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Guilty Until Proven Innocent: California's Prop. 50 Turns the Concept of Due Process On Its Head

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Guilty Until Proven Innocent: California's Prop. 50 Turns the Concept of Due Process On Its Head

Cover Page Footnote

J.D. Candidate, May 2018, Loyola Law School, Los Angeles; B.A., International Relations, University of Southern California. Many thanks to Professors Lee Petherbridge, Adam Zimmerman, and Lauren Willis for their guidance and encouragement and the members of Loyola of Los Angeles Law Review for their hard work and dedication. Finally, I wish to acknowledge my friends and family, including my father, Don, and my grandfather, Max. All that I know about the law I know because of them.

GUILTY UNTIL PROVEN INNOCENT: CALIFORNIA’S PROP. 50 TURNS THE CONCEPT OF DUE PROCESS ON ITS HEAD

*Brantley I. Pepperman**

For decades, “good governance” has been little more than a talking point for politicians on the road to reelection or a promotion to higher office. In 2014, the California Legislature attempted to give teeth to the idea, successfully spearheading an amendment to the California Constitution approved by voters in 2016. But despite its efforts to “drain the swamp,” the Legislature gave itself a powerful tool, the authority to suspend or expel legislators without pay, that presents more problems than solutions. This article explores the implications of that amendment, including the extent to which it, as codified, comports with procedural due process requirements. In so doing, the article proposes several changes that would further insulate the amendment from a legal attack.

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I. INTRODUCTION

From the comfort of a dimly lit, smoke-filled backroom, California political boss Jesse “Big Daddy” Unruh said that “[m]oney is the mother’s milk of politics.”¹ Thanks to a recent amendment to the California Constitution, former Assemblyman Roger Hernández faced the crippling loss of this essential nutrient. Voters authorized Proposition 50, which allows either house of the Legislature to suspend members without pay, eviscerating fundamental notions of due process along the way.²

Hernández’s political career began when, at the age of twenty-four, he was elected to the Rowland Unified School District Board of Education in 1999.³ The son of working-class immigrant parents, Hernández was the first in his family to attend college.⁴ Hernández continued making history when he became the youngest person sworn in as a member of the West Covina City Council in 2003.⁵ He went on to serve as mayor of West Covina, before being elected to represent constituents of the 48th Assembly District in the California State Assembly in November 2010.⁶ There, Hernández served as the chairman of the Assembly Labor and Employment Committee and enjoyed other plum posts on the influential appropriations and governmental organization committees until July 1, 2016.⁷

Hernández and Baldwin Park City Council member Susan Rubio were married in June 2013, and Rubio filed for divorce proceedings in 2014.⁸ During the divorce proceedings, Rubio alleged that Hernández

1. Mark A. Uhlig, *Jesse Unruh, a California Political Power, Dies*, N.Y. TIMES (Aug. 6, 1987), <http://www.nytimes.com/1987/08/06/obituaries/jesse-unruh-a-california-political-power-dies.html> (internal quotation marks omitted).

2. See *California Proposition 50, Legislator Suspension Amendment*, BALLOTPEdia.ORG (June 2016), [https://ballotpedia.org/California_Proposition_50_Legislator_Suspension_Amendment_\(June_2016\)](https://ballotpedia.org/California_Proposition_50_Legislator_Suspension_Amendment_(June_2016)); CAL. CONST. art. IV, § 5. At times, this constitutional provision will be referred to as “Prop. 50.”

3. *Full Biography for Roger Hernandez*, SMART VOTER: LEAGUE OF WOMEN VOTERS (June 8, 2010), http://www.smartvoter.org/2010/06/08/ca/state/vote/hernandez_r/bio.html.

4. *Id.*

5. *Id.*

6. *Roger Hernandez’s Biography*, VOTE SMART: FACTS MATTER, <https://votesmart.org/candidate/biography/71156/roger-hernandez#.WfOxN1tSzct>.

7. Jim Miller, *Assemblyman Removed From Committee Posts over Claims He Abused His Wife*, SACRAMENTO BEE (July 1, 2016, 7:54 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article87326447.html>.

8. Richard Winton, *Judge Orders West Covina Assemblyman to Stay Away from Wife Following Domestic Violence Allegations*, L.A. TIMES (Apr. 15, 2016, 9:41 AM),

had pushed, shoved, hit, and choked her, culminating in a judge granting Rubio a temporary restraining order against Hernández in April 2016.⁹ That restraining order was extended for a period of three years in July.¹⁰ Assemblyman Hernández was not “termed out” from his various committee assignments; rather, he was forcibly removed by Assembly Speaker Anthony Rendon after these graphic allegations of domestic abuse in Hernández’s personal life surfaced.¹¹

This most-recent legal issue in his once-promising career is not the first that Hernández has faced.¹² Nor is it the first time that Hernández and his supporters have urged critics to respect the concept of “due process” pending the completion of investigations into Hernández’s alleged misconduct.¹³

In 2007, a neighbor reported hearing a loud argument, prompting police to respond to Hernández’s home.¹⁴ No charges were filed after Hernández claimed that the report was politically motivated.¹⁵

In August 2012, a jury acquitted Hernández of drunk driving charges stemming from an incident in March of that year where Hernández was driving a state-owned car on a personal trip.¹⁶ At the time of Hernández’s arrest, then-Speaker John A. Perez remarked that like “all Californians, Assembly members deserve due process[.]”¹⁷

In October 2012, Hernández was again accused of domestic violence in relation to a July incident where he allegedly hit a woman

<http://www.latimes.com/politics/la-pol-ca-assemblyman-roger-hernandez-domestic-violence-allegations-20160414-story.html>.

9. *Id.*

10. Javier Panzar, *Judge OKs Restraining Order Against Assemblyman Roger Hernández*, L.A. TIMES (July 30, 2016, 5:44 PM), <http://www.latimes.com/politics/la-pol-sac-essential-politics-updates-judge-oks-restraining-order-against-1467418373-htlmlstory.html>.

11. Miller, *supra* note 7.

12. *Id.*

13. To be clear, this Article renders no judgment as to Hernández’s guilt or innocence in regard to any past, present, or future allegations. The history of Mr. Hernández is used for the sole purpose of illuminating the due process concerns inherent in applying the provisions of Prop. 50 to an individual who has not been charged with a crime.

14. Michael J. Mishak & Teresa Watanabe, *L.A. County Sheriff to Take Over Abuse Probe of Assemblyman*, L.A. TIMES (Oct. 30, 2012, 5:55 PM), <http://latimesblogs.latimes.com/lanow/2012/10/la-sheriff-to-take-over-abuse-investigation-against-west-covina-assemblyman.html>.

15. *Id.*

16. Patrick McGreevy, *Assemblyman Roger Hernandez Found not Guilty of Driving Drunk*, L.A. TIMES (Aug. 27, 2012, 11:55 AM) <http://latimesblogs.latimes.com/california-politics/2012/08/assemblyman-roger-hernandez-verdict.html>.

17. Henry K. Lee, *Assemblyman Apologizes for DUI Arrest in Concord*, S.F. GATE (Sept. 18, 2012, 4:20 PM), <http://www.sfgate.com/crime/article/Assemblyman-apologizes-for-DUI-arrest-in-Concord-3509643.php>.

with a belt and slammed her into a wall, though no charges were filed.¹⁸ At the time, Hernández claimed that the charges were politically motivated.¹⁹

For several years, Hernández was probed by the state Fair Political Practices Commission for allegedly laundering \$100,000 in campaign funds during his 2010 run for State Assembly, but he has denied any impropriety.²⁰ Citing the death of one key witness and the poor medical condition of another, the ethics agency ended the probe in December 2015 without filing charges.²¹

After repeatedly facing and successfully defeating allegations of wrongdoing throughout his career, Assemblyman Hernández again faced punishment by his peers in the Legislature in the form of deprivation of a constitutionally protected property interest: his salary.²² This is despite the fact that Hernández has not been charged with any crime.²³ Prop. 50 allows lawmakers to suspend their colleagues and withhold pay without providing notice, an opportunity to be heard, or any coherent criteria for determining when such a reprimand is appropriate.²⁴ This Article argues that Prop. 50 is both bad law and bad public policy.

Part II provides a brief background on Prop. 50, detailing what is required to suspend a legislator without pay and describing the Proposition's origins. It will then trace the jurisprudence of "property" under the Fifth and Fourteenth Amendments to the United States Constitution and summarize trends in judicial decisions as to what specific procedures are due.

Part III contends that Prop. 50 is unconstitutional under the United States Constitution as currently written. First, it does not provide sufficient procedures for legislators to challenge their suspension of pay, as it does not provide notice or an opportunity to be heard. Second, Prop. 50 is impermissibly vague, lending it to

18. Mishak, *supra* note 14.

19. *Id.*

20. Patrick McGreevy, *Ethics Agency Drops Case Against Assemblyman Roger Hernandez Citing Death of Witness*, L.A. TIMES (Dec. 11, 2015, 11:55 AM), <http://www.latimes.com/politics/la-pol-sac-ethics-agency-drops-case-story.html>.

21. *Id.*

22. The Times Editorial Board, *Legislators Can Suspend Assemblyman Roger Hernandez Without Pay. But Should They?*, L.A. TIMES (Aug. 5, 2016, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-roger-hernandez-prop50-20160804-snap-story.html>.

23. *Id.*

24. *See id.*

overbroad application beyond its original intent because the language does not specify the circumstances in which it can be used. Therefore, it could be used against a member who simply expresses unpopular views, or against a member who has not yet been charged with a crime.

