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## The Antidemocratic Cost of California Direct Democracy

Keith Osentoski

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# THE ANTIDEMOCRATIC COST OF CALIFORNIA DIRECT DEMOCRACY

Keith Osentoski\*

*\$1.1 billion: the amount of money spent on statewide direct democracy measures in California in just one year. This Note examines this extraordinary spending in light of the historical intent behind California's direct democracy system. Over a century ago, California voters amended the state's constitution to create the initiative, referendum, and recall powers. The Progressive Era amendment was designed to root out corporate influences on, and corruption in, the state's governance.*

*Two recent developments, however, show just how far California's direct democracy system has strayed from its original intent. In the 2020 general election, special interests poured more than \$785 million into twelve ballot measures. Of them, Proposition 22 became the most expensive initiative in California history, costing more than \$224 million. The record-setting spending, led by Uber and Lyft, successfully delivered to gig economy companies a carved-out exemption from California's employment classification law. And less than a year later, the failed recall attempt of Governor Gavin Newsom cost more than \$345 million.*

*This Note uses these developments to scrutinize the Supreme Court jurisprudence that has allowed exorbitant spending to corrupt California's direct democracy system. First, against the backdrop of those cases and protected corporate speech, this Note considers the history, intent, and framework of direct democracy in California. Next, this Note details Proposition 22 and the Newsom Recall to highlight in recent developments the issues that flow from unrestrained spending. Finally, this Note concludes that the Supreme Court should reexamine its jurisprudence and allow states to honor the intent of their direct democracy systems by enacting closely drawn contribution limitations to ballot measures and recalls. Left without this meaningful tool, California should consider increasing qualification thresholds or limiting its use of direct democracy to local issues, because the statewide system has been usurped by the very forces it sought to expel.*

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\* J.D. Candidate, May 2023, LMU Loyola Law School. Thank you to Professor Rebecca Delfino, for her passionate teaching that has inspired me throughout law school and for her guidance in writing this Note. I appreciate the space to share my profound gratitude for my mother, Dinah, my father, Steve, and my Aunt Paula, for following my dream to law school was possible only with their love and support. And thank you to the talented editors of the *Loyola of Los Angeles Law Review*, for their thoughtful contributions and hard work.

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## INTRODUCTION

In September 2021, California Governor Gavin Newsom became the first governor in California history—and only the second governor in the nation—to defeat a statewide recall election (the “Newsom Recall”).<sup>1</sup> Newsom defeated the recall in 2021 with the same percentage of the vote he garnered in his original 2018 election.<sup>2</sup> The recall attempt cost California taxpayers more than \$200 million.<sup>3</sup> Additionally, candidates and committees spent more than \$145 million,<sup>4</sup> bringing the total cost of the unsuccessful recall to more than \$345 million.<sup>5</sup>

Less than a year before the Newsom Recall, wealthy interests contributed more than \$785 million to finance twelve ballot measures in the 2020 general election.<sup>6</sup> Of these measures, Proposition 22 became the most expensive in California history—at a combined cost of more than \$224 million.<sup>7</sup> Gig economy companies poured more than \$204 million into supporting the initiative, while opposition spending, led largely by labor groups, added another \$20 million to the total cost of the initiative.<sup>8</sup> The measure passed with 58.6 percent of voter

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1. Wisconsin Governor Scott Walker defeated a recall in 2012 and California Governor Gray Davis was recalled by voters in 2003, replaced by Arnold Schwarzenegger. Amy Zacks, *Recalling Governors: An Overview*, RUTGERS UNIV. CTR. ON THE AM. GOVERNOR (Sept. 15, 2021), <https://governors.rutgers.edu/recalling-governors-an-overview/> [<https://perma.cc/MN6U-WKZR>].

2. See CAL. SEC’Y OF STATE, STATEMENT OF VOTE, CALIFORNIA GUBERNATORIAL RECALL ELECTION, SEPTEMBER 14, 2021, at 11 (2021) [hereinafter 2021 GUBERNATORIAL RECALL STATEMENT OF VOTE], <https://elections.cdn.sos.ca.gov/sov/2021-recall/sov/complete-sov.pdf> [<https://perma.cc/ECG2-DZSX>] (In 2021, 61.9 percent of voters voted not to recall Newsom); CAL. SEC’Y OF STATE, STATEMENT OF VOTE, GENERAL ELECTION, NOVEMBER 6, 2018, at 7 (2018) [hereinafter 2018 GENERAL ELECTION STATEMENT OF THE VOTE], <https://elections.cdn.sos.ca.gov/sov/2018-general/sov/2018-complete-sov.pdf> [<https://perma.cc/AZ2J-WAAK>] (In 2018, 61.9 percent of voters voted to elect Newsom).

3. Letter from Shirley N. Weber, Cal. Sec of State, to Hon. Nancy Skinner, Senate Budget and Fiscal Rev. Comm. Chair, et al. (Feb. 1, 2022) (on file with the California Secretary of State), <https://elections.cdn.sos.ca.gov/statewide-elections/2021-recall/report-to-legislature.pdf> [<https://perma.cc/6JFL-7HNN>]. Administration of the recall election cost California’s fifty-eight counties \$174,059,031 and the California Secretary of State \$26,182,649. *Id.* Notably, counties spent \$81,239,716 on staffing costs alone. *Id.* Additionally, ballots cost \$53,855,686 and the Voter Information Guide cost another \$5,651,171 to print and mail. *Id.*

4. *Gavin Newsom Recall, Governor of California (2019–2021)*, BALLOTPEDIA, [https://ballotpedia.org/Gavin\\_Newsom\\_recall\\_Governor\\_of\\_California\\_\(2019-2021\)](https://ballotpedia.org/Gavin_Newsom_recall_Governor_of_California_(2019-2021)) [<https://perma.cc/R2KN-H4JQ>] (Republican candidates and committees supporting the recall together spent \$53.5 million; Democratic candidates and committees opposing the recall together spent \$91.9 million).

5. See *supra* notes 3 and 4.

6. Ryan Menezes et al., *Billions Have Been Spent on California’s Ballot Measure Battles. But This Year Is Unlike Any Other*, L.A. TIMES (Nov. 13, 2020), <https://www.latimes.com/projecs/props-california-2020-election-money/> [<https://perma.cc/LLT6-C9VU>].

7. *Id.*

8. *Id.*

support,<sup>9</sup> delivering to gig economy companies a lucrative exemption from California's employment classification law, allowing them to classify app-based drivers and delivery persons as independent contractors.<sup>10</sup>

Staggeringly, in less than one year, more than \$1.1 billion was spent on direct democracy in California.<sup>11</sup> Alarming, Proposition 22's title as California's most expensive ballot measure was short-lived: in the 2022 general election, competing gambling interests poured more than half a billion dollars into two dueling propositions to legalize sports betting in California.<sup>12</sup>

Although spending has reached record-setting levels, concern about money's impact on direct democracy is not new. The U.S. Supreme Court addressed the issue nearly a half-century ago in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*.<sup>13</sup> Then, voters in Berkeley, California had approved—through a ballot measure—the Election Reform Act of 1974, which limited individual contributions to committees formed to support or oppose a ballot measure to \$250.<sup>14</sup> The California Supreme Court upheld the ordinance, finding it “furthered compelling governmental interests because it ensured that special interest groups could not ‘corrupt’ the

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9. CAL. SEC'Y OF STATE, STATEMENT OF VOTE, GENERAL ELECTION, NOVEMBER 3, 2020, at 14 (2020) [hereinafter 2020 GENERAL ELECTION STATEMENT OF THE VOTE], <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf> [<https://perma.cc/4BE7-UF96>].

10. Though Proposition 22 has remained in effect, a high-stakes and drawn-out legal battle over its enforceability continues to play out at the time of this writing. In August 2021, a California Superior Court judge ruled Proposition 22 unconstitutional and unenforceable. *See* Order Granting Petition for Writ of Mandate at 4, *Castellanos v. State of California* (Cal. Super. Ct. 2021) (No. RG21088725). But in March 2023, the California Court of Appeal overturned most of that ruling, holding that Proposition 22 is enforceable, except for a clause that restricted collective bargaining. *See* *Castellanos v. State of California*, No. A163655, 2023 WL 2473326 (Cal. Ct. App. 2023). Opponents of the proposition are likely to appeal that decision to the California Supreme Court. *See* Kellen Browning, *California Court Mostly Upholds Prop. 22 in Win for Uber and Other Gig Companies*, N.Y. TIMES (Mar. 13, 2023), <https://www.nytimes.com/2023/03/13/business/prop-22-upheld-california.html> [<https://perma.cc/GJW7-RHCQ>].

11. *See supra* notes 5–6 and accompanying text.

12. Gabrielle LaMarr LeMee et al., *Track the Money Flowing into Prop 26/27: Sports Betting*, L.A. TIMES (Nov. 10, 2022), <https://www.latimes.com/projects/2022-california-election-proposition-26-27-sports-betting-gambling-money-tracker/> [<https://perma.cc/6UD2-2C7V>]. Committees supporting Proposition 26 raised \$132.3 million while opponents to the measure raised \$43.8 million. *Id.* A dueling measure, Proposition 27, garnered outstandingly more spending: committees opposing the measure raised \$249.4 million while its supporters raised \$169.1 million. *Id.*

13. 454 U.S. 290 (1981).

14. *Id.* at 292.

initiative process by spending large amounts to support or oppose a ballot measure.”<sup>15</sup>

But the U.S. Supreme Court reversed the California Supreme Court, holding that the ordinance violated the First Amendment.<sup>16</sup> The Court found the contribution limitation unconstitutional because a state’s interest in protecting against the corruption of candidates was absent in direct democracy measures, which deal directly with issues.<sup>17</sup> *Citizens Against Rent Control*, a case that originated in California more than four decades ago, remains consequential to California today, as spending on direct democracy measures in the state has reached record levels—and continues to soar.<sup>18</sup> The *Citizens Against Rent Control* decision, part of a progeny of cases discussed in Section I.B, opened the floodgates for unfettered spending on ballot measures.

The staggering amount of money poured into California ballot measures is no doubt ironic, given the historical intent of the state’s direct democracy system. Reserving to the people the power of the initiative, referendum, and recall was born out of the twentieth-century progressive movement to root out corruption in government from corporate spending.<sup>19</sup> Many have written before about direct democracy.<sup>20</sup> This Note is different because of its timing. The more than \$1.1 billion spent in just one year highlights why the California Supreme Court correctly recognized in *Citizens Against Rent Control* a state’s interest in rooting out the rampant spending that can corrupt the direct democracy system. Using Proposition 22 and the Newsom Recall as case studies, this Note demonstrates how prolific spending has usurped California’s direct democracy system and offers an inflection point for change.

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15. *Id.* at 293.

16. *Id.* at 300.

17. *Id.* at 297–98.

18. *See supra* notes 11–12 and accompanying text.

19. *See* discussion *infra* Section I.A.

20. *See, e.g.*, Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. STATE L. REV. 293; Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); David A. Carrillo et al., *California Constitutional Law: Direct Democracy*, 92 S. CAL. L. REV. 557 (2019); Shaun Bowler, *When Is It OK to Limit Direct Democracy*, 97 MINN. L. REV. 1780 (2013); Maxwell L. Stearns, *Direct (Anti-) Democracy*, 80 GEO. WASH. L. REV. 311 (2012); Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CALIF. L. REV. 1191 (2005); JOHN G. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHANGE (2020).

To be clear, this Note does not argue that Proposition 22 nor the Newsom Recall were illegal. Proposition 22 was legally filed and won clear majority support.<sup>21</sup> Similarly, while at least two scholars contend that California's recall system might be unconstitutional,<sup>22</sup> the Newsom Recall was legally filed, and Newsom fairly won. So, the amount of money Uber, Lyft, DoorDash, and Postmates spent on Proposition 22 and the money spent on the Newsom Recall was not illegal. Instead, this Note argues that it *should* be.

In Part I, this Note addresses the history of direct democracy in California and discusses how *Citizens Against Rent Control* was part of a string of Supreme Court cases that allowed for unfettered spending on ballot measures.<sup>23</sup> Part II conducts a case study of Proposition 22 and the Newsom Recall.<sup>24</sup> Part III analyzes several issues that follow from unlimited spending on direct democracy.<sup>25</sup> And Part IV explores solutions to reform direct democracy in California.<sup>26</sup>

Certainly, direct democracy is rooted in noble democratic principles and has an important place in California history. But the case studies interrogated in this Note demonstrate that California's direct democracy system has strayed far from its intent, demanding consideration of whether the system is worth keeping at all.

