



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 31

Number 4 *Fritz B. Burns Lecture: Euthanasia,
Morality & Law and Symposium on the
California Initiative Process*

Article 6

6-1-1998

Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts

Craig B. Holman

Robert Stern

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 Loy. L.A. L. Rev. 1239 (1998).

Available at: <https://digitalcommons.lmu.edu/llr/vol31/iss4/6>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

JUDICIAL REVIEW OF BALLOT INITIATIVES: THE CHANGING ROLE OF STATE AND FEDERAL COURTS

Craig B. Holman, Ph.D. and Robert Stern***
Center for Governmental Studies¹

The history of governance in the United States is one of a conflict between democratic rule and the protection of civil liberties. This conflict is perhaps most visible in the tension between the legislative process and the judicial system. While legislation is often the product of democratic majority will, the judicial system is generally designed to be a step removed from democratic majorities—frequently in the form of unelected and unaccountable judgeships.²

Americans select their judges through a wide array of methods, ranging from appointive selection procedures to democratic elections. Federal judges, for example, are appointed by the President, with the advice and consent of the Senate.³ States, on the other hand, are free to devise their own selection procedures with relatively few constraints imposed by federal statutory or constitutional law.⁴ In all cases, the selection procedures chosen reflect a preference between

* Craig B. Holman, Ph.D., is Project Director of the Center for Governmental Studies, a non-profit research organization, and Executive Director of Californians for Political Reform Foundation, a public interest organization committed to the defense and implementation of Proposition 208, California's campaign finance initiative approved by voters in November 1996.

** Robert M. Stern is Co-Director and General Counsel of the Center for Governmental Studies. Mr. Stern also regularly serves as a lecturer on elections at the University of California at Los Angeles and has co-authored several works on the initiative process and campaign finance. He was General Counsel for the California Fair Political Practices Commission from 1975-1983.

1. The views expressed herein are solely those of the authors and not those of the Center for Governmental Studies.

2. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 588 (1993).

3. See U.S. CONST. art. II, § 2, cl. 2.

4. One scholar attributes this state independence in judicial selection to the history of the King of England controlling the pre-Declaration of Independence judges. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714-25 (1995).

judicial autonomy versus *public accountability*—or some balance in between.⁵

Direct democracy in California has found itself in the middle of this unresolved conflict between democratic governance and the judicial protection of civil liberties. Californians make extensive use⁶ of the initiative process, the most democratic and purely majoritarian form of policymaking.⁷ Thus, it should come as no surprise that public policies formulated through the initiative process often become embroiled in controversy and scrutinized by the courts.

California courts, however, are not of one mind when it comes to initiatives. Part of the reason behind the courts' diverging views on judicial scrutiny of initiatives is that, depending on the level of court, judges are selected through three very different methods.⁸ Trial court

5. The conflict between judicial autonomy and public accountability in defining judicial systems arose in colonial America. See Bridget E. Montgomery & Christopher C. Conner, *Partisan Elections: The Albatross of Pennsylvania's Appellate Judiciary*, 98 DICK. L. REV. 1, 2 (1993). In the early 1700s, judges were deemed "crown agents" who were appointed and served at the pleasure of the King. See Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 73 (1997). At that point the judiciary was neither independent of political authorities nor accountable to the public. See *id.* at 74. The Declaration of Independence decried this archaic system of justice for having "made judges dependent on his [the King's] Will alone, for the tenure of their offices, and the amount and payment of their salaries." *Id.* at 73-74, (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)). America's founders decided to remedy this situation by providing that judges be appointed for life and subject to removal from office only by impeachment. Eight of the original thirteen states bestowed the power to select judges upon one or both houses of the state legislature; New Hampshire and Pennsylvania made appointment process a joint responsibility of the governor and the legislature; Maryland, Massachusetts and New York gave the appointive authority to the governor, subject to confirmation by the legislature. See Levien & Fatka, *supra*.

In the country's first years, the lack of popular election of judges at either the federal or state level was due to the Founders' belief that the judiciary needed to be independent of oftentimes emotive political and public whims. See *id.* That attitude eventually faded in the first half of the nineteenth century with the onslaught of the Jacksonian "revolution" against the unaccountability of government institutions. See *id.* The egalitarian philosophy engendered by Andrew Jackson led to the democratization of most state judiciaries. See *id.* In 1832 Mississippi became the first state to make all judgeships elected positions, and by the outbreak of the Civil War, twenty-four of thirty-four states elected their judges. See *id.*

6. See *infra* Part III.

7. See Kara Christenson, Note, *Interpreting the Purposes of Initiatives: Proposition 65*, 40 HASTINGS L.J. 1031, 1035-36 (1989) (describing the initiative process and contrasting it with legislative alternatives).

8. The method of judicial selection affects the way a judge or justice ap-

judges in California are selected in competitive elections;⁹ appellate justices in the state are selected through non-competitive retention elections;¹⁰ and federal judges are selected by the President and confirmed by the U.S. Senate for lifetime appointment.¹¹

These differences in the system of judicial selection at the state and federal courts have a significant impact on California's judicial review of initiatives.

I. CHALLENGING AN INITIATIVE IN COURT CAN BE DONE THROUGH A WIDE VARIETY OF MEANS

Initiatives can be challenged in court through a multiplicity of ways. They can be challenged early to keep them off the ballot or later after voter approval.¹² They can be challenged in state courts or in the federal courts, or both.¹³ Court challenges to initiatives may follow a routine time schedule or an expedited schedule if the courts feel pressing issues must be resolved immediately.¹⁴ And opponents of a voter-approved initiative may request a preliminary injunction to suspend the initiative legislation until after a full trial.¹⁵ In short,

proaches a potentially politically charged initiative issue. See *infra* Part V.

9. See Robert C. Luskin et al., *How minority judges fare in retention elections*, 77 JUDICATURE 316, 318 (1994).

10. See *id.*

11. See *supra* note 3 and accompanying text; see also Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L. Q. 741, 741 (1997).

12. See Daniel J. Curtin, Jr. & M. Thomas Jacobson, *Growth Control By the Ballot Box: California's Experience*, 24 LOY. L.A. L. REV. 1073, 1094 (1991).

13. *Compare* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 697 (9th Cir. 1997) (challenging California's Proposition 209 in federal court), *cert. denied*, 118 S. Ct. 397 (1997), with *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 218, 583 P.2d 1281, 1283, 149 Cal. Rptr. 239, 241 (1978) (challenging California's Proposition 13 in state court); see also *California Prolife Council Political Action Comm. v. Scully*, No. CIV. S-96-1965LKKDAD, 1998 WL 7173, at *1-*4 (E.D. Cal. Jan. 6, 1998) (debating whether state or federal court is the more appropriate forum to analyze California's Proposition 208).

14. *Compare* *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 812-14, 771 P.2d 1247, 1249-50, 258 Cal. Rptr. 161, 163-64 (1989) (noting that it took only two days for the California Supreme Court to act after the enactment of California's Proposition 103, staying the initiative), with *Bates v. Jones*, 958 F. Supp. 1446, 1453-55 (N.D. Cal. 1997) (noting that it took six years for California's Proposition 140 to be properly considered on the merits), *aff'd*, 127 F.3d 839 (9th Cir. 1997), *cert. dismissed*, 118 S. Ct. 679 (1998).

15. See, e.g., *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1491 (N.D. Cal. 1996) (granting preliminary injunction preventing enforcement of Proposition 209 pending trial), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *stay denied*, 118 S. Ct. 17 (1997), *cert. denied*, 118 S. Ct. 397 (1997).

initiatives can be challenged in court in virtually all the ways that any legislation can be legally contested.