Part IV recommends changes to the language of Prop. 50 that would: 1) limit Prop. 50's application to situations where a member has been charged and/or convicted of a crime; 2) require written notice to an accused member that a vote to suspend the member without pay will take place; 3) guarantee a hearing so that legislators can mount a fair defense, the timing of which turns on the nature of the crime the member is accused of; and 4) impose time limits on the duration of suspension without pay.

Part V explains how these proposed changes alleviate some of the existing concerns raised by the current construction of Prop. 50. Finally, Part VI will synthesize all points and conclude.

II. TRACING PROP. 50'S ORIGINS AND ITS CONFLICT WITH PROCEDURAL DUE PROCESS

Before the due process defects of Prop. 50 may be identified and revisions to the law proposed, Prop. 50's history must first be understood and the concept of procedural due process explained. This part follows the origins of Prop. 50 and examines the development of case law governing procedural due process.

A. Prop. 50 Generally

Senator Darrell Steinberg introduced Prop. 50 on March 28, 2014, as Senate Constitutional Amendment 17.²⁵ The Senate adopted the proposition on May 27, 2014, and subsequently referred it to the Assembly.²⁶ There, the Assembly enacted Prop. 50. on August 20, 2014, and it was filed with the Secretary of State's office on August 25, 2014.²⁷ Prop. 50 appeared on the June 7, 2016 ballot where it was

25. See *SCA-17 Members of the Legislature: Suspension*, CAL. LEGISLATURE INFO., http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140SCA17 (last visited Apr. 4, 2019).

26. *Id.*

27. *Id.*

approved by 77 percent of voters.²⁸ Specifically, Prop. 50 amended Article IV, Section 5 of the California Constitution to read:

Each house may suspend a Member by motion or resolution adopted by rollcall vote entered in the journal, two-thirds of the membership concurring. The motion or resolution shall contain findings and declarations setting forth the basis for the suspension. Notwithstanding any other provision of this Constitution, the house may deem the salary and benefits of the Member to be forfeited for all or part of the period of the suspension by express provision of the motion or resolution.²⁹

1. It Is No Coincidence That Prop. 50 Was on the Ballot as a “Legislatively Referred” Constitutional Amendment and that Senator Steinberg Is Its Author

A majority of statewide voters must ratify any amendment to the California Constitution.³⁰ Amendments may come before voters and be placed on the ballot in one of two ways:³¹ 1) circulation of an initiative petition³² or 2) passage of a proposed amendment by a two-thirds majority in each house.³³ As noted, Prop. 50 was first introduced by Senator Steinberg, meaning that Prop. 50 came to voters by way of the latter route.

In theory, the State Senate is led by the Lieutenant Governor, who serves as President of the Senate and has the power to cast a vote in the event of a tie.³⁴ The California Constitution, however, allows members of the Senate to choose their own officers and rules for proceedings to run the day-to-day operations of the chamber.³⁵ The California Constitution, however, allows members of the Senate to choose their own officers and rules for proceedings to run the day-to-day operations of the chamber.³⁶ Thus, the “President pro Tempore,”

28. Alison Noon, *California Prop. 50 Passes, Allows Lawmakers to Be Suspended Without Pay for Wrongdoing*, ORANGE CTY. REG. (June 7, 2016, 10:13 PM), <http://www.oeregister.com/articles/lawmakers-718601-voters-proposition.html>.

29. CAL. CONST. art. IV, § 5.

30. CAL. CONST. art. XVIII, § 4.

31. 13 CAL. JUR. 3D *CONSTITUTIONAL LAW* § 6 (3d 2012).

32. CAL. CONST. art. XVIII, § 3.

33. CAL. CONST. art. XVIII, § 1.

34. CAL. CONST. art. V, § 9.

35. CAL. CONST. art. IV, § 7.

36. CAL. CONST. art. IV, § 7.

who also acts as the Chair of the Senate Rules Committee and the political leader of the majority party, is the most powerful member of the Senate, serving as the presiding officer of that body.³⁷ He or she oversees the appointment of committee members, assignment of bills, progress of legislation through the chamber, confirmation of gubernatorial appointees, and overall direction of policy.³⁸ The “Pro Tem” is also responsible for doling out punishment to Senators who misbehave.³⁹ Between 2008 and 2014, the Senate Pro Tem was Darrell Steinberg, the same Senator who introduced Prop. 50.⁴⁰

Why then, might the most powerful member of the Senate personally introduce legislation asking Californians to go to the polls to ratify his proposal? To Senator Steinberg, the answer is simple: because Prop. 50 “closes a technical, but important loophole in the law.”⁴¹

2. Prop. 50 Emerged Because the Legislature Could Not Suspend Three “Corrupt” Politicians Without Pay

Prior to the enactment of Prop. 50, legislators could not be suspended without pay. The misconduct of three State Senators made this point abundantly clear.

In 2010, a grand jury indicted Senator Roderick Wright on eight felony counts, alleging filing of a false declaration of candidacy, voter fraud, and perjury.⁴² Wright was accused of having listed his residence in a district he wished to represent, but actually living elsewhere.⁴³

37. Leadership, CAL. STATE LEGISLATURE, http://www.legislature.ca.gov/the_state_legislature/leadership_and_caucuses/leadership.html (last visited Apr. 4, 2019).

38. *Id.*

39. *Id.*

40. One day after his term expired in 2014, Steinberg became chair of the California Government Law and Policy Practice of the law and lobbying firm, Greenberg Traurig LLP. Patrick McGreevy, *State Sen. Darrell Steinberg to Join Law and Lobbying Firm*, L.A. TIMES (Oct. 23, 2014), <http://www.latimes.com/local/political/la-me-pc-sen-steinberg-to-join-lawlobbying-firm-20141023-story.html>. In June 2016, Steinberg was elected Mayor of Sacramento. See Ryan Lillis, *Steinberg Wins Sacramento Mayor’s Race by Wide Margin*, SACRAMENTO BEE (June 7, 2016, 8:15 PM), <http://www.sacbee.com/news/politics-government/election/local-election/article82416417.html>.

41. Patrick McGreevy, *Corruption Scandals Spawn Ballot Measure That Would Let Lawmakers Suspend Colleagues Without Pay*, L.A. TIMES (May 13, 2016), <http://www.latimes.com/politics/la-pol-sac-anti-corruption-ballot-measure-20160513-story.html>.

42. Jean Merl, *State Sen. Roderick Wright Indicted on Charges of Voter Fraud, Perjury*, L.A. TIMES (Sept. 17, 2010), <https://www.latimes.com/local/politics/la-me-pol-rod-wright-20140913-story.html>.

43. *Id.*

Under penalty of perjury, Wright listed his residence on his voter registration and declaration of candidacy forms as a multifamily complex in Inglewood, within the 25th Senate District, which he was elected to represent.⁴⁴ Evidence depicting full closets, cars, prescription medicines, artwork, and other personal effects demonstrated that Senator Wright actually lived in a house he owned in Baldwin Hills, in the neighboring 26th District, and he was convicted by a jury in January 2014.⁴⁵

On February 21, 2014, Senator Ron Calderon was charged with taking \$100,000 in bribes in return for supporting legislation favorable to those offering the payments.⁴⁶ Calderon faced 24 counts of fraud, bribery, conspiracy to commit money laundering, money laundering, and assisting in the filing of false tax returns.⁴⁷ The allegations stemmed from incidents during which Calderon sponsored legislation supportive of 1) a surgery business in return for a hospital owner paying Calderon's son for work he did not complete,⁴⁸ and 2) a supposed independent movie studio (which turned out to be a front by undercover FBI investigators) in exchange for the studio head paying Calderon's daughter for work she did not complete.⁴⁹ Senator Calderon later pleaded guilty to a reduced charge of mail fraud on June 21, 2016.⁵⁰

On March 26, 2014, Senator Leland Yee was arrested along with Raymond Chow, a gangster known as "Shrimp Boy."⁵¹ Yee was charged with conspiracy to commit both wire fraud and arms

44. *Id.*

45. Jean Merl, *Wright is Guilty of Voter Fraud*, L.A. TIMES (Jan. 29, 2014), <http://articles.latimes.com/2014/jan/29/local/la-me-rod-wright-verdict-20140129>.

46. Richard Winton, *State Sen. Ron Calderon Faces 395 Years for Alleged Bribery Scheme*, L.A. TIMES (Feb. 21, 2014), <http://www.latimes.com/local/lanow/la-me-ln-calderon-faces-395-years-bribery-case-20140221-story.html>.

47. Richard Winton, *Sen. Ron Calderon Surrenders to Authorities in Corruption Case*, L.A. TIMES (Feb. 24, 2014), <http://www.latimes.com/local/lanow/la-me-ln-sen-ron-calderon-turns-himself-in-20140224-story.html>.

48. *Id.*

49. Scott Glover & Hector Becerra, *California Sen. Ronald S. Calderon, Brother Charged in FBI Probe*, L.A. TIMES (Feb. 21, 2014), <http://www.latimes.com/local/la-me-0222-calderon-20140222-story.html>.

50. Matt Hamilton, *Former State Sen. Ron Calderon Pleads Guilty in Federal Corruption Case*, L.A. TIMES (June 21, 2016), <http://www.latimes.com/local/lanow/la-me-ln-ron-calderon-guilty-plea-20160621-snap-story.html>.