This Note concludes that the answer is both yes and no. On the one hand, California's direct democracy system is a principled component of democratic self-governance and should be maintained as long as it can, in fact, be democratic. To remove the corruptive influence of money on the direct democracy process, the Supreme Court should reexamine its jurisprudence and allow states to enact closely drawn contribution limitations to ballot measures and recalls. On the other hand, as long as unlimited contributions allow big money to dramatically influence its outcome, California—like the nation itself—is much too large for statewide direct democracy. Left without a meaningful check on spending through regulated contribution limits, California should consider raising qualification thresholds or limiting its

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21. The legal battle over Proposition 22 concerns its content, not its enactment. *See supra* note 10.

22. Erwin Chemerinsky & Aaron S. Edlin, Opinion, *There Is a Problem with California's Recall. It's Unconstitutional.*, N.Y. TIMES (Aug. 11, 2021), <https://www.nytimes.com/2021/08/11/opinion/california-recall-election-newsom.html> [<https://perma.cc/2XNH-NVV3>].

23. *See* discussion *infra* Part I.

24. *See* discussion *infra* Part II.

25. *See* discussion *infra* Part III.

26. *See* discussion *infra* Part IV.

use of direct democracy to local issues, because the statewide system has been usurped by the very forces it sought to expel.

## I. BACKGROUND: DIRECT DEMOCRACY IN CALIFORNIA AND UNLIMITED CONTRIBUTIONS

Twenty-six states have some form of a statewide initiative or referendum process.<sup>27</sup> But only nineteen states have a mechanism to recall a statewide officeholder.<sup>28</sup> Between 1912 and 2020, 2,068 initiative measures were circulated for signatures in California, of which 392 qualified for the ballot and 137 were approved by voters.<sup>29</sup> In the same time frame, ninety-four referendum measures were circulated for signatures in California, of which fifty-two qualified for the ballot, and thirty succeeded to repeal a law.<sup>30</sup> And since 1913, there have been 179 attempted recalls of state elected officials in California, with eleven qualifying for the ballot and six succeeding at recalling the officeholder.<sup>31</sup> Indeed, since 1968, every California governor has faced a recall attempt, but only two have qualified for the ballot and just one has succeeded.<sup>32</sup>

To appreciate why the California Constitution reserves to the people the power of the initiative, referendum, and recall,<sup>33</sup> Part I explores how we got here. First, it details the history of direct democracy in California, which dates to a 1911 constitutional amendment. Second, it outlines the framework of California's initiative, referendum, and recall processes. Third, it synthesizes *Citizens Against Rent Control* and other cases that allow for the prolific spending examined in the case studies that follow.

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27. *Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [https://perma.cc/VK7E-EVXE].

28. *Recall of State Officials*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 15, 2021), <https://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx> [https://perma.cc/PRJ6-NHBA].

29. *See* CAL. SEC'Y OF STATE, INITIATIVE TOTALS BY SUMMARY YEAR 1912–2022, <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/initiative-totals-summary-year.pdf> [https://perma.cc/HS77-CLZ9].

30. CAL. SEC'Y OF STATE, SUMMARY OF DATA, <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/referenda-data.pdf> [https://perma.cc/D7JS-XHQG].

31. *Recall History in California (1913 to Present)*, CAL. SEC'Y OF STATE, <https://www.sos.ca.gov/elections/recalls/recall-history-california-1913-present> [https://perma.cc/6NSA-W5PR].

32. Zacks, *supra* note 1.

33. CAL. CONST. art. IV, § 1; CAL. CONST. art. II, § 14.



### A. Direct Democracy in California

California voters amended the state's constitution in 1911 to reserve to themselves the powers of the initiative, referendum, and recall.<sup>34</sup> This constitutional amendment was intended to root out corrupt corporate influences on government officials.<sup>35</sup> A journalist at the time called the amendment an event "that thrust from power the Captains of Greed."<sup>36</sup> The greed voters sought to oust was explained well by Professor Gendzel: "The story of how direct democracy turned California into a political train wreck begins, appropriately enough, with a railroad."<sup>37</sup>

In 1869, California completed its transcontinental railroad project—largely funded by public subsidies—intended to better connect California with the rest of the United States.<sup>38</sup> "Most Californians imagined that the railroad would be a simple, benign technology, but in fact it was a monopoly corporation, known as the Central Pacific Railroad, which soon enjoyed near-total control over all transportation into, out of, and within the state . . . ."<sup>39</sup> In a short time, California farmers could barely afford to ship their products to the rest of the country.<sup>40</sup> Indeed, by the late nineteenth century, because of the railroad's monopolistic tendencies, California experienced some of the highest and most inconsistent railroad rates in the nation.<sup>41</sup> After a merger in 1822, the railroad changed its name to Southern Pacific but continued with the same monopoly power.<sup>42</sup>

Then, in 1879, California adopted a new state constitution that regulated and taxed the railroad.<sup>43</sup> In response, Southern Pacific began to heavily lobby and bribe legislators, judges, and reporters in

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34. CAL. SEC'Y OF STATE, STATEMENT OF THE VOTE, OCTOBER 10, 1911 (1911), <https://archives.cdn.sos.ca.gov/pdf/suffrage/statement-of-vote-1911.pdf> [<https://perma.cc/VAT7-YJ5D>]; see also *Initiative and Referendum*, U.C. HASTINGS SCHOLARSHIP REPOSITORY, [https://repository.uc Hastings.edu/ca\\_ballot\\_props/7/](https://repository.uc Hastings.edu/ca_ballot_props/7/) [<https://perma.cc/4KP5-E6S2>].

35. Glen Gendzel, *The People Versus the Octopus: California Progressives and the Origins of Direct Democracy*, STÉCLES, June 1, 2013, at 3, ¶ 6.

36. Timm Herdt, *After 100 Years, Does California's Initiative Process Need a Tune-Up?*, VC STAR (Sept. 24, 2011), <https://archive.vcstar.com/news/after-100-years-does-californias-initiative-process-need-a-tune-up-ep-364421038-352291341.html/> [<https://perma.cc/7PJQ-DC8S>].

37. Gendzel, *supra* note 35, at 1, ¶ 2.

38. *Id.*

39. *Id.*

40. *Id.* at 2, ¶ 3.

41. *Id.*

42. *Id.*

43. *Id.* at 2, ¶ 4.

exchange for lucrative laws and news stories.<sup>44</sup> Professor Gendzel explains that “[c]orruption in California politics was like wind or gravity: people couldn’t see it directly, but they could observe its effects in the form of relentlessly pro-railroad public policy, year after year.”<sup>45</sup> After decades of corruption, the 1911 Progressive Era amendment reserved in voters the powers of the initiative, referendum, and recall.<sup>46</sup>

### 1. The Initiative

The initiative process allows voters to approve or reject proposed laws directly from the ballot by a simple majority; no approval is needed from either the legislative or executive branches of government.<sup>47</sup> The requisite number of signatures to qualify the initiative depends on whether it is an initiative statute or an initiative constitutional amendment.<sup>48</sup> To qualify a statutory initiative, petitioners must gather signatures from registered voters totaling at least 5 percent of the votes cast in the last gubernatorial election.<sup>49</sup> To qualify a constitutional amendment initiative, the threshold increases to 8 percent.<sup>50</sup> Once signatures have been certified, the Secretary of State must place the measure on either the next general election ballot, the next special election ballot if one is forthcoming, or on a special election ballot called by the governor for the measure.<sup>51</sup> Critically, if accepted by voters, the initiative statute can be amended only by another initiative, unless the text of the measure permits otherwise.<sup>52</sup> Progressive reformers viewed this process as a way to root out the railroad’s grasp on power: “The [railroad] and other wealthy interests might be able to bribe delegates

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44. *Id.*

45. *Id.*

46. *Id.* at 5, ¶ 11

47. *See* CAL. CONST. art. II, § 8.

48. *Id.* art. II, § 8(b).

49. *Id.* The number of signatures required to qualify an initiative statute for 2019–2022 was 623,212 (5 percent of the 12,464,235 votes cast in the 2018 gubernatorial election). *Signature Requirements for Ballot Measures in California*, BALLOTPEDIA, [https://ballotpedia.org/Signature\\_requirements\\_for\\_ballot\\_measures\\_in\\_California](https://ballotpedia.org/Signature_requirements_for_ballot_measures_in_California) [<https://perma.cc/PQ6Y-V6PX>]. This signature requirement represents just 3.2 percent of the 19,696,371 registered voters in 2018. *Id.*

50. CAL. CONST. art. II, § 8(b). The number of signatures required to qualify an initiative constitutional amendment for 2019–2022 was 997,139 (8 percent of the 12,464,235 votes cast in the 2018 gubernatorial election). *Signature Requirements for Ballot Measures in California*, *supra* note 49. The signature requirement represents just 5.1 percent of the 19,696,371 registered voters in 2018. *Id.*

51. CAL. CONST. art. II, § 8(c).

52. *Id.* art. II, § 10(c).

to party conventions and members of the legislature, but they could never bribe a majority of the voters.”<sup>53</sup>

Of the twenty-six states with some form of direct democracy system, twenty-four have a process for initiative measures.<sup>54</sup> More precisely, twenty-one states allow voters to initiate statutes and eighteen allow voters to initiate constitutional amendments.<sup>55</sup> As noted above, between 1912 and 2020, 2,068 initiatives were proposed in California but just 392 qualified for the ballot.<sup>56</sup> Of those, 137 were approved and 250 were rejected.<sup>57</sup> This historical data demonstrates that few proposed initiatives end up qualifying for the ballot (18.96 percent), and even if they do, voters overwhelmingly reject the measures (63.78 percent).

## 2. The Referendum

The Progressive Era amendment also created the referendum process, which is similar to that of the initiative except it allows voters to reject all or parts of statutes that have been passed into law by the legislature.<sup>58</sup> To qualify a referendum, just like the requirement for initiative measures, petitioners must collect signatures from registered voters that equal at least 5 percent of the total votes cast in the last gubernatorial election.<sup>59</sup> Progressive reformers viewed the referendum as further protection against the corporate influences that might sway a legislature.<sup>60</sup>

Of the twenty-six states with some form of direct democracy system, twenty-three of them have a popular referendum process.<sup>61</sup> The other three states reserve in voters only the power to initiate constitutional amendments, not to legislate through initiated statutes or referendums.<sup>62</sup> Further, two of the twenty-three states with a referendum

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53. Gendzel, *supra* note 35, at 4, ¶ 8.

54. *Initiative and Referendum States*, *supra* note 27. Two of the twenty-six states have only a referendum process. *Infra* notes 61–63 and accompanying text.

55. *Id.*

56. CAL. SEC’Y OF STATE, *supra* note 29.

57. *Id.* Five initiatives that qualified for the ballot are not included in the Secretary of State’s approval/rejection count because four were removed by court order and one was to be decided on the 2022 ballot. *Id.*

58. CAL. CONST. art. II, § 9.

59. *Id.* art. II, § 9(b).

60. Gendzel, *supra* note 35, at 4–5, ¶ 9.

61. *Initiative and Referendum States*, *supra* note 27.

62. *Id.* Florida, Illinois, and Mississippi have a direct democracy system insofar as they reserve in voters the power to initiate constitutional amendments, but do not have a system for initiating statutes or popular referendum. *Id.*

process do not have an initiative process, essentially empowering voters only with veto power.<sup>63</sup> As noted above, ninety-four referendum measures were circulated in California between 1912 and 2020, of which fifty-two qualified for the ballot.<sup>64</sup> Of them, twenty-one were approved (i.e., the legislation stayed in place because a majority of voters approved it with a “yes” vote) and thirty were rejected (i.e., the legislation was repealed because a majority of voters disapproved of it with a “no” vote).<sup>65</sup> Thus, more than half of circulated referendums are successful at qualifying for the ballot (53.31 percent) and most are successful at repealing the legislation (58 percent).<sup>66</sup>

### 3. The Recall

The recall is perhaps one of the greatest powers created by the 1911 amendment. It allows voters to remove from office any elected official for any reason.<sup>67</sup> Though the California Constitution requires petitioners to list a reason for the recall, it explicitly states that the sufficiency of that reasoning is not reviewable.<sup>68</sup> That is, the reason for the recall is merely procedural: an elected official in California can be recalled for any reason.