Nevertheless, some patterns of challenging an initiative in court are relatively common. In most states, such as California, the courts are rarely willing to remove an initiative from the ballot prior to an election.¹⁶ For example, the California Supreme Court displayed judicial restraint in refusing to decide the constitutionality of Proposition 8 prior to the 1982 election.¹⁷ Most state and federal courts exercise judicial restraint when it comes to pre-election review of initiatives, especially pre-election review on substantive rather than procedural grounds.¹⁸ Some states even forbid pre-election review of initiatives on substantive grounds.¹⁹

The exercise of such restraint against pre-election review is based on the principle that an initiative is not yet within the purview of either the executive, legislative, or judicial branches before it goes from a mere proposal to an actual law.²⁰ A California appellate court echoed this sentiment when it noted, "As we have frequently observed, it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the

16. See JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 105-06 (1989).

17. See *id.* at 107-09.

18. See *id.* at 105-06; see also *Brosnahan v. Eu*, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982) (denying pre-election review of Proposition 8).

19. See Stan P. Geurin, Comment, *Pre-Election Judicial Review: The Right Choice*, 17 OKLA. CITY U. L. REV. 221, 221 n.6 (1992).

This ban on pre-election review of initiatives is not the case for all states, however. Florida, in fact, *requires* substantive pre-election review of initiative proposals.

Following a series of last-minute court challenges to a number of initiatives from 1982 through 1984, Florida voters ratified a 1986 constitutional amendment requiring state supreme court review of all initiatives which collected 10% of the requisite signatures. The 10% threshold is designed to avoid burdening the court with frivolous initiative proposals. The state supreme court analyzes the initiative proposals for compliance with the single-subject rule and other statutory criteria. The court then issues an advisory opinion on the measure's validity.

CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT, 108-09 (1992). The court's advisory opinion is not binding, but is considered "extremely persuasive" in a later court challenge. See *id.* at 109.

20. See James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 311 (1989).

exercise of the people's franchise, in the absence of some clear showing of invalidity."²¹

Where permissible,²² in order to justify pre-election review on substantive grounds, opponents of an initiative petition must be able to demonstrate convincingly that the measure will be invalidated and that permitting a vote on the issue is likely to cause significant harm.²³ Rationales for pre-election review have included prevention of fiscal waste in conducting the election, federal preemption, and judicial economy.²⁴ In California, only six initiatives and referendums have been subjected to pre-election judicial review.²⁵ Of these, only three initiatives have been removed from the ballot.²⁶ These include a 1983 reapportionment initiative,²⁷ a 1984 federal balanced budget amendment initiative,²⁸ and a 1988 no-fault insurance reform initiative.²⁹

21. *Brosnahan*, 31 Cal. 3d at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101.

22. See Gordon & Magleby, *supra* note 20, at 302-03 (describing three categories of justifiable pre-election review).

23. See *id.*

24. See M. Sean Radcliffe, Comment, *Pre-Election Judicial Review of Initiative Petitions: An Unreasonable Limitation on Political Speech*, 30 TULSA L.J. 425, 430-31 (1994).

25. See Gordon & Magleby, *supra* note 20, at 301-03.

26. See *infra* notes 27-29 and accompanying text.

27. The Sebastiani reapportionment initiative, as it was called prior to being placed on the ballot, would have modified the Democratic Legislature's reapportionment plan and caused more favorable districting for state Republicans. See Philip Hager, *Remapping Vote Voided by High Court*, L.A. TIMES, Sept. 16, 1983, at A1. The California Supreme Court ruled that the initiative was unconstitutional as clearly conflicting with the state constitution. See *Legislature v. Deukmejian*, 34 Cal. 3d 658, 680, 669 P.2d 17, 30, 194 Cal. Rptr. 781, 794 (1983).

28. The initiative was passed on the ballot as Proposition 35, "The Balanced-Budget Initiative." See Myrna Oliver, *Balanced-Budget Vote Killed: High Court Removes Initiative From Ballot*, L.A. TIMES, Aug. 28, 1984, at A1. The California Supreme Court found this initiative invalid on its face because the legislature votes on the budget, not the citizenry. See *AFL-CIO v. Eu*, 36 Cal. 3d 687, 694, 686 P.2d 609, 613, 206 Cal. Rptr. 89, 93 (1984).

29. The 1988 no-fault insurance reform initiative was drafted and circulated by groups associated with the insurance industry. The measure was a 12,000-word tome that contained a hidden sentence exempting the insurance industry from campaign contribution limits. The court disqualified the measure from the ballot on the grounds that it obviously violated the single-subject rule. See *California Trial Lawyers Ass'n, Inc. v. Eu*, 200 Cal. App. 3d 351, 354-56, 245 Cal. Rptr. 916, 917-18 (1988). Proponents removed the offending provision and recirculated the new version in an intense direct mail drive. After spending \$2.3 million on the direct mail circulation drive, proponents were able to gather 167% of the requisite signatures in a brief 48 days. The revised initiative survived further judicial review and was placed on the ballot. See *Insurance Indus. Initiative Campaign Comm. v. Eu*, 203 Cal. App. 3d 961, 963, 250 Cal. Rptr. 320, 321 (1988).

More commonly, initiatives in California and other jurisdictions are challenged after voters have approved them. Initiatives are challenged on a wide variety of grounds. Most often, state and federal courts may invalidate an initiative for violating some constitutional principle.³⁰ Less often, initiatives will be contested for conflicting with a higher federal law, known as "federal preemption."³¹ Courts may invalidate an initiative for addressing more than one subject³² or for exceeding certain subject limitations, such as highlighting a specific individual or corporation for regulation.³³ Finally, a California initiative may amend the state constitution but may not fundamentally revise the constitution.³⁴

In most jurisdictions, each county at the state level or each district at the federal level determines its own rules for allocating cases among specific judges. While "judge shopping" is illegal in all jurisdictions,³⁵ determining the court in which to file is part and parcel of a prudent legal strategy. If prior rulings suggest that judges in one district are more hostile to an initiative than judges in another district, filing in the more hostile district increases the odds of overturning the initiative.

Generally, computers assign cases randomly to judges in the county or district. There are significant exceptions, however. Senior judges receive fewer case assignments because of their additional administrative workload. Further, the court clerk automatically re-assigns judges with business or personal ties to a case. Frequently, the assignment of emergency filings is in consecutive rather than random

30. See, e.g., *Raven v. Deukmejian*, 52 Cal. 3d 336, 355, 801 P.2d 1077, 1089, 276 Cal. Rptr. 326, 338 (1990) (en banc) (concluding that California Proposition 115 violates state constitutional principles as being a revision, not an amendment); *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. at 1499-1510 (N.D. Cal. 1996) (concluding that California's Proposition 209 violates federal equal protection under the Fourteenth Amendment), *rev'd*, 122 F.3d at 709.

31. See *Coalition for Econ. Equity*, 946 F. Supp. at 1511-20 (concluding that Proposition 209 is preempted by Title VII of the Civil Rights Act of 1964), *rev'd*, 122 F.3d at 710.

32. See, e.g., *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. 1990) (en banc); *In re Initiative Petition No. 314*, 625 P.2d 595 (Okla. 1980).

33. See, e.g., *Pala Band of Mission Indians v. Board of Supervisors*, 54 Cal. App. 4th 565, 63 Cal. Rptr. 2d 148 (1997); *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989).

34. See CAL. CONST. art. XVIII, §§ 2-3; *Legislature v. Eu*, 54 Cal. 3d 492, 506, 816 P.2d 1309, 1316, 286 Cal. Rptr. 283, 290 (1991).

35. See, e.g., Cal. R. U.S.D.C.N.D. Civ. L.R. 3-3(c); La. R. 18th Dist. Ct. R. 9; Ohio Sup. R. 36 commentary.

order. Also, judges may on occasion exercise some discretion in consolidating multiple filings on the same initiative by assigning them to a particular judge with special expertise in the field.

