature).

51. See Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUB. CHOICE 27, 27–28 (1978).

52. CAL. SEC'Y OF STATE, *supra* note 45, at 52–55 (describing Proposition 25's elimination of the two-thirds-vote requirement to pass a budget).

53. *Id.* at 30–37 (describing Proposition 22's protection of local government finances from state revenue declines).

54. *Id.* at 56–61 (describing Proposition 26's requirement that extraordinary fees must be passed by a two-thirds vote).

55. *Id.* at 18–23 (describing Proposition 20's expansion of the independent redistricting commission's scope to cover congressional districts).

Haim Saban.<sup>56</sup> An analysis of campaign contributions to ballot measures in California from 1976 to 2004 shows that propositions that promised to benefit a particular industry or small group of citizens raised more money than measures that bring wider benefits.<sup>57</sup> Such funds helped these industries and groups of citizens at the ballot box.<sup>58</sup> The economics of financing direct democracy in modern California play a clear role in shaping the fortunes of piecemeal reforms.

Legal doctrine also places nominal constraints on how amendments—whether they are authored by legislators or by citizens—can change California’s constitution. Amendments can be challenged if the changes they propose could be construed as so fundamental to the state’s governing plan that they constitute a revision or address more than a single subject. Yet, these constraints, as I argue in a later section on the curses of piecemeal reform, have not been interpreted in ways that prevent significant reforms. California’s governing plan has undergone fundamental changes through upheld amendments, thus pointing out the potency of piecemeal reform.

### III. THE BLESSINGS OF PIECEMEAL REFORM

Because it provides the opportunity for major change and puts in place fewer obstacles than other routes, the piecemeal approach has become the most-trafficked avenue to constitutional change in California. It has been utilized by reform groups such as California Forward, the League of Women Voters, and California Common Cause—members of the coalition that successfully created the state’s independent redistricting commission through Proposition 11 in 2008—as well as unions, anti-tax groups, members of Congress, and cities pushing amendments on the November 2010 ballot.<sup>59</sup> What are the advantages that this route promises?

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56. Shane Goldmacher, *Competing Propositions Take Aim at California Redistricting*, L.A. TIMES (Oct. 29, 2010), <http://articles.latimes.com/2010/oct/29/local/la-me-redistricting-20101029> (noting Proposition 27’s elimination of the independent redistricting commission); CAL. SEC’Y OF STATE, *supra* note 45, at 62.

57. *See de Figueiredo et al., supra* note 49.

58. *See id.*

59. *The Ungovernable State: As California Ceases to Function Like a Sensible State, a New Constitution Looks Both Necessary and Likely*, ECONOMIST, May 14, 2009, at 80; L.A. CNTY.



A. *Making Brandeis's Theory of Laboratories for Experimentation a Reality*

In the 1932 case *New State Ice Co. v. Liebmann*,<sup>60</sup> Justice Louis Brandeis offered one of the most powerful and oft-quoted justifications for America's fragmented, often competitive<sup>61</sup> system of federalism: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>62</sup>

An important political science literature shows that states do indeed experiment with innovative policies and that these policies often diffuse around the country in predictable patterns.<sup>63</sup> However, the spread of innovative experiments does not always follow the laboratory model that Justice Brandeis set forth. A happy, scientific form of federalism might work through logical stages. Courageous states could make varied attempts at resolving common policy challenges, then observe and evaluate the effects of innovative policies. Successful innovations could be replicated in other states and on the national level, while failed policies could be abandoned.

Instead of finding evidence of this laboratory model, the empirical record shows that innovations often spread across the country before they can be evaluated. Their replication has more to do with political opportunities<sup>64</sup> and the presence of policy entrepreneurs<sup>65</sup> than with sound judgments of policy effects and replication of the most successful experiments. This is true in policy

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BUS. FED'N, NOV. 2010 BALLOT MEASURES 1-6 (2010), available at [http://www.bizfed.org/files/Nov2010Measures\\_0.pdf](http://www.bizfed.org/files/Nov2010Measures_0.pdf).

60. 285 U.S. 262 (1932).

61. For a discussion of competitive federalism and its relationship to policy innovation and diffusion across the states, see SAMUEL KERNELL ET AL., *THE LOGIC OF AMERICAN POLITICS* 119-21 (4th ed. 2009).

62. *New State Ice Co.*, 285 U.S. at 311.

63. See Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969); see also Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973) (exploring the diffusion of innovation in the states in the areas of education, welfare, and civil rights).

64. See Frances Stokes Berry & William D. Berry, *Tax Innovation in the States: Capitalizing on Political Opportunity*, 36 AM. J. POL. SCI. 715 (1992).

65. See Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738 (1997).

realms from lotteries to school choice<sup>66</sup> and extends to government reforms, such as legislative term limits.<sup>67</sup> Twenty states adopted term limits from 1990 to 1996, before term limits first went into effect in California and Maine after the 1996 elections.<sup>68</sup> Wherever political institutions and voter sentiment gave term limits a good chance of passage, the organized groups that supported term limits pushed for them without waiting for practical experience or any other evaluation of their effects.<sup>69</sup>

The piecemeal approach to reform provides an opportunity to follow Brandeis's model by moving incrementally, guided by evaluations of effects (though it makes no guarantees that this will in fact be the course of reform). Instead of embarking on a comprehensive course toward solving all of the state's problems at once, California reformers could take discrete steps, study their effects, and judge better what remains to be done. A decade-long program of constitutional change could give policymakers, reformers, academics, and voters a better chance to experiment, evaluate, and act on evidence than a headlong move towards a new constitution could.

