ADDRESSING THE DELIBERATIVE DEFICIT: A PROPOSAL TO IMPROVE THE BALLOT-INITIATIVE PROCESS

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The ballot initiative, a form of direct democracy practiced across the country, is often held up as a model of implementing the people's will and, therefore, achieving democracy's most fundamental aim. But with direct popular control over policymaking comes a cost: limited deliberative processes to develop proposals. I call this cost the deliberative deficit. Focusing on California's experience, a state with one of the most salient and consequential direct-democratic processes, this Note discusses the need to look beyond traditional institutions to effectively address the ballot initiative's deliberative deficit. After showing why the judiciary, legislature, and the direct-democratic process itself cannot do so, I suggest creating an independent advisory commission (Commission) to review initiatives. This Commission would make specific recommendations to an initiative's drafters so they can more effectively achieve their stated policy goals and mitigate unintended second-order effects. The Commission would not evaluate the initiative's core normative aims, leaving that assessment to voters. Though not a complete panacea, the Commission is a starting point. It is an example of the kind of thinking and new institutional development needed to address the deliberative deficit.

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INTRODUCTION

Two core principles in California's state constitution are deliberation and direct democracy. Deliberation is a policymaking process where "existing desires should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information."[1] Direct democracy comprises "forms of direct participation of citizens in democratic decision-making."[2] One of the most powerful direct-democracy tools California voters have at their disposal is the ballot initiative.[3] There is, however, an inherent tension between the initiative and deliberation. With some of the nation's most

1. Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1549 (1988).

2. Theo Schiller, *Direct Democracy*, ENCYCLOPAEDIA BRITANNICA, https://perma.cc/55D8-5TVE (archived Jan. 20, 2023).

3. The California Constitution defines the ballot initiative as "the power of the [voters] to propose statutes and amendments to the Constitution and to adopt or reject them." CAL. CONST. art. II, § 8(a).

politically charged initiatives[4] and one of its richest direct-democracy traditions,[5] California tests the limits at which deliberation and the initiative can co-exist in spite of this tension. Given the limitations traditional institutions face in checking the initiative power,[6] deliberation has generally been hindered at its expense. This has created a deliberative deficit in initiative policymaking.

Though the initiative process is here to stay, reforms can help address its deliberative deficit.[7] This Note proposes a path forward that circumvents traditional institutions' limitations in addressing it. Creating an independent advisory initiative commission (Commission) would address the initiative process's deliberative shortcomings without circumscribing electorate discretion or power. To ensure the Commission's independence, voters would ideally elect Commissioners.[8] The body would also be independent of legislative or gubernatorial oversight. Before initiatives appear on the ballot, the Commission would research and debate the policy's intricacies and unexpected second-order effects.[9] It would then recommend substantive edits to the initiative's drafters. As opposed to reforms targeted at providing voters with more information,[10] the Commission would have the goal of producing a better-drafted initiative before presenting it to the electorate. The drafters would then have final say whether to adopt the Commission's recommended changes.

The Commission would help produce more effective initiatives that have fewer unintended second-order effects for two reasons. First, it would focus only on technocratic changes. It would not scrutinize or critique initiatives' normative aims. Second, it would make recommendations to drafters before they finalize initiatives' text, not advocate how the electorate should vote.[11]

The Commission would most beneficially address the deliberative deficit

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4. *See, e.g.*, CAL. SEC'Y OF STATE, 2008 VOTER INFORMATION GUIDE 54-57 (2008) (discussing Proposition 8, which eliminated the right to same-sex marriage); CAL. SEC'Y OF STATE, 2020 VOTER INFORMATION GUIDE 56-59 (2020) (discussing Proposition 22, which exempted app-based transportation and delivery companies from providing benefits to certain drivers).

5. *See* Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1173 (1998) ("[California is] a state at the radical end of the direct democracy spectrum.").

6. The traditional institutions this Note discusses are the judiciary, legislature, and the electorate itself. *See* Part III.

7. *See* THOMAS CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 234 tbl.9.3 (1989) (discussing a poll showing 71% of Californians "like the initiative process, but would like significant changes in how it works").

8. There are, however, practical concerns to electing new Commissioners, such as mustering the political will to develop and create a new body from scratch. Expanding an existing Commission's remit to encompass the role might be more feasible. *See infra* note 264.

9. This Note uses the term "second-order effects" to refer to knock-on effects that might occur as a consequence of the initiative achieving its stated policy goal.

10. *See, e.g.*, *infra* note 166 (discussing three such examples).

11. *See infra* Part IV.A.

where detailed intricacies are central to policy outcomes, for example with initiatives focused on tax[12] and state-legislature[13] reform. Initiatives in these policy areas are rife with potential unintended consequences that neither an initiative's drafters, nor the broader electorate anticipate.[14]

Though many initiative drafters might choose to ignore the Commission's recommendations,[15] many will not. There would be minimal cost to drafters accepting the body's technocratically focused changes. The recommendations would not curtail voters' high-level normative choice; they would only aim to nip unanticipated consequences and efficacy concerns in the bud.[16] Independently, drafters could reap large benefits from accepting the changes. Adopting Commission-recommended reforms would help drafters put on the ballot more effective policy to achieve the normative ends they claim to have. And it would help them draft a policy that is newly shored up against potential lines of critique, making it more popular with voters come election day.[17]

This Note proceeds as follows. Part II establishes that deliberation and the initiative are core principles in California's constitution. It then discusses these two principles' inherent tension, how this tension leads to a deliberative deficit, and why this deficit is harmful. Part III discusses traditional institutions' limited ability to address this deficit. It focuses on California's judiciary, legislature, and the direct-democratic process itself. Part IV then proposes the Commission to

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12. *See, e.g.*, *infra* text accompanying notes 177-83 (discussing 1978's Proposition 13, which barred property-tax increases on extant homeowners and required a two-thirds legislative vote to raise non-property taxes).

13. *See, e.g.*, *infra* text accompanying notes 169-75 (discussing 1994's Proposition 140, which placed six-year term limits on state legislators, the most restrictive in the nation at the time, and slashed the legislature's budget by 38%).

14. 1978's Proposition 13, for example, cut school funding to an extent neither drafters, nor the electorate considered. PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 146-47 (2d ed. 2004) [hereinafter PARADISE]. For a more in-depth analysis of Proposition 13's far-reaching effects, see Evelyn Danforth, Note, *Proposition 13, Revisited*, 73 STAN. L. REV. 511, 521-33 (2021).

15. These drafters fall into two main camps. First, special-interest organizations often draft initiatives with only narrow focuses in mind. They might ignore the Commission's recommended changes because they are not concerned with their initiative's collateral effects on the broader electorate. *See infra* note 63 and accompanying text. Second, many may resist Commission recommendations due to a deep-rooted skepticism of government assistance. *See infra* text accompanying note 201.

16. While the dividing line is not always clear, drafters would have full autonomy to reject any recommendation they see as overstepping into value-based normative edits.

17. Even those most resistant to adopting the Commission's recommendations, *see supra* text accompanying note 15, will have some incentive to adopt Commission recommendations. Special-interest organizations may strategically adopt changes that shore up their initiatives against potential lines of attack during campaigns, increasing the likelihood voters adopt them. And government-skeptic drafters may associate the Commission less with establishment politics, making them less likely to distrust it. CTR. FOR GOVERNMENTAL STUD., DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 123 (2d ed. 2008) [hereinafter DEMOCRACY BY INITIATIVE].

add more deliberation to the initiative process while not sacrificing California's commitment to direct democracy. Part V concludes by relating the preceding Parts' discussion to the broader American state-constitutional system.

I: THE HARMFUL TENSION BETWEEN DELIBERATION AND THE INITIATIVE

A. California's Dual Commitment to Both Principles

A deliberative system of governance and direct democracy are two fundamental parts of California's political structure and culture. The initiative is arguably direct democracy's most prominent manifestation. This Section defines and establishes how deliberation and the initiative gained their current stature in California politics, discusses the nature of California's commitment to each, and shows how the two principles are in tension with each other.

1. Deliberation

California's deliberative process is best understood within the broader American context. The United States Constitution guarantees to every state a republican form of government.[18] Though nonjusticiable,[19] this guarantee shows that since the nation's founding, all levels of American government were envisioned as republican. *The Federalist No. 10* explicitly defines the republican form as a representative government, not a pure democracy.[20] Scholars often point to "deliberation" as a core republican principle.[21] A deliberative process, as defined in this context, is one where "existing [policy] desires should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information."[22]

It is against this backdrop that California held two Constitutional Conventions: one in 1849 and one in 1878-1879.[23] The values of "collective discussion and debate" underpinning America's deliberative process heavily influenced both these documents' framers. Throughout the 1849 Convention's debates, speakers took it as given they were making a deliberative republican

18. U.S. CONST. art. IV, § 4.

19. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149-50 (1912).

20. *See* THE FEDERALIST NO. 10 (James Madison).

21. *See, e.g.*, Sunstein, *supra* note 1, at 1541; Marvin Meyers, *Beyond the Sum of the Differences: An Introduction*, *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON, at xxxiv-xxxv (1981) (discussing "republican deliberation['s]" core role in the Constitutional Convention).

22. Sunstein, *supra* note 1, at 1549.

23. *See Constitutions,* CAL. SEC'Y OF STATE, https://perma.cc/FF5E-VW8H (archived Jan. 20, 2023).

government, not a pure democracy.[24] A similar commitment to deliberative republicanism permeated the 1878-1879 Convention. In response to a proposed change that would have allowed a simple majority of the legislature, as opposed to two-thirds', to submit an amendment to popular vote for approval, one speaker stated the two-thirds vote should remain because it required "more deliberation and care."[25] Several others agreed. With no one voicing dissent, the convention rejected the change.[26]

Deliberation remained a core virtue in California governance through the advent of direct democracy in the state. In 1911 as part of a national wave of progressive-era reforms, California adopted the initiative, referendum, and recall.[27] The arguments these changes' opponents made, though ultimately unsuccessful, often claimed the legislature needed to conduct "a more careful consideration of all proposed laws rather than provide [the initiative and referendum,] which will bring forth a class of statutes largely the product of the public whim[.]"[28] Opponents felt "every law . . . should be subject to deliberation and amendment."[29] They further posited the complexities of modern economic and commercial relations exacerbated direct democracy's risks. Without studying measures and hearing from competing experts, it became more difficult to understand each nuanced detail of industrial-era public policy.[30] This argument failed to carry the day at the start of the twentieth century, but it has gained increasing resonance over the past fifty years.[31]

California still maintains fealty to deliberation, even with direct democracy becoming an increasingly important policymaking tool. The California Supreme Court has recently affirmed that "'comprehensive changes' to the Constitution require more formality, discussion and deliberation than is available through the

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24. *See generally* J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION (District of Columbia, 1849) (detailing various speakers making references to their soon-to-be republican government). In response to a proposed constitutional provision that would have given the people the right to "instruct their representatives," one vocal opponent stated "the peculiar excellence of [the] republican system" is that its representative assemblies "devise measures and deliberate for the good of the whole." *Id.* at 294-95 (statement of Francis J. Lippitt).

25. E. B. WILLIS & P. K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1277 (Sacramento, 1881) (statement of John S. Hager); *see also id.* (statement of J.J. Ayers) ("It is true that large bodies are unwieldy and move slowly, but they move surely and justly, and they are representative in their character. They take in and represent all the diversified interests of the State, and every measure is thoroughly and exhaustively discussed before it is acted upon.").

26. *Id.*

27. CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDE FOR 1911 at 3, 5 (1911) https://perma.cc/QA4K-ABY7.

28. Leroy A. Wright, *Reasons Why Senate Constitutional Amendment No. 22 Should Not be Adopted*, *in* Voter Information Guide for 1911, *supra* note 27, at 8, 11.

29. *Id.*

30. *Id.*

31. *See infra* Part II.B.

initiative process."[32] The initiative therefore has not eradicated deliberation from California's constitution; it coexists alongside it.

2. *The Initiative Power*

Direct democracy, via the initiative, has also become permanently ingrained in California's system of governance.[33] An initiative's drafters need signatures from at least 8% of the electorate to get the measure on the ballot.[34] It then only needs a simple majority to be adopted.[35] Though drafters can request assistance from California's Office of Legislative Counsel, who must help when the measure will be submitted to the electorate with "reasonable probability," the service is optional.[36] The entire initiative process can therefore occur without the legislature's input.[37] And even so, the review process only addresses the language of the initiative, not any substantive concerns with its underlying policy.[38]

The initiative power sits within a state-constitutional system that places "all political power [inherently] in the people" and recognizes their "right to alter or reform [the system] when the public good may require."[39] The 1911 Amendment's drafters had this principle in mind when they described the initiative power as not just "a right granted the people, but a power reserved by

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32. Strauss v. Horton, 207 P.3d 48, 97 (Cal. 2009) (quoting Raven v. Deukmejian, 801 P.2d 1077, 1085 (Cal. 1990)).

33. MARK BALDASSARE & CHERYL KATZ, THE COMING AGE OF DIRECT DEMOCRACY 219 (2008) ("An era of 'hybrid democracy' is underway, with elected representatives through the legislative process and voters through the ballot box jointly sharing responsibility for making public policy.").

34. CAL. CONST. art. II, § 8(b). A proposed initiative statute, by contrast, needs only 5% of the electorate's signatures to qualify. *Id.*

35. *Id.* art. II, § 10(a). As their only decisional aid, voters receive large voter information pamphlets providing them with such in-depth policy analyses that it is impracticable to synthesize all available information. *See, e.g.*, CAL. SEC'Y OF STATE, 2020 VOTER INFORMATION GUIDE, *supra* note 4.

36. CAL. GOVT. CODE § 10243. The Office of the Secretary of State also offers to initiative drafters an optional review service. Though it does not require the measure to meet a "reasonable probability" threshold, it requires the initiative to be fully drafted beforehand. *Id.* at § 12172.