For example, in California, opponents of a 1996 campaign reform measure, Proposition 208, filed five separate actions, all in the United States District Court, Eastern District of California.³⁶ The district has eight judges in all, two of them senior judges with limited caseloads. Not coincidentally, the federal judge serving the district had previously voided campaign finance legislation and an earlier state campaign finance reform initiative—Proposition 73.³⁷ The five actions were distributed randomly among the judges but then consolidated in one court.³⁸ The guiding principle for consolidation in this district was that the judge who receives the lowest case number, or first filing, of these five actions, or of a related case, receives the consolidated actions. A “related case” could include a prior case dealing with a similar subject, and the prior case would then become the lowest case number. Consequently, this consolidation process transformed all five actions against Proposition 208 into one case to be heard by the same judge who had previously invalidated Proposition 73.³⁹ In a decision that both proponents and opponents of Proposition 208 alike expected, this federal district judge ruled against the measure.⁴⁰

II. SHOULD THERE BE A STRICTER STANDARD OF REVIEW FOR INITIATIVES?

Despite the apparent contradiction between the “republican form of government” guaranteed in the United States Constitution⁴¹ and “direct democracy” embodied by initiatives, the U.S. Supreme Court in 1912 found that the initiative process itself was not at odds

36. See John Jacobs, *Courts Speed Up Hearings on Props*, SAN DIEGO UNION TRIB., May 31, 1997, at B6; Dan Bernstein, *Prop. 208 Has Some Dazed, Confused, Exaggerating*, SACRAMENTO BEE, June 15, 1997, at A1.

37. See *Service Employees Int'l Union v. FPPC*, 721 F. Supp. 1172 (E.D. Cal. 1989) (Karlton, C.J., holding that law prohibiting candidates from expending carryover funds in campaigns for elective office violated First Amendment).

38. See *supra* note 36, at A1.

39. See Carl Ingram & Max Vanzi, *Lawyers Finish Arguments on Proposition 208*, L.A. TIMES, Nov. 6, 1997, at A3.

40. See *California Prolife Council Political Action Comm. v. Scully*, No. CIV. S-96-1965LKKDAD, 1998 WL 7173, at *15 (E.D. Cal. Jan. 6, 1998). The case is on appeal to the Ninth Circuit Court of Appeals.

41. See U.S. CONST. art. IV, § 4.

with the form of governance established under the Federal Constitution.⁴² In *Pacific States Telephone & Telegraph Co. v. Oregon*,⁴³ the high court ruled that the initiative process was simply an additional form of government that complements rather than contradicts the federal form of government and representative democracy. Since that ruling, courts have not questioned the underlying legitimacy of the initiative process.

Instead, judicial attention has focused on the appropriate standard of review for assessing the constitutionality of individual initiatives. The courts have generally operated under the presumption that both legislation and initiatives are subject to similar standards of review and constitutional scrutiny.⁴⁴ Chief Justice Burger clearly expressed this viewpoint in *Citizens Against Rent Control v. City of Berkeley*⁴⁵ when he said, "It is irrelevant that the voters rather than a legislative body enacted [this law] because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."⁴⁶

Nevertheless, the debate over the appropriate standard of review for initiatives continues to rage, especially in academic circles. Some legal scholars have argued that initiatives require even stricter standards of scrutiny than those applicable to representative legislation.⁴⁷ They base their argument on several premises. First, academics argue that initiatives, as a tool of majoritarian democracy, disproportionately attack the civil liberties of minorities.⁴⁸ To illustrate, initiatives have on occasion been used to undermine the rights of ethnic minorities,⁴⁹ gays and lesbians,⁵⁰ immigrants,⁵¹ and other minorities.⁵²

42. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

43. 223 U.S. 118 (1912).

44. See, e.g., *Gordon v. Lance*, 403 U.S. 1 (1971); *James v. Valtierra*, 402 U.S. 137 (1971); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Forty-Fourth Gen. Assembly v. Lucas*, 379 U.S. 693 (1965); *Legislature v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).

45. 454 U.S. 290 (1981).

46. *Id.* at 295.

47. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1558 (1990).

48. See William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583, 628 (1994).

49. See Proposition 14 (Rumford Fair Housing Initiative) in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 13-14, 18-20 (Nov. 3, 1964).

50. See *Romer v. Evans*, 517 U.S. 620 (1996).

51. See Proposition 187, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 50-55 (Nov. 8, 1994).

Accordingly, academics often contend that initiatives require stricter review for the protection of civil liberties.⁵³

While there are certainly valid examples of initiative legislation that have threatened civil liberties, no one can claim that this is solely, or even disproportionately, the purview of initiative legislation. The story of American governance is fraught with examples of legislation by representative bodies that has violated the civil liberties of minorities. The internment of Japanese-Americans during World War II,⁵⁴ segregation and poll taxes,⁵⁵ racial gerrymandering,⁵⁶ and obscenity laws⁵⁷ are just a few examples of such legislation. Legislative bodies have also enacted many of the anti-gay, anti-immigrant and anti-crime proposals ascribed to initiatives.⁵⁸ The principle that both initiatives and representative legislation should be subject to equal standards of judicial review is not lost on those interested in protection of civil liberties.

A second argument frequently voiced for a stricter standard of scrutiny on initiative legislation is that initiatives are not drafted with the same deliberateness as legislation from representative bodies.⁵⁹ Initiatives are frequently written by a group of similarly-minded individuals. As the product of subgroups, initiatives can lack the input of opposing viewpoints and the scrutiny of other experts in the field and thus contain oversights and unintended consequences. In California, for example, one group drafted and sponsored a campaign finance reform measure, Proposition 212, which accidentally would have deleted the state's major ethics laws.⁶⁰

52. See Proposition 209, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 30-33 (Nov. 5, 1996).

53. See, e.g., Adams, *supra* note 48, at 623-24; Eule, *supra* note 47, at 1525, 1545.

54. Exec. Order No. 9,066, 3 C.F.R. 1092 (1938-1943).

55. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Kramer v. Union Free Sch. Dist. No. 15, 282 F. Supp. 70 (E.D.N.Y. 1968).

56. See, e.g., Shaw v. Reno, 509 U.S. 630 (1993); Hays v. State of La., 839 F. Supp. 1188 (W.D. La. 1993).

57. See, e.g., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).

58. See, e.g., Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)); United States v. Lopez, 514 U.S. 549 (1995) (addressing Congress's anti-crime statute, 18 U.S.C. § 922, which controls the presence of guns in school zones); Flores-Arellano v. INS, 5 F.3d 360 (9th Cir. 1993) (interpreting the meaning of federal immigration statute 8 U.S.C. § 1257).

59. See Eule, *supra* note 47, at 1555-56.

60. See Mark Gladstone, *Battle Over Campaign Reform Goes to Court*, L.A. TIMES, July 25, 1996, at A3.

This problem, however, is not unique to initiatives. Legislation drafted in representative bodies is, in fact, routinely drafted by special-interest groups and their lobbyists, not necessarily with an eye for the welfare of the general public. A classic example is California's insurance law⁶¹ prior to being changed by an initiative.⁶² In the late 1980s, Assembly Speaker Willie Brown sat down at Frank Fat's restaurant in Sacramento with insurance industry lobbyists and trial lawyers.⁶³ He negotiated an agreement, written on a cocktail napkin, in which the insurance industry obtained an insurance law with no controls on prices and the trial lawyers were rewarded no control on lawyers' fees and damage awards.⁶⁴ All interests were considered except those of California's consumers, who subsequently revolted and rewrote the state's insurance policy by initiative and placed controls on insurance costs.⁶⁵

More recently, the California legislature approved a bold anti-smoking law.⁶⁶ This law prohibits smoking in almost all public places, including bars, in order to protect the health of employees.⁶⁷ But the legislature neglected to clarify issues of enforcement. Bar owners are supposed to take "reasonable steps" to enforce the ban,⁶⁸ but no one is sure what that means. The law delegates enforcement to the cities and counties, with no clear division of authority.⁶⁹ In some instances, a county has the authority either to require bars to post no-smoking signs but no authority to prosecute within certain cities or to make

61. See Stephen D. Sugarman, *California's Insurance Regulation Resolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683, 714 (1990).

