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California Should Return to the Indirect Initiative

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CALIFORNIA SHOULD RETURN TO THE INDIRECT INITIATIVE

*Robert M. Stern**

Recognizing that California's initiative system is under attack, this Article proposes a return to the indirect initiative process, which California adopted in 1911 and repealed in 1966. If an initiative's proponents gather a sufficient number of signatures, the indirect initiative process allows the legislature to review and pass the proposal before placing the initiative on the ballot, eliminating the need for a traditional vote. This Article explains the history behind California's initiative process, examines the reasons why California repealed the indirect initiative once before, and explores the indirect initiative variations that other states employ. After addressing the arguments against the indirect initiative process, this Article puts forth an amended indirect initiative solution—one that would quell voters' concerns by reducing the number of measures on the ballot and by encouraging better-drafted initiatives.

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TABLE OF CONTENTS

I. INTRODUCTION	673
II. CALIFORNIA'S INDIRECT INITIATIVE PROCESS	674
III. USE OF INDIRECT INITIATIVE IN STATES OTHER THAN CALIFORNIA	676
IV. IDEAL SYSTEM FOR CALIFORNIA	679
A. Arguments Against the Indirect Initiative	681
B. Better-Drafted Initiatives	683
V. CONCLUSION.....	685

I. INTRODUCTION

California's initiative process needs to be preserved but improved. It is under attack by a number of people in and out of the state. Those who support the initiative process recognize that it is not perfect but are concerned that those who want to get rid of it will propose changes to undermine it. On the other hand, those who oppose direct democracy are reluctant to suggest anything to improve it for fear that states currently lacking a direct democracy system might adopt an ideal process. And finally, there are those who say that they like the initiative process but that California's use of it gives it a bad name. They are asking for ways to make the process better while still keeping it.

The Center for Governmental Studies (CGS) has issued two editions of its book on this initiative process, *Democracy by Initiative: Shaping California's Fourth Branch of Government*. CGS published the first edition in 1992¹ and the substantially revised second edition in May 2008.² Both books suggest as their major recommendation returning to what is called the "indirect initiative."³

What is the indirect initiative? In its simplest terms, it allows the legislature to review an initiative before it is put on the ballot.⁴ If the legislature decides to pass the proposal, then the voters do not have to consider it.⁵ California, at one time, had this process, and ten other states currently use it in one form or another.⁶ This Article will examine what the indirect initiative was in California until it was repealed in 1966,⁷ what it is in other states, and why and how California should return to it in a new and improved way.

1. CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* (1st ed. 1992).

2. CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* (2d ed. 2008).

3. *See id.* at 17–18.

4. *Id.* at 4.

5. *Id.* at 47 n.51.

6. *Id.* at 124 n.72 (highlighting that California repealed its indirect initiative process in 1966 and noting that Alaska, Maine, Massachusetts, Michigan, Mississippi, Nevada, Ohio, Utah, Washington, and Wyoming all currently employ a form of the indirect initiative process). Mississippi also uses the indirect initiative process for its constitutional amendments. MISS. CONST. art. 15, § 273.

7. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 4.

II. CALIFORNIA'S INDIRECT INITIATIVE PROCESS

When California's voters adopted the initiative process in 1911, they allowed the legislature to get involved if the proponents of an initiative so desired.⁸ In doing so, the voters gave an incentive to the proponents to use the indirect process. If the sponsors of a proposed initiative were willing to have the legislature review and perhaps adopt their measure, they needed to gather signatures of at least 5 percent of the total votes cast at the last gubernatorial election.⁹ If, on the other hand, the proponents did not want the legislature to consider their initiative, the proponents had to collect signatures amounting to at least 8 percent of the last gubernatorial vote—37.5 percent more signatures.¹⁰

One would assume that most proponents would have chosen to collect fewer signatures and go to the legislature. Yet, in reality, few proponents used the indirect alternative.¹¹ Consequently, most political experts have assumed that the indirect process failed.¹² But if one looks more carefully at the rules the process requires, the reason for the indirect process's lack of use becomes clear.