51. Maura Dolan, Scott Gold & Joe Mozingo, *State Sen. Leland Yee Arrested on Corruption Charges in FBI Sting*, L.A. TIMES (Mar. 26, 2014, 6:22 AM), <http://www.latimes.com/local/la-me-yee-arrest-20140327-story.html>.

trafficking.⁵² In exchange for campaign contributions, Senator Yee had allegedly agreed to use his influence to set up meetings for undercover agents posing as businessmen interested in medical marijuana and firearms.⁵³ On July 1, 2015, Yee plead guilty to a reduced racketeering charge.⁵⁴

The Senate agreed near unanimously that Senators Wright, Calderon, and Yee needed to be reprimanded, but members differed as to how.⁵⁵ Some demanded that the Senators resign or face expulsion; others favored suspension until the criminal charges were resolved.⁵⁶

On February 25, 2014, the Office of Legislative Counsel sent Senator Steinberg an opinion letter confirming that while the Senate may suspend its members and prevent them from exercising the privileges of their office, “the body does not have the power to suspend its Members without pay.”⁵⁷ Accordingly, on March 28, 2014, the same day that Prop. 50 was introduced,⁵⁸ the Senate voted 28-1 to suspend Senators Wright, Calderon, and Yee with pay.⁵⁹ The suspensions were to remain in effect “until all criminal proceedings currently pending against them have been dismissed.”⁶⁰ Senator Wright resigned on September 22, 2014.⁶¹ Senators Calderon and Yee

52. Times Staff Writers, *Sen. Yee Charged with Trafficking Firearms in Sweeping FBI Probe*, L.A. TIMES (Mar. 26, 2014), <http://www.latimes.com/local/lanow/la-me-ln-yee-charged-trafficking-firearms-fbi-20140326-story.html>.

53. *Id.*

54. Lee Romney, et al., *Ex-state Sen. Leland Yee Pleads Guilty to Racketeering in Corruption Case*, L.A. TIMES (July 1, 2015, 9:11 AM), <http://www.latimes.com/local/lanow/la-me-ln-ff-leland-yee-plea-20150701-story.html>.

55. Patrick McGreevy, *In Unprecedented Move, State Senate Votes to Suspend Three Lawmakers*, L.A. TIMES (Mar. 28, 2014, 4:28 PM), <http://www.latimes.com/local/la-me-yee-capitol-20140329-story.html>.

56. *Id.*

57. Steinberg, *Bill Analysis*, SENATE RULES COMM., http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0001-0050/sca_17_cfa_20140523_141151_sen_comm.html (last visited Apr. 4, 2019) (entry for “05/23/14- Senate Floor Analyses”).

58. The Times Editorial Board, *Should Accused California Legislators Still be Paid?*, L.A. TIMES (Apr. 1, 2014), <http://articles.latimes.com/2014/apr/01/opinion/la-ed-suspensions-with-pay-yee-calderon-wright-20140401>.

59. McGreevy, *supra* note 55.

60. *SR 38 Senate Resolution*, BILL ANALYSIS, http://www.leginfo.ca.gov/pub/1314/bill/sen/sb_00010050/sr_38_cfa_20141008_094748_sen_floor.html.

61. Patrick McGreevy & Jean Merl, *Sen. Wright to Resign Sept. 22, Start Sentence Oct. 31*, L.A. TIMES (Sept. 25, 2014), <http://www.latimes.com/local/politics/la-me-pol-rod-wright-20140916-story.html>.

served their suspensions, and left office after their terms expired in November 2014.⁶²

3. The Legislative Counsel Opinion

The constitutional rationale for the Senate's previous inability to suspend members without pay is detailed in a February 25, 2014 opinion letter by the Office of Legislative Counsel.⁶³ First, the opinion letter relies upon the enactment of Proposition 112 in 1990, which amended Article III, Section 8 of the California Constitution to create the California Citizens Compensation Commission.⁶⁴ The opinion letter states that "the Constitution vests the Commission with the power to adjust the salary and benefits of Members of the Legislature."⁶⁵ Second, the opinion also states that, under the California Constitution, "the salaries of elected state officers may not be reduced during their term of office."⁶⁶ Finally, the opinion letter warns that suspension without pay could lead to judicial review and reversal by court order⁶⁷ as in the New Jersey case, *Vas v. Roberts*.⁶⁸

There, Joseph Vas, a former member of the New Jersey General Assembly, sought judicial review of a decision by the former Assembly Speaker, Joseph Roberts, to suspend Vas without pay.⁶⁹ Following an investigation spanning two years, a state grand jury indicted Vas on eleven counts related to "conspiracy, misconduct, pattern of official misconduct, theft, misapplication of government

62. Patrick McGreevy & Phil Willon, *Judge Rules Office Records of Ex-Sens. Calderon and Yee Must Be Disclosed*, L.A. TIMES (June 6, 2015), <http://www.latimes.com/local/political/la-me-pc-records-calderon-yee-20150604-story.html>.

63. The Office of Legislative Counsel "is a nonpartisan public agency that drafts legislative proposals, prepares legal opinions, and provides other confidential legal services to the Legislature and others." *Welcome to the Website of Legislative Counsel of California*, ST. OF CAL. OFF. OF LEG. COUNS., <http://legislativecounsel.ca.gov> (last visited Apr. 4, 2019). Attempts to secure the opinion letter in its entirety have been unsuccessful as the Office stated that the letter was protected by attorney-client privilege. The author made a request under the CALIFORNIA PUBLIC RECORDS ACT on September 27, 2016. On October 12, 2016, the Office denied the request, claiming in writing that the opinion was exempt on the basis of attorney client privilege and/or as a record of the Office of Legislative Counsel. Further efforts to procure the opinion letter were unsuccessful.

64. STATE OFFICIALS, ETHICS, SALARIES. OPEN MEETINGS. LEGISLATIVE CONSTITUTIONAL AMENDMENT, Cal. Legis. Serv. Prop. 112 (1990).

65. *SR 38 Senate Resolution*, *supra* note 60.

66. *Id.*

67. Kyle Buis, *California Senators Hold On to Pay Because of New Jersey Court Decision*, CBS SACRAMENTO (Mar. 28, 2014, 7:57 PM), <http://sacramento.cbslocal.com/2014/03/28/web-exclusive-california-senators-hold-on-to-pay-because-of-new-jersey-court-decision/>.

68. 14 A.3d 766 (N.J. Super. Ct. App. Div. 2011).

69. *Id.*

property, and tampering with public records.”⁷⁰ Subsequent state and federal grand juries returned additional indictments against Vas.⁷¹

The New Jersey Constitution specified that legislators “shall receive annually, during the term for which they shall have been elected and while they shall hold their office, such compensation as shall . . . be fixed by law[.]”⁷² Thus, the court held that members had a constitutionally protected interest in receiving their salary while in office and that Roberts, therefore, lacked the authority to suspend Vas without pay.⁷³

It is clear, then, that Prop. 50 was introduced to give Senator Steinberg (and his successors) a power which he previously lacked. Indeed, Prop. 50 was intended to serve as a legislative work-around to the Citizens Compensation Commission dilemma and the constitutional guarantee that reductions in state officers’ salaries cannot take effect during their terms in office, while precluding the possibility of judicial review, as illuminated in the *Vas* case. Now that Prop. 50’s origins have been explored, the concept of procedural due process may be explained, and its inherent conflict with Prop. 50 detailed.

B. Procedural Due Process Generally

The Due Process Clause of the Fifth Amendment to the United States Constitution ensures that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]”⁷⁴ The Fourteenth Amendment extends these protections to actions by the individual states, guaranteeing that no state may “deprive any person of life, liberty, or property, without due process of law[.]”⁷⁵ But what does “due process of law” require? And what constitutes “property” sufficient to trigger these due process protections?

1. Due Process Requires Notice and the Opportunity to be Heard

In *Mullane v. Central Hanover Bank & Trust Co.*,⁷⁶ the Supreme Court articulated that prior to a State’s deprivation of a life, liberty, or

70. *Id.* at 769.

71. *Id.*

72. N.J. CONST. art. IV, § 4, ¶ 7.

73. *Vas*, 14 A.3d at 778.

74. U.S. CONST. amend. V.

75. U.S. CONST. amend. XIV, §1.

76. 339 U.S. 306 (1950).

property interest, procedural due process requires both notice and the opportunity to be heard.⁷⁷ The Court noted that an “elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁷⁸

The United States Supreme Court remained largely silent on the notice and hearing requirements for the next twenty years.⁷⁹ Then, in 1970, the Court reached its seminal decision in *Goldberg v. Kelly*.⁸⁰

In *Goldberg*, residents receiving state and federal financial aid entitlements sought judicial review of the termination of these benefits.⁸¹ Noting that the benefits at issue provided recipients “the means to obtain essential food, clothing, housing, and medical care,” the Court concluded that only a pre-termination evidentiary hearing would satisfy the notice and hearing requirements of procedural due process.⁸² Expanding on the hearing requirement, the Court was quick to caution that, while a pre-termination hearing need not take the form of a trial, due process “require[s] that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.”⁸³

2. Property Under the Due Process Clauses

In *Board of Regents of State Colleges v. Roth*,⁸⁴ the Supreme Court recognized that “the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”⁸⁵ The Court noted that:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead,

77. *Id.* at 313.

78. *Id.* at 314.

79. Henry J. Friendly, “Some Kind of Hearing”, 123 U. PA. L. REV. 1267 (1975).

80. 397 U.S. 254 (1970).

81. *Id.* at 255–56.

82. *Id.* at 264.

83. *Id.* at 266–68.

84. 408 U.S. 564 (1972).