It is best to consider the recall in terms of the office being recalled. To recall a statewide officeholder, petitioners must obtain signatures from registered voters totaling at least 12 percent of all votes cast in the last election for that office, inclusive of signatures from at least 1 percent of the last vote for the office in five different counties.<sup>69</sup> To recall state senators, members of the assembly, and judges, petitioners must obtain signatures totaling 20 percent of the last vote for that office.<sup>70</sup> And to recall a local or county officeholder, the signature requirement is a tiered system based on the number of registered voters in that jurisdiction.<sup>71</sup> Those requirements range from 30 percent in

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63. *Id.* Maryland and New Mexico have a popular referendum process but do not reserve in voters the power to initiate statutes or constitutional amendments. *Id.*

64. CAL. SEC’Y OF STATE, *supra* note 30.

65. *Id.*

66. *Id.*

67. Gendzel, *supra* note 35, at 6, ¶ 10; *see also* CAL. CONST. art. II, § 14.

68. CAL. CONST. art. II, § 14(a).

69. *Id.* art. II, § 14(b).

70. *Id.*

71. CAL. ELEC. CODE § 11221 (2022).

jurisdictions with fewer than 1,000 registered voters to 10 percent in localities with more than 100,000 registered voters.<sup>72</sup>

The recall election is two elections on one ballot: first, a single question of whether to recall the officer; and if so, a second question as to who should be the replacement.<sup>73</sup> The first question of whether to recall is decided by a majority, but the second question of replacement need only receive a plurality.<sup>74</sup>

California's two-vote recall process is not the norm. Only nineteen states allow the recall of statewide officials.<sup>75</sup> Some states, such as Oregon and Michigan, allow a governor to be recalled, but upon a recall, automatically install the lieutenant governor.<sup>76</sup> Most of the states that allow recall, however, leave to voters in some capacity the right to decide the replacement.<sup>77</sup>

Governor Johnson, who helped usher in the Progressive Era agenda in California, put it plainly: "If the people have the right, the ability, and the intelligence to *elect*, they have as well the right, ability, and intelligence to *reject* or to recall."<sup>78</sup> From its very beginning, though, there were signs that the Progressive Era direct democracy system Governor Johnson helped create might be used differently than intended:

For example, the first successful state recall elections in 1913 and 1914 . . . removed two progressive legislators from office. One of them, State Senator Edwin Grant of San Francisco, had voted for anti-liquor and anti-prostitution bills, which prompted saloon and brothel owners to seek revenge by gathering signatures, some of them forged, and mounting a successful recall against him. In 1915, the first statewide referendum . . . repealed a key progressive law, backed by Governor Johnson, which would have made all state elections non-partisan. . . . These early uses of the recall and the referendum—to expel progressive legislators and to repeal

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72. *Id.* § 11221(a).

73. Gendzel, *supra* note 35, at 5, ¶ 10.

74. CAL. CONST. art. II, § 15(c).

75. *Zacks, supra* note 1.

76. Jill Cowan & Shawn Hubler, *What Voters Should Know About the Newsom Recall*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/article/newsom-recall-election-voter-guide.html> [<https://perma.cc/FD2L-4VD6>].

77. *Id.*

78. Gendzel, *supra* note 35, at 5, ¶ 10.

progressive electoral reforms—did not bode well for progressive hopes for direct democracy.<sup>79</sup>

As noted above, there have been 179 attempted recalls of statewide officeholders in California since 1913.<sup>80</sup> Notably, fifty-five of these attempted recalls have sought to remove the governor.<sup>81</sup> But only eleven of the 179 recalls have qualified for the ballot and just six have succeeded at recalling the officeholder.<sup>82</sup> While *every* California governor since 1968 has faced a recall attempt,<sup>83</sup> only two have qualified for the ballot: one succeeding to remove Gray Davis and one failing to oust Gavin Newsom.<sup>84</sup> Nationwide, there have been only four gubernatorial recall attempts.<sup>85</sup>

With the history and framework of California's direct democracy system now detailed, Part I turns to *Citizens Against Rent Control* and other cases that allow for unfettered spending on ballot measures.

### B. *Unlimited Contributions and Corporate Speech*

Current law treats contributions to direct democracy measures differently than those to traditional campaigns. To finance political campaigns, of course, candidates and political parties generally seek donations from wealthy donors, corporations, and political action committees, though smaller individual contributors have recently played an increased role.<sup>86</sup> But direct democracy measures, if often entangled with politics, are not candidates running for office. They are issues. Indeed, even a recall is about the issue of whether to recall the officeholder. This distinction between *candidates* and *issues*, an assumption this Note later questions,<sup>87</sup> underpins a string of cases that now allows for unfettered spending on direct democracy. Foundational to the rest of the analysis, this section explores those cases.

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79. *Id.* at 6, ¶ 12 (footnote omitted).

80. CAL. SEC'Y OF STATE, *supra* note 31.

81. *Id.*

82. *Id.*

83. Zacks, *supra* note 1, at 3.

84. *Id.* at 1.

85. *Id.*

86. Small donor donations totaled 22 percent of total fundraising in the 2020 presidential election, an increase from 15 percent in 2016. Ollie Gratzinger, *Small Donors Give Big Money in 2020 Election Cycle*, OPENSECRETS (Oct. 30, 2020, 1:18 PM), <https://www.opensecrets.org/news/2020/10/small-donors-give-big-2020-thanks-to-technology/> [<https://perma.cc/95FB-VDRK>].

87. *See infra* Part III.

1. *Buckley, Bellotti, and Citizens Against Rent Control:  
Unlimited Contributions*

In *Buckley v. Valeo*,<sup>88</sup> the U.S. Supreme Court upheld contribution limits to political candidates but struck down restrictions on independent political expenditures.<sup>89</sup> The Court reviewed a challenge to the Federal Election Campaign Act of 1971, which, among other regulations, limited contributions to a single candidate for federal office to \$1,000 per individual and set an annual combined maximum contribution limit of \$25,000.<sup>90</sup> The Court held that restrictions on individual contributions to political candidates did not violate the First Amendment because the limitations advanced an important government interest: protecting the “integrity of our system of representative democracy” by guarding against quid pro quo corruption.<sup>91</sup>

Two years later, in *First National Bank of Boston v. Bellotti*,<sup>92</sup> the Court struck down a Massachusetts law that prohibited banks and corporations from making expenditures on ballot measures, except those that materially affected their business.<sup>93</sup> The *Bellotti* court held that “[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.”<sup>94</sup> What is more, the Court held that the otherwise protected speech did not lose its First Amendment protection because of its corporate origin: “To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it.”<sup>95</sup>

Soon after *Bellotti*, the Court ruled in *Citizens Against Rent Control* that a contribution limit to a committee formed to support or oppose a ballot measure violated the First Amendment.<sup>96</sup> The Court heard the case on appeal from the California Supreme Court.<sup>97</sup> The California Supreme Court subjected the contribution limit to strict scrutiny and concluded that the ordinance furthered “compelling

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88. 424 U.S. 1 (1976).

89. *Id.* at 143.

90. *Id.* at 1.

91. *Id.* at 26–27.

92. 435 U.S. 765 (1978).

93. *Id.* at 767.

94. *Id.* at 790 (citations omitted).

95. *Id.* at 784, 790.

96. *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 300 (1981).

97. *Id.* at 290.

governmental interests because it ensured that special interest groups could not ‘corrupt’ the initiative process by spending large amounts to support or oppose a ballot measure.’<sup>98</sup> The California Supreme Court reasoned that exorbitant spending on the initiative process “could produce apathetic voters” and the governmental interest in protecting against such an effect sufficiently outweighed First Amendment infringements.<sup>99</sup> The California Supreme Court also found that the ordinance was narrowly tailored to achieve its goal, finding that “the disclosure requirements of the ordinance [was not] a sufficient prophylaxis to dispel perceptions of corruption.”<sup>100</sup>

The U.S. Supreme Court distinguished the candidate contribution limit it upheld in *Buckley* from the ordinance Berkeley voters adopted, finding that the governmental interest in protecting against the appearance of corrupted candidates was not at issue with ballot measures, but the ordinance’s disclosure requirement was permissible:

Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate’s committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions.<sup>101</sup>

*Buckley*, *Bellotti*, and *Citizens Against Rent Control* lay the foundation for the case studies and arguments that follow. Most critically, contributions to committees formed to support or oppose a direct democracy measure cannot be regulated, except for disclosure requirements. And the reason for the distinction between impermissible contribution restrictions for ballot measures and permissible contribution restrictions for political campaigns is drawn on the difference between candidates and issues. So, though this string of cases recognizes that rooting out actual or perceived corruption from election contributions

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98. *Id.* at 293.

99. *Id.*

100. *Id.* at 294.

101. *Id.* at 299–300.



is a compelling state interest, they stand for the proposition that there is no cognizable interest in doing so on ballot measures.

## 2. *Austin*, *McConnell*, and *Citizens United*: Corporate Speech

Because spending on direct democracy in California is largely funded by corporations and special interests, this section briefly explores the protection of corporate speech. The corporate source of political contributions, not just the amount, has long been an issue. As noted above, before the court struck down the content-neutral contribution limitation in *Citizens Against Rent Control*, the Court had already struck down the restriction in *Bellotti* that prohibited corporations from making expenditures on ballot measures.<sup>102</sup> But less than a decade later, in the context of candidate elections, the Court held in *Austin v. Michigan Chamber of Commerce*<sup>103</sup> that independent expenditures could be restricted because of their corporate source.<sup>104</sup> In *Austin*, the Court reviewed a challenge to a Michigan statute that prohibited corporations from making independent expenditures on behalf of political candidates from their general treasury.<sup>105</sup> The Court upheld the statute, finding it justified by seeking to expel “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>106</sup> In *Austin*, the Court explicitly recognized the state interest in rooting out corporate wealth from unfairly influencing elections through political expenditures.<sup>107</sup>

A decade later, Congress passed the Bipartisan Campaign Reform Act of 2002 (known as the McCain-Feingold Act or BCRA) which, among other regulations, restricted “soft money” donations<sup>108</sup> made directly to political parties.<sup>109</sup> Both major political parties, but

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102. See *supra* notes 92–95 and accompanying text.

103. 494 U.S. 652 (1990).

104. *Id.* at 660.

105. *Id.* at 654.

106. *Id.* at 659–660.

107. *Id.* at 660.

108. Soft money donations are donations made to political parties or committees, as opposed to “hard” donations made directly to candidates. See Gordon Scott, *Soft Money*, INVESTOPEDIA (Apr. 14, 2021), <https://www.investopedia.com/terms/s/softmoney.asp> [<https://perma.cc/Q7DL-AWCZ>].

109. 2 U.S.C. § 431 (2002).

especially the Democratic Party, had benefited from large “soft money” contributions.<sup>110</sup>

In 2003, the U.S. Supreme Court heard a challenge to the BCRA in *McConnell v. Federal Election Commission*.<sup>111</sup> The Court rejected plaintiff’s facial First Amendment challenge and upheld the sections of the BCRA that regulated soft money contributions.<sup>112</sup> In *McConnell*, the Supreme Court cited its earlier jurisprudence that contribution limits are rooted in the important interest of “preventing ‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.’”<sup>113</sup> The Court cited its earlier holding in *Burroughs v. United States*<sup>114</sup> that “[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.”<sup>115</sup> The Court added: “Money, like water, will always find an outlet.”<sup>116</sup>

In *Austin* and *McConnell*, the Court acknowledged the power of large contributions from corporations to influence elections. But in 2010, the Court overruled *Austin* and part of *McConnell* in *Citizens United v. Federal Election Commission*.<sup>117</sup> Section 203 of the BCRA restricted corporations and labor unions from funding “electioneering communications” from their general treasuries.<sup>118</sup> Citizens United sought an injunction against the Federal Election Commission to keep it from enforcing the BCRA against a film it wanted to publish about Hillary Clinton, who was then running for President.<sup>119</sup> The United States District Court for the District of Columbia denied the injunction, concluding that the movie was equivalent to express advocacy because it intended to persuade voters that Clinton was unfit for office,

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110. Seth Gitell, *Making Sense of McCain-Feingold and Campaign-Finance Reform*, THE ATLANTIC (July/Aug. 2003), <https://www.theatlantic.com/magazine/archive/2003/07/making-sense-of-mccain-feingold-and-campaign-finance-reform/302758> [<https://perma.cc/S4GRY3YB>].

111. 540 U.S. 93 (2003).

112. *Id.* at 181–89.

113. *Id.* at 136 (quoting Fed. Election Comm’n v. Nat’l Right to Work Comm., 459 U.S. 197, 208 (1982)).

114. 290 U.S. 534 (1934).

115. *McConnell*, 540 U.S. at 223–24 (quoting *Burroughs*, 290 U.S. at 545) (alterations in original).

116. *Id.* at 224.

117. 558 U.S. 310, 365–366 (2010).