62. See Proposition 103, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 98-101, 140-44 (Nov. 8, 1988).

63. See Paul F. Arentz, *Defining "Professional Negligence" After Central Pathology Service Medical Clinic v. Superior Court: Should California's Medical Injury Compensation Reform Act Cover Intentional Torts?* 30 CAL. W. L. REV. 221, 263 n.24 (1994).

64. See Daniel M. Weintraub, *Lobbyists, Lawyers Cut Deal in Injury Liability*, L.A. TIMES, Sept. 12, 1987, at A1.

65. The cocktail napkin on which Willie Brown wrote his agreement has since been framed and is currently hanging on the wall of Frank Fat's in Sacramento.

66. See CAL. LAB. CODE § 6404.5 (West 1989 & West Supp. 1998); see also Dan Morain, *Smoke Set to Clear in Bars—But Will It?*, L.A. TIMES, Dec. 22, 1997, at A1 (discussing impact of § 6404.5).

67. See CAL. LAB. CODE § 6404.5(a).

68. See *id.* § 6404.5(c).

69. See *id.* § 6404.5(j).

city officials prosecute violations.⁷⁰ This situation has led to inconsistent enforcement of the law throughout the state.⁷¹

The election process itself provides the greatest safeguard against poorly drafted initiatives: through the course of a campaign, debate usually points out and even exaggerates flaws in initiatives, and voters tend to react accordingly. Voters tend to be very cautious and thus are reluctant to approve initiatives at the ballot box. Historically, California's initiatives average a one-third approval rate.⁷² This reluctance dramatically increases when voters are uncertain about a measure. When uncertain, the voter generally casts a vote against an initiative in order to maintain the existing public order.⁷³ Because of uncertainty, voters rejected Proposition 212, which inadvertently would have deleted California's ethics laws.

The problems that plague the initiative process also plague the legislative process. Both processes produce laws which tread on civil liberties, and both produce laws which restore civil liberties. Both produce laws with unintended consequences, and both produce laws to correct inadequate public policies.

Strictly from the perspective of policy outputs, both initiatives and legislation from representative bodies must be subject to judicial review to ensure sufficient and adequate safeguards. Still, there exists in fact an important difference in standards of review for initiative legislation. The distinction is not in the different treatment of initiatives and legislation, however, but in the different approaches taken by the state and federal courts when reviewing initiatives. The state and federal courts apply different standards of judicial scrutiny to initiatives. This practice is beginning to turn the judicial system into an unwitting player in the politics of direct democracy.

70. See *id.* §§ 6404.5(c) & (i).

71. See Jeff Leeds, *Bar Patrons Still Smoke Despite Ban*, L.A. TIMES, Jan. 15, 1998, at B1.

72. See Robyn R. Polashuk, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 U.C.L.A. L. REV. 391, 402-03 (1993) (citing CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 367 (1992)).

73. See Polashuk, *supra* note 72, at 403 (discussing that voters frequently shift their positions on initiatives during the campaign, typically ending in opposition).

III. CALIFORNIA STATE COURTS SHOW SOME DEFERENCE TO INITIATIVES

Although the principle of judicial review of ballot initiatives appears firmly entrenched, courts in some states, including California, express considerable deference to initiatives and have shown a reluctance to overturn them in their entirety.⁷⁴ At one time, Colorado's Constitution forbade pre-election and post-election judicial review of initiatives.⁷⁵ The language of Nevada's Constitution provides a three year moratorium on legislative review of initiatives although Nevada's state courts do not consider themselves bound by this prohibition.⁷⁶

Traditionally, California's state courts have treated direct democracy with considerable respect. This feeling was articulated in a 1978 California Supreme Court decision upholding the constitutionality of Proposition 13, which addressed tax relief: "It is our solemn duty to 'jealously guard' the initiative process, it being 'one of the precious rights of our democratic process.'"⁷⁷ State courts have followed this principle on several other occasions.⁷⁸

Nevertheless, the state courts' respect for the initiative process has not meant that courts have shied away from judicial review of initiatives. California's state courts have reviewed a number of initiatives for constitutionality.⁷⁹ From 1964 to the 1990 primary

74. See *Legislature v. Deukmejian*, 34 Cal. 3d 658, 683, 669 P.2d 17, 35, 194 Cal. Rptr. 781, 799 (1993) (Richardson, J., dissenting) (noting the special and favored treatment of initiatives when reviewed by the court).

75. See COLO. CONST. art. VI, § 6 (*repealed* 1966).

76. See NEV. CONST. art. XIX, § 2; *Nevada Judges Ass'n v. Lau*, 910 P.2d 898 (Nev. 1996) (reviewing a term limits initiative for state and federal constitutional violations); *Choose Life Campaign '90' v. Del Papa*, 801 P.2d 1384, 1386-87 (Nev. 1990) (holding that arguments drafted by the Secretary of State for and against a referendum were false and misleading); *Torvinen v. Rollins*, 560 P.2d 915, 917 (Nev. 1977) (holding amendment to be effective on date votes for amendment were canvassed).

77. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 248, 548 P.2d 1281, 1302, 149 Cal. Rptr. 239, 259 (1978) (quoting *Associates Home Builders v. City of Livermore*, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976)).

78. See, e.g., *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982); *Los Angeles County Transp. Comm'n v. Richmond*, 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982); *Board of Supervisors v. Lonergan*, 27 Cal. 3d 855, 616 P.2d 802, 167 Cal. Rptr. 820 (1980).

79. See Doug Willis, *Get Ready for Another Wild Election Year in 1998*, THE ASSOCIATED PRESS POLITICAL SERVICE, Sept. 28, 1997, available in 1997 WL 2552458. "In the past decade, more than 300 petition drives for initiatives have been started, with only 85 collecting enough signatures to go on the ballot. But

election, 79 initiatives have qualified for the state ballot.⁸⁰ Of these balloted initiatives, 21 have encountered either pre-election or post-election challenges in state or federal court.⁸¹ The courts, however, have upheld slightly less than half of these initiatives—only 10—either substantially or in their entirety.⁸²

Most of these contested initiatives and citizen-initiated referendums from 1964 to 1990 were challenged in the state courts.⁸³ Only one such challenge was originally filed in the federal court system;⁸⁴ two other challenges went through the state courts and were appealed to the federal court system.⁸⁵ Eighteen, or 86%, of the 21 challenged initiatives and referendums were decided at the state court level.⁸⁶

From 1964 through 1990, the state courts were willing to exercise their authority to overturn or substantially modify initiatives and referendums, upholding or substantially upholding 56% and invalidating or substantially invalidating 44% of the 18 challenges heard at the state level.⁸⁷ But the state courts have completely invalidated only 6 initiatives over this 25 year time period.⁸⁸ During the last 15 years of this period, from 1974 to 1990, the state courts were been particularly hesitant to invalidate initiatives. Only 3 of the 29 initiatives approved

voters defeated 61 of those initiatives, and among the 24 they approved, part or all of 16 were overturned in court." *Id.*