37. There exists a parallel legislature-initiated process for amending the Constitution. To submit an amendment to the electorate for approval, two-thirds of *the membership* of each house, not only members voting, must approve the measure. CAL. CONST. art. XVIII, § 1. The amendment is then submitted to the electorate, where it needs "a majority of votes cast thereon." *Id.* art. XVIII, § 4.

38. *See* CAL. SEC'Y OF STATE, STATEWIDE INITIATIVE GUIDE 1 (2022), https://perma.cc/N84S-RKPY. In the Office of the Secretary of State's review process, though drafters may request a statement of fiscal impact, feedback is otherwise similarly constrained to clarity and form. *See id.*

39. CAL. CONST. art. II, § 1.

them."[40] A reserved power is a higher classification, leading courts to see it as "one of the most precious rights of our democratic process."[41] The California Supreme Court has determined it must liberally construe this power whenever challenged.[42] Or, in its own words, courts must "jealously guard" it.[43]

The electorate's initiative power is in tension with California's commitment to deliberation.[44] Initiatives are ad-hoc, one-off binary decisions voters make without much reference to the initiatives' wider context or intricate details.[45] Most voters do not have the time, subject-matter expertise, or governance knowledge to master every intricacy of each complex policy on the ballot every election season.[46] In some cases, enough voters even misunderstand an initiative's meaning to sway its outcome.[47]

B. The Initiative's Deliberative Deficit is Harmful

This Section details the adverse impacts California's deliberative deficit has caused. It discusses why and how the initiative process causes suboptimal policy outcomes, it is ultimately unrepresentative of the electorate's preferences, and it particularly harms minority groups. The Section then discusses how initiatives' effects on the public's political knowledge and voter turnout are unclear and have adverse collateral effects.

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40. Associated Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976); *see also* CAL. CONST. art. IV, § 1 ("[T]he people reserve to themselves the powers of initiative and referendum.").

41. *Associated Home Builders, Inc.*, 557 P.2d at 477.

42. *Id.*; *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 924 (2021) (calling this a "direct-democracy canon" of interpretation); Manheim & Howard, *supra* note 5, at 1198 ("As the initiative/legislative power is one reserved by the same people who [hold 'the political power,'] a legislative exercise by those people should, logically, be superior to the exercise of even the same power by a delegate.").

43. *Associated Home Builders, Inc.*, 557 P.2d at 477.

44. *See* Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMPLE L. REV. 1291, 1301-03 (1995) ("Unfortunately, research on citizen initiatives suggest they hardly resemble a deliberative process.").

45. PARADISE, *supra* note 14, at 20-21.

46. *See* Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1504-06 (1987); CRONIN, *supra* note 7, at 61 ("Critics of direct democracy say the people are not informed or caring enough to vote on complicated public policy issues. Too many would not understand technical issues.").

47. *See, e.g.*, Jones v. Bates, 127 F.3d 839, 856-57 (9th Cir. 1997) (holding that, when adopting 1994's Proposition 140, enough voters mistakenly thought they were adopting lifetime term limits for legislators, not consecutive term limits, to swing the outcome).

1. Harms of the Initiative Process

When compared to legislatively adopted policy, initiatives are less effective in providing public goods and services. In *Federalist No. 10*, James Madison asserted that "pure democracy" is undesirable because it is prone to factionalist policymaking—which he defines as the majority acting in its own self-interest—as opposed "to the permanent and aggregate interests of the community."[48] This assessment holds true in California today. A large increase in the total number of initiatives over the past four decades has coincided with "the gradual replacement of the traditional communitarian ethic, in which all citizens shared the costs of public goods, by a proliferating market ethic that seeks to put an increasing share of the cost of public services . . . on those who use or buy them."[49]

Initiative-adopted policies are also often less effective than legislatively adopted policies. Though people tend to vote against initiatives when they are unsure of their effects or they feel they are overly radical, the "cautious voter" theory is an imperfect check.[50] It results in a system that leaves voters uninformed and dissatisfied with the information they have on hand to make complex policy decisions.[51] Voters in states that heavily use the initiative process are, therefore, less trustful of their government.[52]

The initiative process's deliberative deficit particularly harms marginalized minority groups. Unlike in the legislature, there is no way to register the intensity of one's preferences in the initiative process. Initiatives are single votes on isolated issues.[53] The legislative process, by contrast, contains a multitude of

48. THE FEDERALIST NO. 10 (James Madison), *supra* note 20, at 66; *see also* Sunstein, *supra* note 1, at 1550 ("the antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups"). Madison saw a republic as offering the "cure" by "refin[ing] and enlarg[ing] the public views" through a deliberative process. THE FEDERALIST NO. 10 (James Madison), *supra* note 20, at 71.

49. PETER SCHRAG, CALIFORNIA: AMERICA'S HIGH-STAKES EXPERIMENT 3-4 (2006) [hereinafter EXPERIMENT]. At the same time, however, these policy choices occur with greater political participation than does legislative policy. *See supra* text accompanying notes 85-86. This greater popular ownership over policy somewhat diminishes the normative weight of voters being materially worse off from eventual outcomes.

50. CRONIN, *supra* note 7, at 85. For examples detailing an initiative's broad-reaching effects, despite any "cautious voter" theory, see *infra* Part III.C.

51. *See* BALDASSARE & KATZ, *supra* note 33, at 221 ("Candidate and initiative campaigns are setting new records for spending, while both are coming under harsh criticism from voters who find them uninformative."). *But see supra* text accompanying notes 78-84 (detailing the potential educative effects the initiative process may itself instill in voters).

52. *See* Joshua Dyck, *Initiated Distrust: Direct Democracy and Trust in Government*, 37 AM. POL. RSCH. 539, 557 (2009). Some, however, argue there is no effect on political trust in states with heavy initiative use. *See* Daniel A. Smith, Caroline J. Tolbert & Daniel C. Bowen, *The Educative Effects of Direct Democracy: A Research Primer for Legal Scholars*, 78 U. COLO. L. REV. 1371, 1390-92 tbl.2 (2007) [hereinafter *Primer*] (finding moderate initiative use, but not heavy initiative use, has a positive effect on political trust).

53. Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 16 n.59, 25 (1978).

votes on several disparate issues. This permits minority groups to bargain with others for support on the issues most important to them. In exchange, they support other groups on separate issues.[54] Independently, legislators often do not wish to appear overtly hostile toward minority groups so as not to alienate potential voters. Therefore, "even those elected on more or less overtly racist campaigns . . . may prove responsive to minority pressures for civil rights measures once in office or, at least, be open to the negotiation and give-and-take that constitutes much of the political process."[55] This restraint is absent in initiatives. Members of the public, not politicians seeking election, place initiatives on the ballot and voters can register their preferences "in the privacy of the voting booth."[56] Initiatives therefore often exclude minority voters from the political process more than legislatively adopted policy.[57] This allows the majority to weaponize constitutional change against "'the discrete and insular minorities' thought most needy of constitutional protection."[58]

California initiatives have frequently had negative impacts on minorities. Just as California's racial demographics began shifting rapidly during the late twentieth century, voters passed a litany of initiatives significantly limiting taxation and public spending.[59] Though harmful to many, these initiatives have particularly affected "the younger, preponderately black and Latino people who use the services, but vote in much lower numbers."[60] This has even led some to go so far as to characterize California's modern initiatives as older white voters seeking to entrench their interests while they still have an electoral advantage.[61]

More than just minority groups are underrepresented in the initiative process. People actually turning out to vote in initiative elections tends to skew more

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54. *Id.*

55. *Id.* at 13; *see also* Marci A. Hamilton, *Perspective on Direct Democracy: The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 12 (1997) (arguing incentives for deliberation disappear in the direct-democracy context because, unlike legislators, voters neither face reelection nor have press publicizing their voting decisions). But these restraints have arguably eroded from legislative politics in recent years. *See infra* Part III.B.1.

56. Bell, *supra* note 53, at 14.

57. *See id.* at 27-29; City of Eastlake v. Forest City Enters., 426 U.S. 668, 689 (1976) (Stevens, J., dissenting). That said, as discussed further below, states with ballot initiatives have increased voter turnout across elections. *See supra* text accompanying notes 85-87. To at least a limited extent, this increased turnout might temper an initiative's harmful effects in minority groups by including minority voices in the set of people voting across the political system.

58. Colantuono, *supra* note 46, at 1502 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)). This is not to say the legislature is not rife with its own risks for racial minorities. *See infra* Part III.B. It only highlights the pronounced risks they face from the initiative process. *See id.*

59. PARADISE, *supra* note 14, at 14.

60. *See id.* at 15.

61. *See id.* at xxiv; EXPERIMENT, *supra* note 49, at 11-13; BALDASSARE & KATZ, *supra* note 33, at 36-37.

toward educated, older, and higher-income individuals than it does in candidate elections. Therefore the initiative process ineffectively represents the majority of those eligible to vote.[62] So even if there were deliberation across those actually voting on an initiative, the result would not be representative of what deliberation across California's voter-eligible population would yield, let alone the entire population.

Special interests play a disproportionately significant role in initiative campaigns, further distorting deliberation.[63] Initiatives are more susceptible to special-interest capture than are candidate elections for two reasons. First, voters must make more complex policy determinations with no shorthand cues from political-party affiliation.[64] They are therefore more dependent on media and paid advertising from groups hoping to sway electoral outcomes.[65] Second, onerous signature thresholds and time limitations mean even getting an initiative on the ballot requires significant financing.[66] These features have had telling effects. For example, campaigners raised nearly $390 million for initiative campaigns in the 2020 general election.[67] For comparison, this was more than double what all candidates for California state-level office raised that year.[68]

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62. *See* BALDASSARE & KATZ, *supra* note 33, at 34 (noting that fewer than half of eligible voters participated in recent recall and initiative-only elections); Colantuono, *supra* note 46, at 1501 & n.189 (noting that concerns regarding low and unrepresentative turnout in direct-democracy elections date back to at least 1911); CRONIN, *supra* note 7, at 76 tbl.4.4 (showing that the initiative-voting population nationally skews white, educated, and middle-to-upper-middle class).

63. *See* BALDASSARE & KATZ, *supra* note 33, at 76-77 (discussing how signature-gathering requirements and corresponding time limits made special-interest money instrumental in successful initiative campaigns). Moneyed interests have such a large role that one author referred to California's direct democracy as the "initiative industrial complex." PARADISE, *supra* note 14, at 189.

64. *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 135 (1995) ("The initiative process frequently combines increased information costs with decreased informational resources.").

65. *See* Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 22 (1997).

66. *See, e.g.*, CAL. CONST. art. II, § 8 (requiring 5% of the electorate to sign a petition for initiative statute to appear on the ballot and 8% for constitutional-amendment initiatives); CAL. ELEC. CODE § 9014 (allowing a maximum of 180 days to collect the requisite signatures); CAL. SEC'Y OF STATE, STATE INITIATIVE GUIDE 7 (2022) (stating that drafters must get 623,212 signatures to meet the 5% threshold).

67. *2020 Ballot Measure Contribution Totals,* CAL. SEC'Y OF STATE, https://perma.cc/K8Z9-Z98W (archived Jan. 20, 2023) (placing the total at $389,275,603).

68. *See* Open Secrets, FOLLOWTHEMONEY.ORG, *Show Me Contributions to State House/Assembly Candidates in Elections in California 2020 (Within Federal and State Data)*, https://perma.cc/CJX4-LVSA (archived Jan. 20, 2023) (showing all candidates running for state office raised a combined total of $160,272,812 in the 2020 general election).

2. Defenses of the Initiative Process

The initiative process has its defenders. Many contest that—despite the outsized role moneyed interests play—initiative outcomes are still more in line with the electorate's preferences than are legislative politics' outcomes.[69] Special interests might therefore distort policy more in legislative politics than in initiative politics.[70] These arguments have particular force in the tax and public-spending spheres.[71] But given initiative elections' voter-base skew[72] and California's large and diverse population,[73] the risks are particularly high if small and unrepresentative groups co-opt the state's policymaking process without seeking approval from more than the bare majority of voters.[74]

Others argue having citizens directly participate in policymaking has "educative effects." They assert policy-focused initiative campaigns "foster increased political interest, discussion, and deliberation among the electorate, even among those with low formal education."[75] Initiatives would, over time, equalize representational deficits among different groups, creating a policymaking process that is *more* deliberative than if only the legislature made policy.[76] Researchers analyze two variables as evidence of these broad civic

69. John G. Matsusaka, *Popular Control of Public Policy: A Quantitative Approach*, Q.J. POL. SCI. 133, 145-46, 146 tbl.2 (2010) (showing that a congruence between public policy on major issues and voter's preferences is 10% higher in initiative than non-initiative states). *But see* Edward J. Lascher Jr., Michael G. Hagen & Steven A Rochlin, *Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion*, J. POL. 760, 769 (1996) ("The results of our analysis . . . fail to support the claim that the presence of the initiative process is associated with more responsive policies.").

70. Matsusaka, *supra* note 69, at 145 ("The finding of lower congruence in non-initiative states suggests that legislatures tend to choose noncongruent policies . . . and hints that special interests could be more influential in the legislature than the initiative process.")

71. *See, e.g.*, JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY 3 (2004) (discussing polling showing the majority of voters support initiatives cutting taxes, public spending, and reliance on user fees); PARADISE, *supra* note 14, at 15 (discussing how 1978's Proposition 13 and its progeny "remain sacrosanct, icons of public policy that no politician dare attack").

72. *See* BALDASSARE & KATZ, *supra* note 33, at 34; CRONIN, *supra* note 7, at 76.

73. *See* BALDASSARE & KATZ, *supra* note 33, at 33-36; U.S. CENSUS (2020) (showing California as the most populous state in the U.S. and only 41% white).