Before 1967, the California legislature was a part-time legislature, meeting for six months in odd-numbered years¹³ and for a short budget-only session in even-numbered years.¹⁴ Thus, the legislature could only consider all non-budgetary matters, including initiatives, in the odd-numbered years.¹⁵ In order for an initiative proponent to meet the deadline for the legislature to consider the measure in an odd-numbered year session, the proponent had to circulate the initiative almost two and one half years before the election in which the initiative would appear.¹⁶ Under the provisions of the California Constitution, the proponent had to qualify the initiative ten days before the legislative session began, and the

8. *Id.* at 32.

9. CAL. CONST. art. IV, § 1 (repealed 1966).

10. *Id.*

11. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 48 n.51.

12. *See id.* at 72–83.

13. *Id.* at 4.

14. *Id.* at 113 n.47.

15. *Id.* at 113.

16. *Id.*

legislature had only forty days to pass or reject the measure.¹⁷ If the legislature failed to approve the measure in the odd-numbered year, it would then go on the November ballot in the following even-numbered year.¹⁸ Unlike today, where initiatives appear on both the June and November ballots, initiatives only appeared on the November ballot during this period.¹⁹

Prior to the repeal of the indirect alternative in 1966, only nineteen initiative proponents had opted to use the indirect process.²⁰ Of the nineteen initiatives, only four measures received enough signatures to force the legislature to consider them,²¹ and the legislature enacted only one (a measure concerning fishing control) in 1936.²² The three indirect initiatives that the legislature rejected thus appeared on the ballot. In 1942, voters rejected an initiative that would have reorganized the building and loan associations;²³ in 1952, voters approved an initiative placing old-age-security programs under the state—rather than the counties—and increasing payments to seniors; and in the same year, voters rejected an initiative repealing cross-filing of elections.²⁴

Another reason why only a few measures used this process was that the legislature, in order to remove the measure from the ballot, had to adopt it word for word.²⁵ Proponents and the legislature could not negotiate with each other to forge a compromise measure or to perfect imperfect proposals.²⁶

17. CAL. CONST. art. IV, § 1 (repealed 1966).

18. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 113; *see* CAL. CONST. art. IV, § 1 (repealed 1966).

19. *See* CAL. CONST. art. IV, § 1 (repealed 1966); *see also* CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 113 n.48 (giving an example of an initiative appearing on a ballot in November and noting that initiatives could only appear on general and not primary election ballots).

20. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 112–13.

21. *See id.*

22. *See id.* at 113 n.46.

23. JOHN M. ALLSWANG, CALIFORNIA INITIATIVES AND REFERENDUMS 1912–1990: A SURVEY AND GUIDE TO RESEARCH 96 (1991).

24. *Id.* at 111 (noting that cross-filing allowed candidates to seek the nomination from more than one party).

25. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 113.

26. *Id.*

III. USE OF INDIRECT INITIATIVE IN STATES OTHER THAN CALIFORNIA

Ten of the twenty-four other states that have the initiative process provide for some form of indirect initiative. Those states are Alaska, Maine, Massachusetts, Michigan, Mississippi, Nevada, Ohio, Utah, Washington, and Wyoming.²⁷

All of these states except Utah and Washington mandate that the initiative proponent use the indirect method for statutes.²⁸ However, both Utah and Washington offer an optional incentive to choose the indirect option.²⁹ Washington gives those proponents who opt for the indirect initiative process ten months to circulate a statutory initiative.³⁰ If the proponent chooses to avoid going to the legislature, he or she only has six months to circulate the measure.³¹

However, a closer examination of the Washington state law shows that this incentive requires the proponents to finish collecting signatures by the beginning of the election year in order to give the legislature the entire election year to consider the merits of the measure.³² Most proponents will not want to start collecting signatures that early. In contrast, proponents who choose the direct initiative route can start collecting signatures ten months before the election and must submit their signatures a mere four months before the election.³³

Utah provides an alternative to initiative proponents: go the direct or indirect route.³⁴ If the proponent chooses the indirect option, he or she must gather signatures equaling at least 5 percent of the last gubernatorial vote.³⁵ Then the measure goes to the legislature, which has to approve it without change (except for technical

27. *Id.* at 124 n.72; *see e.g.*, MISS. CONST. art. 15, § 273. South Dakota ended its indirect-initiative system in 1988, twenty-two years after California repealed its process. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 124 n.72

28. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 127.