118. *Id.* at 318–19.

119. *Id.* at 321.

and per *McConnell*, such advocacy was permissibly restricted by the BCRA.<sup>120</sup> In a 5–4 vote, the Supreme Court overruled *Austin* and part of *McConnell*, holding: “We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”<sup>121</sup>

Even though the Court upheld the BCRA’s disclosure requirements because they advanced a state interest of transparency to the electorate, the Court reasoned that “the First Amendment stands against attempts to disfavor certain subjects or viewpoints” and is “[p]remised on mistrust of governmental power.”<sup>122</sup> The Court further reasoned that “[p]rohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others” because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>123</sup>

Any precedential support *Austin* and *McConnell* might have offered for regulating corporate direct democracy contributions was surely put to rest in *Citizens United*. In *Citizens United*, corporations and special interests got the green light to spend as they desired for the electoral outcomes they seek—on either issues or candidates.

This jurisprudence leaves clear three important considerations that this Note addresses. First, there are legitimate state interests in rooting out actual or perceived corruption in elections from large spending. Second, contributions to direct democracy measures cannot be regulated, unlike donations to candidate campaigns, because they deal with issues, not candidates. Third, the First Amendment protects as core political speech both contributions and expenditures from corporations as much as individuals.

## II. CASE STUDIES: RECENT EXAMPLES OF EXPENSIVE DIRECT DEMOCRACY IN CALIFORNIA

This Note now explores two recent examples to interrogate the cost of direct democracy in California. As discussed above, the original intent of direct democracy in California was to protect against

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120. *Id.* at 322.

121. *Id.* at 365–366.

122. *Id.* at 340.

123. *Id.*

corrupt corporate influences that could sway officeholders.<sup>124</sup> But now, that system has itself been corrupted because of the Supreme Court jurisprudence that prohibits states from regulating contributions to direct democracy measures.<sup>125</sup> So, the more than \$1.1 billion spent on direct democracy in California in just one year—led by Proposition 22 and the Newsom Recall—highlights just how far direct democracy has evolved from its original intent. These case studies are consequential because of the exorbitant amount of money their campaigns involved. If Proposition 22 and the Newsom Recall offer a roadmap for special interests and political strategists (i.e., to spend heavily for lucrative laws or to capitalize on off-year special elections) they also provide a cautionary tale of direct democracy taken too far. Before analyzing in Part III several issues these case studies illustrate,<sup>126</sup> the following sections consider the background of Proposition 22 and the Newsom Recall.

#### A. Proposition 22

Proposition 22 signals to businesses that taking an “issue” to the ballot box is the clear choice when the amount spent on the measure is less than complying with a disfavored law or judicial decision. To be sure, this cost/benefit analysis occurs in most business decisions and is not wholly dissimilar from choosing to expend corporate funds on lobbying the legislature. But the ballot measure process was never intended to be a bet-the-company system for special interests and corporations to buy more lucrative laws.<sup>127</sup> Indeed, it was intended to do just the opposite: to root out those interests from swaying the state’s governance.<sup>128</sup> So, this Note does not explore the merits of Proposition 22 but instead examines the system that allowed for it.

Uber, Lyft, DoorDash, and Postmates financed Proposition 22 to create a carved-out exemption for app-based drivers from California employment classification laws.<sup>129</sup> It was, at its core, the last step in a yearslong fight between gig-economy tech companies and labor

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124. *See supra* Section I.A.

125. *See supra* Section I.B.

126. *See infra* Part III.

127. *See supra* Section I.A.

128. *Id.*

129. John Myers & Taryn Luna, *In Prop. 22, App-Based Companies Ask Voters to Resolve What Lawmakers Would Not*, LA TIMES (Oct. 21, 2020, 5:00 A.M.), <https://www.latimes.com/california/story/2020-10-21/proposition-22-rideshare-app-uber-lyft-ab5-employee-independent-contractor> [https://perma.cc/T6N5-G32S].

advocates. In 2018, the California Supreme Court unanimously decided in *Dynamex Operations West, Inc. v. Superior Court*<sup>130</sup> to adopt the “ABC test” as its test to determine whether to classify a worker as an employee or independent contractor.<sup>131</sup> Under the ABC test, all workers are presumed to be employees unless the employer can establish each of three stringent showings.<sup>132</sup> If an employer cannot prove each of the three parts of the ABC test, the worker is classified as an employee, and the state’s relevant wage orders apply.<sup>133</sup> Knowing that under the ABC test they would have to classify their drivers as employees instead of independent contractors and comply with the applicable wage orders, gig-economy companies surely viewed *Dynamex* as an industry-shattering loss in the courts.

But the California legislature strongly supported the ABC test, and in 2019, both codified the *Dynamex* holding and expanded its application.<sup>134</sup> A.B. 5 codified the ABC test and further established its use for the Labor Code, Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission.<sup>135</sup> The legislature declared that “the misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality.”<sup>136</sup> Further, A.B. 5 was expressly intended “to ensure workers who are currently exploited by being misclassified as independent contractors . . . have the basic rights and protections they deserve under the law, including a minimum wage, workers’ compensation . . . , unemployment insurance, paid sick leave, and paid family leave.”<sup>137</sup> In addition to providing workers with these rights and protections, the California Department of Labor Standards Enforcement also estimated that the state loses \$7 billion annually in tax revenue from the misclassification of employees.<sup>138</sup>

The impact that *Dynamex* and A.B. 5 would have had on gig-economy companies was no secret. In a Securities and Exchange

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130. 416 P.3d 1 (Cal. 2018).

131. *Id.* at 40.

132. *Id.* at 39–40.

133. *Id.* at 40.

134. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

135. *Id.*

136. *Id.*

137. *Id.*

138. Lynn Rhinehart et al., *Misclassification, the ABC Test, and Employee Status*, ECON. POL’Y INST. (June 16, 2021), <https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/> [<https://perma.cc/BD6Z-X244>].

Commission filing, Uber acknowledged that classifying drivers as employees would dramatically impact the company:

If, as a result of legislation or judicial decisions, we are required to classify Drivers as employees . . . we would incur significant additional expenses for compensating Drivers, potentially including expenses associated with the application of wage and hour laws (including minimum wage, overtime, and meal and rest period requirements), employee benefits, social security contributions, taxes, and penalties.<sup>139</sup>

To be certain, the new classification test would have impacted many sectors, and the legislature carved out several exceptions. Doctors, lawyers, dentists, architects, engineers, and commercial fishermen, for example, are exempt from the ABC test.<sup>140</sup> Instead, these professions are subjected to the multifactor classification test in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*.<sup>141</sup> Moreover, many professional services are exempt from A.B. 5, such as services provided by graphic designers, fine artists, estheticians, barbers, cosmetologists, and freelance writers.<sup>142</sup> Each of these professional services, however, is subjected to the *Borello* multifactor classification test and six additional requirements in A.B. 5.<sup>143</sup>

Notably, rideshare and delivery services were *not* among the exemptions. Uber and Lyft lobbied for some kind of compromise, promising to pay a minimum wage to drivers while they wait to pick up and drop off passengers and to create a benefits program, in exchange for an independent contractor classification exemption.<sup>144</sup> They even took their lobbying public by directly emailing their customers about A.B. 5, imploring them to contact lawmakers to accept the compromise, and threatening that under A.B. 5 “you could pay more, wait longer, or risk

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139. Uber Techs., Inc., Registration Statement (Form S-1) (Apr. 11, 2019); Alexia Fernández Campbell, *California Just Passed a Landmark Law to Regulate Uber and Lyft*, VOX (Sept. 18, 2019, 2:13 PM), <https://www.vox.com/2019/9/11/20850878/california-passes-ab5-bill-uber-lyft> [<https://perma.cc/6F3A-DTZQ>].

140. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

141. *Id.* (codifying *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Rels.*, 769 P.2d 399 (Cal. 1989)).

142. *Id.*

143. *Id.*

144. Campbell, *supra* note 139.

losing reliable access to rideshare altogether.”<sup>145</sup> Uber and Lyft even threatened to leave California entirely.<sup>146</sup>

While the failure to secure an exception from A.B. 5 may have been disappointing for the gig-economy companies, it certainly should not have been a surprise. Indeed, when State Senator María Elena Durazo introduced A.B. 5, she said, referring to the tech industry that largely established the gig model: “Let’s be clear, there’s nothing innovative about underpaying someone for their labor and basing an entire business model on misclassifying workers.”<sup>147</sup>

The final passage of A.B. 5 was approved with overwhelming legislative support,<sup>148</sup> showing an undeniable desire to change the independent contractor model from which gig-economy companies had long profited. Uber challenged A.B. 5 in court but lost.<sup>149</sup> After losing in the judicial and legislative branches, the gig-economy companies continued their fight in the political arena, collecting enough signatures to qualify Proposition 22. A Lyft spokesperson said:

Our state’s political leadership missed an important opportunity to support the overwhelming majority of rideshare drivers who want a thoughtful solution that balances flexibility with an earnings standard and benefits . . . . The fact that there were more than 50 industries carved out of AB5 is very telling. We are fully prepared to take this issue to the voters of California to preserve the freedom and access drivers and riders want and need.<sup>150</sup>

Proposition 22 secured enough signatures, appearing on the ballot as “Exempts App-Based Transportation and Delivery Companies From Providing Employee Benefits to Certain Drivers. Initiative

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145. *Id.*

146. Levi Sumagaysay, *The Different Routes Uber and Lyft Could Take as They Fight California Law*, MARKETWATCH (Aug. 28, 2020, 4:42 PM), <https://www.marketwatch.com/story/the-different-routes-uber-and-lyft-could-take-as-they-fight-california-law-11598645583> [https://perma.cc/KTL4-QAL4].

147. Gabrielle Canon, *California’s Controversial Labor Bill Has Passed the Senate. Experts Forecast More Worker Rights, Higher Prices for Services*, USA TODAY (Sept. 13, 2019, 5:43 PM), <https://www.usatoday.com/story/news/politics/2019/09/10/what-californias-ab-5-means-apps-like-uber-lyft/2278936001/> [https://perma.cc/2QZX-Y39N].

148. *AB-5 Worker Status: Employees and Independent Contractors: Votes*, CAL. LEGIS. INFO., [https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill\\_id=201920200AB5](https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201920200AB5) [https://perma.cc/D8TU-METD]. The senate vote passed 29-11; the final assembly vote passed 61-16. *Id.*

149. *Olson v. California*, CV 19-10956-DMG (RAOx), 2020 WL 905572, at 16 (C.D. Cal. Feb. 10, 2020).

150. Campbell, *supra* note 144.

Statute.”<sup>151</sup> The nonpartisan ballot guide described what a Yes and No vote on the measure would mean:

A YES vote on this measure means: App-based rideshare and delivery companies could hire drivers as independent contractors. Drivers could decide when, where, and how much to work but would not get standard benefits and protections that businesses must provide employees.

A NO vote on this measure means: App-based rideshare and delivery companies would have to hire drivers as employees if the courts say that a recent state law makes drivers employees. Drivers would have less choice about when, where, and how much to work but would get standard benefits and protections that businesses must provide employees.<sup>152</sup>

Supporters of the initiative, who would reap significant financial benefits by not having to pay minimum wage and benefits to drivers, framed their argument as supporting drivers and providing employee benefits.<sup>153</sup> In the official voter guide, supporters claimed that Proposition 22 “protects app-based drivers’ choice to be independent contractors” and that “by [a] 4:1 margin drivers support independence!”<sup>154</sup> Supporters also claimed that Proposition 22 would save “hundreds of thousands of jobs” and “strengthen public safety,” while providing drivers “historic benefits” and earning guarantees.<sup>155</sup> While Proposition 22 did establish certain new earning guarantees, analysis of the proposals found that the guarantees paid much less than minimum wage.<sup>156</sup>

In support of the measure, supporters of Proposition 22 cast the measure as protecting driver independence because drivers enjoyed the freedom of not being employees.<sup>157</sup> Some of the \$204 million spent

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151. CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION 12 (2020) [hereinafter 2020 GENERAL ELECTION VOTER INFORMATION GUIDE], <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf> [<https://perma.cc/27WG-5NWK>].

152. *Id.*

153. *See id.*

154. *Id.*

155. *Id.*

156. *See* Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour*, UC BERKELEY LAB. CTR (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/> [<https://perma.cc/M73U-4ZZT>].