74. Though there are historic examples of successful initiatives exclusively benefiting non-voting groups, like women's-suffrage measures prior to World War I, public concern remains. 32% of respondents in a national survey said they thought minorities or minority rights would not get a fair hearing in state and local direct-democracy elections. This number was significantly higher among black voters. CRONIN, *supra* note 7, at 98-99, 99 tbl.5.1.

75. *Primer*, *supra* note 52, at 1384.

76. *See id.* (stating that ballot-initiative focused elections "may foster increased political interest, discussion, and deliberation among the electorate"); *see also* Gais & Benjamin, *supra* note 44, at 1313-14 (finding increasing civic engagement counteracts the initiative process's deliberative defects).

benefits: political knowledge and voter turnout.[77] Initiatives, however, have an unambiguously constructive effect on neither.

Initiatives' effect on political knowledge is empirically ambiguous.[78] While there is evidence initiatives increase citizens' general political knowledge,[79] these effects are too conflicted and probabilistic to draw any determinative conclusions.[80]

Some, however, retort that if those who traditionally do not vote were made to deliberate over ballot initiatives—as in small-group, civic contexts like jury duty—they would see higher net gains in political knowledge.[81] Putting aside concerns about the feasibility of implementing this system,[82] compulsory-voting regimes have empirically unclear effects on political knowledge. Though some studies find positive long-term effects, the broader literature is "discordant" regarding whether compulsory voting increases long-run political knowledge.[83] And though there is a lack of empirical research analyzing educative effects on those who vote only because it is mandated,[84] this gap makes the argument inconclusive at best.

In isolation, initiatives have a relatively clear upward effect on voter turnout.[85] One study found that each initiative leads to, on average, a 1% increase in voter participation during presidential-election years and a 2% increase during midterm-election years.[86] This increase comes mainly from independent voters

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77. *Id.* at 1302-03.

78. *See* Mark A. Smith, *Ballot Initiatives and the Democratic Citizen*, 64 J. POL. 892, 895, 898-99 tbl.1 (2002).

79. *See id.* (defining long-term effects as those taking twenty years, "roughly one generation," to take hold).

80. Daniel Scholzman & Ian Yohai, *How Initiatives Don't Always Make Citizens: Ballot Initiatives in the American States, 1978-2004*, 30 POL. BEHAVIOR 469, 483-84 (2008).

81. ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 105 n.30 (2004).

82. Such a radical change to California's system of governance would require constitutional revision. *See* note 125 and accompanying text; *see also* James Fishkin, Book Review, 119 POL. SCI. Q. 544, 545 (2004) (reviewing ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT (2004)) (describing this proposal as "quasi-utopian political theorizing" that may only contribute to governing changes "in the very long term").

83. SHANE P. SINGH, HOW COMPULSORY VOTING SHAPES CITIZENS AND POLITICAL PARTIES 64-65 (2021) (citing thirty-three empirical studies discussing whether compulsory voting has an educative effect on political knowledge, concluding the results are "mixed").

84. *Id.* at 65. Compulsory voting would most increase political knowledge for this group. LEIB, *supra* note 81, at 107.

85. *See* David Magleby, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 197 (1st ed. 1984) (stating that even those most skeptical of a voter-turnout effect concede its likely existence among educated voters and salient initiatives).

86. Daniel Smith & Caroline Tolbert, *The Educative Effects of Ballot Initiatives on Voter Turnout*, 33 AM. POL. RSCH. 283, 303 (2005). *But see* Todd Donovan, Caroline Tolbert & Daniel A. Smith, *Political Engagement, Mobilization, and Direct Democracy*, 73 PUB. OP. Q. 98, 112-13 (2009) (finding initiatives only increase turnout during non-presidential election

who are primarily motivated by policy decisions, not partisan cues.[87] Initiatives therefore have a significant and non-partisan-driven impact on political participation.

This effect on political participation, however, does not occur in a vacuum. Initiative campaigns prime voters to associate certain stances, via partisan stereotypes, with up-ballot candidates. This happens even when those up-ballot candidates do not discuss the initiatives themselves.[88] Sometimes these "spillover effects" can force candidates to take positions on issues they will have no control over if elected, co-opting their campaign agendas.[89] Other times the candidates are the ones co-opting the initiative campaigns. They will purposefully and strategically associate themselves with high-profile initiatives outside their control to take advantage of reverse-coattail effects.[90] State[91] and national[92] candidates across the political spectrum[93] have leveraged initiatives in this way. Candidates and political groups sometimes even use initiatives on cross-cutting wedge issues to lower turnout for their opponents.[94] Initiatives can therefore determine which candidate wins an up-ballot election.

III. TRADITIONAL INSTITUTIONS' INABILITY TO ADDRESS THE DELIBERATIVE

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years).

87. Donovan, Tolbert & Smith, *supra* note 86, at 113-14. This is particularly true for politically salient initiatives. *Id.* at 112-13.

88. Daniel A. Smith, *Direct Democracy and Candidate Elections*, *in* THE ELECTORAL CHALLENGE: THEORY MEETS PRACTICE 199-200 (2d ed. 2011). This effect is particularly prominent in midterm election years, when political information is less readily available than in presidential election years. *Id.* at 198-204.

89. *Primer*, *supra* note 52, at 1381. For a discussion of two examples, see STEVEN P. NICHOLSON, VOTING THE AGENDA: CANDIDATES, ELECTIONS, AND BALLOT PROPOSITIONS 111, 124 (2006).

90. Smith, *supra* note 88, at 205. Reverse coattails are when candidates for up-ballot races, like for g overnor or President, benefit from increased turnout for down-ballot races, like for an initiative. *See* David E. Broockman, *Do Congressional Candidates Have Reverse Coattails? A Regression Discontinuity Design*, 17 POL. ANALYSIS 418, 418 (2009).

91. *See* Smith, *supra* note 88, at 206 (discussing how California's governor benefitted from the increased turnout 1978's Proposition 13 afforded).

92. The 2004 Presidential election had a well-documented reverse-coattails effect from initiatives. George W. Bush came out in favor of several states' initiatives banning gay marriage. *See Primer*, *supra* note 52, at 1380. *But see* David E. Campbell & J. Quin Monson, *The Religion Card: Gay Marriage and the 2004 Presidential Election*, 72 PUB. OP. Q. 399, 404, 411 (2008) (finding increased turnout among evangelical voters outweighed decreased turnout from secular voters in states with 2004 gay-marriage initiatives).

93. Democrats have also leveraged reverse coattails. In 2006, for example, the Democratic National Committee supported six initiatives in swing states to raise the minimum wage. The party anticipated the measures would mobilize low-income voters, who disproportionately supported democratic candidates. Smith, *supra* note 88, at 208.

94. *See id.* at 207 (discussing the Republican National Committee supporting 1996's Proposition 209 in California, which prohibited affirmative action in public employment, schooling, and contracting to pry white voters from Democrats).

DEFICIT

A: The Judiciary's Institutional Constraints

California courts are highly deferential to the people's reserved initiative power.[95] Predominantly, they have looked past initiatives' substantive shortcomings[96] and have relied on procedural constraints to check them.[97] This Section discusses three of these procedural constraints—the single-subject rule, the amendment-revision distinction, and separation-of-powers analyses—to reach two conclusions: The judiciary is too deferential to the electorate's right to exercise its initiative power to address the deliberative deficit and it lacks the tools to do so even if it were willing.

1. Single-Subject Rule

The single-subject rule does little to check an ill-conceived initiative. California's constitution explicitly states that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect."[98] In practice, this means "all of [an initiative's] parts [must be] 'reasonably germane' to each other."[99] This standard has proven generous to initiatives' drafters. Courts do not consider whether an initiative's parts are interdependent or functionally related to each other when determining whether it spans more than one subject.[100] Additionally, the California Supreme Court has found highly general concepts to be single subjects in order to "respect [its] liberal interpretative tradition . . . of sustaining statutes and initiatives which fairly disclose a reasonable and common sense relationship among their various

95. *See* Manheim, *supra* note 5, at 1198; Bulman-Pozen & Seifter, *supra* note 42, at 924; Associated Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976).

96. *See* Note, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279, 284 (1949) ("Material that would normally be passed as a statute [by the legislature but for courts finding it unconstitutional] has been adopted as a constitutional amendment to remove it from the reach of the judiciary").

97. Bulman-Pozen & Seifter, *supra* note 42, at 924-26 (discussing procedure-focused lawsuits across states, including California). Some argue courts should play a more active role in reviewing the initiative process. *See, e.g.*, Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2766-77 (2005) (arguing for more judicial deference to popularly enacted laws when they affect the "machinery of government"); David A. Carrillo, Steven M. Duvernay & Brandon V. Stracener, *California Constitutional Law: Popular Sovereignty*, 68 HASTINGS L.J. 731 (2017) [hereinafter *Sovereignty*] (advocating for an expanded judicial role under a separation-of-powers analysis).

98. CAL. CONST. art. II, § 8(d).

99. Brosnahan v. Brown, 651 P.2d 274, 279 (Cal. 1982) (citing Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1290 (Cal. 1978)).

100. *Id.* at 281.

components in furtherance of a common purpose."[101] The single-subject rule has, therefore, proven a "toothless tiger."[102]

1986's Proposition 8, commonly known as *The Victim's Bill of Rights*, set a low bar for an initiative to satisfy the reasonably germane rule.[103] It contained a number of different provisions that related to enacting "safeguards to the justice system," but are each functionally unrelated to each other.[104] The court found there was no requirement a measure's provisions be "interdependent"; as long as there is no "unnatural combination" of provisions on "unrelated subjects," they are reasonably germane to each other.[105]

Even if courts interpreted the single-subject rule more strictly, they would provide little remedy to address the deliberative deficit. California first added the rule to its constitution to counter the initiative process's risks. One scholar points out "the primary and universally recognized purpose of the one-subject rule is to prevent log-rolling in the enactment of laws—the practice of several minorities combining their several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained."[106] This approach, however, has three issues. First, the rule is concerned with the scope of an initiative's subject matter. This only relates to a subset of the risks the deliberative deficit poses. The single-subject rule, for example, "does not limit the initiative power of the people" to implement ineffective policy aims with unanticipated second-order effects.[107] Second, minority groups, often targets of the majority's ire, might benefit from certain amounts of logrolling. If an

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101. *Id.* at 284; *see, e.g.*, Briggs v. Brown, 400 P.3d 29, 39-40 (Cal. 2017) ("criminal justice reform"); *Brosnahan*, 651 P.2d at 280 ("promoting the rights of actual or potential crime victims"); Legislature v. Eu, 816 P.2d 1309, 1321 (Cal. 1991) ("incumbency reform"); Fair Pol. Pracs. Comm'n v. Super. Ct., 599 P.2d 46, 51 (Cal. 1979) ("political practices"). That said, the court has indicated that some topics are too general to constitute one subject. *See, e.g.*, *Brosnahan*, 651 P.2d at 284 ("government" and "public welfare"); Harbor v. Deukmejian, 742 P.2d 1290, 1301 (Cal. 1987) ("fiscal affairs" and "statutory adjustments"). These are, however, sufficiently broad to prove miniscule hurdles for initiative drafters.

102. JOSEPH R. GRODIN, RICHARD B. CUNNINGHAM & CALVIN R. MASSEY, THE CALIFORNIA STATE CONSTITUTION 78 (2011); *see* Manheim, *supra* note 5, at 1207.

103. *See Brosnahan*, 651 P.2d at 276, 281.

104. These measures included restitution to victims, an inalienable right to safe schools, a truth-in-evidence provision, more stringent conditions for bail, allowing prior convictions for impeachment and sentence enhancement, sentence enhancements for habitual criminals, banning commitment to juvenile facilities for individuals who committed serious offenses when they were eighteen or older, and limiting separate treatment for mentally disordered sex offenders. *Id.* at 277-79.

105. *Id.* at 281, 283 (distinguishing from the fifteen-article measure in *McFadden v. Jordan*, 196 P.2d 787, 790 (Cal. 1948), which would have run afoul of the "reasonably germane" standard).

106. Millard H. Rudd, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 391 (1958). The rule's historical motivation has led some to argue for courts to apply it more strictly as an institutional check on the initiative. *See* GRODIN, *supra* note 102, at 78.

107. *See Brosnahan*, 651 P.2d, at 293 (Bird, C.J., dissenting).

initiative's drafters can include multiple provisions under a highly general topic, the process might introduce some deliberative compromise to let minorities better register their preferences.[108] Third, the single-subject rule rarely changes policy outcomes. Initiative drafters could always present the same provisions to the electorate as two or more separate measures. The same set of voters that support a combined, multi-subject measure would likely vote for each of its separate provisions as separate initiatives.[109]

2. *Amendment-Revision Distinction*

Like in many other states,[110] California explicitly differentiates between procedures implementing fundamental structural changes and lesser changes. The former are called revisions and the latter amendments. While California's electorate can single-handedly amend the state's constitution, it must act jointly with the legislature to revise it.[111] Policing this procedural distinction has become a main tool the judiciary uses to scrutinize initiatives. Judges, however, rarely use it to strike down initiatives.

Courts' analyses focus on the extent of the electorate's power to change the Constitution.[112] They have determined a revision makes "comprehensive changes."[113] When determining whether an initiative implements a comprehensive change, courts look to its quantitative and qualitative effects. The quantitative analysis considers whether the initiative "is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions."[114] A qualitative change, by contrast, considers whether the initiative accomplishes "far reaching changes in the nature of our basic governmental plan."[115]

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108. *See* Bell, *supra* note 53, at 13; Hamilton, *supra* note 55, at 12.

109. *See* Press Release, Repair California, Californians Would Vote to Authorize and Call Constitutional Convention, New Statewide Poll of 1000 Voters Finds (Sept. 16, 2009), https://perma.cc/P24Q-UZCR (discussing two later-withdrawn initiatives utilizing this strategy; one polled at 69% support and the other at 71% support).

