

NOTE

The California Constitution and the Counter-Initiative Quagmire

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Introduction

Everyone is familiar with the way Main Street looks before an election, plastered with the signs of hopeful candidates in bright colors with catchy slogans. But someone new to California might wonder at the numerous political signs which seem to be in code; "YES on 172—it's for kids," or "NO on 81—Stop the Drilling." Of course, the experienced California voter just groans and wonders what the ballot initiative issue of the moment may be. Initiatives are a common way of enacting legislation in California and many other states.¹ Initiatives are pieces of proposed legislation placed on the ballot by collecting the requisite number of signatures of registered voters, and which are voted upon directly by citizens.² The California initiative particularly has long been known as the starting point for national political trends.³ From Proposition 13,⁴ which started the nation-wide tax revolt by freezing property taxes in the 1970s, to Proposition 103,⁵ designed to control the skyrocketing costs of auto insurance in the 1980s, to Proposition 140,⁶ the enactment of term limits for state legislators in 1990, national movements have begun at the California polls.⁷

The initiative process has always had critics among intellectuals who think that allowing citizens to vote directly on legislation funda-

1. LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST?* 16-18 (1984).

2. CAL. CONST. art. II, § 8.

3. James A. Barnes, *Losing the Initiative*, NAT'L J., Sept. 1, 1990, at 2046.

4. *See Arguments and Text of Proposition 13*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION (1976).

5. *See Arguments and Text of Proposition 103*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 98-101, 140-44 (1988).

6. *See Arguments and Text of Proposition 140*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 68-71, 137-38 (1990).

7. Barnes, *supra* note 3, at 2047.

mentally undermines representative democracy.⁸ This criticism has become more broad based in the last five to ten years, however, and large numbers of California voters can now be numbered among the critics of the initiative process.⁹ Unfortunately, there is good reason for this increased criticism. Not only are initiatives becoming more numerous, more complex, and more often the target of million dollar campaigns,¹⁰ but these problems have increased geometrically due to the introduction of a new political strategy, the counter-initiative.¹¹

Counter-initiatives are measures drafted by businesses, industry groups, or occasionally by rival citizen groups in response to an initiative already undergoing the ballot qualification process.¹² When groups hear of a ballot initiative they dislike, they simply draft a measure they find more palatable and begin gathering signatures. A counter-initiative may contain provisions that differ only slightly from the original initiative, it may be composed of completely dissimilar legislation on the same subject, and it may occasionally contain quite deceptive reforms.¹³ For example, in 1990, a group of environmental organizations presented the Big Green Initiative, a three-part environmental protection and regulation measure.¹⁴ Chemical manufacturers circulated a counter-initiative which addressed only the pesticide provisions and advertised it as a "pesticide safety measure."¹⁵ In the seventies and eighties, citizen groups saw increased their use of the initiative after discovery that it was an effective way to circumvent legislatures unwilling or unable to pass controversial legislation.¹⁶ As a response, in the 1980s, corporate interests that opposed many measures sponsored by citizen groups discovered the counter-initiative to be a useful and affordable tool to undercut popular initiatives.¹⁷

In addition to severely burdening the initiative process, counter-initiatives also place a huge burden on the judiciary. When two or

8. See generally Tim Schreiner, *Angry Public Likely to Vote 'No' a Lot*, S.F. CHRON., Nov. 6, 1990, at A1, A10 (quoting Preble Stolz).

9. *Initiatives: The Monster That Threatens California Politics; Out of Control, the Process Itself Now Needs to be Reformed*, L.A. TIMES, Nov. 12, 1990, at B4 [hereinafter *Initiatives*] ("A recent Times Poll found that the public has its own strong reservations about the initiative business. . . . [M]ore than seven in ten Californians think the initiative process has 'gone out of control.'").

10. CALIFORNIA COMM'N ON CAMPAIGN FIN., *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 10, 15 (1992).

11. *Id.* at 271.

12. *Id.* at 180-81.

13. *Id.* at 181 n.26.

14. See *Arguments and Text of Proposition 128*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 22-23, 74-84 (1990).

15. See *Arguments and Text of Proposition 135*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 48-51, 121-23 (1990).

16. *Id.* at 59-63.

17. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 180-81.

more initiatives with contrary provisions receive a majority of votes, courts must decide which of the provisions of the various measures will become law. Review of initiative measures places the judiciary in a delicate position: Courts must walk a fine line between upholding the will of the public and preventing unworkable laws, which cannot later be significantly altered by the Legislature, from going into effect.¹⁸

The review of counter-initiative measures first came before the California Supreme Court in *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*.¹⁹ In *Taxpayers*, two 1988 campaign-reform initiatives containing different proposals were passed by the electorate.²⁰ The court attempted to resolve the dilemma presented by these opposing initiatives by holding that when two conflicting measures receive an electoral majority on the same ballot, only the measure receiving the higher number of votes will take effect. The approach adopted in *Taxpayers* is the method the courts currently employ. However, this approach does not produce satisfying results.

This Note addresses the *Taxpayers* approach to counter-initiatives and alternatives. Part I of this Note sets out various problems with the initiative process—the increase in the number and complexity of initiatives, the professionalization of the initiative qualification process, the immense amount of money spent on initiative campaigns—and explores the role that the counter-initiative plays in exacerbating these problems. Counter-initiatives increase the number of initiatives on the ballot, increase the need for expensive advertising campaigns to distinguish measures from one another, feed the signature-gathering companies which exist simply to qualify ballot measures, and, most importantly, complicate the issues to the point where it is almost impossible for a voter to cast an informed and well-considered vote.

Part II examines one particular counter-initiative situation, the 1988 campaign finance reform battle between Propositions 68 and 73. These competing initiatives were separately qualified for the ballot and both were passed. It then fell to the courts to review the two initiatives and determine if and how either would become law.

Part III analyzes the way in which initiative measures are generally reviewed in California, while Part IV explores the method of judicial review applied specifically to counter-initiative measures in the context of Propositions 68 and 73. Part IV also analyzes the California Supreme Court's decision in *Taxpayers*, which established that

18. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506-07 (1989).

19. 799 P.2d 1220 (Cal. 1990).

20. Richard C. Paddock & Douglas Shuit, *2 Measures on Campaign Funding Lead*, L.A. TIMES, June 8, 1988, at A1.

under section 10(b) of the California Constitution, when two competing initiatives are passed by the voters, only the initiative receiving the greater number of votes may take effect. Part IV finally critiques the court's rationale for the decision and the court's unwillingness to combine various provisions of two counter-initiative measures into one law.

Part V examines judicial review of counter-initiatives after *Taxpayers*. The *Taxpayers* decision has created confusion regarding judicial review of counter-initiatives and has been avoided by later courts.

Part VI proposes that, in order for the initiative process to remain a viable political tool in California, a clear standard of judicial review needs to be set forth, preferably one leading the courts to engage in close scrutiny of the intent of the drafters of counter-initiatives. Some relatively simple legislative reforms would also help greatly in alleviating the problems caused by counter-initiatives. The California judiciary, however, needs to apply a more rigorous level of scrutiny to counter-initiative measures regardless of legislative changes.

The flaws in the initiative process leave it open to abuse by dominant and powerful groups.²¹ The court must recognize the potential for the exploitation of the initiative process by groups who seek only to cancel a competing measure. It should analyze the intent of the measures' drafters, particularly when these measures have been qualified solely as a response to another initiative. The California initiative faces long-term problems, and if it is to retain its function as a valuable electoral tool, the judiciary must take a more active role in guarding the initiative process.

I. Problems with the Initiative Process in California

A. The History and Significance of the Initiative

Most Californians seem to regard voting by initiative as a sacrosanct right, slightly below life and liberty.²² This depth of attachment is surprising considering that the initiative has only existed in California for eighty-two years.²³ Initiative, referendum, and recall procedures came to California as part of a package of twenty-three

21. See Eule, *supra* note 18, at 1555-56.

22. See A.D. Ertukel, *Debating Initiative Reform: A Summary of the Second Annual Symposium on Elections at The Center for the Study of Law and Politics*, 2 J.L. & POL. 313, 331-34 (1985). A 1982 California Poll by the Field Institute found that eighty percent of people polled regard statewide propositions as good for California while only six percent saw them as bad. "Direct democracy is a sacred part of politics and governance in California, and despite the problems cited . . . anything other than technical changes will be bitterly resisted." *Id.* at 331.

23. LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *supra* note 1, at 23 (1984).

measures presented to the voters in a 1911 special election.²⁴ Taken together, the first initiative measures constituted a broad sweep at reform by the newly elected progressive government.²⁵ Subjects ranged from women's suffrage to regulation of railroads and utilities to improved oversight of judicial elections.²⁶

The initiative²⁷ gives Californians a direct voice in lawmaking and provides an outlet for voter outrage.²⁸ It also educates and mobilizes the public on specific issues,²⁹ and allows citizen groups to circumvent special-interest dominated legislatures.³⁰ The initiative also acts as a political bargaining tool. A citizen group's threat to utilize the initiative may be enough of a bargaining chip to either bring about legislative compromise or force the legislature to deal with issues it had previously been unwilling to tackle.³¹ In California, the initiative has spurred legislative action in such areas as nuclear safety,³² agricultural-worker safety,³³ and forest protection.³⁴ When the state legislature is unwilling or unable to deal with issues, the initiative process "extend[s] the range of voices we hear in a democracy," giving a forum to groups and individuals whose views are often not heard in mainstream democratic legislative systems.³⁵

24. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 41. The right to independently adopt or reject legislation by popular vote, not subject to a gubernatorial veto, was itself incorporated into the state constitution by vote of the people. *Id.* at 42.

25. See JOHN H. CULVER & JOHN C. SYER, *POWER AND POLITICS IN CALIFORNIA* 30-31 (1980).

26. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 41.

27. Unless otherwise specified, "initiative" includes initiatives, referendums, elections and recalls.

28. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 71.

29. See Ertukel, *supra* note 21, at 332; see also Steven De Salvo, *Celebrities Stump for Clean Water*, UPI, Sept. 28, 1986. In the 1986 election, supporters of Proposition 65, the anti-toxics initiative, organized a "Clean Water Caravan" bus tour which traversed the state relying on celebrities to attract voters. *Id.* The tour received a great deal of local media coverage, and became a precursor to the bus tours of the 1992 presidential campaign, which are partially credited for solidifying the lead Bill Clinton held in the wake of the Democratic Convention. See Timothy Clifford, *Clinton's Road to the White House*, NEWSDAY, Nov. 5, 1992, at 24.

30. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 71.

31. CULVER & SYER, *supra* note 25, at 75.

32. *Id.*

33. *Id.*

34. See Elliot Diringer, *Timber Bills Spawn New Hostilities*, S.F. CHRON., Jan. 27, 1992, at A17. H. A. Arbit, the main backer of the failed Proposition 130 forest protection measure, decided not to submit the signatures gathered for requalification of the initiative in return for passage and signature of a group of less stringent timber protection bills dubbed the "Grand Accord." *Id.* at A18.

35. Ertukel, *supra* note 22, at 332.

The initiative also gives voters a sense of power by enabling them to circumvent the government and politicians.³⁶ As one commentator expressed it: "I have a real love affair with the initiative process. I think most Californians do. I think maybe the initiative process is providing a nice catharsis for people in terms of feeling like they are a real part of the process."³⁷ Popular frustration with government in the 1990s is at record levels,³⁸ echoing the populist outrage which brought the initiative into being. Voters nationwide have acted on their frustration by implementing term limits³⁹ and supporting candidates perceived to be political outsiders.⁴⁰ While California voters are beginning to perceive the initiative *process* as out of control,⁴¹ the initiative *power* remains a valued weapon in expressing their frustration against entrenched politicians.⁴²

B. Problems With the Initiative Process

Despite voters' appreciation of direct democracy and the unique checks it places on special interests, many commentators today claim that when the Progressives created the initiative power, they unleashed a monster.⁴³ Critics argue that the initiative power, originally conceived of as a way to give citizens a direct hand in government, has become a self-supporting industry and a tool for special interests.⁴⁴

36. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 71.

37. Ertukel, *supra* note 22, at 334 (quoting George Young).

38. See Kevin Phillips, *For an Angry Electorate, Perot Emerges as Answer*, L.A. TIMES, May 31, 1992, at M1.

39. Jennifer Warren, *State Joins Near Sweep for the Term Limits*, L.A. TIMES, Nov. 4, 1992 at A1, A26 ("[L]ook[s] to be a 14 state sweep . . . on term limits.").

40. Patt Morrison, *Women Assess the Spoils of Victory*, L.A. TIMES, Nov. 6, 1992 at A3, A39 ("Among the elements that made women more electable this year [was] . . . a preference for 'outsiders'."). The main expression of this frustration has been the passage of both state and federal term limits by initiative, not only in California but in fourteen other states. *Id.* Paul Feldman, *In the Senate, It's Also the Year of the Democrat*, L.A. TIMES, Nov. 9, 1992, at A3 (noting that 31 percent of voters voting for both Boxer and Feinstein cited the need to bring change to Washington as a major influence in their decision).

41. *Initiatives*, *supra* note 9 ("A recent Times Poll found that the public has its own strong reservations about the initiative business. . . . [M]ore than seven in ten Californians think the initiative process has 'gone out of control.'").

42. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 71; Ertukel, *supra* note 22, at 334. See also Cathleen Decker & Paul Jacobs, *California Elections: Mix of Fear, Frustration Bring Strong Voter Discontent*, L.A. TIMES, Nov. 8, 1990, at A3, A43 ("In a September survey by the Times, voters blamed the Legislature for 'failing to do its job' and, in effect, forcing issues to be dealt with by initiative. Against that backdrop, voter approval of Proposition 140, the term limits initiative, seemed predictable.").

43. Eugene C. Lee, *Hiram Johnson's Great Reform is an Idea Whose Time has Passed*, 31 PUB. AFF. REP. NO. 4, at 1 (1990) ("[T]he initiative, instead of serving as a safety valve, has become an uncontrolled political force of its own.").

44. See generally Ertukel, *supra* note 22, at 313.

Criticism of the initiative process focuses on four areas. First, the rapidly increasing number of measures on each ballot is a cause for concern.⁴⁵ Second, the recent trend toward multiple and complex initiatives is making it more difficult for voters to make intelligent decisions.⁴⁶ Third, the rise of an "initiative industry," consulting companies whose sole business is qualifying measures for the ballot, has made it almost impossible to qualify an initiative without the assistance of a professional political group.⁴⁷ Finally, the lack of campaign spending limits and the one-sided spending in many initiative campaigns distorts the voters' understanding of various measures.⁴⁸

1. *Initiatives, Initiatives Everywhere*

A comparison of the phone book sized ballot pamphlets of recent years with the more moderate epistles of ten or twenty years ago indicates how rapidly the amount of initiatives has increased.⁴⁹ From 1911 until World War II, thirty to thirty-five initiatives qualified for the California ballot each decade.⁵⁰ Between 1960 and 1969 only nine measures qualified.⁵¹ In contrast, the 1992 California general election ballot alone contained thirteen measures.⁵² If the number of initiatives qualifying for the ballot continues to grow at the pace of the last twenty years, seventy-five to one hundred initiative measures could easily qualify during the 1990s.⁵³ It is easy to see the obstacles that voters face in attempting to educate themselves about issues which range from the profound to the obscure in each election cycle.⁵⁴ Yet this increase in the number of initiatives is only one factor contributing to the initiative morass.

45. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 10.

46. *Id.*

47. *Id.* at 12-13.

48. *See* CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 14.

49. Eule, *supra* note 18, at 1508 (relating how, upon moving to California, Professor Eule mistook his ballot pamphlet for the phone book.).

50. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 54.

51. *Id.*

52. *See* California Ballot Pamphlet: General Election 4-6 (1992).

53. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 55 table 2.1.

54. Schreiner, *supra* note 8 ("The 224 page [1990] voter ballot pamphlet is two volumes thick and almost requires a master's degree to comprehend."). Initiative provisions range from the vast fiscal impact of Proposition 13's tax reform to obscure matters such as whether property tax exemptions should be extended to spouses of persons killed in combat. *See Argument and Text of Proposition 13*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 28-31 (1976); *Argument and Text of Proposition 160*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 28-31, 68 (1992).

2. *The Increased Complexity of Initiative Measures*

A more significant problem than the actual number of initiatives is the complexity of issues they now address. Detailed statutory reforms on subjects as varied as auto insurance, property tax, and criminal justice have been enacted by initiative in the last fifteen years.⁵⁵ Other complex measures on environmental protection and campaign financing have been qualified for the ballot but defeated by the electorate.⁵⁶

The increased complexity of initiative measures is primarily the result of the state legislature's inability to pass comprehensive legislation on many subjects.⁵⁷ For nineteen of the past twenty-five years, the legislative and executive branches in California have been controlled by opposing political parties, making it virtually impossible to accomplish significant goals through the legislative process.⁵⁸ Various groups have turned to the initiative as a logical alternative to legislative action on a broad range of issues.⁵⁹ Many successful initiatives in the last fifteen years contained proposals first attempted in the legislature.⁶⁰ The property tax revolt of Proposition 13 and the auto insurance rate reductions of Proposition 103 were both qualified for the ballot after less drastic legislation had repeatedly failed to pass in the legislature.⁶¹

One cause of both the increased numbers and increased complexity of initiatives is politicians' use of initiatives to enact pet legislation.⁶² Governor Pete Wilson has repeatedly used this approach, successfully repealing many state constitutional protections for criminal defendants with the 1990 Victims' Bill of Rights,⁶³ and unsuccessfully attempting to alter the state welfare system significantly with

55. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 58 Table 2.4.

56. *See Arguments and Text of Proposition 128*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 22-23, 74-84 (1990); *Arguments and Text of Propositions 68 and 73*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 12-15, 34-35, 52-56, 63 (1988).

57. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 59-61.

58. *Id.*

59. Bill Bradley, *Initiatives Become a Political Tool—and a Big Business*, CAL. BUS., Feb. 1990, at 19. As political consultant David Townsend noted, "[i]t's now the main way to get big things done here." *Id.*

60. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 59-61.

61. *Id.* at 59, 61.

62. *See* Joel Fox & Harvey Rosenfield, *The People's Initiatives are Under Heavy Assault*, L.A. TIMES, Aug. 23, 1991, at B7 ("Legislators love the initiative process when it serves their own purposes. Of the 28 measures on the ballot last November, 22 were sponsored by legislators or elected officials.").

63. *See Arguments and Text of Proposition 115*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION, 32-35, 65-69 (1990); CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 63 Table 2.6.

Proposition 165 in 1992.⁶⁴ Former California Attorney General John Van de Kamp used three initiatives as a political platform in his unsuccessful bid for Governor in 1990.⁶⁵ Also in the 1990 election, Assemblymen Lloyd Connolly sponsored an alcohol tax measure that he had repeatedly attempted to get through the legislature, and Lieutenant Governor Leo McCarthy sponsored a sales tax increase to fund drug treatment programs.⁶⁶ One veteran consultant has observed that “[i]nitiatives are becoming the candidates’ issue papers.”⁶⁷ The failure of the state legislature to enact certain legislation has led politicians to resort to the initiative process themselves.

3. *The Initiative Industry*

The growing number of initiatives qualifying for the ballot each year has resulted in part from the growth in size and sophistication of companies which specialize in initiative qualification. These companies pay employees to gather the requisite number of signatures of registered voters within the allotted time.⁶⁸ While voter attitudes toward a given initiative will affect the ease with which signatures may be gathered, money and professional signature-gathering services are a virtual necessity to ensure a measure will qualify for the ballot.⁶⁹ Nearly a decade has passed since volunteer efforts alone gathered sufficient signatures to qualify an initiative.⁷⁰

The experience of the qualification of a recent forest protection measure illustrates this new dependence on professional signature-gathering services. Proposition 130,⁷¹ known as ‘Forests Forever,’ was

64. *See Arguments and Text of Proposition 165, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION*, 46-49, 72-79 (1992).

65. CALIFORNIA COMM’N ON CAMPAIGN FIN., *supra* note 10, at 62. The measures included Proposition 128—the Big Green initiative—co-sponsored with various environmental groups, Proposition 131, dealing with term limits and campaign finance reform, and Proposition 129, which closed a budgetary loophole in order to obtain funding for increased drug enforcement.

66. *See Arguments and Text of Propositions 133 and 134, California Ballot Pamphlet: General Election* 40-47, 117-21 (1990); CALIFORNIA COMM’N ON CAMPAIGN FIN., *supra* note 10, at 63 Table 2.6.

