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

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

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

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1. The views expressed herein are solely those of the authors and not those of the Center for Governmental Studies.
judicial autonomy versus public accountability—or some balance in between.⁵

Direct democracy in California has found itself in the middle of this unresolved conflict between democratic governance and the judicial protection of civil liberties. Californians make extensive use of the initiative process, the most democratic and purely majoritarian form of policymaking.⁶ Thus, it should come as no surprise that public policies formulated through the initiative process often become embroiled in controversy and scrutinized by the courts.

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

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

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

⁶. See infra Part III.


⁸. The method of judicial selection affects the way a judge or justice ap-
judges in California are selected in competitive elections; appellate justices in the state are selected through non-competitive retention elections; and federal judges are selected by the President and confirmed by the U.S. Senate for lifetime appointment.

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

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

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

10. See id.
11. See supra note 3 and accompanying text; see also Carl Tobias, Choosing Federal Judges in the Second Clinton Administration, 24 HASTINGS CONST. L. Q. 741, 741 (1997).
initiatives can be challenged in court in virtually all the ways that any legislation can be legally contested.

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

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

17. See id. at 107-09.
18. See id. at 105-06; see also Brosnahan v. Eu, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982) (denying pre-election review of Proposition 8).
exercise of the people’s franchise, in the absence of some clear showing of invalidity.”

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

22. See Gordon & Magleby, supra note 20, at 302-03 (describing three categories of justifiable pre-election review).
23. See id.
25. See Gordon & Magleby, supra note 20, at 301-03.
26. See infra notes 27-29 and accompanying text.
27. The Sebastiani reapportionment initiative, as it was called prior to being placed on the ballot, would have modified the Democratic Legislature’s reapportionment plan and caused more favorable districting for state Republicans. See Philip Hager, Remapping Vote Voided by High Court, L.A. TIMES, Sept. 16, 1983, at A1. The California Supreme Court ruled that the initiative was unconstitutional as clearly conflicting with the state constitution. See Legislature v. Deukmejian, 34 Cal. 3d 658, 680, 669 P.2d 17, 30, 194 Cal. Rptr. 781, 794 (1983).
29. The 1988 no-fault insurance reform initiative was drafted and circulated by groups associated with the insurance industry. The measure was a 12,000-word tome that contained a hidden sentence exempting the insurance industry from campaign contribution limits. The court disqualified the measure from the ballot on the grounds that it obviously violated the single-subject rule. See California Trial Lawyers Ass’n, Inc. v. Eu, 200 Cal. App. 3d 351, 354-56, 245 Cal. Rptr. 916, 917-18 (1988). Proponents removed the offending provision and recirculated the new version in an intense direct mail drive. After spending $2.3 million on the direct mail circulation drive, proponents were able to gather 167% of the requisite signatures in a brief 48 days. The revised initiative survived further judicial review and was placed on the ballot. See Insurance Indus. Initiative Campaign Comm. v. Eu, 203 Cal. App. 3d 961, 963, 250 Cal. Rptr. 320, 321 (1988).
More commonly, initiatives in California and other jurisdictions are challenged after voters have approved them. Initiatives are challenged on a wide variety of grounds. Most often, state and federal courts may invalidate an initiative for violating some constitutional principle. Less often, initiatives will be contested for conflicting with a higher federal law, known as “federal preemption.” Courts may invalidate an initiative for addressing more than one subject or for exceeding certain subject limitations, such as highlighting a specific individual or corporation for regulation. Finally, a California initiative may amend the state constitution but may not fundamentally revise the constitution.

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

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

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

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

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


35. See, e.g., Cal. R. U.S.D.C.N.D. Civ. L.R. 3-3(c); La. R. 18th Dist. Ct. R. 9; Ohio Sup. R. 36 commentary.
order. Also, judges may on occasion exercise some discretion in consolidating multiple filings on the same initiative by assigning them to a particular judge with special expertise in the field.

For example, in California, opponents of a 1996 campaign reform measure, Proposition 208, filed five separate actions, all in the United States District Court, Eastern District of California. The district has eight judges in all, two of them senior judges with limited caseloads. Not coincidentally, the federal judge serving the district had previously voided campaign finance legislation and an earlier state campaign finance reform initiative—Proposition 73. The five actions were distributed randomly among the judges but then consolidated in one court. The guiding principle for consolidation in this district was that the judge who receives the lowest case number, or first filing, of these five actions, or of a related case, receives the consolidated actions. A "related case" could include a prior case dealing with a similar subject, and the prior case would then become the lowest case number. Consequently, this consolidation process transformed all five actions against Proposition 208 into one case to be heard by the same judge who had previously invalidated Proposition 73. In a decision that both proponents and opponents of Proposition 208 alike expected, this federal district judge ruled against the measure.