110. *See* DEL. CONST. art. XVI; FLA. CONST. art. XI, § 2; GA. CONST. art. X; HAW. CONST. art. XVII; ILL. CONST. art. XIV; KAN. CONST. art. 14; KY. CONST. §§ 256-263; LA. CONST. art. XIII; MICH. CONST. art. XII, § 3; MONT. CONST. art. XIV, § 1; NEB. CONST. art. XVI; N.H. CONST. Part II, art. 100; NM. CONST. art. XIX; N.C. CONST. art. XIII, § 1; OR. CONST. art. XVII, § 2; R.I. CONST. art. XIV, § 2; UTAH CONST. art. XXIII; VA. CONST. art. XII, § 2.

111. *See* CAL. CONST. art. XVIII.

112. *Sovereignty*, *supra* note 97, at 738.

113. Raven v. Deukmejian, 801 P.2d 1077, 1085 (Cal. 1990).

114. Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1286 (Cal. 1978).

115. *Id.* at 1286; *see also* Legislature v. Eu, 816 P.2d 1309, 1310 (Cal. 1991) ("[A] qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its

The California Supreme Court has struck down only two initiatives as improper revisions: one under the quantitative branch and the other under the qualitative branch.[116] The improper quantitative revision proposed adding twelve articles, totaling twenty-one-thousand words, to the then-twenty-five article constitution of approximately fifty-five-thousand words.[117] A later case, however, found an initiative adding only eight articles was insufficiently long to constitute a quantitative revision,[118] illustrating the high bar to overturn a measure under this branch of the analysis.[119] The improper qualitative revision would have required California courts to interpret certain state-constitutional criminal-law rights as coextensive with their federal counterparts.[120] By contrast the court upheld a proposition abolishing a judge-found right to same-sex marriage under the California Constitution's privacy and due-process provisions.[121] Given the judiciary's narrow inquiries for both qualitative and quantitative revisions, the amendment-revision distinction does not provide a meaningful check on the initiative process's deliberative deficit.

3. Separation of Powers

In the initiative context, separation-of-powers analyses consider the electorate's effect on independent branches of government. This approach is often implicit in the amendment-revision analysis.[122] It looks at the extent to which initiatives "defeat or materially impair" another branch of government by "intrud[ing] upon a core zone of its authority."[123] While a separation-of-powers

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branches."). For example, "an enactment which purported to vest all judicial power in the legislature would amount to a revision without regard either to the length or complexity." *Id.*

116. In the nineteenth century, the court also once struck down a legislature-proposed constitutional change as an improper revision. The measure would have moved the state's capital from Sacramento to San Jose. Livermore v. Waite, 36 P. 424 (Cal. 1894). The analysis, however, predated the qualitative-quantitative-based reasoning courts now use. *Compare id.*, *with Raven*, 801 P.2d at 1077.

117. McFadden v. Jordan, 196 P.2d 787, 790 (Cal. 1948).

118. *Amador Valley*, 583 P.2d at 1286 (discussing 1978's Proposition 13).

119. *See id.* at 1301-02; *see also Sovereignty*, *supra* note 97, at 739 (calling this distinction "contradictory").

120. *Raven*, 801 P.2d at 1081 (discussing 1990's Proposition 115). The court found this impermissibly "vest[ed] all judicial interpretive power[] as to fundamental criminal defense rights, in the U.S. Supreme Court." *Id.* at 1087.

121. Strauss v. Horton, 207 P.3d 48, 59, 62 (Cal. 2009) (discussing 2008's Proposition 8).

122. In the direct-democracy context, applying separation-of-powers concepts involves construing the electorate as a separate branch of government. *See* BALDASSARE & KATZ, *supra* note 33, at 13 (referring to the electorate as a "parallel legislature" and a "fourth and new branch of state government"); Briggs v. Brown, 400 P.3d 29, 51 (defining an initiative as an exercise of "the legislative power" for purposes of a separation-of-powers analysis, implicitly endorsing this view).

123. Howard Jarvis Taxpayers Ass'n v. Padilla, 363 P.3d 628, 634 (Cal. 2016); *see also*

analysis has a broader analytical frame than the amendment-revision approach,[124] making it a better conceptual fit, California courts have narrowly interpreted what constitutes material impairment and a branch of government's core zone of authority.

1990's Proposition 140 illustrates how the California Supreme Court narrowly interprets what constitutes material impairment. The measure placed six-year term limits on legislators, the most restrictive in the nation at the time, and slashed the legislature's budget by 38%.[125] Unlike more recent cases,[126] the *Eu* Court did not explicitly say it was conducting a separation-of-powers analysis. [127] Its language, however, struck a similar tone in that it deferred more to the initiative's drafters than to the legislature.[128]

In *Strauss v. Horton*, the court narrowly interpreted what falls within a branch's core zone of authority. 2008's Proposition 8 explicitly defined marriage in California's constitution as between a man and a woman, overruling an earlier case law.[129] The court reasoned that "[t]he new constitutional provision d[id] not purport to declare the state of the law as it existed when the [initial] decision was rendered, but instead establish[ed] a new substantive state constitutional rule."[130] The decision, therefore, effectively subjected the court's decisions to veto by the electorate.

Even when courts find an initiative materially impairs another branch's function and intrudes upon a core zone of its authority, they employ strict constitutional-avoidance principles to uphold the measure. They will even construe statutes differently from how voters predominately interpreted them, how their drafters intended them, and how they are naturally read. 2016's Proposition 66 stated that "[w]ithin five years of . . . the entry of judgment of [a death sentence] the state courts *shall* complete the state appeal and the initial state habeas corpus review in capital cases."[131] The court acknowledged this

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Sovereignty, *supra* note 97, at 751-52, 764-67 (detailing this approach and arguing for its more explicit adoption in when an initiative's effect on another branch's power is the predominant issue).

124. *Sovereignty*, *supra* note 97, at 764-66.

125. *See* Legislature v. Eu, 816 P.2d 1309, 1317 (Cal. 1991).

126. *See, e.g.*, *Briggs*, 400 P.3d at 34-35, 56-61; *Strauss*, 207 P.3d at 115-16.

127. *See Eu*, 816 P.2d at 1319 (considering whether "budgetary limitations [are] akin to infringements on the legislature's inherent 'power of self-preservation' as an independent branch of government[,] . . . threaten[ing] the functioning of that branch").

128. *Id.* (finding no legislative impairment because the remaining funds were "more than ample to provide an effective and efficient legislative staff"). For a similarly narrow interpretation of what constitutes a material impairment, see *Amador Valley Joint Union High School District v. State Board of Equalization*, 583 P.2d 1281, 1287 (Cal. 1978), which held that 1978's Proposition 13 limiting local taxation to an extent that local governments had little power to manage and resolve local affairs was not "undue interference."

129. *Strauss*, 207 P.3d at 122.

130. *Id.*

131. *Briggs*, 400 P.3d at 34-35 (emphasis added).

impracticable five-year time limit materially impaired the judiciary's core zone of authority to "fairly balance the matters before them." It also acknowledged that voters intended the limit to be mandatory.[132] Regardless, it interpreted the time limit as "aspirational" "to avoid separation of powers problems."[133] Separation-of-powers analyses therefore rarely allow challengers to strike down ballot initiatives as unconstitutional.

B. The Legislature's Institutional Shortfalls

This Section discusses how, though California's legislative process is often more deliberative than its initiative process, inserting a greater legislative role into initiative adoption will not effectively check the deliberative deficit.[134] Firstly, the legislative process has become rife with its own deliberative issues, even if the legislature proves a relatively effective moderator for certain specific policy areas.[135] Secondly, the legislature has a conflict of interest when addressing governance reforms.

1. Erosion of Legislative Deliberation

Legislatures have always fallen short of the Madisonian ideal discussed above in Part II. In recent decades, however, legislative polarization has vastly increased and race-based identity politics have nationally become more salient. Due in part to California's increasingly heterogeneous racial makeup, it is not immune from these trends. California's legislature faces broadly the same issues plaguing national legislative deliberation. These issues have limited its ability to address the initiative process's deliberative deficit.

Congressional polarization is well documented.[136] But the California legislature's polarization is no less damaging to deliberative policymaking. It has been increasing since the 1950s, ten years earlier than in Congress.[137] And

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132. *Id.* at 56, 58-59. The court stated that imposing a reasonable time limit preserved voters' intent at a higher level of generality. *See also id.* at 60 ("[The Proposition's] language makes it clear that the electorate did not intend to impose an *unreasonable* limit.").

133. *Id.* at 56, 59.

134. The predominant example of other states giving their legislatures greater roles is the indirect-initiative process. In an indirect-initiative process, the electorate refers an initiative to the legislature after it gathers the sufficient signatures. The legislature then votes whether to enact the measure as is, reject it completely (though some states require a popular vote if the legislature takes this course), or amend it prior to it going on the ballot. A direct initiative, by contrast, is what this Note has discussed thus far. The electorate votes directly on the measure without any legislature intervention. *The Indirect Initiative*, NAT'L CONF. OF STATE LEGISLATURES, https://perma.cc/UJX8-WJSM (archived Jan. 20, 2023).

135. *See, e.g.*, *infra* text accompanying notes 140-47.

136. *See, e.g.*, SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 7 (2008).

137. *Compare* Seth Masket, *It Takes an Outsider: Extralegislative Organization and Partisanship in the California Assembly, 1849-2006*, 51 AM. J. POL. SCI. 482, 488 fig.2 (2007)

legislative polarization started increasing earlier and has been far more drastically than in the California electorate. Though ticket-splitting has decreased,[138] the number of self-identified moderate voters has increased.[139] Given the disparity in polarization between the electorate and the legislature, providing a greater role for the latter in the initiative process would further polarize the initiative process. This would decrease the consideration voters give to each side of an issue before determining their vote, not increase it.

There is, however, a silver lining for California's legislature. Unlike Congress, it has proven a relatively effective forum for dampening race-based identity politics. As with polarization, studies abound showing the prominent role race has played in recent national elections.[140] Though large and rapid increases in California's Hispanic population over the past few decades have also led to the state's own flavor of racially charged politics, these political struggles have predominately played out in initiatives.[141]

Though California's state legislature has a dark past with race-based politics,[142] modern policy legislative policy dampens destructive passions. At first glance, the picture seems grim: In legislative elections, the vast majority of the white electorate does not vote for candidates of color.[143] Deeper analysis of legislative-policy outcomes, however, tell a somewhat different story. Compared

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(showing that California eliminating candidates' ability to cross-file on both parties primaries started California's increasing polarization), *and* BRUCE E. CAIN & THAD KOUSSER, ADAPTING TO TERM LIMITS: RECENT EXPERIENCES AND NEW DIRECTIONS 61-62 (2004), *with* THERIAULT, *supra* note 136 (showing that polarization in Congress has consistently increased since the late 1960s).

138. Gary C. Jacobson, *Partisan and Ideological Polarization in the California Electorate*, 4 STATE POL. & POL'Y Q. 113, 120 tbl.2, (2004). Ticket-splitting is when a voter votes for candidates from different parties for different offices. *Id.* at 120.

139. *See* Thad B. Kousser, *Does Partisan Polarization Lead to Policy Gridlock in California?*, 2 CAL. J. POL. & POL'Y 1, 6 (2010).

140. *See, e.g.*, Michael Tesler, *The Return of Old-Fashioned Racism to White Americans' Partisan Preferences in the Early Obama Era*, 75 J. POL. 110, 111 (2013) (showing how race began explicitly forming part of white voters' preferences again during the Obama administration); Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, 51 PS: POL. SCI. & POL. 528, 532 (2018) (showing how, during the 2016 election, anti-immigrant and racist sentiment became the main indicators, along with negative economic outlook, of those who voted for Donald Trump as President).

141. *See* Linda O. Valenty & Ronald D. Sylvia, *Thresholds for Tolerance: The Impact of Racial and Ethnic Population Composition on the Vote for California Propositions 187 and 209*, 41 SOC. SCI. J. 433 (2004) (discussing anti-immigrant messages behind 1994's Proposition 187 and 1996's Proposition 209); *see also Primer*, *supra* note 52, at 1381; Smith, *supra* note 88, at 207; Nicholson, *supra* note 89, at 124.

142. *See* 1913 Cal. Stat. 206-08 (prohibiting "aliens ineligible for citizenship" from owning agricultural land under the Alien Land Law).

143. Gary Segura & Luis Fraga, *Race and the Recall: Racial and Ethnic Polarization in the California Recall Election* 52 AM. J. POL. SCI. 421, 424 (2008).

to Arizona, which also has a large Hispanic population,[144] California's legislative policy is relatively favorable to its immigrant population. One study, for example, found that California has adopted far more immigrant-friendly welfare policies than Arizona.[145] The difference is due to California lawmakers' comparative ability to form inclusive lawmaking coalitions.[146] While California's relatively left-leaning legislative politics helps explain the result, it still contrasts with the electorate adopting 1994's Proposition 187 by initiative.[147] This silver lining, however, does not seem to hold outside identity politics.

2. Governance Reform and the Legislature's Conflict of Interest

When reform measures are directed at the legislature, lawmakers have a conflict of interest. This conflict stems from their inevitable incentive to preserve the system that put them in office.[148] Its effects particularly manifest themselves in policy areas like gerrymandering[149] and campaign finance.[150] In these areas,

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144. Jens Manuel Krogstad, *Hispanics Have Accounted for More Than Half of Total U.S. Population Growth Since 2010*, PEW RSCH. CTR. (July 10, 2020), https://perma.cc/GJ3P-M3YB ("Some of the nation's largest Hispanic populations are in the four states that border Mexico – California, Texas, Arizona and New Mexico. . . . Together, the four border states were home to 50% of U.S. Hispanics in 2019."). A substantial portion of each California's and Arizona's immigrant populations are Hispanic. *See* Hans Johnson, Cesar Alesi Perez & Marisol Cuellar Mejia, *Immigrants in California*, PUB. POL'Y INST. OF CAL. (Mar. 2021), https://perma.cc/34RD-NWGX ("The vast majority of California's immigrants were born in Latin America (50%)."); *Immigrants in Arizona*, AM. IMMIGR. COUNCIL (Aug. 6, 2020), https://perma.cc/U5GM-PLXQ ("The top countries of origin for immigrants were Mexico (55 percent of immigrants).").