67. Bradley, *supra* note 59, at 19 (quoting Los Angeles media consultant Sidney Galanty).

68. CALIFORNIA COMM’N ON CAMPAIGN FIN., *supra* note 10, at 126 (requisite number must be gathered in 150 days); CAL. CONST. art. II, § 8(b) (initiative measure qualifies by presenting signatures of registered voters equalling five percent of the number of registered voters at the time of the most recent gubernatorial election for a statute and eight percent for a constitutional amendment).

69. CALIFORNIA COMM’N ON CAMPAIGN FIN., *supra* note 10, at 157.

70. *Id.* at 145.

71. *See Arguments and Text of Proposition 130, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION* 28-29, 94-101 (1990).

circulated in the spring of 1990.⁷² During this period, media attention was focused on environmental issues,⁷³ culminating in the twentieth anniversary of Earth Day and best-seller status for environmental manuals such as *50 Simple Things You Can Do To Save the Earth*.⁷⁴ The measure addressed only forest preservation and was quite straightforward.⁷⁵ The appeal of the issue should have enabled supporters to mobilize hundreds of volunteers, but even with these factors operating in its favor, supporters spent \$828,730 on signature gatherers to ensure qualification.⁷⁶

While the popular appeal of an initiative remains a factor in the cost of qualification, "[b]allot qualification can reasonably be assured at \$500,000 and guaranteed at a price tag of \$1 million or more."⁷⁷ Political professionals have so thoroughly insinuated themselves into the initiative process that not only is their participation essential to qualify an initiative measure, but they can assure qualification of any measure for the right price.⁷⁸

4. Initiative Campaign Spending

A problem closely related to the need for paid signature gatherers is the absence of limits on campaign contributions in initiative campaigns. Unlike campaigns for political office where contribution limits have become fairly common,⁷⁹ contributions to initiative campaigns are unlimited in every state.⁸⁰

In *First National Bank v. Belotti*,⁸¹ the United States Supreme Court held that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a

72. Carl Nolte, 'Forests Forever' Initiative on Ballot, S.F. CHRON., June 15, 1990, at B7.

73. Kevin Brass, *Planet Heats Up as Media Issue*, L.A. TIMES, Mar. 20, 1990, at F1.

74. JOHN JAVNA & JULIE BENNETT, *50 SIMPLE THINGS YOU CAN DO TO SAVE THE EARTH* (1990); Tim Ward, UPI, July 30, 1990 (noting bestseller status).

75. See *Arguments and Text of Proposition 130*, *supra* note 71.

76. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 152 Table 4.3. Proposition 128, the Big Green Initiative, probably came as close as possible to an all volunteer qualification effort. Only \$24,651 was spent on paid circulators. *Id.* Even those circulators were grassroots activists working to qualify all three measures sponsored by gubernatorial candidate Van de Kamp. However, Big Green was uniquely lucky in its timing and the speed with which volunteers were able to be organized by the sponsoring environmental groups. Telephone Interview with Duane Peterson, Press Secretary, Yes on 128—Big Green (Nov. 10, 1993).

77. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 160.

78. *Id.*

79. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976); Federal Elections Campaign Act, 2 U.S.C. § 441(a)-(g) (1992) (FECA imposes contribution limits on all federal elections).

80. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 291.

81. 435 U.S. 765 (1978).

public issue."⁸² Although the Court has allowed restrictions on contributions to candidate campaigns on the ground that they maintain the integrity of individual politicians, the Court has been unwilling to impose contribution restrictions on initiatives, finding no corresponding risk of corruption.⁸³

The lack of spending limits in initiative campaigns does have an impact on election results and, contrary to the Court's finding in *Belotti*, arguably does harm the integrity of the initiative electoral process.⁸⁴ Fundraising in initiative campaigns is often extremely unbalanced.⁸⁵ While an industry campaign may have a multi-million dollar budget, a citizen group may be struggling to pay a press spokesperson's salary.⁸⁶ In the eighteen highest spending initiative campaigns since 1956, 83% of all contributions have come from business interests.⁸⁷ Large contributions by corporate donors are particularly effective when spent *opposing* an initiative.⁸⁸ Large contributions allow anti-initiative 'NO' campaigns to launch television advertising blitzes that exaggerate the effects of the proposed measures.⁸⁹ This tactic not only places supporters of an initiative on the defensive, but also allows dubious charges to go unanswered because supporters cannot afford the advertising necessary to rebut such exaggerations.⁹⁰ Advertising may have an even greater influence on voters in an initiative campaign than in a race for political office because the voters have nothing but the ballot pamphlet and advertisements upon which to base their decision.⁹¹ While advertising does play a pivotal role in swaying public opinion in the election of public officials, at least in a candidate elec-

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

83. *Id.* at 788 n.26.

84. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 288 (discussing BETTY ZISK, MONEY, MEDIA AND THE GRASSROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS (1987)) (noting that spending has been found to be the single biggest predictor of initiative electoral success).

85. *Id.* at 273. The campaign against Proposition 128 received \$947,000 from Atlantic Richfield, \$812,000 from Chevron and \$600,000 from Shell, as well as between \$100,000 and \$500,000 from 26 chemical companies, including Dow and Monsanto. Much of this money was donated in the closing days of the campaign with little time for voters to react to financial disclosure statements. Telephone Interview with Duane Peterson, *supra* note 76.

86. See CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at Appendix F: Data Analysis Project 390-427.

87. *Id.* at 270.

88. Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 545 (1982).

89. *Id.* at 533-42.

90. *Id.* It costs between three and five hundred thousand dollars to purchase television advertising in the Los Angeles media-market depending on how much time is purchased. Telephone Interview with Duane Peterson, *supra* note 76.

91. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 198-99.

tion, voters have other sources of information to turn to in making their decisions. The guidance of political parties,⁹² the past record of a candidate, or simply the candidate's personality are all absent as decision making factors in initiative campaigns.⁹³ Unbalanced spending distorts issues and makes it virtually impossible for even an astute voter to make knowledgeable decisions on complex initiatives.

C. The Development of the Counter-Initiative Strategy

The problems facing the initiative process have been magnified by the development of a particular political strategy: placing two conflicting initiatives, or counter-initiatives, on the ballot simultaneously. While the subject matter of initiatives have always had some overlap, in the mid-1980s, groups started strategically qualifying measures that explicitly contradicted another measure.⁹⁴ Counter-initiatives first gained extensive public attention in the 1988 auto insurance initiative free-for-all, when four competing measures were on the same ballot.⁹⁵

While the one-half to one million dollar price tag for drafting and qualifying an initiative measure may be daunting to citizen groups and grassroots organizations,⁹⁶ for corporations or industry groups opposed to an initiative measure, the cost of qualifying a counter-initiative is a bargain compared to spending ten to twenty million dollars in contributions for advertising to defeat an initiative.⁹⁷

In the 1990 general election, chemical and pesticide industries strongly opposed the passage of the comprehensive environmental regulation measure "Big Green"⁹⁸ because of its ban on many commonly used pesticides.⁹⁹ These industries were wary of Big Green's popular appeal, and were uncertain what would be required to defeat the measure.¹⁰⁰ A memorandum from the Western Agricultural and Chemical Association prepared in relation to Big Green explicitly laid out this thinking. The memorandum stated, "[i]t will be extremely dif-

92. Political parties often split on whether to endorse ballot initiatives. Telephone interview with Duane Peterson, *supra* note 76.

93. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 198.

94. *Id.* at 180-81.

95. *Id.* at 271 n.15 (noting that the auto insurance measures were Propositions 100, 101, 103 and 104, out of which only Proposition 103, sponsored by Ralph Nader, passed).

96. *Id.* at 160.

97. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 266 Table 8.2, 270-71. Five measures in the 1990 general election had total contributions of over 10 million dollars. *Id.*

98. See *Argument and Text of Proposition 128*, *supra* note 14.

99. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 273-74.

100. Harold Meyerson, *The Year of the Initiative*, L.A. WKLY., May 11-17, 1990.

ficult to defeat with a 'NO' campaign only. We can win with an alternate initiative."¹⁰¹

Because of its strategic value, the use of the counter-initiative is becoming more common. For example, the 1990 general election ballot contained thirteen initiatives, eight of which were counter-initiatives on four subjects: pesticide regulation, term limits, alcohol tax, and forest preservation.¹⁰² Four of the eight counter-initiatives were industry-sponsored measures, which were drafted in response to the corresponding citizen measures and would not otherwise have been on the ballot.¹⁰³ Not surprisingly, it was in the midst of the 1990 pre-election campaign, that a poll indicated for the first time that most voters felt the initiative process was "out of control."¹⁰⁴

The counter-initiative serves a number of purposes. Most obviously, passage of a competing initiative will result in laws the sponsors find more reasonable or favorable to their cause.¹⁰⁵ This was certainly the thinking behind the 1988 measures on both auto insurance and campaign financing.¹⁰⁶ The presence of an alternative measure on the ballot also provides its sponsors with an effective tool in defeating measures they oppose.¹⁰⁷ In their advertising, sponsors can present a counter-measure as a more "reasonable" or "less extreme alternative" for voters to choose.¹⁰⁸ A counter-initiative offered as an alternative helps create a 'NO' vote, since its presence pushes voter opinion on the target initiative from initial support to uncertainty and then opposition late in the campaign.¹⁰⁹ As one study notes, "[i]n candidate elections, an uncertain voter often opts for the status quo by voting for the incumbent; in initiative elections, the uncertain, hesitant or confused voter typically votes 'no.'"¹¹⁰ In the advertising campaign against Big Green, opponents of the initiative capitalized on electoral

101. *Id.* (quoting an internal memorandum of the Western Agricultural Chemical Association).

102. See CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION (1990) (The measures were: 128 and 135, "Big Green" v. "Big Brown" on pesticides; 130 and 135, "Forests Forever" v. "Big Stump" on forest preservation; 134 and 126, "Nickel a Drink" v. "Half-cent a Drink" on alcohol tax; 131 and 140, "Drain the swamp" v. "Nuke the swamp" on term limits.).

103. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 271-74.

104. *Initiatives*, *supra* note 9, at B4.

105. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 271-74.

106. *Id.* at 271, n.15.

107. *Id.* at 181 n.26.

108. *Id.*; Telephone interview with Duane Peterson, *supra* note 76.

109. David Magleby, *Opinion Formation and Opinion Change in Ballot Proposition Campaigns*, in *MANIPULATING PUBLIC OPINION* 105 (Michael Margolis & Gary Mauser eds., 1989).

110. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 200.

confusion by closing all advertisements with a statement by a reluctant narrator to the effect that "it just tries to do to much."¹¹¹

When counter-initiatives conflict only on some points, or do not address all the issues contained in the target citizen-sponsored measure, it increases voter frustration and confusion. One survey conducted after the 1990 election found that 84% of the people polled believed that "there are so many initiatives on the ballot with complex issues that the average voter cannot make an intelligent choice."¹¹² Sponsors of counter-initiatives are able to qualify simpler and more straightforward measures because, unlike citizen groups, they are usually not interested in imposing comprehensive regulations.¹¹³ One problem all initiatives face is the tendency of voters to vote 'NO' on complex or confusing issues.¹¹⁴ One study found that of fourteen "low-clarity" initiatives in California, all of which encountered high spending opposition campaigns, thirteen were defeated.¹¹⁵ In a broad-ranging initiative measure, everyone can find something to dislike.¹¹⁶ It may be easier for voters to oppose complicated reforms that they support in principle, such as forest protection or campaign reform, when there is a simplistic counter-initiative alternative available.¹¹⁷

The final, perhaps unintended effect of a counter-initiative arises after the electorate has voted. On occasion, both the target and the counter-initiative pass.¹¹⁸ When both conflicting initiatives secure a majority of affirmative votes, someone must determine which provisions will take effect. The responsibility for sorting out the quagmire of initiative and counter-initiative falls entirely upon the California courts. Unfortunately, this responsibility creates special difficulties for the courts, which were exemplified by the campaign reform initiative decisions.

II. The Campaign Reform Initiative Battle

In 1990, the California Supreme Court attempted to resolve some of the problems created by counter-initiatives in the wake of an elec-

111. Telephone interview with Duane Peterson, *supra* note 76.

112. *Initiatives*, *supra* note 9, at B4 (quoting L.A. TIMES Poll).

113. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 181 n.26; Schreiner, *supra* note 8, at A10 ("These fat cats . . . don't care whether the measures pass because they're for the status quo.") (quoting grassroots activist Harvey Rosenfield).

114. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 87-89.

115. BETTY H. ZISK, MONEY, MEDIA AND THE GRASSROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 168-69 (1987).

116. See CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 199-200.

117. *Id.*

118. *Id.* at 181 n.26.

toral battle between two campaign financing reform measures.¹¹⁹ Propositions 68¹²⁰ and 73¹²¹ both sought to reform the campaign spending process within the state. Proposition 68 was drafted in response to a report by state leaders on campaign finance reform. It was modeled in part on a proposal contained in that report.¹²² Designed to reduce the influence of special interests outside the legislature and the legislative leadership, Proposition 68 limited not only contributions to individual candidates and total contributions by one individual or group to all candidates, it also prevented the political party leadership from transferring contributions from safe incumbents to needy campaigns.¹²³ Proposition 68 also limited campaign spending, and provided public funding for candidates who agreed to abide by the spending limitations.¹²⁴ The coalition backing the drafting and qualification of the Proposition included Common Cause, the League of Women Voters, and various consumer, environmental, and senior citizen groups.¹²⁵

The counter-initiative, Proposition 73, was drafted by incumbent legislators including Assemblyman Ross Johnson and State Senators Quentin Kopp and Joseph Montoya.¹²⁶ Although Proposition 73 imposed some contribution limits, its main provisions expressly prohibited public financing of campaigns, which directly conflicted with Proposition 68.¹²⁷ Both measures were opposed by Governor Deukmejian and democratic legislative leaders including Assembly Speaker Willie Brown and Senate Leader David Roberti.¹²⁸

Supporters of Proposition 68 raised approximately \$800,000 for both qualification and advertising, an amount considered sufficient for a measure with high public appeal appearing on a primary election

119. See *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220 (Cal. 1990).

120. *Text of Proposition 68*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 13, 52-56 (1988).

121. *Text of Proposition 73*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 33, 63 (1988).

122. See CALIFORNIA COMM'N ON CAMPAIGN FIN., *THE NEW GOLD RUSH: FINANCING CALIFORNIA'S LEGISLATIVE CAMPAIGNS* (1985).

123. See *Analysis by the Legislative Analyst of Proposition 68*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 12-13 (1988).

124. *Arguments and Text of Proposition 68*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 13, 54-55 (1988).

125. Richard C. Paddock, *California Elections; Both Sides Seek Funds to Carry Message on Campaign Financing*, L.A. TIMES, May 25, 1988, at A3.

126. *Id.* Montoya later resigned under indictment for racketeering. See *Chronology of FBI Sting Investigation*, UPI, Sept. 17, 1990.

127. *Argument in Favor of Proposition 73*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 34 (1988).

128. Paddock, *supra* note 125, at 20.

ballot.¹²⁹ The backers of Proposition 73, on the other hand, did not set up a campaign office or purchase advertising, and did not expect to raise more than \$100,000.¹³⁰ Opponents of both initiatives launched a last minute television campaign which focused on the public financing provisions of Proposition 68, insinuating that members of the Ku Klux Klan would be eligible to receive taxpayer dollars.¹³¹ While the opposition campaign reduced the popularity of both measures,¹³² since the negative advertising focused mainly on Proposition 68, its popularity declined more significantly.¹³³ Proposition 68 passed with an approval level of 53% while Proposition 73 coasted to victory at 58%.¹³⁴ As a Proposition 68 campaign spokesman explained: "There was no campaign for the other one. It slid through on the backs of our effort."¹³⁵

The passage of Proposition 73 accomplished three goals. It limited the amount of money individuals and committees could contribute to a candidate, it prohibited a donor from exceeding those limits within a fiscal year, and it banned all public financing of campaigns.¹³⁶

Proposition 68 contained additional provisions that its supporters sought to implement.¹³⁷ These included a ban on fundraising during the years when a candidate's name was not on the ballot, limits on total contributions by an individual or committee to *all* legislative candidates, limits on the total amount any individual politician could accept in a given election, and increased penalties for violation of these rules.¹³⁸ Proposition 68 applied only to campaigns by candidates for the state legislature, while Proposition 73 applied to campaigns for all elected offices in the state, including local municipal posts.¹³⁹

After the election, sponsors of Proposition 68 appealed to the Fair Political Practices Commission seeking to enforce the provisions of Proposition 68 which were either not addressed by or not in conflict

129. Telephone interview with Fredric Woocher, Press Spokesperson for Proposition 68 (Mar. 1, 1993).

130. Paddock, *supra* note 125.

131. Paddock & Shuit, *supra* note 20.

132. Telephone interview with Fredric Woocher, *supra* note 129.

133. *Id.*

134. Brief of Respondent Taxpayers to Limit Campaign Spending at 2 n.3, *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220 (Cal. 1990) (No. S-012016).

135. Paddock & Shuit, *supra* note 20, at 24 (quoting Fredric Woocher).

136. *See Text of Proposition 73, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 33, 63 (1988).*

137. *See Analysis by the Legislative Analyst for Propositions 68 and 73, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 12-13, 32-33 (1988).*

138. *See Text of Proposition 68, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 13, 54-55 (1988).*

139. *See Text of Proposition 73, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 33, 63 (1988).* For a summary of the provisions of the two measures, see Brief of Respondent at 1-2, *Taxpayers*, *supra* note 134.

with those of Proposition 73.¹⁴⁰ In the first judicial decision addressing the two initiatives, the California Court of Appeal, in *Center for Public Interest Law v. Fair Political Practices Commission*,¹⁴¹ found that Proposition 68's expenditure limits and public financing provisions, which complied with constitutional requirements regarding spending limitations¹⁴² and were modeled on the federal campaign laws,¹⁴³ were in direct conflict with Proposition 73's express ban on public financing. Hence they could not go into effect.¹⁴⁴ The remaining dispute focused on whether the additional contribution limits and enhanced penalties of Proposition 68 could take effect. The California Supreme Court addressed this dispute in *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*.¹⁴⁵

III. Judicial Review of Direct Democracy

Before exploring how the California Supreme Court dealt with Propositions 68 and 73 in *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission* it is helpful to analyze how the California courts have reviewed initiatives. The problems of the initiative process—the growth in number and complexity of measures, the sophisticated campaigns, and particularly the increasing use of counter-initiatives—are forcing the judiciary to evaluate and to invalidate more initiative measures than ever before.¹⁴⁶ The question that the courts in California now face is how closely they should scrutinize initiative measures passed by a majority of the electorate.

Because an initiative becomes law as soon as it is passed by the electorate and does not go through the legislative negotiation process, the judiciary is left with the burden of determining how to implement the sometimes muddled measure without the aid of legislative history. Serving as the only check on the constitutionality of an initiative also places the courts in an awkward position. The lack of legislative checks and balances in the initiative process forces the courts into the role of “the policemen of the process not only with challenges about petition circulation and other campaign practices, but in the end determining constitutionality.”¹⁴⁷ Although the United States Supreme Court has been unwilling to recognize a different standard for analyz-

140. *In re Bell*, 11 Op. Fair Political Practices Comm'n 1 (1988).

141. 210 Cal. App. 3d 1476 (1989), *petition for review denied* (Aug. 17, 1989).

142. *Buckley v. Valeo*, 424 U.S. 1 (1976).

143. Federal Elections Campaign Act, 2 U.S.C. §§ 431-56 (1993).

144. *Center for Pub. Interest Law*, 210 Cal. App. 3d at 1476, 1485 (1989).

145. 799 P.2d 1220 (Cal. 1990).

146. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 303.

147. Ertukel, *supra* note 22, at 330 (quoting David Magleby).

ing initiative measures,¹⁴⁸ the California Supreme Court seems more attuned to the fact that, as one commentator states, “[a] judicial decision striking down a voter effort . . . risks engendering a perception by the public itself that its will has been subverted.”¹⁴⁹ While it is difficult for the public to become informed about the substance of an initiative, they are much more aware of the issues on which they have voted than they are of new statutes enacted into law by the legislature.¹⁵⁰ If a measure has garnered enough popular support to pass, a significant portion of the public is aware of the issue. The media is also more likely to cover judicial action on such popular initiative measures.¹⁵¹ Invalidation by the court can result in public outrage,¹⁵² and because the judiciary has no direct enforcement power, it is questionable whether it should use its scarce political capital to invalidate popularly passed initiatives.