157. Myers & Luna, *supra* note 129 (“This is what drivers want . . . . The drivers have been very clear for a number of years that they don’t want to be employees.”).



in support of the measure was used to send slate mailers to voters which deceptively suggested the measure was endorsed by progressive politicians.<sup>158</sup> Many voters received a mailer titled the “Progressive Voter Guide” which implied Senator Bernie Sanders endorsed the ballot measure.<sup>159</sup> Sanders, however, strongly opposed the proposition and said on Twitter, “I call on Uber and Lyft to publicly denounce the deception.”<sup>160</sup> And Uber took their direct marketing efforts even further than the emails to customers they sent earlier,<sup>161</sup> deploying a pop-up notification in their app that required customers ordering a ride to “confirm” a message warning that Proposition 22 would increase wait times and prices and that drivers would “lose their livelihoods.”<sup>162</sup> Experts called their “electioneering, particularly the use of in-app notifications . . . highly untraditional and notably aggressive.”<sup>163</sup> One political science professor noted that “[p]eople are watching this campaign to see how much spending you need to get that Yes vote—how smart it is to drive messages to end users directly.”<sup>164</sup>

Opponents of the measure framed their argument as corporate giants profiting from denying workers employment protections.<sup>165</sup> In the official voter guide, opponents claimed that voting No on Proposition 22 would stop “billion-dollar app companies like Uber, Lyft, and DoorDash from writing their own exemption to California law and profiting from it.”<sup>166</sup> Opponents claimed that Proposition 22 “denies their drivers rights and safety protections they deserve: sick leave, healthcare and unemployment.”<sup>167</sup>

In the end, Proposition 22 passed with 58.6 percent support.<sup>168</sup> In addition to exempting rideshare and delivery drivers from A.B. 5, the measure also banned local communities from imposing similar rules and required any legislative change to be approved by a seven-eighths

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158. *Id.*

159. *Id.*

160. *Id.*

161. *See supra* note 144 and accompanying text.

162. Suhauna Hussain, *Uber, Lyft Push Prop. 22 Message Where You Can't Escape It; Your Phone*, LA TIMES (Oct. 8, 2020), <https://www.latimes.com/business/technology/story/2020-10-08/uber-lyft-novel-tactics-huge-spending-prop-22> [<https://perma.cc/A3KG-N7PE>].

163. *Id.*

164. *Id.*

165. 2020 GENERAL ELECTION VOTER INFORMATION GUIDE, *supra* note 151, at 12.

166. *Id.*

167. *Id.*

168. 2020 GENERAL ELECTION STATEMENT OF THE VOTE, *supra* note 9, at 14.

vote of each chamber of the legislature.<sup>169</sup> The measure did set up earning guarantees and certain benefits for drivers.<sup>170</sup> Proposition 22 delivered to gig-economy corporations perhaps everything they wanted: to keep the independent contractor model from which they profit, to restrain localities from seeking future reforms, and to make legislative changes to the law nearly impossible. What is more, unlike an exemption they might have obtained in the legislature, Proposition 22 can only be amended or repealed by another ballot measure. All for the bargain price of \$204 million.

### *B. The Newsom Recall*

In a special election held on September 14, 2021, California Governor Gavin Newsom defeated a statewide recall attempt.<sup>171</sup> It was only the second gubernatorial recall attempt that successfully qualified for the ballot in California, and only the fourth in the nation.<sup>172</sup> Newsom became the first governor in California history and only the second in the history of the United States to face and defeat a recall.<sup>173</sup>

As noted above, because the stated reason for a recall is not reviewable, an officeholder in California can be recalled for any reason.<sup>174</sup> Section 11020 of the California Election Code nonetheless requires a statement of the reason for the recall.<sup>175</sup> In the official voter information guide, supporters of the recall shared their reason for seeking to remove Newsom:

Governor Newsom has implemented laws which are detrimental to the citizens of this state and our way of life. Laws he endorsed favor foreign nationals, in our country illegally, over that of our own citizens. People in this state suffer the highest taxes in the nation, the highest homelessness rates, and the lowest quality of life as a result. He has imposed sanctuary state status and fails to enforce immigration laws. He unilaterally over-ruled the will of the people regarding

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169. Myers & Luna, *supra* note 129.

170. See Kim Lyons, *Uber and Lyft Roll Out New Benefits for California Drivers Under Prop 22*, THE VERGE (Dec. 14, 2020, 3:38 PM), <https://www.theverge.com/2020/12/14/22174600/uber-lyft-new-benefits-california-drivers-prop-22-gig-economy> [<https://perma.cc/E94X-WRDM>].

171. 2021 GUBERNATORIAL RECALL STATEMENT OF VOTE, *supra* note 2, at 11.

172. Zacks, *supra* note 1.

173. *Id.*

174. See *supra* notes 67–68 and accompanying text.

175. CAL. ELEC. CODE § 11020 (2022).

the death penalty. He seeks to impose additional burdens on our state by the following; removing the protections of Proposition 13, rationing our water use, increasing taxes and restricting parental rights. Having no other recourse, we the people have come together to take this action, remedy these misdeeds and prevent further injustices.<sup>176</sup>

The recall petition was one of seven launched against Newsom.<sup>177</sup> The petition that ultimately qualified was filed in February 2020, just over one year after Newsom took office.<sup>178</sup> The petition did not mention COVID-19, but the pandemic would quickly play a critical role.<sup>179</sup>

On November 6, 2020, months into the COVID-19 pandemic, a Sacramento superior court granted petitioners a four-month extension to gather signatures because stay-at-home orders during the pandemic made it uniquely difficult to collect signatures.<sup>180</sup> That *same* night, Newsom was photographed dining at the luxurious French Laundry restaurant in Napa Valley without a face covering.<sup>181</sup> The dinner became consequential because Newsom had recently asked Californians to stay at home in anticipation of a COVID-19 surge.<sup>182</sup> The seeming double standard caused an uproar and “[w]ithin a month, a recall effort that had only managed to submit roughly 4 percent of the necessary signatures was suddenly soaring, as major Republican donors sent money and the petition gained nearly 500,000 signatures.”<sup>183</sup> The petition eventually gathered more than 1.6 million signatures, crossing the requisite threshold of 1,495,709 signatures (12 percent of the 12,464,235 votes cast in the 2018 gubernatorial election), and the recall qualified for the ballot.<sup>184</sup>

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176. CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GUBERNATORIAL RECALL ELECTION 7 (2021) [hereinafter 2021 GUBERNATORIAL RECALL VOTER INFORMATION GUIDE], <https://vig.cdn.sos.ca.gov/2021/pdf/complete-vig.pdf> [<https://perma.cc/FH L6-EPQQ>].

177. Zacks, *supra* note 1.

178. *Id.*

179. *Id.*

180. Shawn Hubler & Jennifer Medina, *How Gavin Newsom Landed in a California Jam*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2021/04/27/us/politics/gavin-newsom-recall-california.html> [<https://perma.cc/RM36-WW64>].

181. *Id.*

182. *Id.*

183. *Id.*

184. CAL. SEC’Y OF STATE, RECALL OF GOVERNOR GAVIN NEWSOM CUMULATIVE STATEWIDE SUMMARY AS OF 04/19/21 (2021), <https://elections.cdn.sos.ca.gov/recalls/cumulative-newsom-heatlie.pdf> [<https://perma.cc/TE72-NU4D>].

Newsom framed the recall as an opportunistic “Republican power grab” by out-of-state political operatives. In the official voter information guide, Newsom argued:

The recall is an attempt by national Republicans and Trump supporters to force an election and grab power in California. VOTE NO on the recall of Democratic Governor Gavin Newsom to stop the Republican takeover of our state. The recall’s leading supporters are the same national Republicans who fought to overturn the presidential election and launched efforts to undermine the right to vote across the country. Here in California, they are abusing our recall laws in order to gain power and advance their partisan agenda. . . . VOTE NO on the recall to stop this Republican power grab. Stop the Republican Recall of Governor Newsom.<sup>185</sup>

Polls showed a tight race throughout August, but as the election neared, Newsom regained a safe position to defeat the recall.<sup>186</sup> Ultimately, Newsom survived the recall by earning 61.9 percent of the vote—the same percentage of support he received in his original 2018 election.<sup>187</sup>

As detailed earlier, the Newsom Recall cost California taxpayers more than \$200 million to administer.<sup>188</sup> Additionally, candidate and committee spending added more than \$145 million,<sup>189</sup> bringing the total cost of the unsuccessful recall to more than \$345 million.

Together, the 2020 general election ballot measures, led by Proposition 22, and the 2021 Newsom Recall totaled more than \$1.1 billion spent on statewide direct democracy in California in less than one year. This Note now explores three issues that arise from this prolific spending.

### III. ISSUES: DIRECT DEMOCRACY’S PROBLEMS IN CALIFORNIA

This Note will now examine three issues that deserve greater consideration given the record amount of money being spent on direct

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185. 2021 GUBERNATORIAL RECALL VOTER INFORMATION GUIDE, *supra* note 176, at 9.

186. *Latest Polls of the California Recall Election*, ABC NEWS: FIVETHIRTYEIGHT (Sept. 14, 2021, 8:59 AM), <https://projects.fivethirtyeight.com/california-recall-polls> [<https://perma.cc/UF66-LMU7>].

187. *See supra* note 2 and accompanying text.

188. Letter from Shirley N. Weber, Cal. Sec’y of State, to Hon. Nancy Skinner, Senate Budget and Fiscal Rev. Comm. Chair, et al., *supra* note 3.

189. *Gavin Newsom Recall, Governor of California (2019–2021)*, *supra* note 4.

democracy in California. First, the exorbitant amount of money spent on direct democracy begins in the petition circulation phase, where the high cost of gathering signatures makes the system of direct democracy accessible only to the wealthy. Second, Proposition 22 and the Newsom Recall highlight the long reach of the *Citizens Against Rent Control* and *Bellotti* holdings and call into question whether the issues/candidate distinction is workable. This is currently compounded by historic wealth inequality<sup>190</sup> and record corporate profits,<sup>191</sup> centralizing the ability of wealthy donors and well-financed special interests to spend heavily for the lucrative laws they seek. Third, California's two-question recall creates political incentives that encourage strategic political use of the recall, which drives up candidate and committee spending and inflicts significant taxpayer cost. Solutions are explored in Part IV. The following sections first examine the issues.

### A. *The High Cost of Signature Collection*

The antidemocratic issue with big money in direct democracy begins long before voters receive a ballot. Any analysis of spending on California's direct democracy system should begin at the signature collection phase. To consider just how democratic direct democracy is, it is important to examine how measures make their way to a ballot. The short answer, perhaps of no surprise, is money.

Theoretically, ballot measures in California are free, except for a \$2,000 filing fee, which is refunded if the measure qualifies for the ballot.<sup>192</sup> Supporters of a proposed measure or recall could volunteer their energy and organize with little cost, canvassing door-to-door and throughout their communities, or organizing support online. But in reality, petitioners rely on signature-gathering companies, doing little more to qualify a measure than write a check.<sup>193</sup> The National Conference of State Legislators notes that “[v]ery few campaigns attempt to qualify an initiative petition with volunteer circulators” and “[a]

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190. See *infra* note 249 and accompanying text.

191. See *infra* note 248 and accompanying text.

192. *Ballot Initiatives*, OFF. OF ATT. GEN., <https://oag.ca.gov/initiatives> [<https://perma.cc/3B7G-B44E>].

193. See Christine Mai-Duc, *Get Signatures, Make Money: How Some Gatherers Are Making Top Dollar in This Year's Flood of Ballot Initiatives*, L.A. TIMES (Aug. 10, 2016, 12:05 AM), <https://www.latimes.com/politics/la-pol-ca-signature-gatherers-ballot-initiatives-california-20160627-snap-htmlstory.html> [<https://perma.cc/NW3H-F8HC>].

campaign that has adequate funds to pay circulators has a nearly 100 percent chance of qualifying for the ballot in many states.”<sup>194</sup>

The estimated cost of qualifying a ballot measure has dramatically increased. In 1976, the median cost was \$45,000.<sup>195</sup> Alarming, by 2006, the median cost skyrocketed to nearly \$3 million.<sup>196</sup> And in 2020, Proposition 22 supporters alone spent nearly \$6.5 million to collect the required number of signatures, equaling \$10.37 per signature.<sup>197</sup> As an initial matter, then, the high cost of qualifying a ballot measure makes the entire system of direct democracy available only to wealthy individuals or well-funded special interests.