145. Hana E. Brown, *Race, Legality, and the Social Policy Consequences of Antiimmigration Mobilization*, 78 AM. SOCIO. REV. 290, 294, 295 tbl.1 (2013) (detailing how Arizona welfare policy's stricter work requirements, time limits, full-family sanctions, and denial of benefits to noncitizens than California's is less immigrant-friendly).

146. *Id.* at 294-95.

147. *See* Valenty & Sylvia, *supra* note 141, at 442-43 (discussing 1994's Proposition 187, which sought to restrict undocumented immigrants' access to public services and benefits); *see also* Bell, *supra* note 53, at 16 n.59, 25 (discussing how the legislative process has more effectively increased deliberation and coalition-building across racial lines than has the initiative process).

148. *See generally* John Ferejohn, *Performance and Electoral Control*, 50 PUB. CHOICE 5 (1986) (discussing gaining voter support for ensuing elections as a key motivator of incumbent-politician behavior).

149. California has switched back and forth between panel-drawn and legislature-drawn legislative districts for the past half century. The margins of victory and number of safe seats are significantly higher when the legislature has drawn districts than when the independent panel has districts. Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines in California?*, 53 J.L. & ECON. 545, 555-57 (2010).

150. *See* Daniel Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 397, 424 (1992) (detailing how the legislature failed to adopt effective campaign-finance laws partly due to its conflict of interest;

legislators both enact reforms entrenching themselves and actively block deliberatively adopted reforms.

1962's Proposition 7 shows the lengths the California legislature has historically gone to in order to entrench itself in power. The measure made a fundamental change to California's system of governance. Until then, the only method by which reformers could revise California's constitution was to have both the legislature and electorate vote for a constitutional convention.[151] Given that constitutional conventions are profoundly deliberative methods of adopting policy,[152] utilizing one to adopt revisions minimized any deliberative deficit. Proposition 7, by contrast, created a second method: The legislature would draft revisions itself and approve them by two-thirds vote. After approving the revisions, the legislature would directly submit them to voters for adoption by majority vote.[153] This new method essentially "authorized the legislature to act as a constitutional convention."[154]

Though the 1960s brought a nationwide wave of constitutional revision by convention, California's legislature was generally resistant to letting a wholly independent body adopt structural changes. Because it feared drastic reapportionment, it instead maintained control over the process via Proposition 7.[155] Though reapportionment was a fear across states, California's cities experienced a particularly drastic population boom. The state's apportionment formulas, however, remained unchanged.[156] Many legislators could therefore expect to lose their seats if an independent convention redistricted what was "the most grotesquely malapportioned [legislature] in all the United States."[157] Removing the need for a deliberative and independent constitutional convention to make constitutional revisions was therefore an act

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this caused significant distrust and hostility among the electorate, motivating it to adopt harsh legislative term limits in 1990's Proposition 140).

151. The California Constitution Revision Commission, CONSTITUTION REVISION HISTORY AND PERSPECTIVE 15 (1996) [hereinafter Revision Commission].

152. Constitutional Conventions are generally composed of delegates elected for the sole purpose of participating in the body's deliberation. Conventions hear testimony from several experts on a wide array of topics, debate for months, and—in California and many other states—submit the final product to voters for final approval. *See* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 12-18 (2006).

153. CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDE FOR 1962 at 13 (1962).

154. Revision Commission, *supra* note 151, at 7. The revisions were still the product of a Constitutional Revision Commission, which—though not adding as much deliberation as a wholly independent convention—provided more circumspection than the ordinary legislative-adoption process. *Id.*

155. *See id.* at 7-8. A similar fear was also a major reason the legislature ignored the electorate's instruction to provide for a convention in 1934. *See also supra* Part III.B.2.

156. *See* CAL. CONST. of 1879, art. IV, § 6 (stating that no county could have more than one senator and that no senator could represent more than three counties).

157. Revision Commission, *supra* note 151, at 8 (quoting ALONZO L. BAKER, PROBLEMS IN STATE CONSTITUTION REVISION, WITH SPECIAL REFERENCE TO CALIFORNIA 5 (1964)).

of political self-preservation and self-interest.[158]

1962's Proposition 7 made the processes by which the legislature puts revisions and amendments to voters identical.[159] This means there is no added deliberation when the legislature initiates a revision, as opposed to a constitutional amendment.[160] In the name of self-preservation, the legislature aggrandized its own power and significantly pared back the deliberative requirements to revise California's constitution. This shows how, at least for governance reform, the legislature will not address the deliberative deficit. California needs an independent initiative process, unchecked by the legislature, to avoid these self-interest problems.

1934's Proposition 8 shows how, in addition to implementing its own deliberation-eroding reforms, the legislature has actively blocked the electorate's deliberation-promoting reforms. The turn of the twentieth century brought frequent ballot measures that called for a convention to revise California's constitution. The electorate rejected each proposition in 1898, 1914, 1920, and 1930.[161] But in 1934, voters finally approved one: Proposition 8. In addition to two-thirds of each legislative house approving the measure beforehand, the governor-established California Constitutional Commission unanimously voted four years earlier to recommend a convention.[162] Despite the highly deliberative process that led to voters approving California's third constitutional convention, the legislature refused to fulfill its constitutional duty to "provide for the convention."[163] The convention never happened and was lost to history.[164]

The legislature shirked its constitutionally enumerated duty out of self-interest. One of the governor-established Constitutional Commission's principal recommendations for reform was to raise the signature requirement for initiative amendments. The requirement was, at the time, equal to that for initiative statutes. Making this change would require greater deliberation and compromise between the initiative's drafters, the electorate at large, and the legislature to amend the Constitution. Additionally, revisionists were asking for reforms in line

158. Two years after 1962's Proposition 7 passed, the U.S. Supreme Court's ruling in *Reynolds v. Simms*, 377 U.S. 533 (1964), found state-election malapportionment violated the federal Equal Protection Clause. A federal district court then found California's apportionment system ran afoul of *Simms*. Silver v. Jordan, 241 F. Supp. 576 (S.D. Cal. 1964). This led to eventual reapportionment and mooted the legislature's actions. *See id.*

159. *See* CAL. CONST. art. XVIII, § 1.

160. *See* Revision Commission, *supra* note 151, at 7 (stating that "[t]he amendment authorized the legislature . . . to submit its own revisions to the electors for ratification," with no additional procedures forcing consensus and deliberation above those for Constitutional amendments).

161. *Id.* at 6.

162. CAL. SEC'Y OF STATE, 1934 BALLOT PAMPHLET 13 (1934); Revision Commission, *supra* note 151, at 6.

163. Revision Commission, *supra* note 151, at 6 (citing BAKER, *supra* note 157, at 3); CAL. CONST. art. XVIII, § 2.

164. Revision Commission, *supra* note 151, at 6.

with those other states were concurrently considering.[165] The legislature unilaterally and extra-constitutionally blocked this deliberately called-for convention that would have adopted popular, mainstream, and pre-conceived reforms. It acted as a hindrance, showing it would a poor check on the initiative's deliberative deficit.

C: The Direct-Democratic Process's Informational Deficits and Lack of Expertise

This Section demonstrates how increasing opportunities for deliberation among the electorate itself will not adequately address the deliberative deficit.[166] The initiative process often suffers from voters' comparative lack of specialized knowledge and engagement with specialized subject matter. This problem is particularly acute in complex policymaking areas.[167] Though some argue the initiative process may increase the electorate's knowledge long term,[168] direct democracy does not replicate legislators' access to subject-matter experts and a full-time staff. Further, no mechanism through which providing more information to the electorate would mitigate risks that voters act adversely to minority interests.

While initiatives offer an end-run around the legislature's governance-reform limitations, they are rife with their own deliberative issues.[169] Compared to legislators, voters lack policymaking experience and institutional knowledge.[170] Proposition 140 illustrates the consequences of voters' knowledge gap.[171] A federal court even found a critical mass mistakenly thought the initiative's term limits extended for a lifetime, not just across consecutive terms, that there was a reasonable likelihood the error swung the election's outcome.[172] Further, the legislature said the initiative would be devastating because it would remove the experience and budgetary capacity necessary to enact proactive

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165. *Id.*

166. There are myriad proposals for these types of reform. One is to increase signature-gathering time limits to allow more reflection among voters and minimize the role moneyed interests play. CRONIN, *supra* note 7, at 62-66. A similarly minded proposal advocates for internet-based petitions. Garrett, *supra* note 65, at 21. Another, focusing on informational deficits voters face from a lack of partisan cues, advocates for laws requiring drafters to list campaign donors on the ballot. This would provide a heuristic to help voters decide complex issues. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 297-99 (2005).

167. *See supra* text accompanying notes 12-15.

168. *See supra* Part II.B.

169. *See id.*

170. Even after leaving the legislature, lawmakers often run for other offices. *See* CAIN & KOUSSER, *supra* note 137, at 15.

171. *See supra* text accompanying note 125.

172. *See supra* text accompanying note 47.

policy agendas.[173] The measure therefore decimated the legislature's capacity to deliberate.[174] Though voters eventually determined Proposition 140 did more harm than good, subsequently raising legislator term limits to twelve years in 2012's Proposition 28, this was twenty-two years later.[175] As the legislature's initial protests show, a knowledgeable moderating voice could have foreseen issues that voters did not.

Voters are often unable to appreciate the details affecting an initiative's efficacy or collateral effects during campaigns focused on complex policy areas. The electorate instead focuses on high-level normative debates. Injecting more deliberation into initiative campaigns would not shift this focus. 1978's Proposition 13 is a telling example. The initiative barred property-tax increases on extant homeowners and required a two-thirds legislative vote to raise non-property taxes.[176] One of the measure's many second-order effects was a vast decrease in funding for public schools. Voters largely ignored these considerations during the run-up to election day.[177] Public discussion, instead, focused on property taxes pricing people out of homes.[178] Though subsequent initiatives sought to mitigate the educational-budget shortfall,[179] these only had limited effects.[180] These remedial initiatives also had their own unintended consequences.[181] Such ancillary effects were neither focuses of the Proposition 13 campaign,[182] nor any follow-up initiative campaigns.[183] The electorate therefore did not deliberate over them.

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173. *See* Legislature v. Eu, 816 P.2d 1309, 1317 (Cal. 1991).

174. Observers have found myriad negative effects. First, due to their lack of experience, legislative committees were doing a poorer job screening out and amending bills. CAIN & KOUSSER, *supra* note 137, at 34-35. Second, the legislature's trend of increasing polarization accelerated. *Id.* at 63. Third, diminished resources left legislators more time constrained and executive-branch officials knew they could wait out any oversight efforts from term-limited legislators. This combination significantly expanded the executive branch's power. *Id.* at 72.

175. *See* CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDE FOR 2012, PRIMARY at 24 (2012).

176. CAL. SEC'Y OF STATE, 1978 BALLOT PAMPHLET 56-57 (1978).

177. PARADISE, *supra* note 14, at 154-55.

178. *Id.* at 147.

179. One included 1988's Proposition 98, writing state-funding formulas for schools into the Constitution. *Id.* at 12.

180. California had still dropped from between sixth and eight in spending per pupil among states to fortieth as of 2004. *Id.* at 15.

181. Proposition 98, for example, ended up limiting state funds for areas like university education. *Id.* at 165-67.

182. Public discussion focused on increasing property taxes pricing people out of homes while large corporations got tax breaks from the legislature. The "No on 13" campaign had trouble shifting focus because corporate interests largely funded it and it was disunified. PARADISE, *supra* note 14, at 147.

183. Public discussion, which the well-heeled California Teachers Association led as the drafters of Proposition 98, focused on schools being "underfunded and badly crowded . . . and that schools should not be subject to the budgetary whims of the legislature." *Id.* at 165.

Providing voters access to more nuanced information on Proposition 13's precise effects would not have changed the public discussion's focus. The electorate's engagement with the campaign was already markedly high. The 1978 election was a rare instance where turnout was actually higher for an initiative, Proposition 13, than for the top-of-ballot race, the primary for governor.[184] Given the electorate did not effectively deliberate over the full scope of the initiative's effects under such circumstances, it is unclear that it would under any.

Separately, reforms giving the electorate more opportunity to deliberate do not address the risks that minority groups face in the initiative process.[185] When policies inflame identity politics, it bucks intuition to claim that providing more information or time to voters would lead to different outcomes. 2008's Proposition 8 illustrates this point.[186] Voters did not decide based on their views of California's constitution, nor on some factual nuance or potential second-order effect. They instead decided based on deeply held normative convictions.[187] Providing more opportunities for voters to come to a different conclusion on their own accord would not have led to a different result.

IV: A PROPOSAL TO ADDRESS THE DELIBERATIVE DEFICIT

A. An Independent Commission to Advise on Ballot Initiatives

This Note's proposed Commission addresses the deliberative deficit without impinging on the people's initiative power. It leaves that power unscathed because it does not mandate initiative drafters adopt its changes. It therefore does not constrain the electorate's autonomy to draft and adopt the measures they wish. Further, the Commission does not have the institutional constraints the judiciary has; the conflict-of-interest constraints the legislature has; or the electorate's limitations deliberating over technocratic details.

The Commission would be independent from executive and legislative oversight. It would meet biennially to discuss all statewide initiatives on the ballot for a given election, consider those initiatives' policy ramifications, and make substantive recommendations to drafters.[188] It would discuss each

184. Smith, *supra* note 88, at 206.

185. *See supra* text accompanying notes 54-61.