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

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


38. See supra note 36, at A1.


41. See U.S. CONST. art. IV, § 4.
with the form of governance established under the Federal Constitution. In *Pacific States Telephone & Telegraph Co. v. Oregon*, the high court ruled that the initiative process was simply an additional form of government that complements rather than contradicts the federal form of government and representative democracy. Since that ruling, courts have not questioned the underlying legitimacy of the initiative process.

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

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

43. 223 U.S. 118 (1912).
46. *Id.* at 295.
49. *See Proposition 14 (Rumford Fair Housing Initiative) in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 13-14, 18-20 (Nov. 3, 1964).*
51. *See Proposition 187, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 50-55 (Nov. 8, 1994).*
Accordingly, academics often contend that initiatives require stricter review for the protection of civil liberties.\footnote{See Proposition 209, in \textit{California Ballot Pamphlet, General Election} 30-33 (Nov. 5, 1996).}

The principle that both initiatives and representative legislation should be subject to equal standards of judicial review is not lost on those interested in protection of civil liberties.

A second argument frequently voiced for a stricter standard of scrutiny on initiative legislation is that initiatives are not drafted with the same deliberateness as legislation from representative bodies.\footnote{See Eule, \textit{supra} note 47, at 1555-56.} Initiatives are frequently written by a group of similarly-minded individuals. As the product of subgroups, initiatives can lack the input of opposing viewpoints and the scrutiny of other experts in the field and thus contain oversights and unintended consequences. In California, for example, one group drafted and sponsored a campaign finance reform measure, Proposition 212, which accidentally would have deleted the state's major ethics laws.\footnote{See Mark Gladstone, \textit{Battle Over Campaign Reform Goes to Court}, L.A. TIMES, July 25, 1996, at A3.}
This problem, however, is not unique to initiatives. Legislation drafted in representative bodies is, in fact, routinely drafted by special-interest groups and their lobbyists, not necessarily with an eye for the welfare of the general public. A classic example is California's insurance law prior to being changed by an initiative. In the late 1980s, Assembly Speaker Willie Brown sat down at Frank Fat's restaurant in Sacramento with insurance industry lobbyists and trial lawyers. He negotiated an agreement, written on a cocktail napkin, in which the insurance industry obtained an insurance law with no controls on prices and the trial lawyers were rewarded no control on lawyers' fees and damage awards. All interests were considered except those of California's consumers, who subsequently revolted and rewrote the state's insurance policy by initiative and placed controls on insurance costs.

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

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65. The cocktail napkin on which Willie Brown wrote his agreement has since been framed and is currently hanging on the wall of Frank Fat's in Sacramento.
67. See CAL. LAB. CODE § 6404.5(a).
68. See id. § 6404.5(c).
69. See id. § 6404.5(j).
city officials prosecute violations.\textsuperscript{70} This situation has led to inconsistent enforcement of the law throughout the state.\textsuperscript{71}

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

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

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

\textsuperscript{70} See id. §§ 6404.5(c) & (i).
\textsuperscript{73} See Polashuk, supra note 72, at 403 (discussing that voters frequently shift their positions on initiatives during the campaign, typically ending in opposition).
III. CALIFORNIA STATE COURTS SHOW SOME DEFERENCE TO INITIATIVES

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

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

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

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75. See COLO. CONST. art. VI, § 6 (repealed 1966).
76. See NEV. CONST. art. XIX, § 2; Nevada Judges Ass'n v. Lau, 910 P.2d 898 (Nev. 1996) (reviewing a term limits initiative for state and federal constitutional violations); Choose Life Campaign '90 v. Del Papa, 801 P.2d 1384, 1386-87 (Nev. 1990) (holding that arguments drafted by the Secretary of State for and against a referendum were false and misleading); Torvinen v. Rollins, 560 P.2d 915, 917 (Nev. 1977) (holding amendment to be effective on date votes for amendment were canvassed).
79. See Doug Willis, Get Ready for Another Wild Election Year in 1998, THE ASSOCIATED PRESS POLITICAL SERVICE, Sept. 28, 1997, available in 1997 WL 2552458. "In the past decade, more than 300 petition drives for initiatives have been started, with only 85 collecting enough signatures to go on the ballot. But
election, 79 initiatives have qualified for the state ballot. Of these balloted initiatives, 21 have encountered either pre-election or post-election challenges in state or federal court. The courts, however, have upheld slightly less than half of these initiatives—only 10—either substantially or in their entirety.