29. *See id.*; *see also The Indirect Initiative*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16587> (last visited Nov. 17, 2010) ("In Utah, the initial signature requirement is lower for the indirect process.").

30. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 127.

31. *See id.*

32. *See* WASH. REV. CODE § 29A.72.030 (2009).

33. *Id.*

34. *The Indirect Initiative*, *supra* note 29.

35. UTAH CODE ANN. § 20A-7-201(1)(a) (West 2004).

amendments).³⁶ If the legislature rejects the proposal, then the proponent has to collect signatures equaling another 5 percent of the last gubernatorial vote—for a total of 10 percent—the same percentage that a proponent who tries to qualify a direct initiative must gather.³⁷ Thus, the only advantage in Utah for a proponent is the chance that the legislature will approve its indirect initiative after just 5 percent (rather than 10 percent) of the last gubernatorial vote has been collected.³⁸ Using the indirect option also means that the proponent is at a disadvantage if the legislature does not approve the measure.³⁹ The proponent will have to re-energize circulators and perhaps even recruit and train new petition gatherers.

Unlike Washington and Utah, the remaining eight states require the indirect method for statutes. For example, in Ohio, after the proponents gather signatures equaling at least 3 percent of the last gubernatorial vote, the initiative must go to the legislature for consideration.⁴⁰ If the legislature passes the measure in its original form or with amendments, the initiative does not appear on the ballot.⁴¹ If the legislature rejects the proposal, the proponents must circulate the initiative for an additional 3 percent of signatures before it can be placed on the ballot.⁴² The proponents may amend their initiative if either or both houses of the legislature have passed such amendments.⁴³ This process is only used for statutory initiatives, not for petitions that amend the constitution.⁴⁴

In Alaska, a measure may not go on the ballot until after the legislature has considered it.⁴⁵ If the legislature passes a measure in

36. *Id.* § 20A-7-208(1)(a)–(b).

37. *Id.* § 20A-7-208(2).

38. *The Indirect Initiative*, *supra* note 29 (“[P]resenting an indirect initiative to the Legislature requires signatures equal to 5 percent of the votes cast for governor in the last election. However, if the indirect initiative is rejected by the Legislature, proponents must gather additional signatures equal to 10 percent of the votes . . .”).

39. *Id.*

40. OHIO CONST. art. II, § 1b.

41. *Id.*

42. *Id.*

43. *Id.*; CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 124–25.

44. Compare OHIO CONST. art. II, § 1b (describing the process by which initiatives can be used to enact Ohio state laws), with OHIO CONST. art. II, § 1a (describing a separate process by which initiatives can be used to amend the Ohio Constitution).

45. ALASKA CONST. art. XI, § 4; CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 125; GORDON HARRISON, ALASKA LEGISLATIVE AFFAIRS AGENCY, ALASKA’S CONSTITUTION: A CITIZEN’S GUIDE 179 (4th ed. 2002) available at <http://w3.legis.state.ak.us/docs/pdf/>

response to an initiative, the lieutenant governor, with the concurrence of the attorney general, determines whether the legislative act is substantially the same as the initiative.⁴⁶ If they determine that the legislative act and the initiative are substantially the same, the initiative is removed from the ballot, even if the proponents object.⁴⁷ If the legislature does not pass a bill in response to the initiative, the initiative goes on the next statewide ballot held at least 120 days after the legislature has adjourned.⁴⁸

Wyoming's indirect initiative procedure is very similar to Alaska's, except that only the attorney general decides if the legislative measure is close enough to the initiative that the measure will not go on the ballot.⁴⁹ The procedure in Alaska and Wyoming adversely affects initiatives since the proponents have no control over the final language approved by the legislature and cannot object to a legislative determination that their initiative should not be placed on the ballot.⁵⁰

In Massachusetts, the initiative must go to the legislature for consideration.⁵¹ If the legislature adopts the measure as written, the initiative does not go on the ballot.⁵² The law allows the proponents to submit perfecting amendments to the attorney general while the legislature considers the initiative.⁵³ If the legislature does not approve the initiative, then the proponent must obtain additional

citizens_guide.pdf ("By the terms of this section, an initiative may not go before the voters until the legislature has had an opportunity to contemplate the subject matter of the initiative over a full session and decide whether to adopt a similar law.").