The state's recent reform agenda provides a clear example of actions that could be better informed by following Brandeis's model. The independent redistricting commission created by California's 2008 Proposition 11 has yet to be finalized, meet, or draw a single state legislative district.<sup>70</sup> Still, the November 2010 ballot contained both an ICA that would expand the authority of this commission to redistrict Congressional seats as well as those for the state legislature<sup>71</sup> and an ICA that would eliminate the commission altogether.<sup>72</sup> Both appeared to be premature attempts to replicate or abandon a reform experiment before it could be evaluated. Instead of

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66. Berry & Berry, *supra* note 64, at 716–17; *see id.* at 741–42.

67. *See* Rick Farmer & John C. Green, *Introduction: Accelerating Change with Term Limits*, in *LEGISLATING WITHOUT EXPERIENCE: CASE STUDIES IN STATE LEGISLATIVE TERM LIMITS* 1, 1–4 (Rick Farmer et al. eds., 2007).

68. *See id.* at 3; Clifton McCleskey, *Term Limits: Should Virginia Follow Suit*, VA. ISSUES & ANSWERS: PUB. POL'Y. F. (Nov. 1997), <http://www.via.vt.edu/fall97/termlimit.html>.

69. KOUSSER, *supra* note 39, at 7–12.

70. *See* Gerry Shih, *Tackling Redistricting with Money and Zeal*, N.Y. TIMES, Oct. 8, 2010, at A21.

71. CAL. SEC'Y OF STATE, *supra* note 45, at 18–23.

72. *Id.* at 62–67.

attempting to fix California's redistricting process in one fell swoop, reformers should move iteratively, observing and judging the new commission's impact on state legislative districts before taking on the next piece of reform.

*B. Attempts at Comprehensive Reform Often Must Be Broken into Pieces to Succeed*

A comparative look at other states' constitutional reform, as well as California's historical record, shows that attempts at comprehensive constitutional reform often fail unless they are broken into pieces. An analysis of state constitutional conventions shows that nearly half of those held over the past century have failed and that taking a modified piecemeal path is a key to success. Conventions are more likely to succeed when they present voters with a series of separate proposals rather than with a single omnibus package.<sup>73</sup> The experiences of two large, politically divided states comparable to California illustrate this lesson. The omnibus package of reforms drafted at New York's constitutional convention in 1967 included changes ranging from executive reorganization to the environment and from consumer protection to the elimination of the Blaine Amendment (which prohibited government aid to religious schools).<sup>74</sup> Combining all of these contentious measures into a single package set before voters for an up-or-down vote doomed the attempt at reform. Social divisions tore apart the coalition behind the package, and it failed at the ballot box by a three-to-one margin.<sup>75</sup>

Much more successful was the approach taken by delegates to the 1970 Illinois constitutional convention, which put a menu of options before voters.<sup>76</sup> They combined the noncontroversial changes that they proposed into a single document, but then split apart four major, contentious issues into separate amendments.<sup>77</sup> Voters could pick and choose as they pleased, and they ended up passing the

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73. See Kogan, *supra* note 32, at 4.

74. *Id.*; THE HISTORICAL SOC'Y OF THE COURTS OF THE STATE OF N.Y., THE CONSTITUTIONAL CONVENTION OF 1967, available at [http://www.courts.state.ny.us/history/pdf/Library/1967\\_constitutional\\_convention.pdf](http://www.courts.state.ny.us/history/pdf/Library/1967_constitutional_convention.pdf) (last visited Nov. 1, 2010).

75. Galie, *supra* note 34.

76. Kogan, *supra* note 32, at 4.

77. *Id.*; Ann Lousin, *The 1970 Illinois Constitution: Has It Made A Difference?*, 8 N. ILL. U. L. REV. 571, 578-80 (1988).

consensus changes while rejecting all four of the controversial amendments.<sup>78</sup> The lesson for comprehensive reformers from New York and Illinois is that the least popular part of an omnibus package can sink it, so dividing difficult proposals into pieces may offer the best chances of electoral success.

California's experience with constitutional revision offers a similar lesson: breaking reform into pieces is more politically feasible than enacting comprehensive change all at once. The constitutional revision commission established in the 1960s had success with Proposition 1A, its first proposal, in 1966. It failed in 1968 with Proposition 1, however, when the commission rolled reforms to education, local government, utilities, civil service, and other areas of the constitution into a single package.<sup>79</sup> Prior to the election the *Los Angeles Times* editorialized that "the electorate would have been better served had the proposal been less broad in scope,"<sup>80</sup> and the measure was soundly defeated. The commissioners learned their lesson and placed eight separate measures on the ballot in the primary and general elections in 1970.<sup>81</sup> Five of the measures passed.<sup>82</sup> California's revision experience again shows that successful comprehensive reform is divided into separate slices. So why not start with piecemeal reform in the first place?