The exorbitant cost that prohibits qualifying a measure in the first place surely serves as a gatekeeper to many issues making their way to a ballot. In *Meyer v. Grant*,<sup>198</sup> the Supreme Court unanimously held that prohibitions against paying circulators violated the First Amendment.<sup>199</sup> Since then, it has been difficult for states to regulate the signature collection process.<sup>200</sup> Because *Meyer* prohibits states from outright banning paid signature gatherers, states have taken different approaches (with varying results in the courts), from prohibiting a pay-per-signature payment structure to setting a maximum chargeable amount per signature.<sup>201</sup> Many states have age requirements for petition gatherers.<sup>202</sup> California, for instance, requires a petitioner to be at least eighteen years old but does not require the petitioner to have California residency.<sup>203</sup> Additionally, most of the states that have initiative and referendum processes, including California, require the signature-gatherer to sign an affidavit attesting that they personally witnessed the signature.<sup>204</sup>

While this gatekeeping issue is well-known, it is an important first step in analyzing California’s direct democracy system post-

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194. *Laws Governing Petition Signatures*, NAT’L CONF. OF STATE LEGISLATURES (2012), <https://www.ncsl.org/research/elections-and-campaigns/laws-governing-petition-circulators.aspx> [https://perma.cc/92WZ-26C7].

195. Herdt, *supra* note 36; Carrillo, *supra* note 20, at 597–598.

196. *Id.*

197. *California Ballot Initiative Petition Signature Costs*, BALLOTPEdia, [https://ballotpedia.org/California\\_ballot\\_initiative\\_petition\\_signature\\_costs](https://ballotpedia.org/California_ballot_initiative_petition_signature_costs) [https://perma.cc/L6LP-RGE2].

198. 486 U.S. 414 (1988).

199. *Id.* at 428.

200. *Laws Governing Petition Signatures*, *supra* note 194.

201. *Id.*

202. *Id.*

203. CAL. ELEC. CODE § 102; *see also Gavin Newsom Recall, Governor of California (2019–2021)*, *supra* note 4.

204. *Laws Governing Petition Signatures*, *supra* note 194.

Proposition 22 and post-Newsom Recall. Although California's disclosure and attestation requirements certainly add transparency to the process, there is no doubt that well-funded special interests and corporations have a meaningful advantage in the initial step of qualifying their handcrafted measures for the ballot.<sup>205</sup>

This gatekeeping issue makes clear that the system is not, as the name "direct democracy" suggests, completely direct nor perfectly democratic. For instance, out-of-state money can be used, without limitation, to finance signature collection by paid gatherers who might not even live in California. Whatever idea may have once existed of citizens organizing to petition for signatures has been long replaced in California by a robust signature-collecting industry.<sup>206</sup> One consulting firm even provided a money-back guarantee for signature collection.<sup>207</sup> The monetary cost of getting an issue to a ballot is profound and, as Proposition 22 highlights, increasing.<sup>208</sup> This high cost of gathering signatures to qualify a ballot measure makes the system of direct democracy an agenda of issues set by the wealthy, not one which filters to voters only the issues of significant importance demanding direct democratic attention.

### *B. Unlimited Spending*

Once the measure makes its way onto a ballot, *Citizens Against Rent Control* and *Bellotti* create another issue: except for disclosure and transparency requirements, nothing can be done to curb prolific spending, from individuals or corporations. But *Buckley*, *Austin*, and *McConnell* each offered strong support for the proposition that there is a compelling state interest in rooting out actual or perceived corruption from the election process. And *Bellotti* and *Citizens Against Rent Control* agreed, except the Court held the issue simply does not exist in direct ballot measures. To illustrate why California might seek to regulate the amount of money spent on direct democracy, should the

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205. See Garrett, *supra* note 20, at 1851 ("The primary hurdle blocking supporters is finding enough circulators who can approach a sufficient number of citizens within the short time frame allowed to gather signatures. In other words, meeting the signature threshold demonstrates that advocates deployed an army of efficient signature gatherers, not that they garnered significant public support for the consideration of their question. The best way to overcome the real obstacle to qualification is to pay circulators." (footnote omitted)).

206. See Mai-Duc, *supra* note 193.

207. See Garret, *supra* note 20, at 1852–53.

208. See *supra* notes 195–197 and accompanying text.

Supreme Court change course, it is important to understand just how much is spent on ballot measures.

Just the top ten most expensive ballot initiatives in California have alone cost nearly \$1.5 billion.<sup>209</sup> What is more, four of the top ten most expensive measures occurred in the 2020 general election alone.<sup>210</sup> In nine of the ten most expensive ballot initiatives, the side that spent the most prevailed.<sup>211</sup> The only initiative on the top ten list to spend more and lose was Proposition 56 in 2016, where cigarette manufacturers spent \$71 million to oppose an increase in cigarette taxes but lost handily to supporters who spent \$32 million.<sup>212</sup>

Showing a trend of increased spending, all ten of the top ten most expensive initiatives occurred in the decade spanning 2010 to 2020.<sup>213</sup> Further illustrating that trend, Proposition 22 was the most expensive ballot initiative in California history for just one election cycle, until gambling interests in 2022 poured over half a *billion* dollars into Propositions 26 and 27.<sup>214</sup> Notably, both of those measures failed,<sup>215</sup> showing that spending more does not always secure a victory, though it usually does. And research shows that spending is most effective at securing a “no” vote.<sup>216</sup>

Support for Proposition 22 was funded almost exclusively by app-based tech companies whose costs would have been dramatically increased by A.B. 5. Uber contributed more than \$58 million, DoorDash contributed nearly \$52 million, Lyft contributed nearly \$49 million, Instacart contributed nearly \$32 million, and Postmates contributed more than \$13 million.<sup>217</sup> Opposition was led largely by labor groups. The Service Employees International Union contributed more than \$5 million, the United Food and Commercial Workers contributed more than \$4 million, and both the Teamsters and California Labor Federation each chipped in an additional \$2 million.<sup>218</sup> In total, more than

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209. Menezes et al., *supra* note 6.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. LeMee et al., *supra* note 12.

215. *Id.*

216. See Carrillo et al., *supra* note 20, at 598 (noting that voting “no” is also the most common voter response to ballot measures).

217. Menezes et al., *supra* note 6.

218. *Id.*



\$204 million was spent in support of the measure, piling in comparison to the nearly \$20 million spent in opposition.<sup>219</sup>

The Newsom Recall cost \$345 million.<sup>220</sup> That amount should be considered in two parts: the \$200 million cost to California taxpayers for administering the special election and the \$145 million spent by candidates and committees.<sup>221</sup> To many, the more than \$200 million spent to administer the special recall election is likely a shockingly large waste of taxpayer resources. Others might point out that the 2021–2022 California budget totaled \$196.4 billion,<sup>222</sup> bringing the cost of the recall election to just 0.1 percent of the state’s annual expenditures. But recall elections are not regularly scheduled, so the best way to consider the more than \$200 million cost is to contemplate how else it might have been allocated.

That is, putting aside personal policy beliefs on whether the recall was meritorious, Californians of all political backgrounds can appreciate the impact \$200 million could have in other areas. For instance, around the time of the Newsom Recall, the California budget allocated an additional \$1 billion in funding to localities to battle houselessness.<sup>223</sup> That amount could have been increased by twenty percent if the recall money was allocated to that issue. In any event, the taxpayer cost does not alone capture the total expense of the recall election: an additional \$145 million was spent by candidates and groups on campaign efforts.<sup>224</sup> Opposition to the recall spent \$91.9 million to keep Gavin Newsom in office, compared with the \$53.5 million spent seeking to oust the Governor.<sup>225</sup> It is notable that Newsom and committees opposing his recall significantly outspent challengers. This reinforces the research that shows spending is most effective for “no” votes.<sup>226</sup> It also highlights how political incentives to recall can drive up spending because the officeholder has a significant motivation to outspend.

The *Citizens Against Rent Control* decision is consequential because it prohibits states from setting content-neutral contribution

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219. *Id.*

220. *Supra* notes 3–5 and accompanying text.

221. *Id.*

222. CAL. DEP’T OF FIN., CALIFORNIA STATE BUDGET 2021–22 (2021).

223. *Id.*

224. *Gavin Newsom Recall, Governor of California (2019–2021)*, *supra* note 4.

225. *Id.*

226. *See Carrillo et al.*, *supra* note 20, at 598.

limits on ballot measures.<sup>227</sup> And *Bellotti* remains consequential because it prohibits states from addressing the more specific issue of limiting corporate expenditures.<sup>228</sup> Yet, under *Buckley* and applicable campaign finance laws, contributions to candidates are permissibly restricted.<sup>229</sup> And the only distinction between these different outcomes is whether the donation is to a candidate or a ballot measure.

But in the representative democracy system, lobbying is strictly regulated<sup>230</sup> and public debate happens on the record. So, what *Citizens Against Rent Control* allows is for well-funded committees to spend as much as they desire on commercials, mailers, emails, text messages, and other types of political communications. And because the purpose of this advertising is to persuade, its quantity can become overwhelming and, like the Bernie Sanders slate mailer, its content can be deceptive. This forces opponents, if they have enough resources, to spend even more money on their advertising, hoping to counter it. This race-to-spend inundates the airwaves, mailboxes, and billboards with commercials, mailers, and other advocacy, which can distort the issue being presented or lead to voter apathy. This is in stark contrast to representative democracy, where a false claim made during a legislative debate, for instance, can be debunked without cost by another legislator and recorded in the official record. In a representative democracy, a bill can be introduced, debated, and enacted with little cost other than the sunk cost of operating government. While the Supreme Court's reasoning was based on principled First Amendment considerations, the spend-to-win policy issue calls into question the workability of the issues/candidate distinction today.

### C. Political Incentives to Recall and Spend

California's two-question recall system is unique in that it theoretically allows for a new governor to be installed with a small plurality of the vote. This became a real possibility in the Newsom Recall. In arguing that California's recall system is unconstitutional because

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227. *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 300 (1981).

228. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 767 (1978).

229. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976); *State Contribution Limits and Voluntary Expenditure Ceilings*, CAL. FAIR POL. PRACS. COMM'N, <https://www.fppc.ca.gov/learn/campaign-rules/state-contribution-limits.html> [<https://perma.cc/PT2K-C6HH>].

230. *Lobbyist Rules*, CAL. FAIR POL. PRACS. COMM'N, <https://www.fppc.ca.gov/learn/lobbyist-rules.html> [<https://perma.cc/F6FS-345Q>].

it violates Supreme Court jurisprudence that each vote should have equal electoral influence, Dean Chemerinsky and Professor Edlin posited a not-so-outlandish hypothetical:

Imagine that 10 million people vote in the recall election and 5,000,001 vote to remove Mr. Newsom, while 4,999,999 vote to keep him in office. He will then be removed and the new governor will be whichever candidate gets the most votes on the second question. In a recent poll, the talk show host Larry Elder was leading with 18 percent among the nearly 50 candidates on the ballot. With 10 million people voting, Mr. Elder would receive the votes of 1.8 million people. Mr. Newsom would have the support of almost three times as many voters, but Mr. Elder would become the governor.<sup>231</sup>

This hypothetical highlights the incentive a political party has in California to use the recall for political gain. Indeed, *every* California governor since 1968 has faced a recall attempt.<sup>232</sup> But analysis of the Newsom Recall shows something more. Recently, the gap in political party affiliation among registered voters has widened in California.<sup>233</sup> In 2021, 47 percent of voters in California registered with the Democratic Party, compared with only 24 percent registered as Republicans.<sup>234</sup> With this 23 percent gap in party affiliation, Republican candidates currently begin every statewide election at a considerable disadvantage. It is likely no surprise, then, that Democrats currently hold every statewide office and have large majorities in the legislature.<sup>235</sup>

So while Republicans face significant headwinds in voter registration, during the Newsom Recall, some polling showed the Republican replacement candidates very close to defeating Newsom.<sup>236</sup> Though the recall was not successful this time, the Newsom Recall showed how California's two-question recall could be used for

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231. Chemerinsky & Edlin, *supra* note 22.

232. Zacks, *supra* note 1.

233. Mark Baldassare et al., *California Voter and Party Profiles*, PUB. POL'Y INST. OF CAL. (Sept. 2021), [https://www.ppic.org/wp-content/uploads/JTF\\_VoterProfilesJTF.pdf](https://www.ppic.org/wp-content/uploads/JTF_VoterProfilesJTF.pdf) [https://perma.cc/CZ77-R6GC].

234. *Id.*

235. Michael R. Blood, *California GOP Licks Wounds After Another Lopsided Loss*, AP NEWS (Sept. 15, 2021), <https://apnews.com/article/california-recall-elections-california-election-2020-recall-elections-4a135cc452bf758a2206d3632e597102> [https://perma.cc/45QG-CCFF].