46. ALASKA CONST. art. XI, § 4; ALASKA STAT. § 15.45.210 (2008); CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 125 n.73.

47. ALASKA CONST. art. XI, § 4; ALASKA STAT. § 15.45.210; CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 125.

48. ALASKA CONST. art. XI, § 4.

49. WYO. STAT. ANN. § 22-24-119(a)(iii) (2009); CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 125 n.73.

50. WYO. STAT. ANN. § 22-24-122; CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 125 ("Even in Alaska and Wyoming, . . . proponents are given neither the authority nor an incentive to negotiate improvements in the proposal with the legislature.").

51. MASS. CONST. amend. art. XLVIII, pt. II.

52. MASS. CONST. amend. art. XLVIII, pt. V, § 1, *amended by* MASS. CONST. amend. art. LXXXI, § 2.

53. MASS. CONST. amend. art. XLVIII, pt. V, § 2, *amended by* MASS. CONST. amend. art. LXXXI, § 3.

signatures amounting to 0.5 percent of all votes cast in the last gubernatorial election.⁵⁴

An initiative amending the Massachusetts Constitution must also go to the legislature for consideration.⁵⁵ The proposal must receive at least a 25 percent vote at two successive legislative sessions to be placed on the ballot.⁵⁶

Four other states—Maine, Michigan, Mississippi, and Nevada—also mandate that any initiative that has qualified for the ballot go to the legislature first.⁵⁷ If the legislature enacts the measure without a single change, the initiative does not go on the ballot.⁵⁸ If the legislature rejects the proposal, it goes on the ballot.⁵⁹ These states also permit the legislature to put competing measures on the same ballot as the initiative.⁶⁰

IV. IDEAL SYSTEM FOR CALIFORNIA

Voters do not like having to vote on numerous ballot measures⁶¹ or on measures that are poorly drafted.⁶² The process that is suggested below alleviates both of these concerns.

When a proponent turns in enough signatures for the secretary of state to require the counties to begin verifying them to determine whether the initiative has qualified for the ballot, the secretary of state must notify the legislature that it has thirty days to consider the

54. MASS. CONST. amend. art. XLVIII, pt. V, § 1, *amended by* MASS. CONST. amend. art. LXXXI, § 2.

55. MASS. CONST. amend. art. XLVIII, pt. IV, § 4.

56. MASS. CONST. amend. art. XLVIII, pt. IV, §§ 4–5; CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 126 n.74.

57. *See, e.g.*, MISS. CONST. art. 15, § 273; *see also* CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 124 n.72 (listing states that employ a form of the indirect-initiative process).

58. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 124.

59. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 124; *see, e.g.*, MISS. CONST. art. 15, § 273(6).

60. ME. CONST. art. IV, pt. III, § 18, cl. 2; MICH. CONST. art. II, § 9; MISS. CONST. art. 15, § 273(7); NEV. CONST. art. XIX, § 2, cl. 3; *see also* CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 124 (“In some states, such as Maine, Michigan, Nevada and Washington, if the legislature adopts a law that differs from the initiative in any respect, then both the initiative and the law are placed on the ballot.”).

61. *See* CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 348 (citing poll results showing 57 percent of voters “feel that there are too many initiatives on the ballot”).

62. *See id.* at 98 (“Voters may feel justifiably betrayed by initiatives that, because of ambiguous or unconstitutional provisions, are unable to deliver on ballot box promises.”).

measure. The legislature has the option to hold hearings on the proposal but is not required to do so.

During this thirty-day period, the legislature and the proponent can work together to reach an agreement to take the initiative off the ballot. If the proponent, the legislature, and the governor agree on a solution and enact a bill, the initiative is no longer needed, and the voters will not consider it. If the legislature and the proponent cannot agree, the measure goes on the ballot if its proponent has gathered enough qualifying signatures.