### C. Public Opinion Research Reveals Few Intersecting Sets of Support

One of the reasons that omnibus packages of reform fail, even when they avoid hot-button social issues, is that supporters of one reform may be opponents of another. This can be the case among voters even when reform leaders embrace the entire constitutional amendment. The set of voters backing an independent redistricting commission (which would take away power from legislative

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78. Ann Lousin, Professor, John Marshall Sch. of Law, Remarks at the Getting to Reform Conference: The Illinois Experience with Constitutional Revision as It Relates to California in the Twenty-First Century (Oct. 14, 2009), available at [http://igs.berkeley.edu/events/reform2010\\_files/lousin.pdf](http://igs.berkeley.edu/events/reform2010_files/lousin.pdf); see Lousin, *supra* note 77, at 579–80.

79. Bernard L. Hyink, *California Revises Its Constitution*, 22 W. POL. Q. 637, 649–51 (1969).

80. Lee, *supra* note 22, at 6 (recapping the 1968 and 1970 campaigns for constitutional revision as well).

81. *Id.* at 6–7.

82. *Id.*

Democrats), for instance, may not overlap with the set that supports reducing the two-thirds vote required to pass a budget (which would empower legislative Democrats). If this is the case, putting the reforms into a comprehensive package might doom them together even if each they could succeed on its own in a piecemeal process.

In fact, voter responses to an October 2009 constitutional reform Field Poll (“the Poll”) show that very few packages of constitutional reform yield intersecting sets of support.<sup>83</sup> There was no lack of appetite for reform among the 1,005 registered voters who responded to the Poll.<sup>84</sup> When asked whether the state constitution required “fundamental changes,” 51 percent said yes and 38 percent said no, apparently opening the door to serious revision.<sup>85</sup> However, while specific proposals found some support, there was very little intersection between the backers of multiple measures. For instance, one “grand bargain” often proposed in California would package together the elimination of the two-thirds vote required to pass a budget with a spending cap that would ensure the newly empowered majority did not break the bank. By itself, the elimination of the two-thirds rule had a decent level of support in the Poll, with 43 percent approving of the change and 52 percent opposing it.<sup>86</sup> The strict spending cap performed even better, with 48 percent of respondents in support and 45 percent disapproving.<sup>87</sup>

What does the Poll reveal about the prospects for combining the two ideas into a popular package? A close look at the partisan bases of support for each reform points out a problem: support for eliminating the two-thirds rule skewed left, with a majority of Democrats backing it while Republicans opposed the idea by a nearly three-to-one margin.<sup>88</sup> By contrast, the strict spending cap appealed to a majority of Republican voters, while a majority of Democrats opposed it.<sup>89</sup> This makes assembling the grand bargain in the electorate difficult. Throwing out undecided respondents, only 18

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83. See CAL. OP. INDEX, *supra* note 4, at 1.

84. See *id.* at 6.

85. *Id.* at 2.

86. *Id.* at 4.

87. *Id.*

88. *Id.*

89. *Id.*

percent of voters supported both of the reforms.<sup>90</sup> A 60 percent majority was torn, supporting one reform but not the other, and 21 percent opposed both.<sup>91</sup> A campaign in favor of the package would begin with the allegiance of fewer than one in five voters and face an uphill battle to persuade Californians to support an omnibus containing a major reform that they opposed on its own.

Even pairing two reforms that the Poll's respondents support did not guarantee success. One of the most popular proposals was increasing the popular vote needed to approve a constitutional amendment from a simple majority to a two-thirds supermajority, an idea supported by a 56 to 36 percent margin and backed by voters from both major parties as well as independents.<sup>92</sup> Combining this proposal with the imposition of a spending cap, which also enjoyed plurality support, did not produce an obvious winner. Only 34 percent of voters backed both measures, while 46 percent supported only one of them and 20 percent backed neither.<sup>93</sup> Again, the campaign prospects of a two-pronged package appear dim. The Poll alone does not reveal whether the electoral fortunes of a package are lifted up or dragged down by its least popular item—an important question that could be answered using survey experiments in future polls—but the Poll painted a bleak picture. There does not seem to be a stable constituency in favor of any and all reform in the California electorate, presenting a challenge that bipartisan reform leaders in groups such as California Forward should carefully consider.