236. FIVETHIRTYEIGHT, *supra* note 186.

political gain because voter participation is consistently lower in an off-year election.<sup>237</sup> Indeed, only 58.45 percent of registered California voters participated in the Newsom Recall, compared to the 80.67 percent who participated in the 2020 general election and the 64.54 percent who participated in Newsom’s original 2018 election.<sup>238</sup> So while it may be difficult to get a recall petition qualified, once it makes its way to a ballot, as long as one more vote is cast to recall the governor than not, the replacement candidate could ascend to the highest office in the nation’s largest state with only a small plurality of the vote—and *fewer* votes than the now-recalled officeholder received.

These political incentives are important because they make forcing a midterm recall election more valuable, thus driving up spending amongst committees and candidates and inflicting significant taxpayer cost.<sup>239</sup> Important to remember, too, is that all statewide elected officials in California are subject to impeachment for misconduct while in office, which maintains an option to remove an elected official for malfeasance without waiting to vote them out in the next election.<sup>240</sup> But unlike impeachment, the reasoning for a recall is not reviewable.<sup>241</sup>

Whether the reason for a recall is viewed as principled or political will perhaps depend on political preferences, but undeniable is the fact that recalls cost money. Though the intent of the 1911 constitutional amendment that authorized the recall was to reserve to the people the power to recall any officeholder for any reason, it is notable that Newsom defeated the recall by earning the same percentage of support as he garnered in his original election.<sup>242</sup> So even if the Newsom Recall was not weaponized as “an attempt by national Republicans and Trump supporters to force an election and grab power in California” as Newsom argued it was,<sup>243</sup> the results show it was not about widespread disagreement with the governor or his policies.

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237. CAL. SEC’Y OF STATE, HISTORICAL VOTER REGISTRATION AND PARTICIPATION IN STATEWIDE GENERAL AND SPECIAL ELECTIONS 1910–2021, <https://elections.cdn.sos.ca.gov/sov/2021-recall/sov/04-historical-voter-reg-participation.pdf> [<https://perma.cc/ZU2Q-S9BE>].

238. *Id.*

239. For discussion of the dual nature of committee and candidate spending in the 2003 recall of California Governor Gray Davis, see Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 247–52 (2004).

240. CAL. GOV. CODE § 3020 (2022).

241. CAL. CONST. art. II, § 14(a).

242. 2021 GUBERNATIONAL RECALL STATEMENT OF VOTE, *supra* note 2.

243. 2021 GUBERNATORIAL RECALL VOTER INFORMATION GUIDE, *supra* note 176.

With enough space, more issues could certainly be explored. But in those that this Note has just examined, Proposition 22 and the Newsom Recall highlight how California's direct democracy system has developed into a new realm of big-money influence. Keeping in mind the prolific and costly signature gathering industry, the constitutional issues with limiting spending, and the political incentives driving spending on recalls, Part IV will now consider solutions.

#### IV. SOLUTIONS: CONTRIBUTION LIMITS, QUALIFICATION THRESHOLDS, AND LIMITING TO LOCAL MEASURES

This Note assumes that reforms are needed to California's direct democracy system in light of the issues highlighted above. Certainly, arguments could be made otherwise. It is likely that Uber, Lyft, DoorDash, and Postmates, having followed the rules and succeeded in passing a measure crucial to their business model, feel the system works well enough. Perhaps they would argue that being able to take an issue that so deeply impacts their interests directly to voters is the system working as intended. Other industries and special interests might similarly agree, now seeing a path to directly influence laws and avoid regulations without the need for the legislature or courts. And certainly, many voters genuinely believed that Newsom's policies and handling of the COVID-19 pandemic were flawed. But regardless of the merits, Proposition 22 and the Newsom Recall offer an important inflection point on big money in California direct democracy. Although the 1911 amendment aimed to root out the influence from corporations and wealthy donors, the state of direct democracy in California has today strayed far from that intent. This Note concludes that the Supreme Court should reexamine *Citizens Against Rent Control* and *Bellotti* to allow states to enact closely drawn contribution limitations to direct democracy measures. This would allow states to protect the integrity of their direct democracy systems. But left without that meaningful change, California is now much too big for statewide direct democracy, though the system works well enough for local measures.

##### A. Contribution Limits

In *Citizens Against Rent Control* and *Bellotti*, the Supreme Court distinguished candidates from issues, viewing ballot measures as policy issues distinct from political candidates. This distinction certainly

makes sense in theory. But the question that record-setting spending highlights is whether that distinction is workable in practice. In other words, was Proposition 22 purely policy, or was it political? Did it simply amend A.B. 5 to exempt rideshares and delivery drivers from the ABC test? Or was it a long-fought political battle between gig economy corporations seeking to maximize profits and labor advocates pushing for employment protections? It is difficult to say conclusively because both perspectives might be true. But either way, it cannot be said that Proposition 22 was entirely void of politics such that it was purely an issue. Nor can it be said that the Newsom Recall was purely a principled argument that Governor Newsom had lost so much public support that he deserved to be removed from office immediately, because he received the same support in the recall as he did in his original election.

When it reviewed the Berkeley ordinance in *Citizens Against Rent Control*, the California Supreme Court recognized as a compelling governmental interest the state's desire to "ensure[] that special interest groups could not 'corrupt' the initiative process by spending large amounts" of money.<sup>244</sup> While quid pro quo corruption may not be at issue with direct democracy measures, since individual voters are voting directly, there is nonetheless an important interest in protecting the integrity of the direct democracy system. Surely, in 1911, it could have correctly been thought that "[t]he [railroad] and other wealthy interests might be able to bribe delegates to party conventions and members of the legislature, but they could never bribe a majority of the voters."<sup>245</sup> But today, with modern media and technology, corporations and special interests can reach voters directly with their campaign messaging in ways unimaginable in the early twentieth century, like Uber utilizing in-app notifications about Proposition 22<sup>246</sup> or Uber and Lyft sending emails to their customers about A.B. 5.<sup>247</sup>

Other types of perceived corruption, such as the apathy voters might feel from corporations and special interests spending hundreds of millions of dollars to skirt the legislature and the courts, or the ability of political operatives to use the recall for an off-year do-over election could undermine confidence in the direct democracy system. To

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244. *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 293 (1981).

245. Gendzel, *supra* note 35, at 4, ¶ 8.

246. Hussain, *supra* note 162.

247. Campbell, *supra* note 144.

deny the importance of a state's interest in protecting against this perceived corruption is to deny the reality of the modern use of direct democracy measures and to ignore two important economic realities. First, corporations continue to earn record profits (notwithstanding a yearslong global pandemic).<sup>248</sup> To the extent Proposition 22 shows that well-funded corporations are willing to spend hundreds of millions of dollars to influence the law directly with voters, record-setting corporate profits indicate that many more are so able. Second, wealth inequality is at an all-time high.<sup>249</sup> Without contribution limits, these two economic realities centralize the power to influence direct democracy in the hands of the wealthy, unlike ever before.

Perhaps ironically, the ordinance in *Citizens Against Rent Control* was itself approved through a ballot measure. And the ordinance was a contribution limitation, not a prohibition. That is, in *Citizens Against Rent Control*, voters themselves went to the ballot box and voted to restrict their own ability to contribute to ballot measures. While that does not change the constitutionality of the contribution limitation, it certainly demonstrates that a state—or its citizens directly—might desire to protect the integrity of their direct democracy system. But the reasoning in *Citizens Against Rent Control* is rooted in the First Amendment's strong protection of political speech. So, the harder question, then, is how much spending is enough to elevate a state's interest in protecting against big money's actual or perceived corruption on direct democracy to survive heightened scrutiny?

This Note does not attempt to answer numerically how much money is too much, but asserts that the record-setting amount of spending on direct democracy challenges the workability of the issues/candidate distinction. The Supreme Court should reexamine *Citizens Against Rent Control* and *Bellotti* and allow states to enact closely drawn contribution limits to direct democracy measures. Doing so would honor the intent and history of California's direct democracy system. The outcome would surely be less spending, but it would perhaps also be more democratic because committees would have to earn a broader base of support and donors. Too, the contribution

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248. Will Daniel, *U.S. Companies Post Their Biggest Profit Growth in Decades by Jacking up Prices During the Pandemic*, FORTUNE (Mar. 31, 2022, 10:44 AM), <https://fortune.com/2022/03/31/us-companies-record-profits-2021-price-hikes-inflation/> [<https://perma.cc/HSG7-KUXV>].

249. See Juliana Menasce Horowitz et al., *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [<https://perma.cc/5VXC-RKTU>].

limitations would not affect independent expenditures. As Justice White noted in his dissent in *Citizens Against Rent Control*:

Of course, entities remain free to make major direct expenditures. But because political communications must state the source of funds, voters will be able to identify the source of such messages and recognize that the communication reflects, for example, the opinion of a single powerful corporate interest rather than the views of a large number of individuals.<sup>250</sup>

And in addition to donating the maximum contribution and making independent expenditures, individuals can also volunteer directly with the campaign. That is, all contribution regulations would do is require those with the strongest passion to do more than simply open their bank account.

Put plainly: it is a false equivalency to suggest that ballot measures today are purely issues void of politics and that regulating contributions would totally chill speech in the direct democracy system. The same contribution limits are found in candidate elections. Whatever the merit of the arguments might be, however, there is no indication that the Supreme Court will reverse course. That forces the hand of those seeking to protect the integrity of the direct democracy system to ask whether it is worth keeping at all, or whether other changes could protect the system and eliminate corruptive spending.

### *B. Qualification Thresholds*

Assuming the Supreme Court does not change course, an easy-to-accomplish solution would be to change the qualification thresholds for ballot measures and recalls. On the one hand, the threshold could be *lowered*, making it easier to qualify a measure and making access to California's direct democracy system simpler and less expensive. On the other hand, the threshold could be *increased*, making it more difficult to qualify a measure and likely lowering the number of issues that make it to the ballot. After all, the signature requirements are already arbitrary, so there is no reason not to consider changing them. If direct democracy is truly about empowering voters to decide issues, one reform might be to double down, embrace direct democracy by

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250. *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 308–09 (1981) (White, J., dissenting).



lowering the threshold, and have voters decide more issues.<sup>251</sup> And if the intent is to reduce the number of issues on a ballot to protect against voter apathy and reduce spending, raising the threshold could perhaps filter to voters the most important of issues.

If the floodgates were opened by making it easier to qualify ballot measures, the gatekeeping issue described in Section III.A might be resolved. Doing so would lower the cost of collecting signatures and filing the measure, at least assuming the cost-per-signature remained stable to current figures. It would also honor the progressive intent of the direct democracy amendment by reserving even more power directly to the people because more issues would be presented to voters.

But decreasing the signature requirement will not cure the issues with exorbitant spending on direct democracy in California. First, while it might decrease spending per measure, it would likely increase spending in the aggregate, if more measures were filed as a result of lower qualification thresholds. This would frustrate the problem of money's influence on direct democracy and would likely depress participation because voting in California would become even more cumbersome. Both effects would run contrary to the themes upon which this Note is premised: minimizing waste and protecting the integrity of the direct democracy system. Already, nearly 800,000 voters who participated in the 2020 election abstained from voting on Proposition 22.<sup>252</sup> By presenting voters with even more measures, voter information guides would get thicker, ballots would become longer, researching trusted information would become more difficult, and voter participation would almost certainly decrease. The result would be determining ballot measures in an even *less* representative manner.

Raising the qualification threshold would create a higher barrier to entry to the direct democracy system, which would likely reduce the number of measures that appear on the ballot and accordingly reduce spending. Notably, many constituencies within the lawmaking process negotiate with one another using the threat of ballot measures.<sup>253</sup> By increasing the qualification thresholds and making it more challenging and costly to qualify a measure, the bargaining positions within the governing-by-threat-of-initiative would change.

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251. See MATSUSAKA, *supra* note 20 (arguing that direct democracy can mend the growing divide between governments and the people).

252. 2020 GENERAL ELECTION STATEMENT OF THE VOTE, *supra* note 9.

253. See Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1121–30 (2005).

But raising the qualification thresholds might not be a perfect solution. After all, as Proposition 22 highlights, if the issue is of enough importance to someone with money, spending more money to collect more signatures would not necessarily be a barrier to entry. If more signatures are required, there is no indication that petitioners would not simply spend more money to reach the higher signature threshold. So, while there might be fewer measures, the cost per measure might increase, perhaps negating the aggregate benefit of reducing the amount of money in direct democracy.