85. *Id.* at 571–72.

have a legitimate claim of entitlement to it Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.⁸⁶

The Supreme Court again addressed property rights in the context of employment in *Cleveland Board of Education v. Loudermill*.⁸⁷ Under state law, Loudermill could only be fired “for cause” and was entitled to an administrative review of his termination.⁸⁸ He brought suit, contending that he had a property interest in his employment and that the procedures in place for administrative review were deficient under the Fourteenth Amendment.⁸⁹ The Court agreed, finding that a guarantee that Loudermill could only be terminated “for cause,” rather than at will, created a property interest in employment sufficient to trigger the notice and hearing requirements of procedural due process.⁹⁰

3. The *Mathews* Test

In *Mathews v. Eldridge*,⁹¹ the Supreme Court announced three factors for consideration in determining whether specific procedures comport with due process’ notice and hearing requirements:

First, the private interest . . . affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved

86. *Id.* at 577.

87. 470 U.S. 532 (1985).

88. *Id.* at 535.

89. *Id.* at 536.

90. *Id.* at 532. The Court further expanded on the hearing requirement, noting that the purpose of the pre-deprivation hearing is to “be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Id.* at 545–46. It doled out the requirements of such a hearing, concluding that “[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” *Id.* at 546.

91. 424 U.S. 319 (1976).

and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁹²

Eldridge, an individual receiving disability benefits under the Social Security Act, sought judicial review of the procedures in place to challenge termination of those benefits.⁹³ In applying these three factors, the Court concluded that the procedures in place “fully comport with due process.”⁹⁴

4. Notice and Hearing Requirements Post *Gilbert*

The Supreme Court’s landmark decision in *Goldberg* suggests that the state instrumentality must provide a hearing *prior* to the deprivation of an individual’s property interest. That changed for public employees when the Court heard *Gilbert v. Homar*⁹⁵ in 1997.⁹⁶

In that case, Homar served as a police officer employed at a Pennsylvania public university and was arrested during a drug raid.⁹⁷ He was charged with a count of marijuana possession, possession with intent to deliver, and conspiracy to violate the controlled substance law.⁹⁸ The university’s police chief immediately suspended Homar without pay.⁹⁹ Homar brought suit, alleging that the university’s failure to provide him with notice and an opportunity to be heard prior to being suspended without pay violated due process.¹⁰⁰

In noting that the purpose of a pre-suspension hearing is to determine whether there are reasonable grounds to support the suspension without pay, the Court concluded that “a grand jury indictment provides adequate assurance that the suspension is not unjustified.”¹⁰¹ The Court found that an individual being arrested and formally charged with a felony is similarly sufficient because an independent third party, such as a prosecutor, “has determined that there is probable cause to believe the employee committed a serious crime.”¹⁰² The Court concluded that “the State has a significant

92. *Id.* at 335.

93. *Id.* at 323–25.

94. *See Id.* at 349.

95. 520 U.S. 924 (1997).

96. *Id.*

97. *Id.* at 926.

98. *Id.* at 926–27.

99. *Id.* at 927. The conspiracy charge was classified as a felony. *Id.*

100. *Id.* at 928.

101. *Id.* at 934.

102. *Id.*

interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers.”¹⁰³ It is apparent then, that in limited circumstances, public employees *may* be suspended without pay, without a presuspension hearing, so long as a prompt postsuspension hearing is held. That is because “the government does not have to give an employee charged with a felony a paid leave at taxpayer expense.”¹⁰⁴

III. PROP. 50 DOES NOT PASS CONSTITUTIONAL MUSTER AS WRITTEN

In light of the foregoing discussion, this Section posits that Prop. 50 is unconstitutional for two reasons. First, Prop. 50 provides procedures which fail to comport with the notice requirements consistently articulated by the United States Supreme Court. Second, Prop. 50 provides insufficient hearing procedures to legislators contesting their suspension without pay.

A. A Legislator’s Pay is “Property” Within the Meaning of the Due Process Clause of the Fourteenth Amendment

Writing for the *Roth* majority, Justice Stewart noted that the “requirements of procedural due process apply *only* to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.”¹⁰⁵ Subsequent Supreme Court opinions have reiterated that “no process is due if one is not deprived of life, liberty, or property[.]”¹⁰⁶ Thus, in order for some sort of notice and hearing to be due, the threshold inquiry is whether suspension of a legislator’s pay implicates a life, liberty, or property interest.¹⁰⁷

Typically, property interests are “not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes[.]”¹⁰⁸ State law, then, illuminates whether a property interest exists. At least one provision

103. *Id.* at 932.

104. *Id.*

105. *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972) (emphasis added).

106. *Kerry v. Din*, 135 S. Ct. 2128, 2132 (2015) (quoting *Swarthout v. Cooke*, 565 U.S. 216, 219 (2011)) (internal citations omitted).

107. Colorable arguments could be made that Prop. 50 implicates either a life and/or liberty interest. This Article focuses, however, on the treatment of legislator pay as a property interest.

108. *Goss v. Lopez*, 419 U.S. 565, 572 (1975) (internal quotation marks omitted).

of the California Constitution creates a protected property interest in pay for state legislators.

1. Article III, Section 4 of the California Constitution
Mandates that The Salaries of State Legislators
May Not Be Reduced During Their Term of Office

State law creates a protected property interest in a benefit where an individual has a reasonable expectation of entitlement to that benefit.¹⁰⁹ Whether a reasonable expectation of entitlement exists is “determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms.”¹¹⁰

Article III, Section 4 of the California Constitution mandates that “salaries of elected state officers *may not be reduced* during their term of office.”¹¹¹ State officers include state legislators.¹¹² On its face, the provision gives no discretion to decision makers to reduce state legislators’ salaries mid-term. The provision’s plain language and comparison to case precedent, then, makes clear that legislators have a property interest in receiving uninterrupted, non-reducible pay.

In *Roth*, a nontenured college professor at Wisconsin State University-Oskosh hired for a one-year term, challenged his dismissal after being notified that he would not be rehired for the subsequent academic year.¹¹³ Under Wisconsin law, a nontenured teacher must be informed by February 1 whether or not he is to be retained for the following year, but “no reason for non-retention need be given. No

109. *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (quoting *Roth*, 408 U.S. at 577) (internal citations and quotations omitted).

110. *Id.*

111. CAL. CONST. art. III, § 4(a) (emphasis added). Subdivision(b) provides one exception to this guarantee for “a judge of a court of record.” This subsection applies only to judges and not to other state officers. See David Villalba, *Authority of the California Citizens Compensation Commission to Reduce Elected Officials’ Salaries During Their Term in Office*, DEP’T OF PERS. ADMIN. (June 11, 2009), <http://www.calhr.ca.gov/Documents/cccc-mid-term-salaray-reductions-20090611.pdf> (holding that “Subdivision(b) applies only to judges, not other elected officials”).

112. State officers include “the Governor, Lieutenant Governor, Attorney General, Controller, Insurance Commissioner, Secretary of State, Superintendent of Public Instruction, Treasurer, member of the State Board of Equalization, and *Member of the Legislature*.” CAL. CONST. art. III, § 8(l) (emphasis added); see also Jake M. Hurley, *Mid-Term Salary Reductions of Elected State Officers*, DEP’T OF PERS. ADMIN. (May 18, 2009), <http://www.calhr.ca.gov/Documents/cccc-reduce-during-term-dpa-20090518.pdf>. (“While the term ‘elected state officers’ is not defined for purposes of [Article III,] section 4(a), the California Supreme Court has held this term to include elected state officers in all three branches of government.”) (referencing *Olson v. Cory*, 27 Cal. 3d 532, 543 (1980)).

113. *Bd. of Regents v. Roth*, 408 U.S. 564, 566 (1972).

review or appeal is provided in such case.”¹¹⁴ State law “leaves the decision whether to rehire a nontenured teacher for another year to the *unfettered discretion* of university officials.”¹¹⁵

Roth argued that he had a “property” interest in continued employment and that his not being rehired and not having been told why violated his due process rights.¹¹⁶ The Supreme Court disagreed because the express terms of Roth’s employment stated that he would be employed for a one-year term, and university officials had discretion on whether to rehire Roth.¹¹⁷ Therefore, Roth lacked a property interest in continued employment beyond the one year term and was not entitled to the notice and hearing requirements of procedural due process.¹¹⁸

Roth is inapposite precisely due to the level of discretion vested in superiors in deciding whether to rehire nontenured professors after their initial one year term. Whereas in *Roth* the statute left university officials free to choose *whether or not* to retain nontenured professors, Article III, Section 4 is unambiguous that state legislators’ salaries *may not* be reduced during their terms in office.¹¹⁹

The Supreme Court’s finding of a property interest in *Loudermill* further supports a determination that state legislators possess a protected property interest in their pay.¹²⁰ There, the Cleveland Board of Education had hired Loudermill as a security guard after Loudermill indicated on his job application that he had never been convicted of a felony.¹²¹ After learning that Loudermill had previously been convicted of grand larceny, the Board dismissed Loudermill without giving him a chance to respond or otherwise challenge the firing.¹²²

Loudermill pursued judicial review of the Board’s termination, charging that he had a property right in his employment and was due some sort of hearing.¹²³ The Court agreed, relying on the statutory language which guaranteed that Loudermill was entitled to retain his position “during good behavior and efficient service, . . . [and] could

114. *Id.* at 567 (internal citation omitted).

115. *Id.* (emphasis added).

116. *Id.* at 568.

117. *Id.* at 578.

118. *Id.*

119. CAL. CONST. art. III, § 4(a).

120. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 532 (1985).