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

From 1964 through 1990, the state courts were willing to exercise their authority to overturn or substantially modify initiatives and referendums, upholding or substantially upholding 56% and invalidating or substantially invalidating 44% of the 18 challenges heard at the state level. But the state courts have completely invalidated only 6 initiatives over this 25 year time period. During the last 15 years of this period, from 1974 to 1990, the state courts were been particularly hesitant to invalidate initiatives. Only 3 of the 29 initiatives approved voters defeated 61 of those initiatives, and among the 24 they approved, part or all of 16 were overturned in court. See infra Table 1.

80. See infra Table 1.
81. See infra Table 1.
82. See infra Table 1.
83. See infra Table 1.
84. See infra Table 1.
85. See infra Table 1.
86. See infra Table 1.
87. See infra Table 1.
<table>
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<tr>
<td>Qualified Initiatives</td>
<td>79</td>
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<tr>
<td>Percentage Qualified</td>
<td>17%</td>
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<tr>
<td>Approved Initiatives</td>
<td>34</td>
</tr>
<tr>
<td>Percentage Approved</td>
<td>44%</td>
</tr>
<tr>
<td>Contested Initiatives</td>
<td>21</td>
</tr>
<tr>
<td>Percentage Contested of Balloted Initiatives</td>
<td>27%</td>
</tr>
<tr>
<td>Contested Initiatives Upheld</td>
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<td>Percentage Contested Upheld</td>
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<tr>
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by voters during that time were invalidated in their entirety: Proposition 6 regarding inheritance tax; Proposition 68, campaign finance; and Proposition 105, disclosure.\(^89\)

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

IV. FEDERAL COURTS APPEAR MORE WILLING TO INVALIDATE INITIATIVES

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

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

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\(^90\) See infra Appendix A.

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

\(^92\) See supra Table 1.

\(^93\) See infra Table 1.
<table>
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<tr>
<td>Qualified Initiatives</td>
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</tr>
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<td>Approved Initiatives</td>
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</tr>
<tr>
<td>Contested Initiatives</td>
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</tr>
<tr>
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<td>4</td>
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<tr>
<td>Reviewed by State Courts</td>
<td>2</td>
<td>22%</td>
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<td>Upheld by State Courts</td>
<td>2</td>
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<tr>
<td>Reviewed by State/Federal Courts</td>
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</tr>
<tr>
<td>Upheld by State/Federal Courts</td>
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<tr>
<td>Reviewed by Federal Courts</td>
<td>5</td>
<td>56%</td>
</tr>
<tr>
<td>Upheld by Federal Courts</td>
<td>2</td>
<td>40%</td>
</tr>
</tbody>
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FIGURE 1

COURT JURISDICTION OF CONTESTED INITIATIVES:

1964 - 1990 PRIMARY

State Courts

Federal Courts

State/Federal Courts

1990 - 1996 PRIMARY

State Courts

Federal Courts

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

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

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

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

95. See supra Table 1.
96. See supra Table 2.
97. See supra Tables 1 & 2.
98. See supra Tables 1 & 2.
FIGURE 2

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

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

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

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

V. IMPLICATIONS FOR THE JUDICIAL SYSTEM

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

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

103. See California Commission on Campaign Financing, The Price of Justice 74 (1995). Competitive elections clearly are the most common method of judicial selection with 29 states primarily using election contests to select judges. Twelve of these states conduct their competitive judicial elections on partisan ballots. Several states also employ partisan ballots for noncompetitive retention elections. The remaining 17 states that primarily select their judges through competitive elections place the contests on nonpartisan ballots.

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

Eleven states, plus the District of Columbia, primarily employ an appointment method of judicial selection among most of their jurisdiction’s courts. The appointing authority ranges from both houses of the legislature in South Carolina and Virginia—Rhode Island for Supreme Court only—to the U.S. Senate in the District of Columbia. Most states, however, vest this responsibility with the governor. See id.; Joseph R. Grodin, In Pursuit of Justice: Reflections of a State Supreme Court Justice 3-4 (1989).


105. See id.

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

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

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

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

108. See supra Part III.
109. See Price, supra note 95, at 37.
112. See Price, supra note 95, at 37.
use of federal courts as part of a comprehensive opposition campaign strategy.

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

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

From 1910 through 1976, a federal statute required a three-judge panel to address any suit seeking an injunction against implementation of a legislative statute on grounds of federal constitutional issues.\(^\text{118}\) The federal statute was amended in 1976, leaving the three-judge panel requirement to apply only in two types of cases: suits involving apportionment of congressional and legislative districts and suits otherwise required to be heard by a three-judge panel,\(^\text{119}\) such as those filed under the Voting Rights Act of 1965.\(^\text{120}\) Congress eased


\(^{114}\) The primary bills are HR 1170 and HR 1252. See supra note 109.