A. Competing Theories of Judicial Review of Initiative Measures

There are two competing theories regarding the degree of deference courts should give initiatives. One theory advocates close scrutiny of citizen measures, giving initiatives a “hard judicial look.” The other theory argues that initiatives should be treated with great deference.¹⁵³

The “hard look” theory is premised on the idea that because direct democracy was not addressed in the United States Constitution, the outcome of initiative votes should not receive a great deal of deference,¹⁵⁴ and that initiatives should not be subject to the same deferential rules of construction as statutes passed by a legislature.¹⁵⁵ Advocates of this theory, particularly Professor Julian Eule, argue that the presumption extended to acts of the legislature, that enactments are constitutional so long as they have a rational basis, should not apply to the less deliberative initiative process.¹⁵⁶ The judiciary’s tradi-

148. *Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley*, 454 U.S. 290, 295 (1981) (“It is irrelevant that the voters rather than a legislative body enacted [this law], because the voters may no more violate the Constitution . . . than a legislative body.”).

149. Eule, *supra* note 18, at 1506-07. Former California Supreme Court Justice Joseph Grodin acknowledges this phenomenon: “It is one thing for a court to tell a legislature that a statute it has adopted is unconstitutional, to tell that to the people of a state who have indicated their direct support for the measure through the ballot is another.” *Id.* at 1507 n.12 (quoting JOSEPH P. GRODIN, *IN PURSUIT OF JUSTICE* 105 (1989)).

150. *Id.* at 1579.

151. See Bill Sing, *What Does Prop. 103 Approval Mean? Here Are Some Answers*, L.A. TIMES, May 5, 1989, at A28 col.1.

152. John Balzar, *Initiatives, Time for Reform?*, L.A. TIMES, Mar. 27, 1990, at A1.

153. Eule, *supra* note 18, at 1549.

154. *Id.* at 1558-62.

155. *Id.* at 1568, 1571-73.

156. *Id.*

tional caution in modifying or invalidating laws is premised on a balance of powers, a concern that is absent in the initiative context.¹⁵⁷ Because initiatives originate and are passed outside the legislature, "hard look" advocates argue that the courts need not be concerned with the relationship between the judiciary and the other branches of government or with the balance of power between the federal government and the states.¹⁵⁸ Professor Eule contends that the absence of traditional checks and balances in the initiative process, such as political parties, a bicameral legislature, and the executive veto, should incline state courts to look more closely at the constitutionality of initiative measures.¹⁵⁹ This contention is particularly forceful now that the initiative process has become more susceptible to manipulation and domination by powerful interest groups.¹⁶⁰ Given the growing problems with the initiative process, including the difficulty voters face in making educated decisions, an increased amount of judicial scrutiny seems logical.

Professor Eule envisions the standard of review as a fluid one, where the level of scrutiny would vary.¹⁶¹ Scrutiny should be high when the initiative effectively stifles minority voices or political expression, and lower when the group mounting the challenge is "able to defend their view in the popular arena."¹⁶²

B. The California Supreme Court and Initiative Review

The contrary school of thought on review of initiative measures is wary of an appointed judiciary imposing its views over the expressed will of the populace.¹⁶³ This view emphasizes respect for the will and intelligence of the voter.¹⁶⁴ One advocate of this view asserts that while "people may sometimes approve mischievous or unconstitutional measures, . . . by and large, . . . they are good legislators."¹⁶⁵ The California Supreme Court has tended to endorse this latter view

157. *Id.* at 1558-67.

158. Eule, *supra* note 18, at 1558-67.

159. *Id.* at 1557-58.

160. *See id.* at 1558 n.247.

161. *Id.* at 1572-73.

162. *Id.* at 1573.

163. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 304.

164. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL, 61 (1989) ("If we accept the premise that people can choose between good and bad leaders, we must accept the premise that people can choose between good and bad laws.") (quoting Carol Carlton, spokesperson for The League of Women Voters).

165. Donald S. Greenberg, *The Scope of Initiative and Referendum in California*, 54 CAL. L. REV. 1717, 1747-48 (1966).

of judicial deference towards initiatives.¹⁶⁶ The court has been especially reluctant to hold initiatives unconstitutional in their entirety.¹⁶⁷ Even Proposition 13, which one commentator described as the victim of 'drunken drafting'¹⁶⁸ survived constitutional scrutiny.¹⁶⁹ The California Supreme Court has generally held to the standard it enunciated in *Brosnahan v. Brown*: "We ordinarily should assume that the voters who approved a constitutional amendment . . . 'have voted intelligently upon an amendment to their organic law, the whole text of which was supplied [to] each of them prior to the election and which they must be assumed to have duly considered.'"¹⁷⁰ The California Supreme Court will "not consider or weigh the economic or social wisdom," nor "pass judgment on the propriety or soundness [of an initiative]."¹⁷¹

The increasing problems with the initiative process have, however, led the court to take a more activist role in the past five years. The most striking example is *Calfarm Insurance Co. v. Deukmejian*,¹⁷² the challenge to Proposition 103 in which the court invalidated a twenty percent auto insurance rate rollback provision that had immense public support. The court did so on the grounds that insurers had a constitutional right to a "fair and reasonable" rate of return.¹⁷³ This decision came at considerable cost and brought public ire down upon the court.¹⁷⁴ But it is only one in a series of recent decisions which indicates a growing willingness on the part of the court to invalidate initiatives regardless of public sentiment.¹⁷⁵ This trend becomes more clear by examining the two primary grounds the court has used to review the constitutionality of initiatives in recent cases: the single-subject rule and the no revision rule.

1. *The Single-Subject Rule*

Under the California Constitution, an initiative may not embrace more than one subject.¹⁷⁶ While this provision would appear to prohibit many of the complex initiatives that have been the source of

166. See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1284 (Cal. 1978); *Brosnahan v. Brown*, 651 P.2d 274, 281 (Cal. 1982).

167. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 302.

168. Edward Hamilton, *California's Sloppy Ballot Measures*, L.A. Times, Aug. 11, 1982.

169. *Amador*, 583 P.2d 1281.

170. 651 P.2d 274, 283-84 (citations omitted).

171. *Amador*, 583 P.2d at 1283; *Brosnahan*, 651 P.2d at 281.

172. 771 P.2d 1247 (Cal. 1989).

173. *Id.* at 1257.

174. See Schreiner, *supra* note 8, at A10 ("Voters also are upset with the initiative process because they have found that courts often circumvent their intentions, as the State Supreme Court did with Proposition 103.")

175. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 303.

176. CAL. CONST. art. II, § 8(d).

voter confusion from reaching the ballot or becoming law,¹⁷⁷ since 1948, when the single-subject rule was added to the California Constitution, only two initiatives passed by the voters have failed the single-subject test.¹⁷⁸ The courts have routinely upheld far-reaching initiatives on the grounds that a "reasonable relationship" existed among its provisions.¹⁷⁹ Three complex regulatory initiative measures, the Big Green initiative, the 1982 Victims' Bill of Rights, and the 1974 Political Reform Act, each containing a number of different issues, survived challenges based on the single-subject rule.¹⁸⁰ Most recently, Governor Wilson's Proposition 165 survived a single-subject challenge even though it would have made wide-ranging changes to welfare programs, restricted eligibility for other entitlement programs, and given the governor huge emergency budgetary power.¹⁸¹ In 1991, however, in *Chemical Specialties Manufacturers Association v. Deukmejian*,¹⁸² the court invalidated a measure on single-subject grounds for the first time since 1949. Proposition 105 set forth rules requiring disclosure of financial information pertaining to contributions in political advertising, investment in South Africa, and administration of senior citizen facilities.¹⁸³ The court held that the initiative violated the single subject rule due to the diversity of subjects it covered, even though the provisions were not particularly complex.¹⁸⁴

2. *The No-Revision Rule*

Article XVIII of the California Constitution states that, while the California Constitution may be amended by initiative, it may not be revised unless the legislature places the proposed constitutional revision on the ballot or calls a constitutional convention.¹⁸⁵ The California Supreme Court, however, has been very hesitant to invalidate initiatives on this basis.¹⁸⁶ In 1991, Proposition 140, which completely altered the system of legislative elections by imposing strict term limits on state officials, survived a challenge on the grounds that it consti-

177. See *infra* text at note 181.

178. *Perry v. Jordan*, 207 P.2d 47 (Cal. 1949); *Chemical Specialties Mfrs. Ass'n v. Deukmejian*, 227 Cal. App. 3d 663 (1991).

179. See *Perry*, 207 P.2d at 47.

180. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 315-16.

181. *League of Women Voters v. Eu*, 7 Cal. App. 4th 649, 653-54 (1992); See *Arguments and Text of Proposition 165*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 46-49, 72-79 (1992).

182. 227 Cal. App. 3d 663 (1991).

183. *Text of Proposition 105*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 107, 157-58 (1988).

184. *Chemical Specialties*, 227 Cal. App. 3d at 670-71.

185. CAL. CONST. art. XVIII.

186. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 320-22.

tuted an improper revision.¹⁸⁷ Prior to 1990, the court had only once held that an initiative measure improperly revised the constitution.¹⁸⁸ The court partially invalidated an initiative under the no-revision rule for the second time in 1990 when a portion of Proposition 115, the "Crime Victims Reform Act," was held to constitute an improper revision.¹⁸⁹ The initiative attempted to force the judiciary to follow federal law and constrained the state judiciary from following its own precedents regarding sentencing.¹⁹⁰ The court in *Raven v. Deukmejian*¹⁹¹ held that this imposition of federal law amounted to an improper revision of the California Constitution and invalidated that portion of the measure.¹⁹² The court's recent uses of the single-subject rule and no-revision rule reflect its heightened awareness of initiatives.

IV. Judicial Review and Counter-Initiatives

The California Supreme Court has also recently become more activist with regard to counter-initiatives. The court's recent willingness to invalidate measures as constitutionally deficient is a move toward the heightened scrutiny advocated by Professor Eule.¹⁹³ Heightened scrutiny is appropriate in the area of the counter-initiative because the motives and methods of their sponsors are often suspect.¹⁹⁴ While the California Supreme Court has become more willing to invalidate initiatives, however, the court has not become more willing to engage in close scrutiny of the substantive provisions. Instead, the court has attempted to develop rigid rules that determine when measures will be invalidated in order to avoid engaging in a "hard look" which would include examining the purposes of the sponsors. The court's attempt to avoid close judicial scrutiny of counter-initiatives has exacerbated the unique problem such initiatives present.