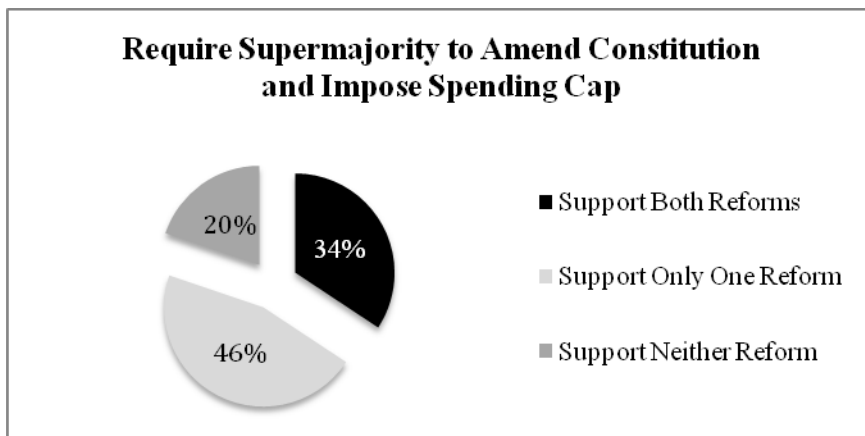
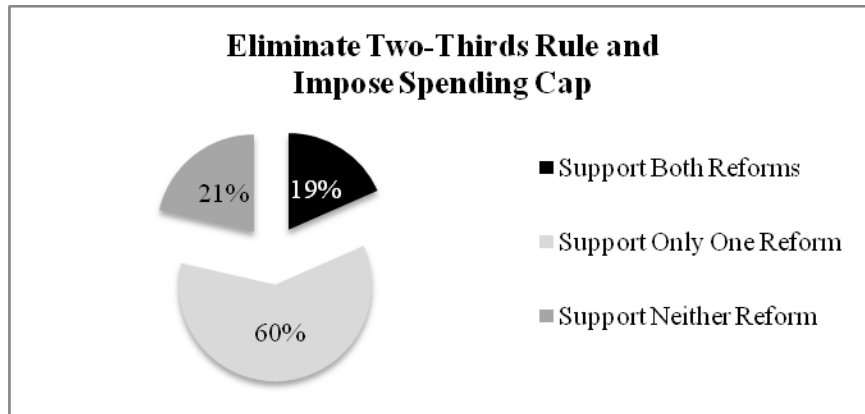
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90. *See id.*

91. *See id.*

92. *Id.* at 5.

93. *See id.* at 4–5.



*D. Avoids the Pandora's Box of Hot-Button Policies*

A final advantage of piecemeal reforms is that they are finite, static proposals. After an amendment has qualified for the ballot, no one can take advantage of Californians' appetite for reform by placing a rider on a popular amendment that veers away from governmental affairs into contentious social issues. This is a worry, by contrast, for a constitutional convention. When Repair California's convention call was still a possibility, some worried that it would open a Pandora's box of controversial policy battles being fought out within the constitution.<sup>94</sup> Because California's governing document does in fact touch on many policy areas ranging from the

<sup>94</sup> See Elise Viebeck, *Failed Convention Post-Mortem*, CAL WATCHDOG (Mar. 18, 2010), <http://www.calwatchdog.com/2010/03/18/new-failed-convention-post-mortem>.

definition of marriage to the right to fish, these fears were not outside the realm of possibility.<sup>95</sup>

The Poll asked voters whether they thought reform deliberations should be limited to the operation of government or whether the debate should also address issues like same-sex marriage and illegal immigration.<sup>96</sup> By a 59 to 33 percent margin, voters wanted to keep same-sex marriage out of the debate, but a 48 percent plurality of voters (over a 41 percent minority) thought that the debate *should* address illegal immigration.<sup>97</sup> If convention delegates did see this as part of their legitimate scope, public divisions on immigration could have doomed the process. Since voters' views on immigration appear to shape their views on constitutional amendments that in no way impact immigration policy,<sup>98</sup> a convention that included the topic of immigration would be politically fraught. Vladimir Kogan's cross-state study of the success of constitutional meetings concluded that "[c]onventions failed, however, when their proceedings were hijacked by advocates of large reforms on issues for which there was little public consensus."<sup>99</sup> Piecemeal reforms, because they cannot be hijacked, stand a greater chance of passage.

#### IV. THE CURSES OF PIECEMEAL REFORM

##### *A. Amendments Are Constrained by Single-Subject and Revision Doctrines*

The most obvious disadvantage of piecemeal reform is that one-by-one amendments ostensibly cannot bring changes as profound as those that might emerge from a convention or a revision commission. Looking closely at the interpretation of this doctrine, though, reveals that the constraints in fact rule out very few attempts at major reform. The single-subject rule requires that every part of an initiative be "functionally related in furtherance of a common

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95. CAL. OP. INDEX, *supra* note 4, at 3.

96. *Id.*

97. *Id.*

98. See Jack Citrin, Iris Hui & Thad Kousser, A Taste for Reform, Presentation at the Annual Meeting of the Western Political Science Association (Apr. 1-3, 2010).

99. See Kogan, *supra* note 32, at 5.



underlying purpose.”<sup>100</sup> Studies show that the application of this rule depends as much on political circumstances as on the objective breadth of an initiative.<sup>101</sup> Further, the single-subject rule has not kept off the ballot multi-pronged reform attempts such as 2006’s Proposition 89, which would have provided public funding for state candidate races at the same time that it brought a new regulatory regime to initiative-campaign finance.<sup>102</sup>

Amendments should not make a “far-reaching change in our governmental framework,”<sup>103</sup> such a privilege is ostensibly reserved to revisions. But the furthest-reaching changes to California’s constitution made in the past generation have both resulted from ICAs and survived challenges on the grounds that they constituted revisions. Proposition 13—which in 1978 changed property tax rates and assessment mechanisms, increased the legislative voting threshold for state tax increases and the popular voting threshold for local tax increases, ultimately realigning the fiscal relationship between state and local governments—was upheld as an amendment.<sup>104</sup> In 1990, Proposition 140 imposed legislative term limits and slashed the legislative staffing budget, radically shifting the balance of power from the legislative branch to the executive branch but surviving a legal challenge on the grounds that it was a revision.<sup>105</sup> More recently, the California Supreme Court initially upheld Proposition 8’s ban on same sex-marriage by ruling that it

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100. *Brosnahan v. Eu*, 641 P.2d 200, 204 (Cal. 1982) (quoting *Schmitz v. Younger*, 577 P.2d 652, 656 (Cal. 1978) (Manuel, J., dissenting)) (noting that the California Supreme Court has adopted Justice Manuel’s dissenting approach).