80. See *infra* Table 1.

81. See *infra* Table 1.

82. See *infra* Table 1.

83. See *infra* Table 1.

84. See *infra* Table 1.

85. See *infra* Table 1.

86. See *infra* Table 1.

87. See *infra* Table 1.

88. See, e.g., *Weaver v. Jordan*, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966) (holding that Proposition 15—the Free Television Act, prohibiting pay television in the home—abridged state and federal free speech guarantees); *Kopp v. Fair Political Practices Comm'n*, 11 Cal. 4th 607, 905 P.2d 1248, 47 Cal. Rptr. 2d 108 (1991) (holding that judicial review of Proposition 68, which limited campaign contributions, could not save unconstitutional initiative); *Chemical Specialties Mfg. Ass'n v. Deukmejian*, 227 Cal. App. 3d 663, 278 Cal. Rptr. 128 (1991) (holding that Proposition 105—the Public's Right to Know Act—was invalid because it violated the single subject rule); *Legislature v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983) (holding that Sebastiani Redistricting Initiative was precluded by constitutional provision limiting redistricting to once per 10-year period); *California Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351, 245 Cal. Rptr. 916 (1988) (holding that No Fault Insurance Initiative violated single subject rule); *American Fed'n of Labor-Congress of Indus. Org. v. Eu*, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984) (holding Balanced Budget Taxpayer Initiative, directing or requesting Congress to request a Constitutional Convention, but which did not enact legislation of any kind, was invalid).

TABLE 1

CALIFORNIA INITIATIVES
1964 THROUGH 1990 PRIMARY ELECTIONS

Titled Initiatives, 1964 – 1990 Primary	476
Qualified Initiatives	79
Percentage Qualified	17%
Approved Initiatives	34
Percentage Approved	44%
Contested Initiatives	21
Percentage Contested of Balloted Initiatives	27%
Contested Initiatives Upheld	10
Percentage Contested Upheld	48%
Reviewed by State Courts	18
Percentage Reviewed by State Courts	86%
Upheld by State Courts	10
Percentage Upheld by State Courts	56%
Reviewed by State/Federal Courts	2
Percentage reviewed by State/Federal Courts	9%
Upheld by State/Federal Courts	0
Percentage Upheld by State/Federal Courts	0%
Reviewed by Federal Courts	1
Percentage Reviewed by Federal Courts	5%
Upheld by Federal Courts	0
Percentage Upheld by Federal Courts	0%

by voters during that time were invalidated in their entirety: Proposition 6 regarding inheritance tax; Proposition 68, campaign finance; and Proposition 105, disclosure.⁸⁹

Although they reviewed a smaller number of cases, the federal courts have not shown any similar deference to initiatives during the same period. Of the 3 challenged initiatives that originated or ended up in the federal court system, none were upheld.⁹⁰ Proposition 14, addressing fair housing, and Proposition 73, campaign finance, were entirely or substantially invalidated by the federal courts,⁹¹ and a balanced budget initiative was removed from the ballot in a pre-election challenge.⁹²

IV. FEDERAL COURTS APPEAR MORE WILLING TO INVALIDATE INITIATIVES

While California's state courts have shown some deference to initiatives, the federal courts have not been perceived as showing a similar reluctance to review and invalidate initiatives. It is not at all clear at this point whether this perception is valid. Nevertheless, an entirely new pattern of judicial review of initiatives is emerging from the federal courts.

Perhaps unwittingly, the federal courts have become key players in California's initiative process. The willingness of the federal courts to invalidate initiatives prior to 1990,⁹³ bolstered by a growing understanding within the legal community of the differences in judicial culture between an elective state judiciary and an appointed federal judiciary, has caused opponents of initiatives to increasingly take their

89. See, e.g., *Estate of Cirone* 153 Cal. App. 3d 199, 200 Cal. Rptr. 511 (1984) (invalidating Proposition 6); *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 212 Cal. App. 3d 991, 260 Cal. Rptr. 898 (1989) (invalidating Proposition 68); *Chemical Specialties*, 227 Cal. App. 3d 663, 278 Cal. Rptr. 128 (invalidating Proposition 105).

90. See *infra* Appendix A.

91. See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding that Proposition 14, which amended the California Constitution so as to prohibit the state from denying residents the right to decline to sell, lease or rent property to any person within their absolute discretion, impermissibly involved the state in private racial discriminations); *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312 (1992) (holding that Proposition 73, governing candidates' fiscal spending, was unconstitutional).

92. See *supra* Table 1.

93. See *infra* Table 1.

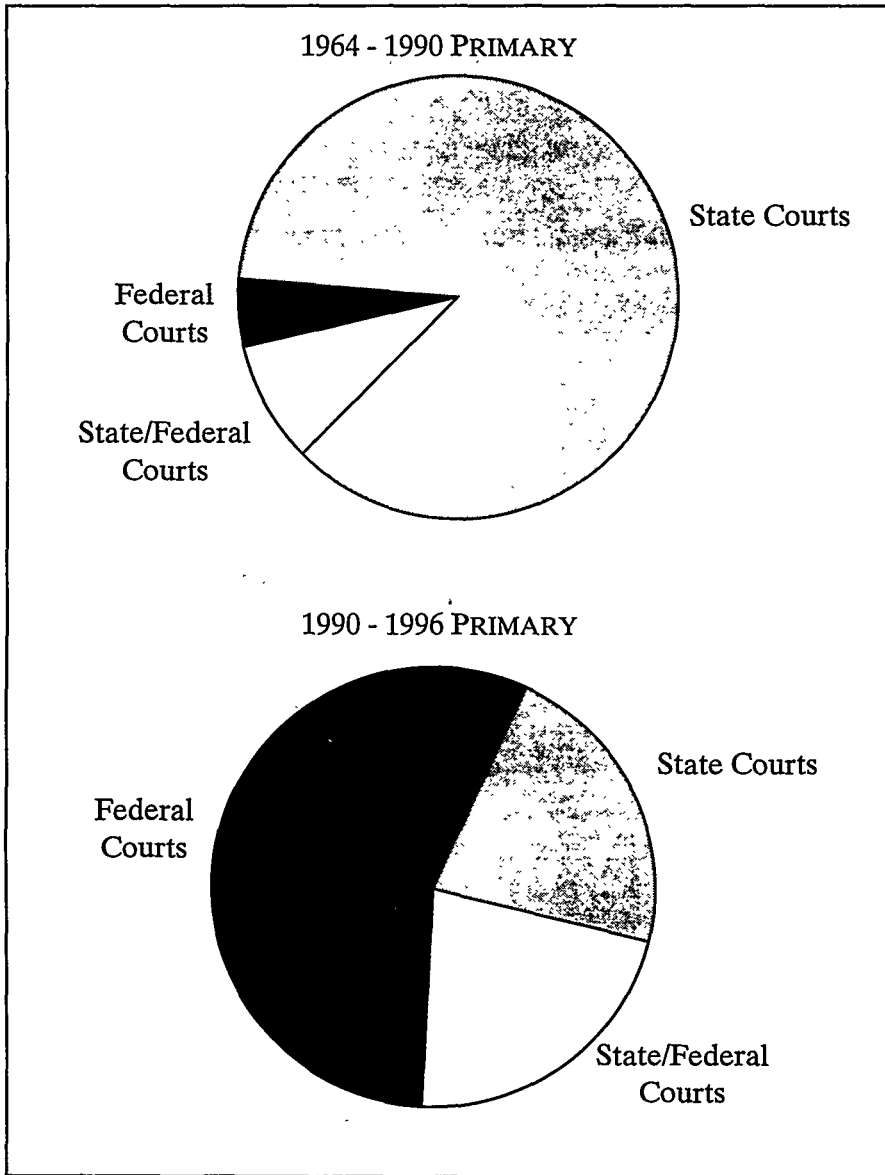
TABLE 2

CALIFORNIA INITIATIVES
1990 THROUGH 1996 GENERAL ELECTIONS

Titled Initiatives, 1990 – 1996 General	199
Qualified Initiatives	44
Percentage Qualified	22%
Approved Initiatives	15
Percentage Approved	34%
Contested Initiatives	9
Percentage Contested of Balloted Initiatives	21%
Contested Initiatives Upheld	4
Percentage Contested Upheld	44%
Reviewed by State Courts	2
Percentage Reviewed by State Courts	22%
Upheld by State Courts	2
Percentage Upheld by State Courts	100%
Reviewed by State/Federal Courts	2
Percentage reviewed by State/Federal Courts	22%
Upheld by State/Federal Courts	1
Percentage Upheld by State/Federal Courts	50%
Reviewed by Federal Courts	5
Percentage Reviewed by Federal Courts	56%
Upheld by Federal Courts	2
Percentage Upheld by Federal Courts	40%