\(^{115}\) Coalition for Economic Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1997).

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

\(^{117}\) See Bruce L. Moyer, Judge's Pay Delinkage & COLA Relief Near Passage, 44 Fed. Law. 8, 9 (Oct. 1997).


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

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

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

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

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

\begin{thebibliography}{99}
\bibitem{footnote122} See \textit{infra} notes 121-22 and accompanying appendices.
\bibitem{footnote123} See Prince, \textit{supra} note 95, at 38.
\bibitem{footnote124} See \textit{id}.
\bibitem{footnote125} See \textit{id}.
\bibitem{footnote126} See \textit{id}.
\bibitem{footnote127} See \textit{id}.
\end{thebibliography}
thing, but almost as many respondents want to see some changes to it.\textsuperscript{129} One of the most popular proposals for change is to restrict court invalidation of initiatives.\textsuperscript{130}

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

VI. CONCLUSION: PROMOTE DELIBERATENESS IN JUDICIAL PROCEEDINGS

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

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

\textsuperscript{129} See id.
\textsuperscript{130} See id.
\textsuperscript{131} See Jones v. Bates, 127 F.3d 839, 844 (9th Cir. 1997), \textit{rev'd sub nom.} Bates v. Jones, 131 F.3d 843 (9th Cir. 1997) (en banc). Judge Reinhardt represented a three-judge panel of the Ninth Circuit Court of Appeals. Following Reinhardt's ruling that voters had been ignorant of a provision calling for the lifetime ban on
Perhaps even more alarming for the integrity of the judiciary is the dramatic transformation of the role of the federal courts in direct democracy. Once an occasional arbiter of civil rights, the federal courts have recently become part and parcel of an overall opposition campaign strategy. Opponents of initiatives have come to realize that different judicial selection processes have created different judicial cultures between the state and federal courts—with the federal courts less inclined to defer to initiatives. As a result, opposition campaigns in California are now more likely to challenge initiatives in federal court and to bypass the state court system altogether. In essence, federal district judges are being integrated into the politics of initiative campaigns.

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

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

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

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

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

<table>
<thead>
<tr>
<th>YEAR</th>
<th>PROP. NUMBER</th>
<th>DESCRIPTION</th>
<th>PRE OR POST ELEC. REV.</th>
<th>RESULT</th>
<th>LEVEL OF COURT</th>
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<td>State</td>
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<tr>
<td>1964</td>
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<td>1964</td>
<td>15</td>
<td>Pay television</td>
<td>Post-Election</td>
<td>Invalidated</td>
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<td>1972</td>
<td>21</td>
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<td>1974</td>
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<tr>
<td>1978</td>
<td>13</td>
<td>Property taxes</td>
<td>Post-Election</td>
<td>Upheld</td>
<td>x</td>
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<tr>
<td>1980</td>
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<td>Reapportionment</td>
<td>Pre-Election</td>
<td>Substantially Upheld</td>
<td>x</td>
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<tr>
<td>1980</td>
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<td>Pre-Election</td>
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<tr>
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<tr>
<td>1982</td>
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<td>x</td>
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<tr>
<td>1983</td>
<td>Removed Sebastiani reapportionment</td>
<td>Pre-Election</td>
<td>Invalidated</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td>24</td>
<td>Legislative reform</td>
<td>Post-Election</td>
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<tr>
<td>1984</td>
<td>Removed Balanced budget</td>
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<td>1986</td>
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<td>Taxation</td>
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<td>Pre-Election</td>
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<td>Post-Election</td>
<td>Invalidated</td>
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<tr>
<td>1988</td>
<td>73</td>
<td>Campaign finance</td>
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<td>1988</td>
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<td>AIDS testing</td>
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<td>1988</td>
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<td>1988</td>
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<td>Disclosure</td>
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<td>June 1990</td>
<td>115</td>
<td>Victims' rights</td>
<td>Post-Election</td>
<td>Substantially Upheld</td>
<td>x</td>
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## Appendix B


<table>
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<tr>
<th>Year</th>
<th>Prop. Number</th>
<th>Description</th>
<th>Pre or Post Elec. Rev.</th>
<th>Result</th>
<th>Level of Court</th>
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<td>Post-Election</td>
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<td>1992</td>
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<td>Congressional term limits</td>
<td>Post-Election</td>
<td>Invalidated</td>
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<td>184</td>
<td>Three strikes</td>
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<td>Post-Election</td>
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