Counter-initiatives create a unique problem because where two conflicting measures have passed, invalidating one ignores the will of a majority of the electorate. Yet to meld two initiatives together requires the court to create a hybrid law that was never put before the voters. Neither of these options is particularly palatable for the judici-

187. *Legislature v. Eu*, 816 P.2d 1309, 1318 (Cal. 1991).

188. *Perry v. Jordan*, 207 P.2d 47 (Cal. 1949); CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 320.

189. *Raven v. Deukmejian*, 801 P.2d 1077, 1088-89 (Cal. 1990).

190. *Arguments and Text of Proposition 115*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 33-35, 65-69 (1990).

191. 801 P.2d 1077 (Cal. 1990).

192. *Id.* at 1089.

193. Eule, *supra* note 18, at 1507.

194. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 181 n.26.

ary.¹⁹⁵ However, given the problems inherent in the growing counter-initiative strategy and the increasing difficulty voters face in distinguishing competing measures,¹⁹⁶ the courts must exercise their power as the only check upon the process.

A. The Background of Judicial Review of Counter-Initiatives

The California Constitution anticipates the possibility that initiative measures may conflict.¹⁹⁷ California Constitution Article II, section 10(b), provides: "If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."¹⁹⁸ Fifteen other states have statutes or state constitutions which provide for the possibility of conflicting ballot initiatives.¹⁹⁹ While five states have statutory or constitutional language similar to that of the California Constitution section 10(b), voiding *provisions* which conflict with provisions of other measures adopted by a higher affirmative vote, eight states mandate that if two measures on the same subject pass, the *measure* receiving the highest number of votes prevails in its entirety.²⁰⁰

Because the proliferation of counter-initiatives is a relatively recent phenomenon, prior to the passage of Propositions 68 and 73, the issue of initiative conflict has seldom been litigated.²⁰¹ The California courts took up this issue only once prior to 1990 in *Gibson v. Bird*.²⁰² In *Gibson*, two virtually identical initiatives regarding inheritance and gift tax were passed in the 1982 election.²⁰³ The only difference between the two propositions were the provisions pertaining to the initiatives' operative dates. One measure mandated that the tax repeal would take effect on the date of passage in 1982, while the other applied the tax repeal retroactively to 1981.²⁰⁴ The California Court of Appeal applied the rule of statutory construction that "statutes relating to the same subject matter must be read together and reconciled whenever possible."²⁰⁵ The court then held that where the provisions of two initiatives are in direct conflict, as they were in this case, California Constitution section 10(b) applies, and the conflicting *provision*

195. *Id.* at 308-09.

196. *See Eule, supra* note 18, at 1572 n.310 ("If the electorate was indeed confused about Proposition 103, it was largely as a result of the insurance industry's own efforts.")

197. CAL. CONST. art. II, § 10(b).

198. *Id.*

199. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 309-10.

200. *Id.*

201. *State ex rel. Nelson v. Jordan*, 450 P.2d 383, 386 (Ariz. 1969).

202. 139 Cal. App. 3d 733 (1983).

203. *Id.* at 734.

204. *Id.* at 736.

205. *Id.* (citing *Fuentes v. Workers' Comp. App. Bd.*, 547 P.2d 449 (Cal. 1976)).

of the initiative that received fewer votes becomes invalid.²⁰⁶ Hence, the provision which did not retroactively apply the tax repeal became law.²⁰⁷ While *Gibson* interpreted section 10(b) as invalidating only the conflicting provision and not the entire initiative, the court did not decide if *non-conflicting* provisions of two initiative receiving the fewer votes could be combined together with the provisions of the initiative receiving the greater number of votes into one law.

Another jurisdiction was forced to address this question. The Arizona Supreme Court held that two initiatives could be combined in *State ex rel. Nelson v. Jordan*²⁰⁸ because "the will of the majority as expressed in free elections must prevail."²⁰⁹ *Nelson* was the result of two initiatives passed by the Arizona electorate, one of which eliminated the office of State Auditor, while the other lengthened the terms of office for executive offices, including the State Auditor.²¹⁰ Arizona's constitutional provision is similar to California's and states that: "If two or more conflicting measures or amendments to the Constitution shall be approved by the people at the same election, the measure . . . receiving the greatest number of affirmative votes shall prevail in all particulars as to which there is conflict."²¹¹ The Arizona court determined that the two measures could be melded together. "[W]here, as here, separate parts of a constitution are seemingly in conflict, it is the duty of the court to harmonize both so that the constitution is a consistent workable whole."²¹² The court did this, however, by determining that the two initiatives did not in fact conflict, but rather addressed two separate clauses of the state constitution.²¹³

The decision in *Nelson* was reached on a rehearing, after a new appointment to the court altered the balance between the majority and dissent. The original opinion held that the two statutes were in direct conflict and that no provisions of the measure receiving less votes should take effect.²¹⁴ Although the court in *Nelson II* did combine provisions of two initiatives together into a single law, the court did not have to decide what should happen when the initiative receiving fewer votes contains additional provisions. Thus, it remained to be seen what a court would do with two complex initiatives having multiple conflicts. With the simultaneous passage of Propositions 68

206. *Id.*

207. *Gibson*, 139 Cal. App. 3d at 736.

208. 450 P.2d 383 (Ariz. 1969).

209. *Nelson*, 450 P.2d at 386.

210. *Id.* at 385.

211. ARIZ. CONST. art. IV, pt. 1, § 1(12) (emphasis added).

212. *Nelson*, 450 P.2d at 386.

213. *Id.* at 387 (holding that one clause of the constitution dealt with the State Auditor, who was an executive officer, while the second dealt with the terms of office for such officers).

214. See *State ex rel. Nelson v. Jordan*, 449 P.2d 18, 29 (Ariz. 1968).

and 73, the campaign reform initiatives, the California courts had to squarely address this issue.

In its first foray into the counter-initiative morass created by the passage of Propositions 68 and 73, the California Supreme Court had to determine whether the non-conflicting provisions of an initiative receiving fewer votes could become law. In *Taxpayers to Limit Campaign Financing v. Fair Political Practices Commission*,²¹⁵ the court held that the non-conflicting provisions could not go into effect.²¹⁶ The court did not simply hold that all the provisions of Proposition 68 were in conflict with the provisions of Proposition 73, but, instead, noted that where two initiatives conflict, the initiative as a whole that receives less votes may not take effect.²¹⁷ The court stated:

[U]nless a contrary intent is apparent in the ballot measures, when two or more measures are competing initiatives, either because they are offered as "all or nothing" alternatives or because each creates a comprehensive regulatory scheme related to the same subject, section 10(b) mandates that only the provisions of the *measure* receiving the highest number of affirmative votes be enforced. Neither an administrative nor a regulatory agency nor the court, may enforce individual provisions of the measure receiving the lower number of affirmative votes.²¹⁸

One of the more surprising aspects of this decision is that the court reached this interpretation of California Constitution section 10(b) independent of the Petitioner Fair Political Practices Commission and the Respondent initiative committee. The parties to the action *agreed* that the provisions of the measure receiving fewer votes could become law, and they were simply disputing whether various provisions were in conflict.²¹⁹ The court instead followed the urging of an amicus curiae, the California Teachers Association.²²⁰ In *Taxpayers*, the California Supreme Court attempted to strike a balance between respecting the will of the voters and simplifying the task of judicial review of counter-initiatives.

B. The Lower Court Opinion in *Taxpayers*

Prior to the California Supreme Court's decision, the appellate court applied a different standard in reviewing Propositions 68 and 73. The California Court of Appeal used a "severability analysis" to de-

215. 799 P.2d 1220 (Cal. 1990).

216. *Taxpayers*, 799 P.2d at 1222.

217. *Id.* at 1233.

218. *Id.* at 1221 (emphasis added).

219. Brief of Appellant Fair Political Practices Commission at 6, *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220 (Cal. 1990) (No. S-012016).

220. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 307.

termine which provisions of Propositions 68 should take effect. In *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*²²¹ the appellate court held that the provisions of Proposition 68 and Proposition 73 could be combined into one law, provided that the provisions of Proposition 68, the measure which passed by fewer votes, met a two-prong test.²²² First, the provisions could not conflict with provisions of Proposition 73. Second, the non-conflicting provisions of Proposition 68 must be severable, or capable of standing alone, from the portions of Proposition 68 which *were* in conflict with Proposition 73.²²³ The appellate court contended that rules of statutory construction required the court to make every effort to harmonize initiatives as it would conflicting statutes, and "thereby avoid, if at all possible an interpretation which would cause one of the statutes to be ignored."²²⁴ Section 10(b) would only be invoked in situations where it was impossible to harmonize the provisions of the two initiatives.

Under the appellate court's two-prong test, even portions of Proposition 68 not directly in conflict with Proposition 73 must be independently severable from the conflicting provisions. Therefore, "if the statute [or provision] is not severable, then the void part taints the remainder and the whole becomes a nullity."²²⁵ When an initiative contains a severability clause, as did Proposition 68,²²⁶ a presumption of severability is established.²²⁷

Severability of initiative provisions is determined by a three factor test set forth in *Santa Barbara School District v. Superior Court*.²²⁸ The first factor is whether the provision is grammatically severable—that is, "whether the valid and the invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words."²²⁹ Second, the court determines whether the severed provisions can be independently applied, "unaided by the invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy consid-

221. 260 Cal. Rptr. 898 (1989), *petition for review granted*, 782 P.2d 1139 (Cal. 1989), *rev'd*, 799 P.2d 1220 (Cal. 1991).

222. *Taxpayers*, 260 Cal Rptr. at 905.

223. *Id.*

224. *Id.* (citing *Fuentes v. Workers' Comp. App. Bd.*, 547 P.2d 449, 453 (Cal. 1976); *Gibson v. Bird*, 139 Cal. App. 3d 733, 736 (1983)).

225. *In re Blaney*, 184 P.2d 892, 900 (Cal. 1947); *Santa Barbara Sch. Dist. v. Superior Ct.*, 530 P.2d 605, 617-18 (Cal. 1975); *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1255-56 (Cal. 1989) (rule applies to initiatives).

226. *Text of Proposition 68*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 56 (1988).

227. *Santa Barbara*, 530 P.2d at 618.

228. *Id.* at 617-18; *see also Taxpayers*, 260 Cal. Rptr. at 906.