FIGURE 1

COURT JURISDICTION OF CONTESTED INITIATIVES:
1964 - 1990 PRIMARY V. 1990 - 1996 GENERAL



case to federal rather than state court.⁹⁴ The dramatic shift in filing challenges to California's initiatives in federal rather than state court began with the 1990 general election. Since then, opponents of initiatives in California have consistently filed in the federal courts.

As shown in Figure 1, the pattern of challenging initiatives has dramatically and overwhelmingly shifted between the time periods of 1964 through the 1990 primary election and the 1990 general election to present. While state courts reviewed 86% of all contested initiatives from 1964 to 1990,⁹⁵ they reviewed only 22% from 1990 to 1996.⁹⁶ The federal courts have clearly become the preferred venue for these challenges. While only 5% of challenged initiatives were filed with the federal courts from 1964 to 1990, 56% of all challenges were filed with the federal courts from 1990 to 1996.⁹⁷ The role of the federal courts in the initiative process appears even greater when looking at the number of initiatives that currently end up in the federal courts, regardless of where the challenges were originally filed. An overwhelming 78% of all challenges to California's initiatives since the general election of 1990 have ended up in the federal courts for a final decision, compared to 14% in the previous 26 years.⁹⁸

This change is not due to federal judges' stepping into the fray but due to the fact that opponents of initiatives have generally bypassed the state court system and filed their challenges directly in federal district court. A new, aggressive attitude has developed among those who campaign against initiatives to continue the fight by other means—federal litigation.

Federal litigation is thus fast becoming another step in an opposition campaign strategy. If opponents fail to defeat an initiative at the ballot box, a portion of the campaign budget is routinely set aside

94. See, e.g., *Walton v. Walton*, 31 Cal. App. 4th 277, 36 Cal. Rptr. 2d 901 (1995) (discussing Proposition 164); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297 (9th Cir. 1997) (discussing Proposition 187); *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. Cal. 1997) (discussing Proposition 198); *California Pro-life Council Political Action Comm. v. Scully*, No. CIV. S-96-1965LKKDAD, 1998 WL 7173 (E.D. Cal. Jan. 6, 1998) (discussing Proposition 208); *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996) (discussing Proposition 209); *People v. Trippet*, 56 Cal. App. 4th 1532, 66 Cal. Rptr. 2d 559 (1997) (discussing Proposition 215).

95. See *supra* Table 1.

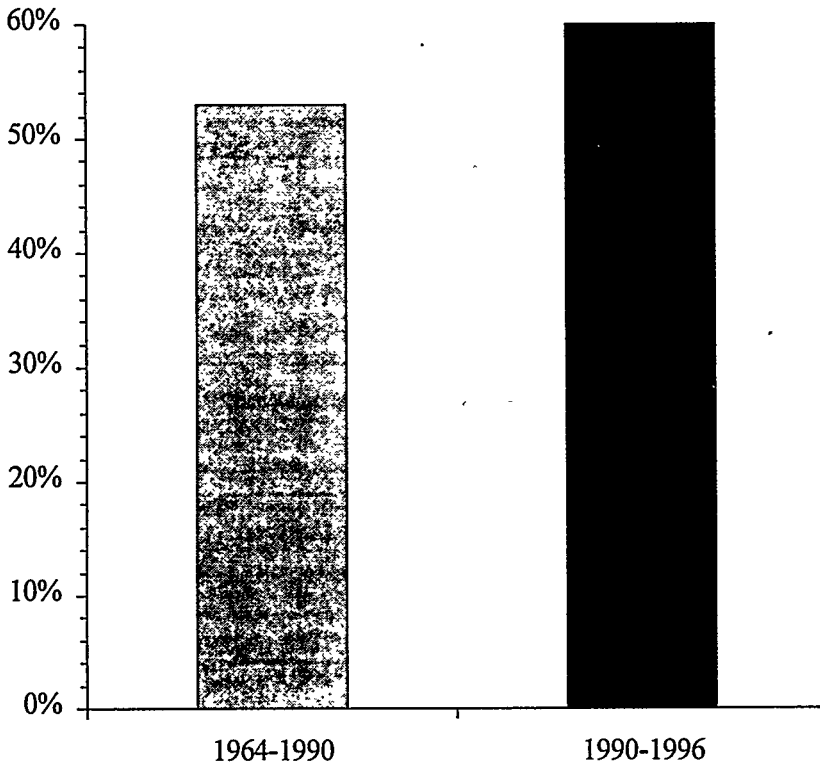
96. See *supra* Table 2.

97. See *supra* Tables 1 & 2.

98. See *supra* Tables 1 & 2.

FIGURE 2

PERCENTAGE OF VOTER-APPROVED INITIATIVES
CHALLENGED IN COURT:
1964 – 1990 PRIMARY V. 1990 – 1996 GENERAL



to contest the initiative in federal court.⁹⁹ Consequently, there has been a modest but significant increase in the likelihood that an initiative approved by the voters will be litigated. Given the large increase in balloted initiatives in the 1990s, the percentage of contested initiatives of all balloted initiatives before and after 1990 are comparable. However, when looking at those initiatives that have been approved by voters, 60% of all voter-approved initiatives have faced litigation since the 1990 general election, compared to 53% prior.¹⁰⁰

There is some indication that this strategy may be paying off for opponents of initiatives. Challenging initiatives in the state court system traditionally has been a 50-50 proposition given state judges' deference to initiatives. But the federal court system—with its lifetime appointive system for judges—offers an entirely different outlook for the survival of initiatives.

Once again, the number of cases is small; but a pattern of judicial decision-making is becoming apparent. As shown in Table 2, both initiatives filed and decided in state courts since 1990—Proposition 184, "Three Strikes," and Proposition 213, which excludes drunk drivers and uninsured motorists from seeking non-economic damages in suits—have been entirely or substantially upheld.¹⁰¹ Five initiatives have been challenged in the federal courts since 1990, with only two being upheld thus far. That means about three-fifths of initiatives filed in the federal court system have been entirely or substantially invalidated to date. This pattern stands in sharp contrast to the state court system, which has not invalidated any initiative since the 1990 general election.

A word of caution about these figures needs to be pointed out, however. Unlike the data for the period prior to the 1990 general election, in which all the cases have been decided, many of the initiatives challenged since 1990 are still pending or on appeal.¹⁰² Although opponents evidently believe their chances of overturning voter-approved initiatives are better in the federal courts than the state courts—and the early results suggest they may be correct—it is

99. See Charles M. Price, *Shadow Government*, CAL. J., Oct. 1997, at 32-33.

100. See *infra* Figure 2.

101. See *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 986, 993, 68 Cal. Rptr. 2d 553, 560, 564 (1997) (holding that Proposition 213 did not violate the Equal Protection Clause of the Federal Constitution or the single subject requirement of the California Constitution).

102. See Appendix B at 53.

uncertain whether the appellate courts in the federal system will follow suit.