However, either solution of adjusting signature thresholds is at least appealing because it is easy to accomplish and does not involve full-scale systematic change. And as between the two options, raising the qualification threshold would have the greater impact because it would alter the cost/benefit analysis of using the direct democracy system and encourage better legislative outcomes. Too, this change could be incorporated in addition to contribution limits, should the Supreme Court reexamine its jurisprudence. Ultimately, voters must decide whether to implement any changes, and adjusting the arbitrary signature threshold to protect against corruptive money might be a good first step, or at least more appealing than entirely changing the direct democracy system.

### C. *Limiting to Local Measures*

The bigger question Californians should consider is whether the system even works fundamentally. If the Supreme Court does not reconsider its jurisprudence that allows unlimited spending to corrupt the direct democracy system, another solution would be to limit the ballot measure process to local issues.

This solution would recognize that California is now much too large for statewide direct democracy. After all, California is the most populous state in the nation, with more than ten million more residents than the next largest state.<sup>254</sup> Of the next four largest states by population in the United States—Texas, Florida, New York, and Pennsylvania<sup>255</sup>—*only* Florida has any form of direct democracy system.<sup>256</sup> Even

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254. *2020 Population and Housing State Data*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html> [https://perma.cc/4J2L-SXFK].

255. *Id.*

256. *Initiative and Referendum States*, *supra* note 27.

then, Florida allows only for constitutional amendment initiatives.<sup>257</sup> And *none* of these four states allow for statewide recall.<sup>258</sup> Thus, among the largest states, California is clearly the outlier in its use of direct democracy.

Highlighting why a business has so much at stake to justify exorbitant spending for lucrative laws, California has the largest state economy in the country.<sup>259</sup> What is more, if California were a country, it would be the fifth-largest economy in the world and second-largest in North America, behind only the United States itself.<sup>260</sup> Accordingly, this solution would recognize a reality: because there is so much to gain or lose in the laws and economy of California, the incentives to utilize direct democracy for special interests are much too stark.

This solution recognizes what is known to be true about the United States: it is much too big to rely exclusively on direct democracy. Imagine if California's direct democracy system existed on the national level. Since 2000, the popular vote margin of victory in U.S. presidential elections has averaged just 2.6 percent, with two presidents being elected *without* majority support.<sup>261</sup> If only 12 percent of total voter turnout was required to qualify a presidential recall, there is every reason to assume the losing political party would collect enough signatures to qualify a recall the day after the inauguration. And considering the close party-line margins with which modern national legislation passes, if only 5 percent of signatures were required to qualify an initiative or referendum, there is every reason to believe special interests and political parties would similarly use that tool for their gain. Accordingly, this solution recognizes that the magnitude of California's population and economy outsizes the incentive to use its direct democracy system for strategic and political gain. This solution would resemble a federalist form of government. On the statewide level, laws would be passed or repealed in representative democracy,

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257. *Id.*

258. Zachs, *supra* note 1.

259. *Gross Domestic Product by State, 1st Quarter 2021*, U.S. DEP'T OF COM.: BUREAU OF ECON. ANALYSIS (June 25, 2021, 10:00 AM), <https://www.bea.gov/sites/default/files/2021-06/qgdpstate0621.pdf> [https://perma.cc/PFS4-V92J].

260. *California Now Has the World's 5th Largest Economy*, CBS NEWS (May 4, 2018, 6:35 PM), <https://www.cbsnews.com/news/california-now-has-the-worlds-5th-largest-economy/> [https://perma.cc/WM98-7Z7N].

261. Aaron O'Neill, *Winning Margins in the Electoral and Popular Votes in United States Presidential Elections from 1789 to 2020*, STATISTA, <https://www.statista.com/statistics/1035992/winning-margins-us-presidential-elections-since-1789/> [https://perma.cc/T9AC-EFFH].

officeholders can be impeached or voted out of office, and voters retain the direct democracy power for local issues and approval of constitutional amendments.<sup>262</sup>

### 1. Local Recalls Would Reduce Political Incentives and Decrease Spending

Had the Newsom Recall succeeded as the petitioners hoped, a new governor, presumably from the Republican Party, would have been installed for only fifteen months, until the term expired in January 2023. The new Republican governor would have had to work with a legislature overwhelmingly controlled by Democrats and a Democratic lieutenant governor. So, would more than \$200 million of taxpayer money and an additional \$145 million in candidate and committee spending have been worth it, even if the recall succeeded? The answer to that question likely depends on one's political affiliation. And that, of course, is the issue: it should not. Because the recall is supposed to be about voters' opposition to an officeholder, not strategic political maneuvering. The issue that the Newsom Recall highlighted is that there are too many political incentives built into the current recall system. And getting rid of them is difficult. At least one public opinion poll showed considerable support for the recall system but also majority support for various changes to it.<sup>263</sup>

Many changes to the recall system have been suggested after the Newsom Recall.<sup>264</sup> Replacing a recalled governor with the lieutenant governor, as some states already do,<sup>265</sup> would solve the elected-with-less-than-a-majority problem highlighted above,<sup>266</sup> but it does not eliminate political incentives. California elects its lieutenant governor independently from the governor, so the two positions can be held by

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262. The California Constitution requires all constitutional amendments to be approved by voters either: (1) directly through a constitutional initiative, (2) by ratifying an amendment passed by two-thirds of the membership of each chamber of the California State Legislature, or (3) by approving a constitutional convention. CAL. CONST. art. XVIII, § 1.

263. Mark DiCamillo, Tabulations from an Early September 2021 Survey About California Voter Views About Recall Elections and Various Reform Proposals 1 (Sept. 13, 2021) (IGS Poll) (on file with the Institute of Governmental Studies, University of California, Berkeley), <https://escholarship.org/uc/item/9h80w781> [<https://perma.cc/WB64-4BYP>].

264. *E.g.*, Ben Christopher, *Full Speed Ahead on Overhauling California Recalls*, CALMATTERS (Sept. 15, 2021), <https://calmatters.org/politics/2021/09/california-recall-change-law/> [<https://perma.cc/4BQW-H5ZT>].

265. Cowan & Hubler, *supra* note 76.

266. *See* Chemerinsky & Edlin, *supra* note 22.

members of different political parties.<sup>267</sup> So it is unlikely that wealthy donors and out-of-state campaigns would contribute to recalling a Democrat if the replacement is the Democratic lieutenant governor, but this solution accomplishes little when the lieutenant governor is from the opposite party. Indeed, in a split-party executive, the lieutenant governor's party would have an even stronger political incentive to use the recall for a "do-over" election, with hopes of ousting the governor from another party.<sup>268</sup> While this reform would decrease the likelihood of a politicized recall, it would not eliminate it.

Some have suggested holding a runoff election if no replacement gets a majority.<sup>269</sup> This solution should be rejected because, while it ensures that the replacement governor is elected with majority support, it potentially doubles the cost of the election and requires voters to vote twice, contributing to more wasteful spending, increased voter apathy, and frustrating participation with a more cumbersome process.

Others have suggested raising the threshold signature requirement.<sup>270</sup> As addressed above, while seemingly an easy and meaningful solution, especially because the thresholds are arbitrary anyway, the suggestion fails to reduce the wasteful spending on direct democracy. Because California already has a prolific signature-gathering industry<sup>271</sup> and the political incentives of ousting a sitting governor are so high, there is no reason to think that simply raising the signature threshold would keep political operatives from attempting to gather more signatures. Thus, this solution would similarly drive up the cost of recall without providing any barrier to politically weaponizing the system.

So, it is worth considering whether the recall is worth keeping at all. Notably, thirty-one states do not have a recall process to remove statewide officials and the federal government does not have a recall process at all.<sup>272</sup> Thus, in the overwhelming majority of states and for federal offices, if the electorate loses faith in their elected officials, the remedy is to get rid of the officeholder the old-fashioned way: by voting them out of office in the next election.

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267. CAL. CONST. art. V, § 11.

268. See Garrett, *supra* note 239, at 260 (noting that in a split-party executive, this could incentivize the lieutenant governor to mount a recall drive).

269. Christopher, *supra* note 264.

270. *Id.*

271. See Mai-Duc, *supra* note 193.

272. Zacks, *supra* note 1.

Because of the actual monetary cost of the recall and the significant distraction of government resources it entails, California voters could amend the constitution to remove the statewide recall while reserving the power to recall local officials. All statewide officer holders in California are subject to impeachment for misconduct while in office,<sup>273</sup> which maintains a meaningful option to remove an elected official for malfeasance. Because there are significantly fewer political incentives to recall local officials, this solution would remove the politicized use of the California recall and decrease spending.

## 2. Local Ballot Initiatives Would Reduce Economic Incentives and Decrease Spending

Local ballot measures focus on a variety of issues that impact the everyday lives of citizens, like local tax policy and bonds, infrastructure spending, policing policy, and public-school administration.<sup>274</sup> Local ballot measures are already widely used in California<sup>275</sup> and can bring together communities to impact local change. For example, in 2020, Los Angeles County voters approved Measure J, which diverted money from the police department by requiring that “10 percent of the city’s unrestricted general funds—estimated between \$360 million and \$900 million per year—be invested in social services and alternatives to incarceration, not prisons and policing.”<sup>276</sup> And in 2022, Los Angeles County voters approved Measure A, which granted the Los Angeles Board of Supervisors authority to remove an elected sheriff for cause.<sup>277</sup> While many more examples could be highlighted, these show the workability of the direct democracy system on a smaller, local level, even on timely and consequential issues.

Like in the other large states analyzed above, under this solution, statewide issues would be exclusively tasked to the legislature. This proposal would decrease the difficulty of information gathering

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273. CAL GOV. CODE § 3020 (2022).

274. See *Local Ballot Measures, California*, BALLOTPEDIA, [https://ballotpedia.org/Local\\_ballot\\_measures,\\_California](https://ballotpedia.org/Local_ballot_measures,_California) [<https://perma.cc/NF2M-SNTB>].

275. *Id.* (“In even-numbered years, [California] voters decide hundreds of measures; the number of local measures has ranged from about 530 to over 800 in the last three two-year cycles. In odd-numbered years, local [California] voters generally decide between 100 and 200 measures.”).

276. Roge Karma, *Los Angeles Voters Just Delivered a Huge Win for the Defund the Police Movement*, VOX (Nov. 4, 2020, 4:27 PM), <https://www.vox.com/2020/11/4/21549019/measure-j-police-abolition-defund-reform-black-lives-matter-protest-2020-election-george-floyd> [<https://perma.cc/W3H5-XHL5>].

277. *Statement of Votes Cast*, L.A. CNTY. REGISTRAR (Nov. 8, 2022), [https://content.lavote.gov/docs/rccc/svc/4300\\_final\\_svc\\_countywide.pdf?v=2](https://content.lavote.gov/docs/rccc/svc/4300_final_svc_countywide.pdf?v=2) [<https://perma.cc/35GQ-E2VW>].

because the issues are more local and therefore, at least in theory, more ascertainable. Important to the premise of this Note, large donations and exorbitant spending would be unlikely because of the limited effect of the measure if voters approve it. That is not to say the solution would eradicate those interests completely. Special interests might have a lot to gain or lose in large counties surrounding Los Angeles and San Francisco, for instance, or find it advantageous to fight measures to prevent them from being copied elsewhere. But this solution would preserve the system of direct democracy on the local level while making meaningful attempts at rooting out the prolific spending which has now come to define direct democracy in California.

### CONCLUSION

The \$1.1 billion spent on direct democracy in California in just one year serves as another inflection point in California's experiment with direct democracy. It highlights the corruptive level of spending by corporations, special interests, and wealthy individuals that now dominates the ballot measure system. And because direct democracy in California has been usurped by the very forces it sought to expel, this inflection point demands consideration of whether the system can work today as it was intended.

The U.S. Supreme Court should reexamine its holdings in *Citizens Against Rent Control* and *Bellotti* and allow states to enact closely drawn contribution limitations to direct democracy measures. Given the demonstrable usage of the direct democracy system in California, the reality of wealth inequality, and increasing corporate profits, doing so would allow states to return their direct democracy systems to the principled democratic power for which it was intended, instead of a purchase-your-law system reserved only for the wealthy. For as long as the Supreme Court withholds from states this meaningful check on the corruptive influence of money in direct democracy, California voters are left to decide whether, and if so how, to cure the problem by amending the state constitution. To that end, raising the qualification thresholds would be a good first step, particularly because the thresholds are arbitrary anyways. And to accomplish a more systematic change, direct democracy could be limited to local measures, where it is already widely used, which would decrease spending and reduce the political and economic incentives to misuse the system.

What might follow from Proposition 22 and the Newsom Recall is still to be seen, but as this Note examined, these developments illustrate the antidemocratic cost of direct democracy in California.