229. *Santa Barbara*, 530 P.2d at 617 (internal quotes omitted).

erations.”²³⁰ Third, the court makes a subjective determination of whether the remaining provisions “‘would have been adopted by the legislative body had [it] foreseen the partial invalidation of the statute.’”²³¹ The third part of the test has been applied liberally. In *Calfarm Insurance Company v. Deukmejian*,²³² the court held that provisions of an initiative could go into effect because the voters would likely have favored the initiative even in the absence of the invalid provision.²³³

Using the three part test for severability, the court of appeal in *Taxpayers* held that four sections of Proposition 68 could go into effect: the ban on non-election year fundraising, the enhanced criminal penalties for violations, the limitation on the total amount of contributions which could be accepted in one election cycle, and the limitation on the amount an individual could contribute to all candidates.²³⁴

The merging of Propositions 68 and 73 resulted in a campaign finance law that made both Proposition 13 and Proposition 103²³⁵ look well drafted. While it was complicated, it was nonetheless a workable law that imposed significant limitations on campaign spending.²³⁶ Ironically, the combination of fiscal year contribution limits from Proposition 73, with the aggregate per campaign contribution limits of Proposition 68, resulted in a campaign finance law more restrictive than either measure alone.²³⁷

C. The Federal Court Battle Over Proposition 73

At the same time that *Taxpayers* was making its way through the state court system, there was a separate action in federal court challenging the constitutionality of Proposition 73.²³⁸ In *Service Employees International Union, AFL-CIO v. Fair Political Practices Commission*, the Federal District Court for the Eastern District of California held Proposition 73's fiscal year contribution limit unconsti-

230. *People's Advocate v. Superior Ct.*, 181 Cal. App. 3d 316, 332 (1986).

231. *Santa Barbara*, 530 P.2d at 618 (quoting *In re Bell*, 122 P.2d 22, 28 (Cal. 1942)).

232. 771 P.2d 1247, 1256-57 (Cal. 1989).

233. See also *People's Advocate*, 181 Cal. App. 3d at 333.

234. *Taxpayers*, 260 Cal. Rptr. at 1018.

235. Passed in the 1988 general election, Proposition 103, the insurance rate rollback, was still being litigated on the fourth anniversary of its passage. See 20th Century Ins. Co. v. Garamendi, No. BS016789 (Los Angeles Superior Court, filed May 31, 1992).

236. Telephone interview with Fredric Woocher, *supra* note 129.

237. Brief of Appellant Fair Political Practices Comm'n at 11, *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220 (Cal. 1990) (No. S-012016).

238. See *Service Employees Int'l Union, AFL-CIO v. Fair Political Practices Comm'n*, 721 F. Supp. 1172 (E.D. Cal. 1989), *aff'd*, 955 F.2d 1312 (9th Cir. 1992), *cert. denied*, 112 S. Ct. 3057 (1992).

tutional.²³⁹ The Ninth Circuit Court of Appeals later affirmed this decision on the grounds that Proposition 73 was unconstitutionally discriminatory.²⁴⁰ The Ninth Circuit noted that fiscal year contribution limits allowed incumbents to receive the maximum contribution from the same donors for up to six years, while challengers who decided to run within a year of the election could collect from the same donors only once.²⁴¹ While the federal constitutionality of Proposition 73 was being litigated, the California Supreme Court granted review of the appellate court decision in *Taxpayers* on the issue of whether any provisions of Proposition 68 could take effect.²⁴²

D. The California Supreme Court Decision in *Taxpayers*

The Fair Political Practices Commission ("FPPC") sought review of the decision in *Taxpayers*, contending that the appellate court was in error in its holding that the four parts of Proposition 68 could go into effect.²⁴³ The FPPC argued that all of the provisions of Proposition 68 either conflicted with Proposition 73 or could not be severed from the portions which conflicted.²⁴⁴ Since Proposition 68 was a more restrictive law, the FPPC argued, it was in complete conflict with the less restrictive scheme of Proposition 73.²⁴⁵ Several amici curiae, led by the California Teachers Association ("CTA"),²⁴⁶ independently

239. *Id.* at 1180.

240. *Service Employees Int'l Union, AFL-CIO v. Fair Political Practices Commission*, 955 F.2d 1312, 1316-22 (9th Cir. 1992), *cert. denied*, *Kopp v. Service Employees Int'l Union*, 112 S. Ct. 3057 (1992).

241. *Id.* at 1316-18. Ironically, had the two measures ultimately been enforced under the court of appeal scheme, the off-year ban of Proposition 68 may have saved Proposition 73 because all candidates would be limited to raising monies in the year their name appeared on the ballot.

242. *See Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 782 P.2d 1139 (Cal. 1989) (granting petition for review). The Ninth Circuit decision came down after the California Supreme Court's *Taxpayers* decision. In *Taxpayers*, the court held that Proposition 68 could not take effect. After the Ninth Circuit issued its decision, the sponsors of Proposition 68 filed a Petition for Writ of Mandate in the California Supreme Court requesting the court to make Proposition 68 operable. Petition for Writ of Mandate and Supporting Memorandum of Points and Authorities, *Gerken v. Fair Political Practices Comm'n*, No. S-025815 (Cal. filed March 26, 1992). The decision in *Gerken* was pending at the time this Note went to print. At oral argument on November 2, 1993, however, Justices Mosk, Kennard, and Arabian appeared to be in favor of reviving Proposition 68. *See Todd Woody et al., Defense Faces Tough Questioning on 'Fear of Cancer,' THE RECORDER*, Nov. 3, 1993, at 1.

243. Brief of Appellant Fair Political Practices Commission at 1-2, *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220 (Cal. 1990) (No. S-012016).

244. *Id.* at 8.

245. *Id.*

246. The other amici were the California Political Attorneys' Association and the California Republican Party.

argued a different point.²⁴⁷ The CTA advanced a somewhat convoluted argument based on the legislative history of California Constitution section 10(b).²⁴⁸ It argued that section 10(b) mandated an all or nothing approach to initiatives, and that therefore *no provisions* of an initiative receiving fewer votes could take effect.²⁴⁹

1. *The Legislative History Approach*

The California Supreme Court ultimately adopted the interpretation of section 10(b) advanced in the CTA amicus brief.²⁵⁰ Section 10(b) reads: "If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."²⁵¹ The court acknowledged that one interpretation of the section is to understand "those" as referring to only the conflicting provisions of each measure, which would leave the non-conflicting portions intact. The court held that this interpretation was "not the only reasonable understanding of the section however. It can also be read to mean that when initiatives with provisions that are in *fundamental conflict* receive affirmative votes at the same election, only the provisions of the measure receiving the highest affirmative vote are operative."²⁵² The court found that the wording of section 10(b) was ambiguous and required the court to analyze the legislative history and "contemporaneous understanding at the time of [section 10(b)'s] adoption."²⁵³ The court's legislative history analysis, on which it based its holding, relied primarily on the arguments advanced by the CTA. The CTA argued that the legislative history of section 10(b) supported a treatment of conflicting initiatives on an "all or nothing" basis.²⁵⁴

The court relied upon three sources to determine the legislative intent at the time of the 1911 passage of section 10(b): a book written by Franklin Hirschborn, a 1911 legislative observer; a similar measure regarding local initiatives adopted during the same period; and the 1911 ballot pamphlet argument which reads, "[i]f a conflict arise[s]

247. The California Teachers Association was the lead party for a group of legislative leaders including Speaker Willie Brown and Senate Leader David Roberti, *the same* legislative leaders who had campaigned against both Propositions 68 and 73 and were simultaneously seeking to have Proposition 73 held unconstitutional. See *Application for Leave to File a Brief Amicus Curiae and Brief Amicus Curiae of California Teachers Association, Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220 (Cal. 1990) (No. S-012016).

248. Brief Amicus Curiae of California Teachers Association, *supra* note 247, at 3-17.

249. *Id.*

250. See *Taxpayers*, 799 P.2d at 1236-37.

251. CAL. CONST. art. II, § 10(b).

252. *Taxpayers*, 799 P.2d at 1233 (emphasis added).

253. *Taxpayers*, 799 P.2d at 1234.

254. Brief Amicus Curiae of California Teachers Association, *supra* note 247, at 2.

between provisions adopted and approved by the electors at the same election, *that* receiving the highest vote shall prevail.”²⁵⁵ Although the court’s examination of the legislative history surrounding the adoption of section 10(b) reveals a degree of ambiguity in the understanding of various drafters, there are two problems with the court’s analysis.

First, the court wrongly determined that section 10(b) was ambiguous. Justice Kennard made this point in her dissent. She noted that the differentiation between the words “measure,” referring to the initiative in its entirety, and “provision,” referring to a part of the initiative, is unambiguous.²⁵⁶ Where the language is clear, Justice Kennard maintained, the court should halt its inquiry.²⁵⁷ Instead the court determined that there was ambiguity in the language of section 10(b) which necessitated the examination of legislative history.

Second, while the legislative history may be contradictory, there is no reason to presume that because local initiatives were treated in one way, the legislature may not have intended to treat statewide measures differently. To the contrary, the fact that the provisions were worded differently suggests an intent to distinguish the treatment of statewide and local initiatives.²⁵⁸

2. *The Court’s Concern with Voter Intent*

The dispute over the textual interpretation of section 10(b) is set within the broader context of the court’s unwillingness to engage in close scrutiny of initiatives or to infer voter intent. The court read section 10(b) as invalidating Proposition 68 because of the “analytical difficulty and practical impossibility of implementing the presumed, but in fact unknown, will of the electorate by judicially merging competing initiative regulatory schemes.”²⁵⁹ The court was particularly troubled by the appellate court’s holding, which created a hybrid law more stringent than either law standing alone.²⁶⁰

a. *Applying Rules of Construction to Initiatives*

The court’s refusal to engage in closer scrutiny of the provisions of Proposition 68 and 73 was based upon its belief that inferring elec-

255. *Taxpayers*, 799 P.2d at 1233-35; *see also*, Brief Amicus Curiae of California Teachers Association, *supra* note 247, at app. B (emphasis added).

256. *Taxpayers*, 799 P.2d at 1248.

257. *Id.*

258. Supplemental Brief of Appellee Taxpayers to Limit Campaign Spending at 7-8, *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm’n*, 799 P.2d 1220 (Cal. 1990) (No. S-012016).

259. *Taxpayers*, 799 P.2d at 1232.