101. John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399 (2010) (presenting a recent empirical analysis showing that the partisan affiliation of judges appears to affect the likelihood that they will uphold initiatives against single-subject challenges). For a discussion of how this rule has been applied in California, see Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983). See also Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35 (2002) (presenting a national study that compares the discretionary use of the single-subject rule to a rule that was proposed and rejected at the federal constitutional convention that would have allowed judges to nullify congressional acts that they disagreed with).

102. CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 7, 2006: OFFICIAL VOTER INFORMATION GUIDE 8, 82–89 (2006) available at <http://vote2006.sos.ca.gov/voterguide/pdf/English.pdf>.

103. *Raven v. Deukmejian*, 801 P.2d 1077, 1080 (Cal. 1990).

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

105. *Legislature of Cal. v. Eu*, 816 P.2d 1309 (Cal. 1991).

was an amendment rather than a revision.<sup>106</sup> One possible read of judicial doctrine in its recent application is that the revision doctrine may constrain the breadth of constitutional change, disallowing reforms that change many aspects of the state's governing apparatus while allowing deep, reverberating changes that alter only one area of government.

*B. Warring Reforms Can Distort Each Other's Effects*

Perhaps a more pressing problem for the project of piecemeal reform is that the lack of coordination between approaches to reforms prevents individual amendments from acting in concert. Separate amendments can bring disjointed or even antagonistic changes. Reforms pushed by disparate, often-warring authors can work at cross purposes, distorting each other's effects. The 2010 battle of redistricting initiatives is the most obvious example,<sup>107</sup> but not the first. Even amendments proposed by allied forces can interact in unpredictable ways.

During the 1979 tax revolt, Howard Jarvis's Proposition 13 was closely followed by the "Gann Limit" on expenditures of tax revenues.<sup>108</sup> Jarvis and Gann were allied political entrepreneurs, but Jarvis's initiative so drastically reduced the state's tax revenues that Gann's spending limit became virtually a dead letter that had the primary effect of pushing the state to raise more in fees.<sup>109</sup>

The campaign finance changes brought about by Proposition 34 in 2000 have made it easier for parties—rather than candidates—to raise political funds. This may have created a weapon that party organizations can use to play a greater role in determining their standard bearers now that the 2010 "top-two" primary amendment, which gives parties great incentives to clear the field for one

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106. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

107. See Daniel Lowenstein, *Viewpoints: Time to Broaden Redistricting Reforms? No*, SACRAMENTO BEE, Oct. 2, 2010, at 13A; *supra* notes 70–72 and accompanying text. But see David Pacheco, *Viewpoints: Time to Broaden Redistricting Reforms? Yes*, SACRAMENTO BEE, Oct. 2, 2010, at 13A.

108. ARTHUR B. LAFFER ET AL., *RICH STATES, POOR STATES: ALEC-LAFFER STATE ECONOMIC COMPETITIVENESS INDEX* 73–74 (2d ed. 2009).

109. See Thad Kousser et al., *For Whom the TEL Tolls: Can State Tax and Expenditure Limits Effectively Reduce Spending?*, 8 ST. POL. & POL'Y Q. 331, 351 (2008); Thad Kousser et al., *When Does the Ballot Box Limit the Budget? Politics and Spending Limits in California, Colorado, Utah, and Washington*, in *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY* 290–91 (Elizabeth Garrett et al. eds., 2008).

candidate, has passed. When one political change goes into effect, it alters the environment that another reform is intended to affect. This interaction can reshape the impact of multiple reforms. Cross-state comparisons have shown that legislative term limits have a much different impact on states with professional legislatures, such as California, than they have on citizen statehouses.<sup>110</sup> Because there have been recent calls both to alter California's term-limit law and to turn the legislature into a citizen body,<sup>111</sup> it is important to consider the complex interactions between these piecemeal reforms.

### C. *The Catch-22 of Financing Reform*

Interest groups qualify piecemeal reforms for the ballot, rather than the reforms being placed on the ballot by a convention or commission that in some way represents the state. These interest groups often turn to direct democracy because the legislature would not pass their proposals, and their proposals reach the ballot because the groups have the resources to fund professional signature-gathering campaigns. This means that the types of proposals that become the substance of the piecemeal process will be qualitatively different from the types of reforms that emerge from the convention and revision processes. It also means that reforms promising benefits for a narrow group have a better chance at qualifying for the ballot as ICAs than as reform attempts with broader constituent bases. Since voters are not fools, the flip side of this advantage is that narrow-interest initiatives, once qualified, have a lower chance of ultimate passage. Overall, this reduces the chances that the ICA process will produce reform results. The fate of Repair California's attempt to uses two ICAs to call a constitutional convention illustrates this challenge.