V. IMPLICATIONS FOR THE JUDICIAL SYSTEM

The difference in the way state courts and federal courts treat initiatives is largely attributable to the different judicial cultures arising from their respective judicial selection processes. Most state judges, including those in California, are elected to office, a process which emphasizes judicial accountability to the public. Federal judges, however, are appointed for life and may be removed only through impeachment, which emphasizes judicial independence from the public.¹⁰³ Regardless of the relative merit of accountability versus independence, the difference in emphasis is likely to influence the court's willingness to void all or part of an initiative.

Associate Justice Otto Kaus, who served on the California Supreme Court from 1980 through 1985, described the different judicial cultures between an elective system and an appointive system with a metaphor.¹⁰⁴ Justice Kaus said that reviewing the constitutionality of an initiative when facing reelection is like finding a crocodile in your bathtub in the morning.¹⁰⁵ You try not to think about the crocodile, but you know it is there, and it is hard to think of much else while shaving.¹⁰⁶

103. See CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *THE PRICE OF JUSTICE* 74 (1995). Competitive elections clearly are the most common method of judicial selection with 29 states primarily using election contests to select judges. Twelve of these states conduct their competitive judicial elections on partisan ballots. Several states also employ partisan ballots for noncompetitive retention elections. The remaining 17 states that primarily select their judges through competitive elections place the contests on nonpartisan ballots.

Ten states use the retention election process for selecting most judges. Not all retention systems are the same. Several retention election systems, such as California's method of selecting appellate judges, do not include a merit selection process.

Eleven states, plus the District of Columbia, primarily employ an appointment method of judicial selection among most of their jurisdiction's courts. The appointing authority ranges from both houses of the legislature in South Carolina and Virginia—Rhode Island for Supreme Court only—to the U.S. Senate in the District of Columbia. Most states, however, vest this responsibility with the governor. See *id.*; JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* 3-4 (1989).

104. See Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

105. See *id.*

106. See *id.*

While no self-respecting judge would sacrifice constitutional principles in the face of reelection opportunities, the point that can be drawn from Justice Kaus is that an elective system does somewhat increase judicial accountability. For example, in a recent decision upholding Proposition 140 on term limits, the California Supreme Court opined that

[a]lthough the legislative power under our state Constitution is vested in the Legislature, "the people reserve to themselves the powers of initiative and referendum." Accordingly, the initiative power must be *liberally construed* to promote the democratic process. Indeed, it is our solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise.¹⁰⁷

However, this has not meant that state courts are insensitive to constitutional issues when it comes to reviewing initiatives. As shown above, the state courts have been reluctant to overturn entire initiatives.¹⁰⁸ Rather, the state courts have frequently used a scalpel to sever the offending sections of initiatives.¹⁰⁹ Proposition 140, for example, was left mostly intact; but the court did remove the initiative's retroactive sanction against legislative pensions.¹¹⁰ A section of Proposition 115—addressing victim's rights—was removed because the court felt it impinged on federal authority, though the initiative itself was substantially upheld.¹¹¹ More recently, the California Supreme Court modified Proposition 184 to give trial judges the same right to strike prior felony convictions as is given to district attorneys.¹¹²

Conversely, in an appointive judicial selection system, life-tenured judges remain comfortably aloof of the public's will. From this difference in judicial selection procedure stems a difference in judicial culture between the state and federal courts. Although this difference should not be overstated, opponents of initiatives have realized the difference in judicial cultures and have incorporated the

107. *Legislature v. Eu*, 54 Cal. 3d 492, 500-01, 816 P.2d 1309, 1312-13, 286 Cal. Rptr. 283, 286-87 (1991) (quoting CAL. CONST. art. IV, § 1) (citations omitted).

108. *See supra* Part III.

109. *See Price, supra* note 95, at 37.

110. *See Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991).

111. *See Izazaga v. Superior Ct.*, 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991); *Raven v. Deukmejian*, 52 Cal. 3d 336, 355-56, 801 P.2d 1077, 1089-90, 276 Cal. Rptr. 326, 338-39 (1990); *Price, supra* note 95, at 37.

112. *See Price, supra* note 95, at 37.

use of federal courts as part of a comprehensive opposition campaign strategy.

In recent years, Congress has considered proposals for moderating federal court authority to overturn state initiatives.¹¹³ Regardless of the merits of some of the provisions of these bills, they have thus far been presented as an ideological attack on "liberal judges" of the federal courts, resulting in the alienation of many Democratic congressional members.¹¹⁴ Ironically, some of the initiatives that federal judges temporarily enjoined, such as an initiative eliminating affirmative action, have since been upheld. In an unusually sharp personal attack on the federal district judge who struck down the measure, a three-judge appellate panel wrote: "A system which permits one judge to block with a stroke of the pen what 4,736,180 [actually, 5,268,462] state residents voted to enact as law tests the integrity of our constitutional democracy."¹¹⁵

Although these bills have contained several provisions, the key element of each bill is a proposal that all federal challenges to state initiatives be heard first by a three-judge federal panel.¹¹⁶ This proposal follows a long tradition of federal judicial practice.¹¹⁷

From 1910 through 1976, a federal statute required a three-judge panel to address any suit seeking an injunction against implementation of a legislative statute on grounds of federal constitutional issues.¹¹⁸ The federal statute was amended in 1976, leaving the three-judge panel requirement to apply only in two types of cases: suits involving apportionment of congressional and legislative districts and suits otherwise required to be heard by a three-judge panel,¹¹⁹ such as those filed under the Voting Rights Act of 1965.¹²⁰ Congress eased

113. See H.R. 1170, 104th Cong. (1995); H.R. 1252, 105th Cong. (1997).

114. The primary bills are HR 1170 and HR 1252. See *supra* note 109.

115. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir. 1977).

116. See H.R. 1252, 105th Cong. (1997) (proposing a three judge requirement). Other provisions of HR 1170 include: granting courts of appeals discretion to allow interlocutory appeals from district court orders that determine whether an action may be maintained as a class action; limiting the power of the federal judiciary to impose new taxes on states; and permitting proponents and opponents one opportunity to reassign the case to another judge.

117. See Bruce L. Moyer, *Judge's Pay Delinkage & COLA Relief Near Passage*, 44 FED. LAW. 8, 9 (Oct. 1997).

118. See Act of Mar. 4, 1913, Pub. L. No. 62-445, 37 Stat. 1013 (codified as amended at 28 U.S.C. § 2284(a) (1994)).

119. See 28 U.S.C. § 2284(a).

120. See Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. § 1973(c) (1994)).

the requirement that a three-judge panel hear all contested state statutes because of the burden it had placed on the federal court system.¹²¹

Requiring a panel of three district court judges to hear challenges to state initiatives would not impose a similar burden on federal courts. At most, about a dozen or so state initiatives might be challenged in federal court each election year.¹²² This would not constitute an overly burdensome caseload.

While the costs to the federal judiciary would be negligible, the benefits are potentially significant. Citizens are likely to feel more concerned and involved with legislation emerging from the initiative process than with the remote legislation produced by legislatures. When federal judges strike down initiatives, voters frequently react with hostility toward the judiciary and conclude that the personal prejudices of one judge have been unfairly imposed upon an entire state.¹²³ This attitude is reflected in a growing distrust of both the judiciary—at both the state and federal levels—and the initiative process itself.¹²⁴

For example, California Supreme Court justices had been readily confirmed in judicial retention elections throughout the state's history.¹²⁵ Since the 1986 voter revolt against Chief Justice Bird and three other colleagues who undercut much of the death penalty initiative,¹²⁶ most justices have received an average 40% "no" vote in retention elections.¹²⁷ Once a highly esteemed governmental body, the courts—state and federal alike—are beginning to lose some of the public's confidence. Striking down popular initiatives has likely contributed to this loss in confidence.