121. *Id.*

122. *Id.*

123. *Id.* at 536.

not be dismissed except . . . for . . . misfeasance, malfeasance, or nonfeasance in office.”¹²⁴

Importantly, the *Loudermill* Court was willing to find that *Loudermill* possessed a property right in continued employment even where the statute provided superiors with limited discretion to terminate employees in certain instances involving impropriety or poor performance.¹²⁵ Article III, Section 4’s plain language gives no such discretion to decision makers to reduce legislators’ salaries during their terms of office. It is instead absolute, compelling a finding that Article III, Section 4 confers to legislators a protected property interest in their salary.¹²⁶

2. Prop. 50’s “Notwithstanding” Language Does Not Destroy Legislators’ Property Interest in Pay

Prop. 50 includes the specific language that the Legislature’s ability to suspend a member without pay upon a two-thirds vote is “[n]otwithstanding any other provision of this Constitution[.]”¹²⁷ Thus, it would appear upon first glance that there is a conflict in the California Constitution between Article IV, Section 5 (which codified Prop. 50 into law) and Article III, Section 4 (which prohibits the reduction of a legislator’s salary during the legislator’s current term), extinguishing a legislator’s protected property interest in receiving uninterrupted, non-reducible pay. However, such a reading would ignore the United States Supreme Court’s repudiation of the “bitter with the sweet” principle.

In the context of procedural due process, the “bitter with the sweet” approach maintains that “when the source of a property right contains within it specified procedures for protection of that right, one cannot simultaneously insist upon the right and complain that the

124. *Id.* at 538–39 (internal quotation marks omitted).

125. *Id.* at 539 n 4.

126. Courts in other jurisdictions have found that public employees have protected property rights to their compensation. *See* *Sherlock v. United States*, 43 Ct. Cl. 161, 165 (1908) (holding that the federal Postmaster-General could fix an employee’s salary, “but when fixed, as long as he was an incumbent of the office, so far as earned, it was his property . . . [and] no power could take [it] from him without due process of law.”); *Hanchey v. State ex rel. Roberts*, 52 So. 2d 429, 431–32 (Fla. 1951) (holding that a Florida Sheriff is entitled to a commission based on moneys collected for the State because an officer “is now responsible to the public for the performance of the duties of the office, and, upon assuming the duties and responsibilities thereof likewise he became entitled to its profits and emoluments. The right of compensation is an incident to the office as the person holding the office is entitled to its compensation.”).

127. CAL. CONST. art. IV, § 5(2)(A).

specified procedures are constitutionally inadequate.”¹²⁸ The principle is commonly associated with the case of *Arnett v. Kennedy*.¹²⁹

In *Arnett*, the Supreme Court addressed whether the Lloyd-La Follette Act’s procedures for removing a nonprobationary employee from the Federal Civil Service violated that employee’s procedural due process rights.¹³⁰ There, the Act stated that an employee could not be terminated except for “such cause as will promote the efficiency of the service.”¹³¹ The statute “expressly provided also for the procedure by which ‘cause’ was to be determined[.]”¹³² In writing for a plurality of the Court, Justice Rehnquist noted that “where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.”¹³³

According to the Court’s plurality opinion, because the employee relied on the Lloyd-La Follette Act’s “for cause” language as the basis for his claim that he had a protected property interest in continued employment, the employee must accept the Act’s procedural limitations.¹³⁴ By this “bitter with the sweet” logic, if a legislator were to rely on California Constitution Article III, Section 4’s guarantee that salary may not be reduced during the legislator’s current term in office, the legislator must also accept California Constitution Article IV, Section 5’s procedural limitation that upon a “motion or resolution adopted by . . . two-thirds of the membership concurring[,] . . . the house may deem the salary and benefits of the Member to be *forfeited* [.]”¹³⁵ However, the Supreme Court later rejected this “bitter with the sweet” approach by an 8-1 margin.¹³⁶

In *Loudermill*, seven Justices concurred with Justice White that “the ‘bitter with the sweet’ approach misconceives the constitutional guarantee” of procedural due process.¹³⁷ Justice White clarified that

128. Jeffrey M. Gamso, *Tenured Public Employee Entitled to Pre-Termination Hearing Regardless of Statutory Procedures for Dismissal: Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487 (1985), 17 TEX. TECH L. REV. 255, 262 (1986).

129. 416 U.S. 134 (1974).

130. *Id.*

131. *Id.* at 151–52.

132. *Id.* at 152.

133. *Id.* at 153–54.

134. *Id.*

135. CAL. CONST. art. IV, § 5(a)(2)(A) (emphasis added).

136. See Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 193, 196 (1990).

137. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

“[t]he categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. ‘Property’ cannot be defined by the procedures provided for its deprivation[.]”¹³⁸ That the statute which stated that the Board could only terminate Loudermill “for cause” also specified its own procedures to govern termination in no way defined or eliminated Loudermill’s property interest in continued employment.¹³⁹ Similarly, although Article IV, Section 5 states that either house of the Legislature may suspend a legislator without pay with: 1) a two-thirds vote and 2) a declaration explaining the basis for the suspension,¹⁴⁰ such a procedural limitation does not define or eliminate the property right conferred by Article III, Section 4’s guarantee that “salaries of elected state officers may not be reduced during their term of office.”¹⁴¹

Accordingly, Article IV, Section 5 attempts to answer the question of “*what* process is due” rather than “*whether* process is due[.]”¹⁴² Article III, Section 4 already answers the latter inquiry in the affirmative. This distinction is *not* one without a difference.

Once state law confers a protected property interest, “the question remains what process is due.”¹⁴³ The answer does not lie in state law, such as Article IV, Section 5, because “minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate[.]”¹⁴⁴ Federal law, therefore, dictates “what process is due” to a legislator choosing to challenge a suspension without pay.

B. Prop. 50 Provides Insufficient Notice and Hearing Procedures

At its core, procedural due process requires notice and the opportunity to be heard.¹⁴⁵ Prop. 50 provides neither of these safeguards enshrined in the Fourteenth Amendment.

138. *Id.*

139. *See Id.* at 539–40.

140. CAL. CONST. art. IV, § 5(a)(2)(A).

141. CAL. CONST. art. III, § 4(a).

142. *See Farina, supra* note 136, at 195.

143. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

144. *See Loudermill*, 470 U.S. at 541.

145. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

1. The Plain Language of Article IV, Section 5 Makes
No Mention of the Notice Provided to a Legislator Facing
Suspension Without Pay

In *Mullane*, the Supreme Court articulated what sort of notice is guaranteed under the Fourteenth Amendment. There, the Central Hanover Bank established a common trust fund and subsequently petitioned a New York Court for the settlement of the account after placing a notice in a local newspaper.¹⁴⁶ The publication stated the name and address of the Central Hanover Bank, the name of the common trust fund and the date it was established, and a list of all funds, trusts, and/or estates participating in the trust fund, as required under New York law.¹⁴⁷

Mullane, the court-appointed special guardian, objected, contending that the statute's procedures were insufficient under the Due Process Clause of the Fourteenth Amendment.¹⁴⁸ The Court agreed, finding that the Bank was required to send mail notice to individuals whose names and addresses the Bank knew.¹⁴⁹ This relative lack of notice was crucial to the Court's reasoning because the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."¹⁵⁰

Prop. 50 merely provides, in relevant part, that "[e]ach house may suspend a Member by motion or resolution adopted by rollcall vote entered in the journal, two-thirds of the membership concurring. The motion or resolution shall contain findings and declarations setting forth the basis for the suspension."¹⁵¹ The measure lacks *any* express language requiring that prior to the consideration of any suspension motion or resolution, legislators give the member notification of the pending motion and/or the time and place that such a motion or resolution is to be considered.¹⁵² This directly contravenes the Court's clear directive in *Mullane* that "the notice must be of such nature as

146. *Id.* at 309.

147. *Id.* at 309–10.

148. *Id.* at 311.

149. *Id.* at 318.

150. *Id.* at 314.

151. CAL. CONST. art. IV, § 5(2)(A).

152. While Prop. 50 requires that there be a written explanation for the suspension without pay, it is unclear when, if at all, the Legislature provides this explanation to an aggrieved legislator. Presumably, this explanation might be provided to a legislator *after* a motion or resolution to suspend without pay has *already* been passed.

reasonably [necessary] to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance[.]”¹⁵³

2. The Plain Language of Article IV, Section 5 Makes No Mention of the Hearing Provided to a Legislator Facing Suspension Without Pay

Any determination of whether Prop. 50 is constitutionally sufficient begins with the recognition that the “fundamental requisite of due process of law is the opportunity to be heard.”¹⁵⁴ The Supreme Court’s opinion in *Goldberg* provides the basic framework for what is required during such an opportunity.¹⁵⁵

In *Goldberg*, New York City residents receiving state and federal financial aid entitlements challenged the sufficiency of procedures in place governing the termination of these entitlements.¹⁵⁶ The procedures required that recipients be given notice of the proposed termination at least seven days in advance, have the ability to challenge the termination to a superior official, and enjoy the opportunity to submit a written statement detailing why the proposed termination should not take effect.¹⁵⁷ While the recipients were not able to appear in person, present evidence orally, or confront adverse-witnesses *prior* to a determination decision, recipients could request a post-termination “fair hearing” where such recourse was available.¹⁵⁸

The Court concluded that “when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process.”¹⁵⁹ Therefore, that an in-person hearing was available only *after* an eligibility decision had been made proved “fatal to the constitutional adequacy of the procedures.”¹⁶⁰ The Court acknowledged that the “hearing need not take the form of a judicial or quasi-judicial trial.”¹⁶¹ However, “where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for

153. *Mullane*, 339 U.S. at 314.

154. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

155. *Goldberg v. Kelly*, 397 U.S. 254, 255–56 (1970).

156. *Id.*

157. *Id.* at 258.

158. *Id.* at 259.

159. *Id.* at 264.

160. *Id.* at 268.

161. *Id.* at 266.

decision. . . . [A] recipient must be allowed to state his position orally.”¹⁶²

With respect to a hearing, Prop. 50 states only that “[e]ach house may suspend a Member by motion or resolution adopted by rollcall vote entered in the journal, two-thirds of the membership concurring.”¹⁶³ Whereas the statute in *Goldberg* was inadequate even where it specified that an aggrieved individual could appear personally, present evidence orally, and cross-examine adverse witnesses (after an eligibility determination had been made), the express language of Prop. 50 is silent as to any of these basic protections. Notably, Cal. Gov’t Code § 8940 et seq., which governs the Joint Legislative Ethics Committee,¹⁶⁴ by statute specifically grants accused members various rights during hearings to “examine and make copies of all evidence in the possession of the committee[.]”¹⁶⁵ to “be represented by legal counsel; to call and examine witnesses; to introduce exhibits; and to cross-examine opposing witnesses[.]”¹⁶⁶ and to “testify or, at the discretion of the committee, to file a statement of facts under oath relating solely to the material relevant to the testimony of which he complains.”¹⁶⁷ Thus, in other areas of state law, where a member of the Legislature has been accused of wrongdoing, the Legislature has been careful to clearly articulate the nature of a disciplinary hearing and to notify the accused member of his or her rights during such a hearing. The drafters of Prop. 50 could have provided legislators facing suspension any of these rights or those articulated by the *Goldberg* court; the fact that they did not suggests a deliberate choice not to.

IV. PROPOSED SOLUTIONS

The idea behind Prop. 50 is simple: “Why should lawmakers get a paid vacation if they’re accused of violating the public trust?”¹⁶⁸ At the time it was enacted, many members of the Legislature and the

162. *Id.* at 269.

163. CAL. CONST. art. IV, § 5(a)(2)(A).

164. The Joint Legislative Ethics Committee investigates and makes “findings and recommendations concerning alleged [ethics] violations by Members of the Legislature[.]” CAL. GOV’T CODE § 8943(a).

165. *Id.* § 8946.

166. *Id.* § 8948(b).

167. *Id.* § 8949.

168. The Times Editorial Board, *supra* note 22.

public alike hailed Prop. 50 as an important tool that would allow lawmakers to hold their colleagues accountable.¹⁶⁹ But the road to Hell is paved with good intentions. If Prop. 50's drafters were serious about enacting a good-government reform that would curb corruption, then the measure is in serious need of a linguistic detour to survive a constitutional challenge. Indeed, several key changes are necessary for Prop. 50 to withstand judicial scrutiny.

A. Requirement of Written Notice

In its present form, Prop. 50 merely requires that a motion or resolution to suspend a legislator without pay contain "findings and declarations" regarding the basis for any suspension.¹⁷⁰ The measure is otherwise silent as to the specific mechanism required to notify accused legislators of pending suspension proceedings. To the contrary, Section 8944 of the California Government Code, which governs the filing of complaints against legislators with the Joint Legislative Ethics Committee, requires that any complaint: 1) be in writing; 2) state the name of the legislator accused of having committed a violation; 3) set forth allegations, which if true, would constitute an ethics violation with the Committee's jurisdiction; 4) be signed by the complainant under penalty of perjury; 5) include a statement that the complainant knows the facts alleged to be true or believes them to be true; and 6) be sent promptly to the accused legislator by the Committee.¹⁷¹ Incorporation of these precise requirements into Article IV, Section 5 would mitigate Prop. 50's notice shortcomings.

B. Guarantee of Hearing

Prop. 50 is similarly vague as to the sort of hearing (if any) provided to a legislator facing suspension without pay. Article IV, Section 5 merely offers that "Each house may suspend a Member by motion or resolution adopted by rollcall vote entered in the journal, two-thirds of the membership concurring."¹⁷² Presumably, a house of the Legislature considers a motion or resolution to suspend a legislator without pay in the same manner it would any other piece of

169. See McGreevy, *supra* note 41.

170. CAL. CONST. art. IV, § 5(2)(A).

171. CAL. GOV'T CODE §§ 8944(b), (d).

172. CAL. CONST. art. IV, § 5(2)(A).

legislation.¹⁷³ However, a resolution to proclaim the 30th anniversary of the Paris Wine Tasting of 1976¹⁷⁴ necessarily does not implicate the same magnitude of concerns as a resolution to suspend a legislator without pay. Common sense suggests, and the Fourteenth Amendment to the United States Constitution requires, that more stringent hearing procedures accompany any possible suspension without pay.

1. Particular Procedures

In his article “Some Kind of Hearing,” famed Second Circuit Judge Henry J. Friendly suggests that any fair hearing requires¹⁷⁵ 1) an opportunity to present reasons why the proposed action should not be taken; 2) the right to call witnesses; 3) the right to know the evidence against oneself; 4) the right to counsel; and 5) and public attendance.¹⁷⁶ Cal. Gov’t Code §§ 8940–48, which governs the Joint Legislative Ethics Committee’s operating procedures, guarantees: 1) the right to present exhibits; 2) the right to call, examine, and cross-examine witnesses; 3) that an accused legislator may examine and make copies of all evidence in the possession of the committee relating to the initial complaint; 4) representation by legal counsel; and 5) that any hearing be open to the public.¹⁷⁷ Any subsequent amendment to Prop. 50 should heed Judge Friendly’s suggestions and draw upon the analogous procedures found under Cal. Gov’t Code §§ 8940–48.

2. Timing of the Hearing

Whether the Fourteenth Amendment requires that a legislator facing an unpaid suspension receive a hearing before or after a decision to suspend is made depends on the proposed basis for the suspension. That is because “the State has a significant interest in immediately suspending, when felony charges are filed against them,

173. Procedure is governed by the State Constitution, Joint Rules, Senate Standing Rules, Assembly Standing Rules, and/or Mason’s Manual. See Glossary of Legislative Terms, CAL. ST. LEGISLATURE, <http://www.legislature.ca.gov/quicklinks/glossary.html>.

174. *Assembly Concurrent Resolution No. 153*, CAL. LEGISLATIVE INFO., http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060ACR153.

175. Judge Friendly makes other recommendations unrelated to the hearing requirement and instead related to preservation of the right to seek judicial review, the notice requirement, and other areas not covered in this section. Those suggestions are not included here.

176. Friendly, *supra* note 79.

177. CAL. GOV’T CODE § 8946.

employees who occupy positions of great public trust and high public visibility[.]”¹⁷⁸

The timing of a hearing accompanying a legislator’s unpaid suspension must therefore hinge on whether the legislator is accused of having committed a felony or some lesser criminal offense.¹⁷⁹ Legislators accused of either a misdemeanor or an infraction must be entitled to a pre-suspension hearing. Legislators accused of having committed a felony, however, may be suspended without pay without first having a hearing so long as they are accorded a post-suspension hearing.

C. Imposition of a Time Limit on Duration of the Suspension

Article IV, Section 5 of the California Constitution states that the suspension of a Member pursuant to this paragraph shall remain in effect until the date specified in the motion or resolution or, if no date is specified, the date a subsequent motion or resolution terminating the suspension is adopted by rollcall vote entered in the journal, two-thirds of the membership of the house concurring.¹⁸⁰

Hence, there is no requirement that a suspension last a finite period of time and legislators could conceivably be suspended without pay for significant portions of their terms, including the remaining durations of their terms. Indeed, Senators Yee and Calderon were suspended for eight months through the end of their terms.¹⁸¹

The term of office for a state Senator is four years while Assembly members serve two years.¹⁸² Consequently, a suspension under Prop. 50 should not exceed six months, one-quarter of an Assembly term or one-eighth of a Senate term. If the circumstances warrant it, the relevant chamber could choose to renew the suspension at the end of the initial six-month span. Of course, if the crime is so grave and the

178. *Gilbert v. Homar*, 520 U.S. 924, 932 (1997).

179. A “felony is a crime punishable by death, by imprisonment in state prison, or by imprisonment in county jail under P.C. 1170(h). Every other crime or public offense is a misdemeanor ‘except those offenses that are classified as infractions.’ (P.C. 17(a)).” NORMAN L. EPSTEIN ET AL., *WITKIN CALIFORNIA CRIMINAL LAW* § 86 (4th. ed. 2012).

180. CAL. CONST. art. IV, § 5.

181. McGreevy, *supra* note 41.

182. CAL. GOV’T CODE § 9001.

legislator is already adjudged guilty in a court of law, the Legislature would be free to exercise its impeachment powers.¹⁸³

D. Limitation on the Applicability of the Proposition

In its present form, Prop. 50 lacks language limiting the circumstances in which it may be invoked. Given that Prop. 50 was born out of the aftermath of the Legislature's inability to suspend without pay members accused of criminal activity, it is appropriate that Prop. 50's own language expressly limit its use to the criminal impropriety context. Adding language to Article IV, Section 5 such as "suspension of a Member pursuant to this paragraph may occur only where that Member has been charged and/or convicted of a criminal offense under federal, state, local, or other applicable law" is crucial to ensuring that the provision comports with its original intent.

V. JUSTIFICATIONS FOR THE PROPOSAL

Amending Article IV, Section 5 of the California Constitution would serve two fundamental purposes. First, inclusion of the proposed additions would mitigate constitutional concerns implicated by the Fourteenth Amendment. Second, it would further various policy goals.