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110. Farmer & Green, *supra* note 67, at 1, 4–9 (discussing the results of a cross-state comparison of legislative term limits where states are grouped by the level of legislative professionalism). See generally Karl T. Kurtz et al., *Introduction* to INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE OF TERM LIMITS 1, 3 (Karl T. Kurtz et al. eds., 2007) (“One of our key findings . . . is that the impact of term limits . . . is greatly affected by two factors: the degree of professionalism of the legislator and the restrictiveness of the term limit.”).

111. John Marelius, *Critics Seek a Part-Time California Legislature*, SAN DIEGO UNION-TRIB., Mar. 1, 2010, at A1; Anthony York, *Term Limit Tweak May Be Heading Back to Ballot: New Initiative Closely Resembles Failed 2008 Measure to Change Law*, CAPITOL WKLY. (Sacramento), Oct. 8, 2009, at A7.

After 2009's summer of love and hope for Repair California's constitutional convention idea turned into a fall troubled by campaign logistics and then into a winter of discouraging failure, Californians were reminded once again what a tough trick it is to fund a reform campaign. There was no lack of enthusiasm for the constitutional convention idea; thousands of supporters turned out at town hall meetings across the state, newspapers editorialized about the idea in glowing terms, and Governor Schwarzenegger rarely missed a chance to voice his support for it.<sup>112</sup> Yet the harsh reality is that none of this enthusiasm turned into cold hard cash to support a signature-gathering effort.

This failure illustrates the catch-22 that reform groups always face: it is hard to raise money for ballot measures that do not help any narrow interest, but it is nearly impossible to obtain broad support for measures that appear to provide a special benefit. The first part of this dilemma is easy to read from the story of Repair California. Holding a constitutional convention, with all of the uncertainty about what might emerge from it, did not clearly align with the interests of any major political camp, industry, or benefactor. Support may have been a mile wide, but it was only an inch deep among the groups that could write the six- and seven-figure checks necessary to fund a serious campaign.

The second part of the dilemma can be seen in recent cases of reform propositions that made it to the ballot but failed to win a majority vote because they appeared too tilted toward their benefactors' interests. Proposition 89, the California Nurses Association's 2006 initiative for "clean money" and direct-democracy campaign finance reform, provided comprehensive campaign finance changes.<sup>113</sup> The initiative also included a few provisions that clearly benefited unions and could help the nurses

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112. Erwin Chemerinsky, *The Wrong Fix for California*, L.A. TIMES, May 28, 2009, at A27 (discussing the positive response of the state's major newspapers to the question of a constitutional convention); Skelton, *supra* note 6 ("Gov. Arnold Schwarzenegger says he 'absolutely' loves the idea of holding a constitutional convention to overhaul state government."); Press Release, Repair Cal., Government Reform Coalition Submits Measures to Call California Constitutional Convention (Oct. 28, 2009), available at [http://www.repaircalifornia.org/Docs/oct\\_28\\_repair\\_california\\_press\\_release.pdf](http://www.repaircalifornia.org/Docs/oct_28_repair_california_press_release.pdf) (discussing attendance at town hall meetings).

113. See Dan Morain, *Prop. 89 Takes on Election Funding*, L.A. TIMES, Sept. 26, 2006, at B1.

push for single-payer healthcare reform, a long-time policy goal.<sup>114</sup> As laudable as those goals may have been, changing the rules to benefit a special-interest group did not appear fair to voters, who rejected the proposition handily.<sup>115</sup> In 2008, Assembly Speaker Fabian Nunez and Senate leader Don Perata funded Proposition 93, which would have changed term limits and, not coincidentally, extended both Nunez's and Perata's careers.<sup>116</sup> Again, many strong arguments could be made for this initiative, but the opposition only needed to focus on these two scandal-plagued legislative leaders to turn voters against the measure.<sup>117</sup>

The path of piecemeal reform requires ICAs to overcome two hurdles. The first, qualifying for the ballot, is steepest for broad-based reforms that lack specific patrons. The second, obtaining majority support on election day, is hard for any measure that, no matter how much good it might do for the state, promises even greater benefits for the narrow group that placed it on the ballot. Together, these obstacles have doomed many attempts at constitutional change.

#### *D. Narrow Victories for Amendments Change Constitutions on a Knife's Edge*

Of course, some reform measures have succeeded, though often by strikingly narrow margins. In recent years, a remarkable number of major reforms have passed or failed by a knife's edge in a state that now has 37 million residents:<sup>118</sup>

- 2010's Proposition 14, the top-two primary, won by 398,287 votes<sup>119</sup>

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114. *Id.*

115. *Pros & Cons—In Depth: Ballot Measure: California Fair Elections Act*, LEAGUE OF WOMEN VOTERS OF CAL., <http://www.cavotes.org/vote/election/2010/february/16/ballot-measure/political-reform-act-1974-california-fair-elections-ac/more> (last visited Nov. 13, 2010) (discussing the failure of Prop 89, with 74 percent of California constituents voting no on the measure).

116. Op-Ed., *Corruption of a Good Idea*, S.F. CHRON., Jan. 15, 2008, at B6.

117. Jim Boren, *Passive-Aggressive Lawmakers Just Play to the Crowd*, FRESNO BEE, Feb. 10, 2008, at J3.

118. See Harris, *supra* note 3, at 3.

119. See CAL. SEC'Y OF STATE, STATEMENT OF VOTE: JUNE 8, 2010, STATEWIDE DIRECT PRIMARY ELECTION 19 (2010), available at <http://www.sos.ca.gov/elections/sov/2010-primary/pdf/19-votes-for-against.pdf> (noting there were 2,868,945 votes for Prop 14 and 2,470,658 votes against).