There are several reasons why the legislature and the proponents should agree to legislation that takes initiatives off the ballot. First, the public is better served if the legislature enacts a bill that is acceptable to the proponents. The legislative process at its best is far better than the initiative process at its best because the legislature can take the time to examine legislation, and the public can view all the committee and staff analyses regarding the legislation.⁶³ In addition, the legislative hearings are open to the public and allow discussion on ways to improve the proposal.⁶⁴ If there is a resolution, then the legislature will and should receive credit for solving a problem that was the subject of an initiative.

Having the legislature pass the initiative should also help the proponents since they will not have to risk their initiative failing at the ballot box. Moreover, the proponents will not have to raise campaign funds to try to pass their propositions; in many cases, this could save the proponents \$5 to \$10 million.⁶⁵ But most importantly, if the legislature passes their initiative, it ensures that it becomes law.

In 2006, CGS commissioned a poll on the initiative process.⁶⁶ The poll was conducted by Fairbank, Maslin, Maullin & Associates, under the direction of Winner & Associates.⁶⁷ On the question of whether the proponents and the legislature should be permitted a thirty-day period in which to work out legislation that would take the

63. *See id.* at 96.

64. *Id.*

65. *See id.* at 181 tbl.4.5.

66. *Id.* at 348; FAIRBANK, MASLIN, MAULLIN & ASSOCS., CTR. FOR GOVERNMENTAL STUDIES, SOLUTIONS FOR DEMOCRACY, RANDOM DIGIT DIAL SURVEY AND ARS STUDY (2006) (on file with author).

67. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 348 n.3; FAIRBANK, MASLIN, MAULLIN & ASSOCS., *supra* note 66.

initiative off the ballot, 56 percent of Californians agreed provided the proponent was in control of the measure's contents.⁶⁸

Based on forty years of experience watching the legislature respond to initiatives, it is my best estimate that the legislature and the proponents would agree on a solution between 15 and 20 percent of the time, thus reducing the number of measures on the California ballot by one or two per election.

Informally, initiative proponents and legislators have occasionally worked together to enact initiatives through legislation rather than through the voters. CGS's *Democracy by Initiative* lists a few such cases. For example, in 1998, the legislature and initiative proponents agreed to enact legislation that permitted school districts to increase the number of charter schools and to make it easier to create such schools.⁶⁹ Reed Hastings, the initiative's proponent, threatened the legislature by showing them the number of signatures he had gathered (over 1.1 million).⁷⁰ He pledged not to submit the signatures if the legislature passed a bill.⁷¹ The California Teachers Association endorsed the bill but added a provision requiring teachers in such schools to have a state credential and a section that mandated oversight of the school's curriculum and spending.⁷²

A. Arguments Against the Indirect Initiative

When CGS suggested an indirect initiative approach in its first book, published in 1992,⁷³ no legislator introduced it as a bill and nobody submitted it as an initiative. Since 1992, the Center has talked to a number of strong supporters of the initiative process, some of whom are adamant that the process should not be changed in any way, whether by the legislature or through an initiative.⁷⁴ Their arguments center on their distrust of the legislative process.⁷⁵ They look at what other states have done to initiatives after they have

68. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 133; FAIRBANK, MASLIN, MAULLIN & ASSOCS., *supra* note 66, at 25.

69. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 111–12.

70. *Id.* at 87, 111.

71. *Id.* at 87.

72. *Id.* at 111–12.

73. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 1, at 4–5 (providing an outline of recommendations for initiative process reform).

74. *See* CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 134–35.

75. *Id.*

passed, and what the California legislature has tried to do with enacted initiatives that permit legislative amendments.⁷⁶ Their experiences with the legislative process have been negative, and thus they want to leave the current law as it stands.⁷⁷

Some who oppose any change also worry that initiative proponents might be too easily persuaded to drop their initiatives, either because of intense pressure from the legislature and the political elite or even because they might be bought off.⁷⁸ They are concerned that proponents might become convinced that an initiative has no chance of passing, and they will therefore accept severely weakened amendments in order to get something enacted and be able to claim credit for the passage of legislation.⁷⁹ In such a case, the proponents might not represent the will of those who signed the petition, who had supported something much stronger than what the legislature and the proponents accepted. Some people consider signing a petition to be a contract with the proponents so that the proponents should always be required to submit it to the people for a vote.⁸⁰ However, even under the process now in effect, the proponents can change the so-called contract,⁸¹ at least until they submit it to the counties.⁸² The proponents can stop collecting signatures or fail to turn in signatures already collected if they work out a deal with the legislature during the circulation period.⁸³

In addition, very few people who sign petitions read the text or even the summary on top of the petitions.⁸⁴ They generally sign because they agree with the concept or, in some cases, because they do not want to be impolite to the circulator.⁸⁵

76. *See id.* at 129–30.