186. *See supra* text accompanying note 121.

187. *See* Ron Prentice, Rosemarie Avila & Bishop George McKinney, *Argument in Favor of Proposition 8*, *in* 2008 VOTER INFORMATION GUIDE, *supra* note 4, at 56 ("*[Proposition 8] restores our definition of marriage* to what the vast majority of California voters already approved and human history has understood marriage to be . . . . We should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay.").

188. This Commission would not consider local-level initiatives for three reasons. First, the number of local ballot initiatives in a given year would make reviewing each in a timely

initiative's potential second-order policy implications and expected efficacy in achieving its stated aims. If the Commission feels more information is necessary to come to a sufficiently informed recommendation, it could seek either public comment[189] or submissions from subject-matter experts and particularly interested parties. After coming to a conclusion regarding any recommended changes, the Commission would send them—and the reasoning for its determination—to the initiative's drafters.[190] Any dissenting Commissioners could send their contrary proposal and reasoning too.[191]

The Commission would be advisory. From a Constitutional standpoint, California can therefore adopt it by legislative or initiative statute.[192] The Commission would support the Constitutionally enumerated initiative process. The initiative's drafters are merely receiving advice from an independent body and, should they choose, changing their initiative accordingly. Other than the Commission's independent status and focus on initiatives' substantive detail, the body is similar to the Legislative Counsel's and Secretary of State's offices

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manner infeasible. *November 3, 2020 Ballot Measures in California*, BALLOTPEDIA, https://perma.cc/4STA-RSUD (archived Jan. 24, 2023) (showing California had 413 local initiatives during the 2020 general election). Second, elections for local initiatives are annual, while elections for statewide initiatives are biennial. The proposed committee would therefore need to meet twice as often to consider local initiatives. Thirdly, local initiatives generally address local, not statewide matters. *See* TRACY M. GORDON, THE LOCAL INITIATIVE IN CALIFORNIA, at vi (2004). Local officials, therefore, are better placed than state-level officials to make substantive recommendations for changing local initiatives. Independent local-level Commissions—focusing only on individual-county initiatives—similar to the state-wide Commission this Note proposes would serve an analogous purpose and yield similar benefits.

189. Though others have similarly called for a public-comment period, *see* DEMOCRACY BY INITIATIVE, *supra* note 17, at 18, the reform there was aimed at providing notice to the electorate for its own deliberation. Here, by contrast, public comment would only be to inform the Commission's recommendation. Requests for comments, therefore, are at the Commission's discretion.

190. *See infra* text accompanying note 250 (discussing the necessary steps so the Commission could provide recommendations with sufficient time for drafters to decide whether to adopt the changes).

191. For an example of what these recommendations may look like—both when the proposed Commission recommends changes and where it does not—see *2019-2020 Annual Report*, 46 CAL. L. REVISION COMM'N REP. 711 (2019), https://perma.cc/C384-G4HZ. A key difference from this report, however, is that the proposed Commission would only send recommendations to an initiative's corresponding drafters. They would then determine whether to amend the initiative within the bounds of the original language's purpose and intent. *See also* CAL. CONST. art. II, § 8(c) (discussing why changing California's initiative process to allow for limited post-qualification changes would not require a constitutional amendment).

192. The Commission would likely be politically popular. Voters want elected representatives to play a bigger role in the front-end initiative-drafting process. This includes "holding hearings . . . allowing voters and interest groups to weigh in before measures reach the ballot [and] . . . seek[ing] compromises with initiative sponsors before the measures go to the ballot." BALDASSARE & KATZ, *supra* note 33, at 219-20. Voters, in other words, want "public discussions on initiatives as a way to ensure that the proposed measures constitute sound policy." *Id.* at 220.

initiative-review services. The legislature adopted both these services by statute.[193]

From a practical standpoint, adopting this Commission by either legislative or initiative statute would be viable.[194] But given the inevitable risks that accompany either process, proponents should be prepared to move forward with both, regardless of which is their preferred approach. When pursuing a legislative path, having a fallback electorate-focused initiative path allows proponents to walk away from legislative negotiations. This gives them crucial bargaining power. Such power would mitigate any dissenting legislators' influence in blocking efforts to adopt the proposed Commission.[195] When pursuing a statutory-initiative approach, the legislative path would be an essential hedge. As discussed in Part III.C, voters have less familiarity with government function than legislators. Therefore, as with the campaign surrounding 1990's Proposition 140,[196] trying to adopt the Commission via initiative statute alone risks public debate ignoring essential issues and being mired in misunderstanding.

A statute or initiative statute could not give the Commission power to make binding changes to initiatives.[197] California's constitution states that, after an initiative's authors gain the requisite signatures, "[t]he Secretary of State *shall* then submit the measure at the next general election," implying there is no discretion.[198] Further, the Constitution explicitly clarifies that "the people reserve to themselves the powers of initiative and referendum" when establishing the legislative power. This implies that legislative power yields to the initiative power when the two are in conflict.[199] A statute purporting to subject the

193. *See* CAL. GOVT. CODE §§ 10243, 12172.

194. *See* CAL. CONST. art. XVIII, § 3; *id.* art. II, § 8(a); *id.* art. IV, § 1; *see also infra* text accompanying note 254.

195. Though this Commission would not threaten any aggregate encroachment on legislative power, *see infra* text accompanying notes 242-45, many legislators might view the electorate's initiative power as a threat to its own, and therefore be wary of further institutionalizing in any respect. *See* BALDASSARE & KATZ, *supra* note 33, at 13 (referring to the electorate as a "parallel legislature").

196. *See supra* text accompanying notes 169-75.

197. Though the electorate has appetite for a more deliberative initiative-adoption process, *see supra* text accompanying note 192, the initiative itself remains extremely popular. *See* BALDASSARE & KATZ, *supra* note 33, at 23 tbl.1.2 (2008); CRONIN, *supra* note 7, at 80 tbl.4.6 (discussing a poll where 76% of respondents think voters should have a say on some public-policy issues). It is therefore likely politically infeasible to curtail the electorate's initiative powers by giving the Commission binding authority, even if doing so were constitutional.

198. *See* CAL. CONST. art. II, § 8(c) (emphasis added). So long as the changes are consistent with the draft's purpose and intent, drafter-made post-qualification changes to an initiative would not be unconstitutional. *See* DEMOCRACY BY INITIATIVE, *supra* note 17, at 354. The legislature could, therefore, adopt these changes via statute, as can the electorate via an initiative statute. *See id.*

199. *See* CAL. CONST. art. IV, § 1; *see also id.* art. II, § 10(c) ("The Legislature may

electorate's initiative power to an independent body's veto creates such a conflict and is likely unconstitutional.[200]

Though it would require constitutional revision, making the Commission's recommendations binding would solve a crucial shortcoming the proposed Commission will face: Initiative drafters could refuse to adopt Commission recommendations. Montana, which has an arm of its legislative counsel conduct an advisory substantive review of initiatives before they appear on the ballot, illustrates this problem well. The state has encountered "less receptivity to more substantive recommendations," as compared to semantic corrections and matters of constitutionality. Experience shows this is due to drafters' viewing state officers as "adversaries," minimizing their willingness to accept substantive, policy-based advice.[201] While the Commission would be an independent body, unlike Montana's legislative counsel, it would still be a state actor. Some initiative drafters, therefore, would not distinguish between these bodies. If the Commission's recommendations were binding it would avoid this problem by imposing them on drafters.

Putting aside practical hurdles to creating a Commission with binding review power,[202] a binding body presents normative difficulties an advisory body does not. A binding review would give the Commission an effective veto over initiative substance. This would circumscribe the people's reserved initiative power. The core motivation behind the proposed advisory Commission, by contrast, is addressing the deliberative deficit without diminishing the initiative power.[203] That said, evaluating a binding Commission exposes a limitation of an advisory body. Because drafters could simply refuse to adopt the Commission's substantive recommendations, an advisory Commission is not a silver bullet; it is only a starting point to address the deliberative deficit.

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amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval.").

200. Given the judiciary liberally construes the electorate's initiative powers, *see* note 43 and accompanying text, a constitutional amendment may be improper. California could only create the Commission with binding powers via revision. Subjecting the electorate's initiative power to an independent body's veto would change the basic "governmental plan or framework of California." *See* Strauss v. Horton, 207 P.3d 48, 62 (Cal. 2009).

201. DEMOCRACY BY INITIATIVE, *supra* note 17, at 123 (citing Telephone Interview with Greg Petesch, Dir. of Legal Servs., Mont. Legis. Servs. Div. (June 6, 2007)).

202. The most likely path forward to revise the constitution would require a two-thirds vote in each legislative house, followed by a majority vote from the electorate. *See* CAL. CONST. art. XVIII, § 1. This would be the first time in California's history that the state validly adopted a single qualitative revision absent more widescale changes. *See supra* text accompanying note 23 (discussing the two constitutional conventions California held); *see also supra* text accompanying notes 159-60 (discussing when the legislature adopted more widescale constitutional revisions).

203. *See supra* Part I.

Unlike other proposals,[204] the Commission supplements deliberation at the drafting stage. Early-stage intervention would better improve policy efficacy and mitigate unintended second-order effects. The electorate cannot replicate legislatures' expert-informed drafting process.[205] A Commission recommending changes at the drafting stage addresses this gap. It would synthesize expert information, providing concrete recommendations on technocratic issues to initiatives' drafters. This would provide the drafters with similar access to information that state legislators receive when writing bills.[206] That information would help them address technocratic-focused issues before an initiative reaches voters, like it helps legislators address them in draft bills before they reach a final floor vote.[207]

The Commission's recommendations would not address questions of normative judgement. Preserving the initiative's core purpose,[208] the Commission leaves these determinations solely to the electorate. The Commission, acting at the drafting stage, facilitates voters making normative policy judgments by reducing their need to evaluate simultaneously a policy's efficacy and second-order effects.[209] The electorate, like the full State Assembly or State Senate holding the final floor vote to adopt a bill as law, makes this determination based largely on its normative views.[210] The Commission, by contrast, helps address the technocratic blind spots at the drafting stage.[211]

B. Past Literature's Suggestions for Reform

The idea that an independent commission would add more deliberation to the initiative process is not new. Gais and Benjamin first proposed one as the second of a two-step reform to the initiative process.[212] The first step would have implemented an indirect initiative, instead of a direct one. Doing so would allow

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204. *See infra* Part IV.B.

205. *See supra* text accompanying notes 166-68; *see also* Gais & Benjamin, *supra* note 44, at 1315 ("Instead of applying the analogy of *candidate* voting to initiatives and referenda, perhaps we should instead apply the analogy of *legislative* voting . . .").

206. *See supra* Part II.B.

207. *See The Legislative Process: A Citizen's Guide to Participation*, CAL. STATE SENATE (Apr. 2019), https://perma.cc/KR9C-K5WQ.

208. *See supra* text accompanying notes 33-43.

209. *See The Legislative Process: A Citizen's Guide to Participation*, *supra* note 207.

210. *See generally* James Coleman Battista, *Committee Theories and Committee Votes: Internal Committee Behavior in the California Legislature*, 62 STATE POL. & POL'Y Q. 151 (2006) (finding state-legislative votes at the floor-vote stage are more likely to be ideologically driven than they are at the committee-vote stage).

211. The Commission would do little to defend against overtly racial normative aims like those Bell feared would run rampant in direct democracy. *See* Bell, *supra* note 53, at 14. It would, however, help mitigate unintended race-based harm that comes from second-order effects. *See infra* Part IV.D.

212. Gais & Benjamin, *supra* note 44, at 1308-11.

the legislature to address the deliberative deficit by determining whether to amend a proposed initiative before placing it on the ballot.[213] To address the legislative conflict-of-interest problem,[214] the authors suggested a commission at step two. The commission would "oversee and ensure the integrity of the process," making sure the legislature faithfully considers and refines an initiative before presenting it to voters. If the legislature did not, the commission would have the power to hold its own evidentiary hearings and present a more faithful version.[215]

Addressing the shortcomings in Gais and Benjamin's proposal,[216] Leonard argues for a commission that would give initiatives' drafters final say whether to adopt any recommendations.[217] But that final say would not be absolute. After drafters determined whether to accept the Leonard commission's recommendations, the commission would hold a final vote. Should it determine by a simple majority that the proposed initiative is not desirable, the measure would need a two-thirds popular vote to become law. If the commission voted in favor of the initiative, it would only need a simple majority from the electorate. As in this Note's proposed Commission,[218] commissioners would also publish majority opinions, concurrences, and dissents. But unlike this Note's Commission,[219] these opinions are not aimed at informing the initiative drafters' efforts to improve the initiative. Instead, they are publicly advocating to voters how they should vote.[220]

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213. *Id.* at 1309-10; *see supra* text accompanying note 134.

214. *See supra* Part III.B.2; *see also* Nick Brestoff, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 935 n.67 (1975).

215. Gais & Benjamin, *supra* note 44, at 1311. Though Gais and Benjamin's proposal addresses conflict-of-interest issues stemming from the legislature addressing the deliberative deficit, it suffers from two key shortfalls. First, because the commission's changes to initiatives would be binding, it would require constitutional revision to adopt this reform in California. *See supra* notes 198-200 and accompanying text. Second, the commission, not the initiatives' drafters, would have the final say over the measures' text. Though the commission would simulate the drafters' preferences better than conventional indirect initiatives alone, it would still be a step removed from the direct-democratic ideal that California's constitution "jealously guard[s]." *See* note 203 and accompanying text; note 43 and accompanying text.

216. *See supra* text accompanying note 215.

217. *See* Arne A. Leonard, *In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change*, 69 TEMPLE L. REV. 1203, 1227, 1229 (1996).

218. *See 2019-2020 Annual Report*, *supra* note 191, at 711; *see also supra* text accompanying note 191.

219. *See supra* text accompanying note 193.