- 2008's Proposition 11, setting up a redistricting commission, won by 197,378 votes<sup>120</sup>
- 2008's Proposition 93, which would have amended term limits, lost by 613,360 votes<sup>121</sup>
- 1990's Proposition 140, which instituted term limits, won by 311,781 votes<sup>122</sup>

These close outcomes for major constitutional changes raise the question of whether there should be any limits on the changes that a simple majority can make to state government, especially in lower-turnout primary elections. Though the decisions on the constitutional amendments listed above reflect the preferences of the median voter, they each left a very large minority of voters unhappy. This is especially troubling given evidence that members of racial and ethnic minorities sometimes end up on the losing end of direct democracy elections.<sup>123</sup> Of course, this is a hazard of all majoritarian decision processes. In the case of California constitutional reform, though, three arguments can be made against passing piecemeal reforms on a knife's edge.

First, when a constitutional amendment wins by a narrow majority, the election does not signal that the winning reform is the median voter's ideal governing structure; it merely shows that the median voter prefers it to the constitutional provision that existed before the election. The amendment's proponents only have to beat the status quo, giving them outsized agenda-setting power in return for the resources that they spent to qualify for the ballot.<sup>124</sup> This is a particular problem for piecemeal initiative reform because the process does not allow for amendment. At a constitutional convention, in a revision commission, or on the floor of the legislature, moderate representatives could offer changes to bring the

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120. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), available at [http://www.sos.ca.gov/elections/sov/2008\\_general/7\\_votes\\_for\\_against.pdf](http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf).

121. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: FEBRUARY 5, 2008, PRESIDENTIAL PRIMARY ELECTION 13 (2008), available at [http://www.sos.ca.gov/elections/sov/2008\\_primary/13\\_votes\\_for\\_against.pdf](http://www.sos.ca.gov/elections/sov/2008_primary/13_votes_for_against.pdf).

122. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 6, 1990, at 9 (1990), available at <http://www.sos.ca.gov/elections/sov/1990-general/1990-general-sov.pdf>.

123. See Zoltan Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154 (2002).

124. See Romer & Rosenthal, *supra* note 51, at 28.

ultimate constitutional proposal closer to what the median voter wants. Lacking this process of give and take, piecemeal reform allows the amendment's sponsors to craft one-sided measures that will succeed as long as they can narrowly defeat the status quo.

Second, simple-majority vote rules that allow would-be reformers to ignore wide swaths of the electorate raise the specter of allowing the winners in an electoral system to write the rules of the game for their further benefit. This is a particular danger in a state, like California, where constitutional amendments may be passed in primary elections or even special elections, such as those held in 2003 and 2005, that have especially low turnout.<sup>125</sup> It might be possible to pass ICAs that put up obstacles to political participation, such as voter identification laws, with a narrow majority in a low-turnout election. The manipulation of electoral rules for the benefit of a temporary majority has a long history in American politics.<sup>126</sup>

Third, it presents an illogical asymmetry that California's constitution requires supermajorities to make so many decisions, but a simple majority can amend it. With two-thirds votes in the legislature required to pass a budget or to raise taxes, and supermajority popular votes required to pass many local taxes and bonds, amending the state constitution is one of the easier tasks in California politics. It is often noted that 1978's Proposition 13 imposed some of these super-majoritarian provisions, when the ICA itself fell short of two-thirds supermajority support, winning with 64.8 percent of the vote in the primary (and thus lower-turnout) election.<sup>127</sup> To many voters, this asymmetry does not make sense. When the Poll asked whether a two-thirds popular vote should be required to amend the constitution, 56 percent favored this change and only 36 percent opposed it, with voters of all party stripes supporting it at equal rates.<sup>128</sup>

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125. See CAL. SEC'Y OF STATE, SPECIAL STATEWIDE ELECTION, OCTOBER 7, 2003: STATEMENT OF VOTE, at xiii (2003), available at [http://www.sos.ca.gov/elections/sov/2003\\_special/sum.pdf](http://www.sos.ca.gov/elections/sov/2003_special/sum.pdf); CAL. SEC'Y OF STATE, SPECIAL STATEWIDE ELECTION, NOVEMBER 8, 2005: SUPPLEMENT TO THE STATEMENT OF VOTE (2005), available at [http://www.sos.ca.gov/elections/sov/2005\\_special/ssov/ssov\\_summary\\_pg\\_1.pdf](http://www.sos.ca.gov/elections/sov/2005_special/ssov/ssov_summary_pg_1.pdf).

126. See Peter H. Argersinger, "A Place on the Ballot": *Fusion Politics and Anti-Fusion Laws*, 85 AM. HIST. REV. 287 (1980); Amy Bridges & Richard Kronick, *Writing the Rules to Win the Game: The Middle Class Regimes of Municipal Reformers*, 34 URB. AFF. REV. 691, 697-99 (1999).

127. *Nordlinger v. Hahn*, 505 U.S. 1, 4 (1992).