A. Constitutional Concerns Mitigated

Assuming the finding of a constitutionally protected property interest, courts must then determine "what process is due."¹⁸⁴ Over the last four decades, "the cornerstone for all analysis of procedural adequacy has become Justice Powell's opinion in *Mathews v. Eldridge*."¹⁸⁵ Thus, whether the changes proposed to Prop. 50 in this Article mitigate the constitutional concerns with the measure in its current form depends upon consideration of three factors:

183. Senator Joel Anderson was the sole senator to vote "neat" on the suspensions of Senators Calderon, Wright, and Yee in 2014. With respect to Prop. 50, Anderson has said "those people shouldn't be suspended; they should be expelled. If you cannot perform the duty of voting for a bill – for whatever reason – then you need to go home." Ben Adler, *Proposition 50: Should Legislature Be Able To Suspend Lawmakers Without Pay?*, CAP. PUB. RADIO (May 23, 2016), <http://www.capradio.org/articles/2016/05/23/proposition-50-should-legislature-be-able-to-suspend-lawmakers-without-pay/>.

184. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

185. CHARLES H. KOCH, JR., *FEDERAL PRACTICE AND PROCEDURE JUDICIAL REVIEW* § 8129 (1st ed. 2006).

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁸⁶

1. Loss of a Legislator's Salary is a Significant Private Interest at Stake

The Supreme Court has “repeatedly recognized the severity of depriving someone of his or her livelihood[.]”¹⁸⁷ Yet, the *Gilbert* Court upheld the unpaid suspension of a police officer facing various felony drug charges.¹⁸⁸ There, Homar argued he had a significant private interest at stake in “the uninterrupted receipt of his paycheck.”¹⁸⁹ The Court disagreed, reasoning that because Homar faced only a temporary suspension without pay and was given a post-suspension hearing, his lost income was relatively insubstantial and benefits such as health and life insurance were likely not affected.¹⁹⁰ However, unlike Homar who faced just the loss of his salary, a legislator suspended under Prop. 50 faces the loss of both his salary *and* benefits.¹⁹¹ Therefore, a suspension pursuant to Prop. 50 implicates higher stakes than an unpaid suspension like the one in *Gilbert* because a legislator may also face the loss of health, dental, vision, and other benefits.¹⁹²

Similarly, in *Mathews*, the Supreme Court upheld the administrative procedures in place for contesting a decision to terminate social security disability benefits.¹⁹³ The Court determined

186. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

187. *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 243 (1988).

188. *Gilbert v. Homar*, 520 U.S. 924, 924 (1997).

189. *Id.* at 932.

190. *Id.*

191. See CAL. CONST. art. IV, § 5(a)(2)(A) (after a house has passed a suspension by two-thirds vote, “the house may deem the *salary and benefits* of the Member to be forfeited”) (emphasis added).

192. See Proposition 50 *SCA 17 (Resolution Chapter 127, Statutes of 2014)*, Steinberg, *Members of the Legislature: suspension*, LCA (June 7, 2016), <https://lao.ca.gov/BallotAnalysis/Proposition?number=50&year=2016>.

193. *Mathews v. Eldridge*, 424 U.S. 319, 319 (1976).

that Eldridge’s only private interest at stake was the uninterrupted receipt of disability benefits pending an administrative determination of his eligibility.¹⁹⁴ In reaching its decision, the Court distinguished between eligibility for disability benefits and matters of “financial need”, such as welfare benefits.¹⁹⁵ Whereas welfare recipients rely on entitlements as subsistence, the Court contended that individuals like Eldridge might receive support from family or other private sources, workers compensation awards, tort claim awards, insurance, pensions, food stamps, or other public assistance programs.¹⁹⁶ Thus, because of “these potential sources of temporary income,” the first factor weighed in favor of constitutional sufficiency.¹⁹⁷

Members of the California Legislature are unable to draw upon many of the types of “potential sources” of temporary income described in *Mathews*.¹⁹⁸ For one, legislators are not entitled to any pension or retirement benefits as part of their service.¹⁹⁹ Conflict of interest laws further prevent legislators from: 1) obtaining any financial support from any lobbyist, lobbying firm, or *any* person who has been under contract with the Legislature in the last 12 months;²⁰⁰ 2) accepting an honorarium²⁰¹ which is payment for making a speech, publishing an article, or attending any public or private gathering;²⁰² 3) and receiving most, if not all, gifts.²⁰³ Article IV, Section 13 of the California Constitution additionally bars a state legislator from concurrently holding most other public offices while still a member of the Legislature.²⁰⁴ Even if a legislator chooses to resign, he or she is prohibited from entering the “revolving door” of lobbying for a full 12

194. *Id.* at 340.

195. *Id.* at 340–41.

196. *Id.* at 341.

197. *Id.* at 343.

198. *Id.*

199. See CAL. CONST. art. IV, § 4.5 (“[A] person elected to or serving in the Legislature on or after November 1, 1990, shall participate in the Federal Social Security (Retirement, Disability, Health Insurance) Program and the State shall pay only the employer’s share of the contribution necessary to such participation. No other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation.”).

200. CAL. CONST. art. IV, § 4(a).

201. CAL. CONST. art. IV, § 5(b).

202. *Gifts, Honoraria, Travel Payments, and Loans*, CAL. FAIR POL. PRACT. COMM’N, <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/gifts-and-honoraria.html>.

203. CAL. CONST. art. IV, § 5(c).

204. CAL. CONST. art. IV, § 13.

months, affecting the legislator's income opportunities even after leaving office.²⁰⁵

The *Mathews* court's analysis seemingly ignores consideration of the cost of living. In its report entitled "2017 State Business Tax Climate Index," the Tax Foundation rated California the third most unfavorable state in the nation for overall state tax systems.²⁰⁶ It has the highest top income tax²⁰⁷ and state sales tax rates in the country.²⁰⁸ Unsurprisingly, California has the third highest median sales price of residential homes in the country.²⁰⁹ While California lawmakers receive the highest pay of any state legislators in the country,²¹⁰ that pay does not go comparatively far due to the Golden State's astronomical cost of living. Taken in conjunction with limitations on the manners of making a living available during a suspension, a member has a significant private interest at stake in the continued, uninterrupted receipt of salary and benefits.

As Prop. 50's critics have stated, "[m]any legislators come from modest means, and losing their legislative paycheck could force them out of office."²¹¹ Accordingly, the first *Mathews* factor weighs against the sufficiency of Prop. 50 in its present form.

2. The Risk of Erroneous Deprivation is High Because Prop. 50 Presently Provides Insufficient Safeguards, and the Proposed Additional Protections Would Reduce this Risk

The second *Mathews* factor requires inquiry into "the risk of erroneous deprivation and the likely value of any additional procedures."²¹² In *Goldberg*, welfare recipients challenged an administrative scheme which did not afford the recipients an in-person

205. CAL. CONST. art. IV, § 5(e).

206. Scott Drenkard et. al, *2017 State Business Tax Climate Index*, TAX FOUND. (2016), <https://drive.google.com/file/d/0B6586UGJDFOLNU9XbGtVejJxZkU/view>.

207. Specifically, California has a top income tax rate of 13.3%. *Id.* at 30.

208. Scott Drenkard & Nicole Kaeding, *State and Local Sales Tax Rates in 2016*, TAX FOUND. (Mar. 9, 2016), https://files.taxfoundation.org/legacy/docs/TaxFoundation_FF504.pdf.

209. National Home Prices Page, TRULIA (Dec. 28, 2016), https://www.trulia.com/home_prices.

210. Jim Miller, *California Panel Lifts Pay 4 Percent for Jerry Brown, Lawmakers*, SACRAMENTO BEE (June 1, 2016, 11:50 AM), <http://www.sacbee.com/news/politics-government/capitol-alert/article81143257.html>.

211. The Times Editorial Board, *Punishing Corrupt Politicians is Important, but Prop. 50 isn't the way to do it*, L.A. TIMES (Apr. 20, 2016, 5:00 AM), <http://www.latimes.com/opinion/endorsements/la-ed-proposition-50-20160420-story.html>.

212. *Gilbert v. Homar*, 520 U.S. 924, 933 (1997).

evidentiary hearing prior to a decision to terminate benefits.²¹³ The Court found that the current procedures, which only allowed recipients a written challenge to a proposed termination, carried a high risk of erroneously depriving recipients of their benefits because “where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision.”²¹⁴ In contrast, the *Mathews* court found that procedures carried a low risk of erroneous deprivation where the recipient was only entitled to challenge an initial decision to terminate disability benefits by a written submission.²¹⁵ That is because the decision to discontinue disability benefits relied upon “routine, standard, and unbiased medical reports by physician specialists”²¹⁶ such as X-rays and clinical/laboratory tests, which are “information typically more amenable to written than to oral presentation.”²¹⁷ A decision to suspend a legislator without pay necessarily involves credibility, veracity and testimony, rather than objective medical reports, and is thus more comparable to the situation in *Goldberg* than that in *Mathews*.

With respect to procedure, Prop. 50 merely offers that “Each house may suspend a Member by motion or resolution adopted by rollcall vote entered in the journal, two-thirds of the membership concurring. The motion or resolution shall contain findings and declarations setting forth the basis for the suspension.”²¹⁸ As written, Prop. 50 makes no mention of whether an accused legislator has the power to appear personally, present evidence orally, examine witnesses, or even submit a written statement. Presumably, all that the statute requires is a two-thirds vote by the relevant house of the Legislature. That a chamber of the Legislature may suspend a member without first considering oral or written testimony highlights the substantial likelihood that a member may be erroneously deprived of a protected property interest.