77. *See id.* at 83 (“For [its staunch defenders], the initiative process stands as the people’s last resort, a way to work around an unresponsive and gridlocked state government.”).

78. *See id.* at 83, 270–71 (discussing the possibility of corruption and manipulation in the initiative process).

79. *See id.* at 74–75 (“Some initiative proponents . . . deliberately add popular (and constitutionally questionable) provisions and terminology to increase the likelihood of passage.”).

80. *Id.* at 135.

81. *See* CAL. ELEC. CODE § 9002 (West 2010).

82. *See id.* § 9030(a).

83. *See* CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 133 (“California’s experience indicates that some proponents are already willing to work with the legislature instead of placing their measures on the ballot . . .”).

84. *Id.* at 135.

85. *See id.*

B. Better-Drafted Initiatives

It is unlikely that the legislature will enact a large number of initiatives with the proponents' approval.⁸⁶ The proponents usually circulate initiatives because the legislature has failed to address the problem.⁸⁷ In the overwhelming number of instances where the legislature and the proponents cannot work out a compromise that takes the initiative off the ballot, the proponents should be allowed to amend the initiative and put the amended initiative on the ballot. This amendment, however, should be permitted only if the attorney general approves the initiative as being consistent with the proposal's original purposes (subject to the Sacramento County Superior Court's review if challenged).

This proposal should generate better-drafted initiatives. Almost no initiative or bill introduced by legislators is perfectly drafted. During the circulation period, and while the legislature is considering the measure, the proponents will most likely discover drafting errors.⁸⁸ Under current law, the proponents cannot change one word of the initiative once the attorney general has issued a title unless the proponents want to start the process over again.⁸⁹

Perhaps the best example of an initiative that needed clarification occurred in 1996 when the California Public Interest Research Group circulated a very tough ethics and campaign reform initiative, Proposition 212.⁹⁰ Only after the proponents had turned in the signatures did they learn that the initiative included a provision that repealed a ban on gifts to legislators and other public officials.⁹¹ The proponents refused to admit their mistake, insisting that they had meant to repeal the provision and that the legislature would fix the problem by imposing even stricter gift restrictions if the initiative passed.⁹² Proposition 212 failed, with the controversy over the gift repeal perhaps playing a factor in the measure's defeat.⁹³

86. *See id.* at 83 ("Even when the legislature appears to respond to the threat of an initiative, proponents do not always find the compromise acceptable.").

87. *See id.* at 1 ("On many of these pressing issues, the elected state legislature and governor failed to act or respond in a manner that would satisfy interested parties.").

88. *See id.* at 2.

89. *Id.* at 96.

90. *See id.* at 102.

91. *See id.*

92. *See id.*

93. *See id.*

Another good example of why the indirect initiative should be mandatory occurred in 2008. Starting in 2005, a coalition of transportation groups circulated a measure to change the way the legislature could take gas tax transportation money.⁹⁴ During this period, the proponents also negotiated a compromise measure with the legislature that was put on the 2006 ballot as Proposition 1A, which the voters approved.⁹⁵

Unfortunately, although the proponents attempted to prevent their first measure from qualifying by holding back 300,000 signatures, the proponents had already gathered and submitted 7,000 too many signatures than necessary,⁹⁶ forcing the secretary of state to certify the measure and put it on the February 2008 ballot as Proposition 91.⁹⁷ The voters were confronted with an unusual ballot pamphlet. In the section discussing the official arguments in support of the initiative, the proponents of Proposition 91 urged people to vote “No” on the measure. Moreover, the pamphlet did not include any arguments against the measure.⁹⁸ Although Proposition 91 failed, it still received almost 42 percent of the vote,⁹⁹ presumably from voters who did not realize that the legislature and the measure’s proponents had reached a compromise two years earlier. Had the indirect initiative proposal been in effect, the state would not have wasted state funds printing an extra few pages in the ballot pamphlet, and voters would not have needed to spend time studying a measure that even proponents no longer thought necessary.