220. *See* Leonard, *supra* note 217, at 1232-33. Leonard's commission poses three conceptual problems. First, though to a lesser extent than Gais and Benjamin's commission, *see supra* text accompanying note 215, its power to impose a two-thirds' vote requirement addresses the deliberative deficit by diminishing the people's initiative power. Second, the commission makes normative, not just technocratic, suggestions. Commissioners then base their final votes at least partly on normative preferences. *See* Leonard, *supra* note 217, at 1227 ("The commission is responsible for . . . voting and expressing opinions on the merits of initiatives . . . ."). The commission therefore takes on a broader role than simply ensuring

Gastil, Reedy, and Wells proposed a third commission-like body to address the deliberative deficit: a Citizens' Initiative Review (CIR). The state would select members of the public at random to serve on the CIR. Members would assess proposed initiatives and make recommendations to the public, deliberating for multiple days and hearing testimony from experts and interested parties.[221] Their findings would serve a similar function to voter-information pamphlets sent out ahead of current California elections.[222] As with Leonard's commission and this Note's Commission,[223] disagreeing members of the CIR can write concurrences and dissents. This allows findings to represent different viewpoints.[224]

Many authors have also advocated for non-commission-based non-traditional reforms to address the deliberative deficit.[225] Some suggest making mandatory the currently optional review processes the Office of Legislative Counsel or the Secretary of State provide.[226] This reform, however, suffers from three limitations. First, it does not address the conflict-of-interest problem because neither of the two bodies are independent.[227] The Secretary of State is

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policy efficacy and mitigating unintended second-order effects. Third, the commission's power to require a two-thirds supermajority from the electorate would fundamentally change the initiative-amendment process. Advocates therefore would need to adopt it by revision. *See supra* text accompanying note 115. Consequently, as with Gais and Benjamin's commission, it is far less likely the state could successfully implement Leonard's proposed reform. *See id.*

221. John Gastil, Justin Reedy & Chris Wells, *When Good Voters Make Bad Policies: Assessing and Improving the Deliberative Quality of Initiative Elections*, 78 U. COLO. L. REV. 1435, 1462 (2007).

222. *Compare id.* at 1464, *with* 2008 Voter Information Guide, *supra* note 4 (listing voter-information-guide examples).

223. *See supra* text accompanying note 220.

224. Gastil, Reedy & Wells, *supra* note 221, at 1464. CIRs maintain broad popular support, making them practically adoptable. *See id.* at 1465. To this point, British Columbia, Ontario, and Oregon have adopted similar bodies. *See Improving Democracy in B.C.*, CITIZENS' ASSEMBLY ON ELECTORAL REFORM (2003), https://perma.cc/3TPU-YYLG (British Columbia); *A New Way to Vote in Ontario*, CITIZEN'S ASSEMBLY ONT. (2007), https://perma.cc/C98L-P7NJ (Ontario); Andy Puthenpurayil, *What is the Citizens Initiative Review Commission?*, MCCOURTNEY INST. FOR DEMOCRACY (2017), https://perma.cc/7F3Z-AUVT (Oregon). Their effect, however, will have limited scope for two reasons. First, CIRs make recommendations at the voting stage, not the drafting stage. Because they leave voters to synthesize their findings, CIRs suffer from similar shortfalls as proposals that increase the electorate's opportunities for its own deliberation. *See supra* Part III.C. Drafting-stage interventions avoid this limitation. *See infra* Part IV.C. Second, like Leonard's commission, CIRs address normative policy disputes, raising similar issues. *See supra* text accompanying note 220.

225. These proposals, however, each have their own limitations. *See supra* text accompanying notes 226-38.

226. *See* Nick Brestoff, Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 935 n.67 (1975).

227. *See id.*; *see also supra* Part III.B.2; Legislature v. Eu, 816 P.2d 1309, 1316 (Cal. 1991) (discussing how an electorate-initiated ballot measure might be the only practical means to reform the legislature, given legislators' inherent conflict of interest).

an executive official reporting to the Governor, not the legislature.[228] But whenever an initiative implicates executive power, the Secretary of State has an analogous conflict of interest to the legislature's. Second, the existing review processes only seek to improve initiatives' language. They do not consider policy substance.[229] Third, mandating review by one of two separate branches of government likely violates separation of powers and constitutes an unconstitutional revision.[230]

Others have called for (1) a legislative analyst to prepare a publicly available policy analysis of each qualifying initiative; and (2) a public hearing so drafters can incorporate electorate input.[231] These reforms largely suffer from the same problems that does mandating legislative- or executive-branch review. First, the conflict-of-interest problem remains because the legislative analyst sits within the legislative branch.[232] Second, though this proposal broadens the scope of initiative review to both "form and substance," it only highlights exemplar states that have most success analyzing measures for "clarity[and] consistency."[233] This Note's proposed Commission, by contrast, would focus on the substantive policy's efficacy and second-order effects. Third, like the above-discussed CIR, these reforms' public-facing focus seeks to enhance the electorate's opportunity for deliberation, not create an independent body to separately provide deliberative benefits.[234]

In a separate vein, some have suggested that Congress, legislating through the Guarantee Clause, should ensure states adopt initiatives through a deliberative process.[235] Regardless of whether this would be a positive additional reform, "the people" of California relying on the federal government to provide deliberation in their initiative process would cede a substantial amount of their "political power . . . . to alter or reform [their government]."[236] The same is true for other states where "the people" retain the political power.[237]

Finally, some have argued states should cabin initiatives to certain subjects, like those that generate the public's interest or do not involve specialized knowledge. A combination of Constitutional, statutory, and judicial limits could

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228. CAL. SEC'Y OF STATE, https://perma.cc/6AFN-89UQ (archived Jan. 20, 2023).

229. *See* note 38 and accompanying text.

230. *See supra* Part III.A.

231. *See* DEMORACY BY INITIATIVE, *supra* note 17, at 18-19.

232. *See supra* text accompanying note 227.

233. DEMOCRACY BY INITIATIVE, *supra* note 17, at 122 (discussing Idaho's and Montana's systems for initiative review).

234. *See supra* text accompanying notes 216-20.

235. *See generally* Catherine Engberg, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569 (2001).

236. *See* CAL. CONST. art. II, § 1.

237. *See supra* text accompanying note 39.

enforce these bounds.[238] Any subject-specific or salience-threshold line-drawing, however, will inevitably be murky and imperfect.[239]

C. Past Constitutional Commissions Providing the Proposal's Foundation

Constitutional commissions have been the method of choice for deliberating and drafting major constitutional changes in California since the early 1900s.[240] Whether or not the electorate adopted their recommendations, the body's familiarity has given it legitimacy. Creating the proposed Commission would only require three steps forward from this tradition. Each would cause little-to-no logistical trouble.

First, the Commission would answer directly to the electorate, whereas prior commissions answered to the legislature.[241] The legislature has historically resisted making this change. But this resistance is due to legislators acting out of self-preservation, not due to a blatant power grab or feasibility concerns.[242] The proposed Commission suggesting changes to initiatives would not systematically encroach on any existing legislative power[243] or any individual legislator's reelection chances. Though individual initiatives might lessen legislative power,[244] other initiatives might increase legislative power.[245] The legislature would not likely resist implementing the proposed Commission for self-interest reasons.

Second, the proposed Commission would review all initiatives, not just constitutional revisions. Initiatives are much more frequent.[246] Currently, the

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238. Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 938 (1988).

239. *See id.*

240. *See Sovereignty*, *supra* note 97, at 743-44 (stating there were four constitutional revision commissions in the twentieth century: in 1930, 1947, 1962, and 1993).

241. *See id*; Revision Commission, *supra* note 151, at 7.

242. *See supra* text accompanying notes 155-58. A direct commission-to-electorate connection is feasible. It is not much different than when a convention puts issues directly to voters. And a convention did not present major logistical issues either time California held one. *See* CAL. CONST. art. XVIII, § 4.

243. While the Office of Legislative Counsel offers a service to review proposed initiatives, *see supra* text accompanying notes 36-38, it only focuses on the initiative's language. This proposed Commission, by contrast, focuses on an initiative's policy ramifications. *See supra* Part IV.A.

244. *See, e.g.*, *supra* Part III.B.2.

245. *See, e.g.*, CAL. SEC'Y OF STATE, 2010 BALLOT PAMPHLET 52-55 (2010) (discussing 2010's Proposition 25, which changed the vote threshold for the legislature to pass the state's budget from two-thirds to a simple majority).

246. There have only been four revision commissions since the last constitutional convention in 1878-1879. *See* Revision Commission, *supra* note 151, at 6. There were, by contrast, twelve propositions on the 2020 general-election ballot alone. *See generally* CAL. SEC'Y OF STATE, TEXT OF PROPOSED LAWS: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 3, 2020, https://perma.cc/9ZU4-2WXE.

Offices of Legislative Counsel and Secretary of State must assist in drafting any *proposed* measure, should its authors request help and there is a reasonable probability it will appear on the ballot.[247] Though the proposed Commission would make review mandatory, it would only apply to measures that actually qualify for the ballot.[248] Further, the average initiative will have much narrower scope than a revision. Each qualifying initiative would therefore take far less time to review.[249] The volume of initiatives the Commission reviews therefore would not compromise the analysis it conducts for each.

Third, the Commission would meet biennially. This is so it could review all initiatives before election day as not to delay the electorate's voting on them.[250] There is a balance to strike though. The Commission should meet far enough in advance of any election to allow further deliberations among its members, required policy research, and appropriate time to draft recommendations. But the body should not meet so far in advance that it hinders drafters' ability to qualifying their measures for an upcoming ballot. Because recommendations themselves will be relatively succinct, however, this is a wide window.[251]

Constitutional commissions have become increasingly normalized across American states. One scholar noted "the commission method has now emerged as the leading mechanism for stimulating state constitutional change."[252] Despite the fact that state constitutions do not explicitly provide for commissions, judicial challenges to their validity have generally failed when states utilize them alongside constitutionally established methods of constitutional change.[253] The proposed Commission would similarly seek to support California's constitutionally enumerated amendment- and statutory-initiative procedures.[254]

The proposed Commission's three deviations from past California commissions find parallels in other states.[255] With respect to the Commission being directly answerable to the electorate, Florida has empowered a similar commission to submit recommendations directly to voters. The body was so popular the state adopted a second with the same powers, focusing specifically

247. *See supra* text accompanying note 36; *see also* CAL. GOVT. CODE §§ 10243, 12172.

248. *See* DEMOCRACY BY INITIATIVE, *supra* note 17, at 354 (discussing why changing California's initiative process to allow for limited post-qualification changes would not require a constitutional amendment).

249. *See supra* Part III.A.2.

250. *See infra* text accompanying notes 265-68 (discussing the California Law Revision Commission (CLRC), which meets annually without logistical or conceptual issues).

251. *See supra* text accompanying note 191.

252. Robert F. Williams, *Are State Constitutional Conventions a Thing of the Past? The Increasing Role of The Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 4 (1996).

253. *Id.* at 22.

254. *See* CAL. CONST. art. XVIII, § 3; *id.* art. II, § 8(a); *id.* art. IV, § 1.

255. *See supra* text accompanying notes 241-54.

on tax and budget reform.[256] Though Florida created these two commissions by constitutional amendments,[257] Utah adopted a standing constitutional commission by statute that considers recommendations directly from the public.[258]

Several other states' commissions have also gone beyond revisions to focus on the full spectrum of methods for constitutional and statutory change. In the nation's first two large-scale state-constitutional commissions, New York and New Jersey appointed bodies to "explore, debate, and entertain" amendments to their respective Constitutions."[259] New Jersey's Commission in particular was "one of the most successful constitutional commissions in history," leading voters to adopt all twenty-eight of its recommended amendments.[260] Many of those amendments were only submitted to voters after significant "modifications" and "deliberations," increasing their efficacy and long-term impact.[261] The New Jersey commission's success considering several varying proposals to a wide range of constitutional provisions shows what success California's expanded Commission could have.

Regarding meeting biennially, the aforementioned Utah Commission has met annually since the state created it in 1969.[262] Additionally, Florida has provided that both its commissions meet every twenty years with standing authorization to act.[263]

California need not create the proposed Commission from scratch. It can expand the current California Law Revision Commission's (CLRC) remit.[264] Created by statute in 1953, the CLRC is an independent state agency that advises

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256. *See* FLA. CONST. art. XI, § 6.

257. *See id.*

258. Williams, *supra* note 252, at 14-15.

259. *See id.* at 7-8 (discussing New York's 1872 and New Jersey's 1873 constitutional commissions).

260. *Id.* at 7.

261. *See id.*

262. Williams, *supra* note 252, at 14-15.

263. FLA. CONST. art. XI, § 2. Like California's constitution, Florida's constitution is one of the most easily amended in the country. Some have pointed to Florida's standing constitutional commission's easy-amendment processes as more deliberative. *See* Robert F. Williams, *Foreword: Is Constitutional Revision Success Worth Its Popular Sovereignty Price*, 52 FLA. L. REV. 249, 552, 258 (2000). Others have recommended California adopt a similar standing revision commission alternating with a standing constitutional convention. One of the two would occur every decade. *See* DEMOCRACY BY INITIATIVE, *supra* note 17, at 22.

264. *See General Information*, CAL. L. REVISION COMM'N, https://perma.cc/2MM2-Y9ZJ (archived Jan. 20, 2023) [hereinafter CLRC]. Members of the CLRC are gubernatorial appointees or members of the state legislature, not directly elected by voters. CAL. GOVT. CODE § 8281. Though a Commission appointed in this way would diminish the body's independence, expanding an existing Commission might be more politically feasible than adopting a new one from scratch. Therefore, the marginal diminution in independence compared to a directly elected body might be a practical reality.

the legislature and governor.[265] It proactively examines California law and recommends reforms based on comprehensive studies, public written comment, and testimony through open public meetings.[266] Expanding the CLRC's role to review initiatives would be straightforward. The electorate votes on a manageable number of propositions each year, only a subset of which are initiatives.[267] And reviewing electorate-drafted initiatives would be a more contained exercise than searching for laws within the entire California Code that would benefit from reform and determining those reforms.[268] Expanding the CLRC's remit would, therefore, not crowd out its other work.