128. CAL. OP. INDEX, *supra* note 4, at 5.

## V. CONCLUSION: AN ALTERNATIVE APPROACH

California's current path of constitutional reform—a meandering medley of disparate amendments pushed by a fractious set of authors rather than a comprehensive project of revision—may be surprising given the magnitude of the state's governing crisis. But it should not be surprising that we are on a piecemeal path given California's constitutional history and the records of other states. University of California, Berkeley, political scientist Bruce Cain subtitled his review of California's constitutional change as follows: "The Triumph of Amendment over Revision."<sup>129</sup> This is the way that the Golden State muddles through reform with today's approach a microcosm of our long-standing tradition.

If piecemeal reform is our political reality, how can this common tool be used best? I conclude by advocating an approach that draws on the strengths and combats the characteristic weaknesses of piecemeal reform: reformers should assemble a series of bipartisan "reform logrolls" that each tackles a single subject. Each logroll would combine something that left-leaning voters desire with a reform in the same area preferred by the right. The logrolls could be proposed in sequence, allowing reformers, voters, and scholars to carefully consider the impact of shifts in one area before moving on to fix the next area, thereby making Brandeis's experimental theory a reality. Reforms would be put before voters one at a time, avoiding the electoral vulnerability that harmed many omnibus comprehensive constitutional changes. Like other piecemeal reforms, these amendments would also avoid opening the Pandora's box of divisive social debates.

This approach picks up many of the advantages of piecemeal reform and simultaneously avoids its drawbacks. Because each logroll would contain two provisions focused on a single area of government, the piecemeal reforms would avoid single-subject challenges and most likely be safe against revision challenges. If legislators or groups like California Forward assembled the bipartisan deals, the reforms would not distort each other's effects

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129. See Bruce E. Cain, *Constitutional Revision in California: The Triumph of Amendment Over Revision in State*, in 1 *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM* 60 (G. Alan Tarr & Robert F. Williams eds. 2006).



because they would be planned and drafted in concert. This approach would get around the catch-22 of financing reform. The narrower interests represented by both sides would put up the initial funds, and when measures qualified for the ballot, their bipartisan nature would give them broad appeal. The authors of such reforms would still face the challenge of putting together nonintersecting coalitions to back their initiatives. They would have to compromise to succeed at the ballot box. This would compel them to assemble coalitions like the one that pushed Proposition 1A's revisions to overwhelming victory in 1966<sup>130</sup> and thus avoid making major changes on knife's edge. Concrete examples of reforms that have the potential to fit this mold include the following:

- A majority-vote logroll that would eliminate the two-thirds requirement to pass a state budget in exchange for abolishing the legislative leadership's control over the "Suspense File," which stops bills that might win majority support from ever reaching the floor of the legislature. The first part of this deal would ensure that the party that wins a legislative majority can shape the state's spending plan while the second part would give the minority an equal voice in the legislative process by allowing their bills to pass or fail on their merits.<sup>131</sup>
- A logroll that reduces legislative term limits—the total length of time for which legislators can serve—from fourteen to twelve years but allows legislators to serve all of their time in one house or the other as long as voters keep electing them. An ICA that would enact this change has qualified to appear on the next statewide ballot after November 2010, with the petition drive funded by a coalition of Los Angeles business and labor groups.<sup>132</sup>

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130. KOUSSER, *supra* note 39, at 13.

131. For a more detailed explanation of the Suspense File and its link to majority rule in California, see Thad Kousser, *What Democrats Must Give Up to Restore True Majority Rule to California's Legislature*, 2 CAL. J. POL. & POL'Y Article 8 (2010), <http://www.bepress.com/cjpp/vol2/iss3/8/>, and Gary W. Cox et al., *Party Power or Preferences? Quasi-Experimental Evidence from the American States*, 72 J. POL., 799, 799–811 (2010).

132. In the February 2008 election, voters rejected Proposition 93, which was similar except that it would have applied retroactively to current sitting officeholders, allowing some of them to serve for more than twelve years. CAL. SEC'Y OF STATE, *supra* note 119. The new ballot measure avoids this electorally devastating conflict of interest because it does not apply to any current legislators.

- A logroll requiring that ballot measures, whether they mandate new programs or cut taxes, pay for themselves. Many propositions include politically popular provisions but do not provide a clear source of funding for the new programs or tax cuts that they create. A reform designed to combat fiscal irresponsibility on both the left and the right would require any measure that seeks to increase spending or cut revenues to identify a source—either spending cuts or revenue increases—to pay for itself. A constitutional amendment to require this, Senate Constitutional Amendment 14,<sup>133</sup> was introduced during the 2009–2010 legislative session, but it stalled awaiting a vote on the senate floor. In the Poll, 75 percent of surveyed voters supported this proposal, with support coming evenly from Democrats, Republicans, and independents.<sup>134</sup>

By themselves, none of these changes would resolve California's constitutional challenges. Piecemeal reforms never do. But a sustained project of coordinated, incremental reforms that assemble broad coalitions in support of their limited aims appears to be the most promising path to reform in California.

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133. *Reforms Headed to the Ballot in November*, CALIFORNIACHOICES.ORG, <http://californiachoices.org/reforms-headed-to-the-ballot-in-november> (last visited Nov. 9, 2010).

134. See CAL. OP. INDEX, *supra* note 4, at 5.