A similar situation occurred in 2004, when the proponents of an initiative that had already qualified for the ballot negotiated a compromise measure with the legislature to put another measure on

94. *Id.* at 112. The proponents wanted to prevent the legislature from using the gas tax money for non-transportation purposes.

95. *Id.*

96. *Id.*

97. *See id.* (explaining that the surplus signatures were enough to qualify the initiative for the ballot, leaving proponents unable to withdraw it).

98. CAL. SEC’Y OF STATE, CALIFORNIA PRESIDENTIAL PRIMARY ELECTION, TUESDAY FEBRUARY 5, 2008: OFFICIAL VOTER INFORMATION GUIDE 10–11 (2008); *see also* Michael Cabanatuan, *Prop 91: Voters Defeating Gas Tax Measure*, S.F. CHRON., Feb. 6, 2008, http://articles.sfgate.com/2008-02-06/news/17141833_1_gas-tax-transportation-california-initiative (“But in their official argument in favor of the initiative, they wrote: ‘Vote no on Proposition 91. It’s no longer needed.’”).

99. CAL. SEC’Y OF STATE, FEBRUARY 5, 2008, PRESIDENTIAL PRIMARY ELECTION: SUPPLEMENT TO THE STATEMENT OF VOTE 5 (2008).

the ballot covering the same subject.¹⁰⁰ The legislature put the compromise measure, Proposition 1A, and the original initiative, Proposition 65, before the voters on the same ballot.¹⁰¹ This time, however, the legislature put both propositions together in a supplemental ballot pamphlet.¹⁰² The proponents of Proposition 65 did not write an argument in favor of the measure.¹⁰³ Thus, only a “No” argument appeared in the section for official arguments in support of Proposition 65, urging voters to approve Proposition 1A and to defeat Proposition 65.¹⁰⁴ Eighty-four percent of voters supported Proposition 1A, while 62 percent voted against Proposition 65.¹⁰⁵

Finally, the person who signs the petition is in the same position as a legislator who votes for a bill that is subsequently amended. In the legislature there will be a final vote on the bill, and the legislator can vote against the bill if the amendments are not acceptable. Similarly, a person who has signed a petition that is later amended can also vote against the measure on the ballot.¹⁰⁶

V. CONCLUSION

California should return to the indirect initiative process because it is the best way to reduce the number of measures on the ballot and to ensure that proposals put forth by initiatives are well drafted and do what the proponents intend.

However, it may be very difficult to convince the legislature to enact a variation of the system that was in effect until the end of 1966. Also, initiative proponents may be worried about appearing

100. See CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 112 (“[I]n 2004 Proposition 65 proponents used the measure as a bargaining tool with the legislature in their negotiations to better protect local government revenue from state-level appropriations.”).

101. *Id.*

102. CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION: SUPPLEMENTAL OFFICIAL VOTER INFORMATION GUIDE 3 (2004).

103. *Id.*

104. *Id.*; see also CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 112 (“The initiative proponents and the legislature both agreed to campaign for Proposition 1A and against Proposition 65.”).

105. CAL. SEC’Y OF STATE, PRESIDENTIAL GENERAL ELECTION NOVEMBER 2, 2004: STATEMENT OF VOTE xxi (2004).

106. See CTR. FOR GOVERNMENTAL STUDIES, *supra* note 2, at 4–5 (explaining that initiative proponents must first obtain a sufficient number of signatures to qualify an initiative for the ballot and that once the initiative is on the ballot, the initiative needs a majority vote to be enacted).

before the legislature to defend their measures. They may be concerned that the legislature will force them to take their measures off of the ballot by passing enticing substitute measures. In addition, initiative proponents may want to have a campaign even if it means that their measure may be defeated. Moreover, the legislature may not want to be forced to take the time to consider all of the initiatives that have qualified for the ballot.

For these reasons, it seems more likely that an initiative to amend the initiative process will be necessary to achieve the suggested reforms. The year to put forth such a proposal is 2012.