The changes to Prop. 50 proposed in this Article would undoubtedly reduce the risk of an erroneous decision. First, the right to appear personally and introduce exhibits is crucial because a legislator must be able to “mold his argument to the issues the decision

213. *Goldberg v. Kelly*, 397 U.S. 254, 254 (1970).

214. *Id.* at 268–69.

215. *Mathews v. Eldridge*, 424 U.S. 319, 345 (1976).

216. *Id.* at 344 (internal quotation marks omitted).

217. *Id.* at 345.

218. CAL. CONST. art. IV, § 5(a)(2)(A).

maker appears to regard as important.”²¹⁹ Second, allowing the legislator to call, examine, and cross-examine witnesses is important because witnesses’ “memor[ies] might be faulty or . . . [witnesses] might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.”²²⁰ Third, providing an accused legislator written notice of the pendency of a suspension hearing as well as access to examine and make copies of all evidence relevant to such a proceeding is necessary, “[o]therwise the individual likely would be unable to marshal evidence and prepare his case so as to benefit from any hearing that was provided.”²²¹ Fourth, representation by legal counsel (if so desired) promotes an accurate result because “[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the [client’s] interests[.]”²²² Finally, requiring that any suspension hearing be open to the public promotes confidence in the integrity of the hearing,²²³ promotes the introduction of accurate evidence,²²⁴ and increases the likelihood that the officials will fairly conduct the hearing.²²⁵

3. The Proposed Additional Protections Would Impose Little to No Additional Fiscal and/or Administrative Burdens on the Government

The final *Mathews* factor assesses the Government’s interest, including the administrative burden and societal costs associated with the additional procedures sought by the complainant.²²⁶ The Supreme Court has maintained that “the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers.”²²⁷ On its face, this factor would seem to weigh in favor of Prop. 50’s constitutional sufficiency.

219. *Goldberg*, 397 U.S. at 269.

220. *Id.* at 270 (internal quotation marks omitted).

221. Friendly, *supra* note 79, at 1280–81.

222. *Goldberg*, 397 U.S. at 270–71.

223. Friendly, *supra* note 79, at 1293 n. 132 (citing JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 335 (3d ed. 1940)).

224. *Id.* (citing 3 BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 373 (Wayne Morrison ed. 2001)).

225. *Id.* (citing JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 335 (3d ed. 1940)).

226. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

227. *Gilbert v. Homar*, 520 U.S. 924, 932 (1997).

However, the proposed changes to Prop. 50 would not significantly increase the State's administrative and/or financial costs, if at all. In fact, given that Prop. 50's current language does not specify when the measure may be invoked, specifically limiting its application to circumstances where a legislator has been accused of criminal misconduct might actually *reduce* the State's burden by decreasing the number of situations in which the additional proposed procedures would have to be offered. So too would bolstering Prop. 50's procedural safeguards to dissuade would-be constitutional challengers from forcing the State to dedicate time, personnel, and money to defend the law and its application in Court.²²⁸

At the outset, it is also important to note that the California legislature infrequently disciplines its members. Prior to the suspension of Senators Calderon, Wright, and Yee in March 2014, neither the California Senate nor the Assembly had ever before suspended a member.²²⁹ The last time a house expelled a legislator was in 1905, when the Senate expelled four members for taking bribes.²³⁰ It follows then that it is unlikely either chamber will regularly invoke Prop. 50, in which case there will rarely be a need to utilize the additional procedures proposed (or pay their costs).

Moreover, the State Legislature has a combined 120 members.²³¹ With an estimated population of more than 39 million,²³² Prop. 50 directly affects less than 0.00031% of the State's inhabitants. That is in stark contrast to the situation in *Goldberg* where the Court nonetheless found the existing procedures to be insufficient despite the Court's acknowledgement that "requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped[.]"²³³ Taken together with the fact that Prop. 50 puts a

228. See *Vas v. Roberts*, 14 A.3d 766, 769 (N.J. Super. Ct. App. Div. 2011) (a suspended state legislator sought judicial review of the Speaker's decision to suspend the legislator without pay).

229. Don Thompson, *California Senate Suspends 3 Democratic Lawmakers*, ORANGE CTY. REG. (Mar. 28, 2014, 3:27 PM), <http://www.oregister.com/2014/03/28/california-senate-suspends-3-democratic-lawmakers/>.

230. *Bribe-Takers are Expelled: State Senate Shows No Mercy to Quartet of Boodlers*, SAUSALITO NEWS (Mar. 4, 1905), <https://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=SN19050304.2.7>.

231. See *Legislators and Districts*, CAL. ST. LEGISLATURE, http://www.legislature.ca.gov/legislators_and_districts.html (last visited Apr. 4, 2019).

232. *QuickFacts California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/06> (last visited Apr. 4, 2019).

233. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). *But see Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("[T]he Government's interest . . . in conserving scarce fiscal and administrative

significant private interest at stake in legislators' livelihoods, that Prop. 50's current iteration does little to ensure that a just decision is reached and the changes detailed would foster accuracy and fairness, it is clear that Prop. 50 is flawed and the amendments offered provide the constitutional remedy.

B. Furtherance of Policy Goals

Amending Prop. 50's broad language would also serve several public policy goals. For one, explicitly limiting Prop. 50's application to situations in which a legislator faces criminal charges would assuage critics who warn that legislative majorities could use the provision to hand down unpaid suspensions for political reasons.²³⁴ Such an addition would ensure that the Proposition more closely conforms with its original statutory intent, having been created in the aftermath of the criminal sagas of Senators Calderon, Wright, and Yee in March 2014. Finally, imposing a maximum time limit on suspension under Prop. 50 of six months (one-quarter of an Assembly term or one-eighth of a Senate term), would avoid the imposition of "taxation without representation" for extended periods of time.

C. Methods of Enacting Proposed Changes

The California Constitution can be amended in two ways: upon a two-thirds vote of each house, the Legislature may propose an amendment to the voters,²³⁵ or voters themselves may amend the Constitution through the initiative process.²³⁶ Either method requires statewide approval by a majority of votes.²³⁷ Thus, the Legislature could enact the proposed changes in the same way that Prop. 50 became law, as a legislatively referred constitutional amendment. Conversely, the changes could take effect as an initiated constitutional amendment.²³⁸

resources . . . must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action . . . may be outweighed by the cost.").

234. The Times Editorial Board, *supra* note 211 ("The proposition also would not limit the use of this punishment to elected officials who are accused (or convicted) of breaking laws. . . . It doesn't set any criteria for what transgressions would justify this punishment, [and an] . . . unpaid suspension could conceivably be used for political reasons.").

235. CAL. CONST. art. XVIII, § 1.

236. CAL. CONST. art. XVIII, § 3.

237. CAL. CONST. art. XVIII, § 4.

238. It is relatively easy to qualify a measure on the statewide ballot a proposition. *See* Charlene Wear Simmons, *California's Statewide Initiative Process*, CAL. RES. BUREAU, CAL. ST. LIBR. 1

VI. CONCLUSION

Politicians often face the unenviable choice of picking between what is right and what is righteous. In the era of the outsider, where electoral survival may very well depend on an official's ability to persuade voters of his or her dedication to rooting out corruption, inaction, and dysfunction, Prop. 50's political expediency is apparent. Denying a legislator accused of criminal wrongdoing a paid vacation may be appealing, but the temptation alone does not make it legally permissible.

The Fourteenth Amendment to the United States Constitution ensures that no State may "deprive any person of life, liberty, or property, without due process of law[.]"²³⁹ It protects welfare recipients and the disabled. And, despite the majority of voters who approved of Prop. 50 on the June ballot, it protects "crooked" politicians accused of lying on residency forms, misusing power to obtain jobs for relatives, participating in a drug and firearm ring, and even physically abusing a spouse.

Judicial precedent makes clear that a legislator's pay is "property" within the meaning of the Fourteenth Amendment. Once a benefit achieves protected status under the Constitution, the procedures for depriving that benefit become matters of federal law. That means that despite the intent of Prop. 50's drafters to specify in the state Constitution that pay and benefits may be forfeited upon a two-thirds vote by either house of the Legislature, federal law is nonetheless controlling. And on that subject, federal law is abundantly clear that procedural due process requires notice and the opportunity to be heard, two areas where Prop. 50 is currently lacking. Amending Prop. 50 to guarantee legislators the rights to appear personally and introduce exhibits, to call/examine witnesses, to receive written notice of the pendency of suspension proceedings and access to all relevant evidence, to be represented by legal counsel, and to be allowed public

(1997), <https://www.library.ca.gov/CRB/97/06/97006.pdf> ("[T]he number of constitutional initiatives has also increased, in part because of California's relatively 'easy' qualification process."); Maureen Cavanaugh & Michael Lipkin, *Should California Change Its Voter Initiative Process?*, KPBS (Sept. 6, 2016), <http://www.kpbs.org/news/2016/sep/06/ca-ballot-features-17-initiatives/> (seventeen initiatives were on the November 2016 statewide ballot); Robert M. Stern, *California's Initiative Process Needs Reform—Not Repeal*, SAN DIEGO UNION-TRIB. (July 11, 2016, 5:00 PM), <http://www.sandiegouniontribune.com/opinion/commentary/sdut-californias-initiative-process-needs-reform-not-2015jul11-story.html> ("It is too easy to qualify a measure if you have the money to do so (between \$1 million and \$2 million)[.]").

239. U.S. CONST. amend. XIV, § 1.

observation of any proceedings would go a long way in transforming Prop. 50 from “righteous” to “right.”