At the same time, voters in California are growing increasingly frustrated with the initiative process. Surveys show that while overwhelming majorities of Californians want to preserve the right of initiative, they also want some reforms of the process.¹²⁸ Some 74% of respondents believe that the initiative process is generally a good

121. See S. Rep. No. 94-204, at 3-4, reprinted in 1976 U.S.C.C.A.N. 1988, 1990-91.

122. See *infra* notes 121-22 and accompanying appendices.

123. See Prince, *supra* note 95, at 38.

124. See *id.*

125. See *id.*

126. See *id.*

127. See *id.*

128. See John Jacobs, *Poll: Voters Like Initiative Process, But Want it Fixed*, SACRAMENTO BEE, Dec. 9, 1997, at B7.

thing, but almost as many respondents want to see some changes to it.¹²⁹ One of the most popular proposals for change is to restrict court invalidation of initiatives.¹³⁰

For the reason of public alienation alone, it is appropriate to provide special safeguards for federal judicial review of state initiatives. The modest proposal of requiring a hearing by a panel of three district judges could go a long way toward assuaging the public's disenchantment with the judiciary and the initiative process. Determinations by a three-judge panel are more likely to be deliberative and fair, overcoming the particular biases of a single judge, and are likely to be seen as such by the public.

VI. CONCLUSION: PROMOTE DELIBERATENESS IN JUDICIAL PROCEEDINGS

Judicial intervention in the legislative process, including legislation by initiative, is and must continue to be a hallowed principle of American governance. It is designed, in part, to protect civil liberties against the potential excesses of majoritarian democracy. Legislation by initiative is majoritarian democracy in its purest sense and clearly must be subject to judicial review.

When the courts invalidate initiatives, however, the ramifications are far greater than court invalidation of most other legislation. Initiatives usually address issues of deep concern to the populace, and voters feel a stake in initiative legislation unlike that felt for legislative acts. Court invalidation of initiatives has caused the beginnings of a voter backlash—both against the initiative process and the judicial system. Surveys support the fact that voters in California are losing faith in legislation by initiative. The refrain “why should I vote for the initiative when the courts will just throw it out” is increasingly heard. At the same time, voters are losing confidence in the judiciary—a branch of government that has historically been held in high esteem. The judicial system was especially cast in a poor light when Judge Stephen Reinhardt of the Ninth Circuit invalidated Proposition 140 on state term limits, claiming that voters did not understand the initiative.¹³¹

129. *See id.*

130. *See id.*

131. *See Jones v. Bates*, 127 F.3d 839, 844 (9th Cir. 1997), *rev'd sub nom. Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc). Judge Reinhardt represented a three-judge panel of the Ninth Circuit Court of Appeals. Following Reinhardt's ruling that voters had been ignorant of a provision calling for the lifetime ban on

Perhaps even more alarming for the integrity of the judiciary is the dramatic transformation of the role of the federal courts in direct democracy. Once an occasional arbiter of civil rights, the federal courts have recently become part and parcel of an overall opposition campaign strategy. Opponents of initiatives have come to realize that different judicial selection processes have created different judicial cultures between the state and federal courts—with the federal courts less inclined to defer to initiatives. As a result, opposition campaigns in California are now more likely to challenge initiatives in federal court and to bypass the state court system altogether. In essence, federal district judges are being integrated into the politics of initiative campaigns.

Perhaps this “politicization” of the federal judiciary cannot be avoided, but the process by which the courts review the constitutionality of initiatives must be fair and balanced and perceived as such. A simple step of returning to the time-honored legal tradition of hearing challenges to state laws—in this case initiatives—before a panel of three federal district court judges would encourage greater deliberateness in the process of judicial review and would strengthen the legitimacy of the judges’ decisions.

officials holding the same office after a given term, an 11-judge en banc panel of the same court reversed the three-judge panel decision by a nine-to-two vote. *See Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3492 (U.S. Mar. 23, 1998) (No. 97-1173). Judge David Thompson, who wrote the majority opinion for the en banc panel, noted that extensive media coverage, opposition campaign literature warning of the lifetime ban, and voter rejection of a more limited term limits proposal on the same ballot made it clear voters knew what they were doing. *See id.* at 846.

While agreeing with Thompson on the result, three judges argued that Thompson went too far by deciding on the merits of the case. Judges Schroeder, Rymer and O’Scannlain lamented that the California Supreme Court should have had the last word on the issue when it upheld the initiative six years earlier. *See id.* at 858 (O’Scannlain, J., concurring).

In a sarcastic note, Judge O’Scannlain wrote: “Searching the Constitution, I am unable to locate an ‘ignorant voter clause’ that vests federal courts with the power to review voter-enacted legislation to ensure that enough people were capable of understanding what they had voted for. . . .” *Id.* at 853 (O’Scannlain, J., concurring).

APPENDIX A

CALIFORNIA INITIATIVES CHALLENGED IN STATE AND FEDERAL COURTS: 1964 THROUGH 1990 PRIMARY ELECTION

YEAR	PRPOP. NUMBER	DESCRIPTION	PRE OR POST ELEC. REV.	RESULT	LEVEL OF COURT		
					State	State/Fed.	Federal
1964	14	Fair housing	Post-Election	Invalidated		x	
1964	15	Pay television	Post-Election	Invalidated	x		
1972	21	School busing	Post-Election	Substantially Invalidated	x		
1974	9	Political reform	Post-Election	Substantially Upheld	x		
1978	7	Death penalty	Post-Election	Substantially Upheld	x		
1978	13	Property taxes	Post-Election	Upheld	x		
1980	10	Reapportionment	Pre-Election	Substantially Upheld	x		
1980	11	Reapportionment	Pre-Election	Substantially Upheld	x		
1980	12	Reapportionment	Pre-Election	Substantially Upheld	x		
1982	6	Inheritance tax	Post-Election	Invalidated	x		
1983	Removed	Sebastiani reapportionment	Pre-Election	Invalidated	x		
1984	24	Legislative reform	Post-Election	Substantially Invalidated	x		
1984	Removed	Balanced budget	Pre-Election	Invalidated		x	
1986	62	Taxation	Post-Election	Substantially Upheld	x		
1988	Removed	No-fault insurance	Pre-Election	Invalidated	x		
1988	68	Campaign finance	Post-Election	Invalidated	x		
1988	73	Campaign finance	Post-Election	Invalidated			x
1988	96	AIDS testing	Post-Election	Upheld	x		
1988	103	Insurance reform	Post-Election	Substantially Upheld	x		
1988	105	Disclosure	Post-Election	Invalidated	x		
June 1990	115	Victims' rights	Post-Election	Substantially Upheld	x		

APPENDIX B

CALIFORNIA INITIATIVES CHALLENGED IN STATE AND FEDERAL
COURTS: 1990 THROUGH 1996 GENERAL ELECTION

YEAR	PRPOP. NUMBER	DESCRIPTION	PRE OR POST ELEC. REV.	RESULT	LEVEL OF COURT		
					State	State/Fed.	Federal
Nov. 1990	140	Term limits	Post-Election	Substantially upheld		x	
1992	164	Congressional term limits	Post-Election	Invalidated			x
1994	184	Three strikes	Post-Election	Substantially upheld	x		
1994	187	Immigration	Post-Election	Substantially invalidated, appealed			x
1996	198	Open primary	Post-Election	Upheld, appealed			x
1996	208	Campaign finance	Post-Election	Invalidated, appealed			x
1966	209	Affirmative action	Post-Election	Upheld			x
1996	213	Drunk driver suits	Post-Election	Substantially upheld	x		
1996	215	Marijuana	Post-Election	Substantially upheld		x	