D. Envisioning the Commission in Action

1978's Proposition 13 illustrates how the Commission would help increase initiatives' policy efficacy and mitigate their unintended second-order effects. The measure barred the legislature from raising property taxes for existing homeowners and required a two-thirds legislative vote to raise non-property taxes.[269]

By recommending targeted revisions before Proposition 13 ever reached voters, the Commission could have helped the initiative's drafters address its unanticipated consequences. Commentary from fiscal-policy experts and interested parties whom the initiative most directly affected would have informed these recommendations. The Commission could have recommended ways to mitigate the measure's effect on public-school budgets.[270] Though these recommendations arguably veer into making normative judgments that school budgets should be shielded at all from Proposition 13's taxation limitations, the line between normative and not will never be completely clear. The Commission's recommendations, however, are non-binding. Therefore, drafters have the choice whether or not to adopt the recommendation.[271]

Though drafters could reject recommendations from the Commission, it

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265. CAL. GOVT. CODE §§ 8280-8298.

266. *See* CLRC, *supra* note 264.

267. *See, e.g.*, *supra* text accompanying note 242 (discussing the feasibility of a direct commission-to-electorate connection by analogy to constitutional conventions direct connection with the electorate). Though the electorate itself would not have the time or energy to keep up with researching and understanding this still-varied and -multifaceted set of policy proposals, *see supra* text accompanying note 46, the CLRC's policymaking background and particular focus would give make the task feasible for it.

268. *See* CLRC, *supra* note 264.

269. *See supra* text accompanying notes 176-83.

270. One potential recommendation might have been to permit independent community votes on tax plans for school budgets. New York, for example, holds annual votes where voters decide whether or not to approve their local school district's proposed budget. *See Budget Vote Results*, N.Y. STATE DEP'T OF EDUC., https://perma.cc/NAM3-PNTC (archived Jan. 20, 2023).

271. *See supra* text accompanying note 16.

likely would have been in their best interest to adopt them for two reasons. First, the proposed edits would not seek to alter Proposition 13's goal of stopping property-tax increases from pricing people out of their homes. Second, mitigating the risk of second-order effects could have made the initiative more popular, increasing the *ex ante* likelihood the initiative would end up passing.[272] And though Proposition 13's public campaign did not focus on school funding, there was no way drafters could have known this beforehand.[273] Therefore, adopting the Commission's recommendation would have increased the likelihood the initiative would receive a majority of voters' support.

The Commission also would have helped increase Proposition 13's efficacy. After hearing relevant testimony, the body would have recommended more effective methods to decrease homeowners' property-tax burden. It would have been in the drafters' best interest to accept these recommendations too. Because the Commission would be seeking to serve the drafters' purported goal, there would be little reason to reject the changes.[274]

1994's Proposition 184 illustrates how the Commission could address second-order effects. The initiative implemented California's three-strikes law, which put in place onerous mandatory-minimum sentences for one's third felony conviction as a means of deterring repeat offenders and increasing public safety by removing them from the streets.[275] The initiative, however, had the unintended second-order effect of constraining prison budgets. Though drafters were aware of predictions that total prison population would increase, one largely unanticipated effect of the initiative was an aging prison population.[276] The longer sentences have caused people to be incarcerated later in life. This has increased costs to house them.[277] The Commission could have brought this effect to drafter's attention and suggested ways to minimize the cost.[278]

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272. Though Proposition 13 did pass, *see California Proposition 13, Tax Limitations Initiative (June 1978)*, BALLOTPEDIA, https://perma.cc/YV2M-NPD6 (archived Jan. 24, 2023), drafters could not have known that would be the case when it was first approved to go on the ballot. Given this lack of certainty, there would still be strong incentives to maximize the initiative's popularity beforehand.

273. *See supra* text accompanying note 182; *see also* PARADISE, *supra* note 14, at 147.

274. *See id.*

275. *See* CAL. SEC'Y OF STATE, 1994 BALLOT PAMPHLET 64-65.

276. *See A Primer: Three Strikes - The Impact After More Than a Decade*, LEGIS. ANALYST'S OFF. (Oct. 2005), https://perma.cc/YAE9-8ZL3.

277. *See id.* ("As inmates age, the cost of housing them increases due to age-related illness and the associated health care costs, as well as the security and transportation costs of moving these inmates between prisons and local hospitals."). It costs up to three times as much to house an elderly inmate than the average inmate. *Id.*

278. One suggestion could have been to include provisions directing the California Department of Corrections and Rehabilitation to build specific facilities for aging populations, taking advantage of economies of scale with respect to healthcare, security, and transportation. *See id.* ("[T]he state has not built any new prisons specifically for striker inmates."). Another suggestion could have been decreasing the elderly inmate population by expanding eligibility

2020's Proposition 22 is a more recent example illustrating how the Commission could address policy efficacy. The initiative classified app-based rideshare and delivery drivers as "independent contractors," instead of "employees," under which meaning companies would not have to pay costs to provide standard employee benefits and protections.[279] In these protections' place, the initiative implemented a list of specifically defined replacement benefits.[280] Rideshare and food-delivery companies put the initiative on the ballot to overrule the effects of a then-recently passed statute classifying these drivers as employees.[281] Rideshare companies' intended policy aim was to avoid substantial cost increases and to pass those costs onto consumers.[282] Spending a record $224 million on the campaign, proponents successfully passed the measure.[283]

Under a year after voters adopted Proposition 22, a trial court found it violated California's constitution by impeding the legislature's "plenary" authority to regulate worker's compensation.[284] Though the initiative remains in effect pending appeal, the lower-court ruling has injected substantial uncertainty and legal costs into the legal regime proponents spent $224 million dollars to implement.[285] This Note's proposed Commission could have increased policy efficacy by helping sidestep this issue altogether. It would ideally have advised

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for California's "Elderly Parole Program," to second- and third-strike inmates, who are now exempt from consideration. *See* CAL. PEN. CODE § 3055 (2021) (providing parole eligibility to certain inmate populations over fifty that have been incarcerated for over 20 years).

279. CAL. SEC'Y OF STATE, 2020 OFFICIAL VOTER INFORMATION GUIDE, *supra* note 4, at 56.

280. These benefits comprised an "earnings minimum" of 120% of the local minimum wage, a health-insurance stipend, the employer paying for costs when the driver gets injured on the job, a "rest policy" prohibiting more than 12-hour periods of work within a 24-hour period, and a set of protections to prohibit discrimination and promote driver safety. *Id.* at 57.

281. *See* Sara Ashley O'Brien, *The $185 Million Campaign to Keep Uber and Lyft Drivers as Contractors in California*, CNN (Oct. 8, 2020, 11:17AM EDT), https://perma.cc/9GKC-RN75; CAL. LAB. CODE §§ 3351, 2750.3 (2019).

282. CAL. SEC'Y OF STATE, 2020 OFFICIAL VOTER INFORMATION GUIDE, *supra* note 4, at 57-58. The initiative also purported to protect driver flexibility and independence. *See id.* at 57. But those opposing the initiative disputed how genuine this additional policy aim was. *See id.* at 58-59.

283. Brian Chen & Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional.*, NAT'L EMP. L. PROJECT (Sept. 16, 2021), https://perma.cc/V3ES-S7LL.

284. Castellanos v. California, Case No. RG21088725, 2021 WL 3730951 at *1-4 (Cal. Super. Ct. Aug. 20, 2021).

285. *See* Max Kutner, *Gig Workers Await Judicial Action In Prop 22 Limbo*, LAW360 (Aug. 23, 2022), https://perma.cc/GE92-8K4H. On top of mere uncertainty, the litigation risks forcing liability for backpay on drivers. *See id.* Though one might argue the ruling shows a place for the judiciary in addressing these types of concerns, it is unclear the appellate court will uphold the lower-court ruling. In their appeal, initiative proponents have cited cases discussing courts' duty to harmonize seemingly unconstitutional initiatives, not repeal them. *See id.*; *see also supra* text accompanying notes 131-33.

drafters regarding the constitutional concerns and recommended a proposed solution.[286] Doing so would have avoided the initiative's judicial limbo and costs of the past year, allowing for its more efficacious implementation.

By contrast to the above three examples, 2008's Proposition 8 illustrates the normative issues the Commission would not seek to address. The initiative, defining marriage as between a man and a woman, was straightforward and affected a policy area most voters' common knowledge and understanding made them familiar with. There were no significant efficacy or second-order effects to consider other than those immediately obvious to the electorate.[287] This contrasted with laws outlining the precise benefits couples would receive in a non-marital civil unions.[288] Therefore, a deeper technocratic analysis would have provided marginal benefit to Proposition 8. The only significant determination voters needed to make was normative: how should society define marriage.[289] This question sits outside the Commission's remit. The California legislature, by contrast, has proven relatively adept at forming coalitions in other contentious social-policy debates.[290] It may more effectively supplement deliberation, through methods like an indirect initiative or referendum, than would the proposed Commission.[291]

CONCLUSION

California's experience highlights the structural tension between deliberation and the initiative process, both of which form the foundation of the state's systems of governance. With one of the most salient initiative processes in the country, California often sets a path other states follow.[292] Nationally, the number of initiatives has more than quadrupled since the 1970s, becoming a major force in creating public policy.[293] California offers the entire nation

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286. For example, the Commission might have recommended a second companion constitutional initiative to limit or redefine the legislature's "plenary" authority to allow certain limitations be implemented via initiative statute. *See Castellanos*, 2021 WL 3730951, at *1-4.

287. *See supra* text accompanying notes 186-87.

288. *See, e.g.*, AB 26, 1999-2000 Assemb., Reg. Sess. (Cal. 1999) (defining the contours of legal rights for non-marital civil unions in California).

289. *See supra* text accompanying notes 186-87.

290. *See supra* Part III.B.1.

291. This point might not be extrapolatable to all other states. Congress and swing-state legislatures have proven less adept at deliberating across racial lines on issues of racial tension. *See supra* text accompanying notes 140-41.

292. *See, e.g.*, PARADISE, *supra* note 14, at 9-10, 16-17 (discussing how California's populist tax revolt, culminating in Proposition 13, helped pave the way for similar state-level initiatives across the country and federal anti-tax policies); *id.* at 9, 17 (discussing the same trend for stricter criminal-sentencing laws, culminating in 1994's Proposition 184—California's three-strikes law).

293. BALDASSARE & KATZ, *supra* note 33, at 38.

lessons. It is both a leader in the use-of-initiatives pack and an exemplar of the difficulties of directly engaging a broadly diverse population in a deliberative policymaking process.[294]

The initiative process's deliberative deficit is not a unique problem to California. State judiciaries across the country are highly deferential to the electorate. Twenty-two state constitutions explicitly recognize that "all political power is inherent in the people" and thirty-five explicitly recognize the right of "the people" to "alter," "reform," "modify," or "abolish" their constitutions and governments.[295] Examples abound showing state courts using these provisions as justification to construe the initiative power liberally.[296] For state legislatures nationwide, the same conflict-of-interest[297] and deliberation-eroding[298] limitations are endemic. And as for the electorate itself, cross-country studies show other states have the same limitations as California.[299] The proposed Commission is therefore applicable for other states too.

State constitutional law plays an increasingly large role governing our daily lives and defining our most fundamental rights.[300] Broad legislative grants of emergency powers have recently caused controversy, leading some to claim that initiatives are a potential path to curb such powers.[301] This makes addressing the

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294. *See id.*

295. Bulman-Pozen & Seifter, *supra* note 42, at 869-70 (discussing state constitutions' textual commitments to popular sovereignty).

296. *See* Bulman-Pozen & Seifter, *supra* note 42, at 924-26 (discussing state courts in Maine, Michigan, South Dakota, Missouri, Washington, and California applying generous constructions, termed a "direct-democracy canon").

297. *See, e.g.*, JONATHAN WINBURN, THE REALITIES OF REDISTRICTING: FOLLOWING THE RULES AND LIMITING GERRYMANDERING IN STATE REDISTRICTING 9 (2008) (discussing the need for state-constitutional restraints to limit partisan gerrymandering in state elections).

298. *See generally* Boris Shor, *Polarization in State Legislatures*, *in* AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 203, 203-221 (2015) (discussing how polarization has been increasing in state legislatures across the country, leading to legislative gridlock and unilateral policymaking by governors); Rodney E. Hero & Caroline J. Tolbert, *A Racial/Ethnic Diversity Interpretation of Politics and Policy in the States of the U.S.*, 40 AM. J. POL. SCI. 851, 851-52 (1996) (finding levels of racial and ethnic diversity explain large portions of varying political cultures across states); BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 66-70 (2001) (discussing how legislative incumbents have incentives to create campaign-finance laws that most entrench their advantage).

299. *See, e.g.*, Lascher, Hagen & Rochlin, *supra* note 69, at 771-73 (discussing how "more extensive use of the [initiative] process" would not change the fact that "individual voters have difficulties monitoring legislative behavior, and are unlikely to follow state politics closely").

300. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 5-6 (2013) (discussing state constitutions' role in defining positive rights); William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (discussing state constitutions' role in defining negative rights).

301. *See, e.g.*, *In re* Certified Questions from the District Court, Western District of Michigan, Southern Division, 958 N.W.2d 1, 51 (Mich. 2020) (McCormack, C.J., dissenting

deliberative deficit all the more critical as states utilize initiatives as a vehicle for direct democracy.

in part) (noting, in a judicial challenge to the governor's statutory emergency powers during the COVID-19 pandemic, that Michigan voters can repeal or amend the statutory powers via initiative).