260. *Id.* at 1233 (“[S]ection 10(b) does not anticipate that the court will create a hybrid regulatory scheme in order to carry into effect some of the provisions of the proposition . . . that received fewer votes.”).

toral intent exceeds the scope of the judicial role. The court wrote that the lower court's application of the rules of construction led the court to infer a "fictitious electoral intent."²⁶¹ Because the voters could not have anticipated that only parts of both measures would become law, the court reasoned, the combined provisions could not go into effect.²⁶² The court again accepted the reasoning of the amicus curiae CTA in this analysis. The CTA argued that standard rules of statutory construction used by the Court of Appeal, requiring that statutes be harmonized wherever possible, should not apply to initiatives because initiatives do not go through the same legislative compromise process of hearings and debates as do statutes and other legislation.²⁶³ The CTA also pointed out that unlike the initiative process, conflicting statutes are not passed simultaneously by the legislature and hence the same assumptions cannot be extended to the initiative context.²⁶⁴

In its analysis though, the California Supreme Court ignored the severability analysis expressly developed for harmonizing conflicting initiatives. The rules of construction utilized by the court of appeal are not uniquely applicable to statutes. Rather, the court of appeal used the three part severability test which has traditionally been applied to initiatives: are the provisions mechanically severable, can they be applied independently, and would the severed portions have been adopted independently if the voters had foreseen that the other portions would be invalidated.²⁶⁵ The California Supreme Court could have reached the same result, giving no effect to any of the provisions in Proposition 68, through a strict application of this time tested approach. A strong argument existed for finding that none of the provisions of Proposition 68 were severable from the provisions in direct conflict with Proposition 73.

The court has been unwilling to find provisions of initiative measures severable when the "substantial purpose" of the measure cannot be accomplished in the absence of the invalid portions.²⁶⁶ For example, in *Metromedia, Inc. v. City of San Diego*,²⁶⁷ the court determined that it was "doubtful" whether the purpose of the statute in question,

261. *Taxpayers*, 799 P.2d at 1235.

262. *Id.*

263. Brief Amicus Curiae of California Teachers Association, *supra* note 247, at 25-26; *see also* *People v. Davenport*, 710 P.2d 861, 870 n.6 (Cal. 1985) ("[T]here may be some basis for the argument that some of the principles which guide courts in their efforts to ascertain the intent of particular statutory provisions enacted through the legislative process may not carry the same force and logic when applied to an initiative measure.").

264. Brief Amicus Curiae of California Teachers Association, *supra* note 247, at 26.

265. *See supra* notes 228-31 and accompanying text; *see also* *Santa Barbara Sch. Dist. v. Superior Ct.*, 530 P.2d 605, 617-18 (Cal. 1975).

266. *See Santa Barbara*, 530 P.2d at 618-19.

267. 649 P.2d 902 (Cal. 1982).

an all-out ban on billboards, could be served absent a provision banning billboards containing non-commercial speech that was severed as unconstitutional.²⁶⁸ If the true concern of the court in *Taxpayers* was to avoid inferring "fictitious electoral intent," it could have done so through a strict application of the severability test. Under this test, the court could have held that the substantial purpose of Proposition 68 could not be effected in the absence of the provisions in direct conflict with Proposition 73.

b. Inferring Electoral Intent

The court refused to combine the provisions of Propositions 68 and 73 absent a showing that a majority of the *same* voters intended for both initiatives to pass.²⁶⁹ It is impossible, in practice, to establish that the same majority of voters who voted for Proposition 73 also voted for adoption of Proposition 68. Although the court recognized that the judiciary indulges in the presumption that voters understand what they are voting for,²⁷⁰ the court was unwilling to presume that voters had both recognized that the initiatives conflicted, and analyzed the provisions to determine which would go into effect.²⁷¹ The court held that in order to combine the two initiatives, there must be a demonstrable showing that the voters predicted the passage of both measures, anticipated which provisions would conflict, and gave adequate reflection to the resulting law.²⁷² Justice Mosk's concurrence noted that the two initiatives were clearly presented to the voters in the ballot pamphlet as alternatives, and "[t]hus election results do not allow us to presume that the majority wanted *both* to pass."²⁷³

There is no way to determine that the same majorities voted for adoption of both measures, and it is not altogether clear why the court considered this a necessary prerequisite for combining the initiatives. Both initiatives were passed by a majority vote, just as if both measures had been passed by a majority of the legislature. Courts do not require that legislators fully understand the ramifications of their actions and hence should not require a more rigorous level of understanding by voters. In *United States Railroad Retirement Board v. Fritz*,²⁷⁴ the United States Supreme Court held that the fact that Congress was unaware and possibly misinformed about the statutory scheme it was enacting was insufficient reason to invalidate it since

268. *Id.* at 908-09.

269. *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220, 1235 (Cal. 1990).

270. *See Brosnahan v. Brown*, 651 P.2d 274, 283-84 (Cal. 1982).

271. *Taxpayers*, 799 P.2d at 1235.

272. *See id.* at 1235-36.

273. *Id.* at 1245 (Mosk, J., concurring and dissenting).

274. 449 U.S. 166 (1980).

there may have been a plausible reason for the statute.²⁷⁵ Passage of both Proposition 68 and Proposition 73 indicates that the voters were anxious for campaign finance reform of some sort. It is certainly "plausible" that in their eagerness to implement change, voters may have voted for both initiatives in the hope that if one fails the other might succeed. Also, a voter may have supported both initiatives in order to achieve as thorough a reform of the campaign finance system as possible. The California Supreme Court's insistence upon a rigorous demonstration of voter intent results in a scrutiny of conflicts between initiatives that is not applied to the substantive *content* of an initiative.

The severability test set forth in *Santa Barbara School District v. Superior Court* allows a court to determine whether voters would have wanted a particular provision of an initiative to go into effect even in the absence of other provisions of the initiative.²⁷⁶ This makes unnecessary the type of evidence required in the *Taxpayers* decision as a prerequisite to combining the provisions of two initiatives. Under a *Santa Barbara* severability analysis, instead of requiring this impossible demonstration of voter intent, if the court finds that a majority of the electorate supported both reform measures, both should become law. The lower court's combination of the provisions of Propositions 68 and 73 resulted in a serious campaign reform law, all provisions of which had been approved by the electorate.²⁷⁷ Ironically, since the provision in Proposition 68 granting the publicly financed campaign matching funds, which are perennially unpopular with voters,²⁷⁸ was no longer a part of the "hybrid" measure crafted by the lower court,²⁷⁹ the combination law may have been the best of all possible worlds for the electorate.²⁸⁰

275. *Id.* at 179.

276. *See Santa Barbara Sch. Dist. v. Super. Ct.*, 530 P.2d 605, 618 (Cal. 1975).

277. The court could have found that the provisions of Proposition 68 were not severable since it was not possible to accomplish the substantial goal of the measure in the absence of the invalid provisions. *See id.*

278. Linda Chavez, *Is Money What Talks in Campaigns Today?*, USA TODAY, June 21, 1993, at 13A. ("As Sen. Bob Dole and others have already pointed out, Americans participate in a referendum on public financing of elections every April 15, and they are decidedly unenthusiastic. Federal law currently allows taxpayers to check off \$1 in taxes they already owe to pay for presidential elections, but only about 15% of taxpayers chooses to do so.")

279. *See Center for Pub. Interest Law v. Fair Political Practices Comm'n*, 210 Cal. App. 3d 1476 (1989).

280. At the time this Note went to print, five years after the popular vote for Propositions 68 and 73, the ultimate result of the passage of the two initiatives remains unclear. *See Claire Cooper, '88 Reform May Be Revived By High Court*, SACRAMENTO BEE, Nov. 3, 1993, at A8. The California Supreme Court has held oral argument, but has not yet issued a decision on whether Proposition 68 may take effect after the federal courts found that the

Instead of applying a heightened level of judicial scrutiny to counter-initiatives, the California Supreme Court in *Taxpayers* established a standard of review which allows the court to invalidate initiatives with no scrutiny whatsoever. In so doing, the court failed to perform its duty of balancing competing interests. By refusing to consider electoral intent, the court ignored the power that certain groups may wield in the initiative process, and did a disservice to voters who already faced tremendous obstacles in attempting to vote knowledgeably on issues. Furthermore, as the following section will illustrate, the *Taxpayers* rule, that section 10(b) invalidates an initiative which conflicts with an initiative receiving more votes, creates a bifurcated standard of review which has further confused the already complicated counter-initiative morass.

E. Unanticipated Results of the *Taxpayers* Decision

The California Supreme Court had some legitimate concerns when it set out the *Taxpayers* standard of review. The court was uncomfortable with combining two conflicting regulatory initiatives, because it believed that inferring electoral intent exceeded the judicial role.²⁸¹ The court was also concerned about unworkable laws resulting from an amalgamation of various measures which often may only be amended by initiative.²⁸² Although almost all initiatives are drafted with a provision which allows for legislative amendment,²⁸³ such amendments must often be in "furtherance of the goals" of the initiative, a standard which is vague at best and is currently being tested in the courts of appeal.²⁸⁴ Finally, an all-or-nothing approach to complex measures simplifies the role of the court. The court has faced an increase in the number and complexity of initiative challenges commensurate with the growth of the initiative process.²⁸⁵ The approach set forth in *Taxpayers*, at first glance, seems to allow the court to simplify the courts role by invalidating all counter-initiatives which pass by a smaller majority vote.

The result of the court's action in the *Taxpayers* decision, however, has added to the incentives to qualify counter-initiatives.²⁸⁶ In

major provisions of Proposition 73 constitutionally deficient. See *Gerken v. Fair Political Practices Comm'n*, No. S-025815, (Cal., filed March 26, 1992).

281. See *Taxpayers* 799 P.2d at 1234-35.

282. CAL. CONST. art. II, § 10(c); see also *Taxpayers*, 799 P.2d at 1234-35; CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 94.

283. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 94.

284. See Opening Brief of Appellant John Garamendi, *Amwest Surety Ins. Co. v. Garamendi*, No. BO54071, (2d Dist., Div. 3, filed July 1991).

285. See Jonathan L. Kirsch, *Initiatives: Cutting Up the Constitution?*, CAL. LAW., Nov. 1984, at 35, 75.

286. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 308-09.

the wake of *Taxpayers*, an industry group has a chance to completely eradicate a citizen measure even if the citizen measure is passed by the electorate. Moreover, initiatives seeking broad-based reforms, which are often the target of heavy industry opposition, tend to contain complex provisions which ensure that they fall under the *Taxpayers* definition of regulatory schemes.²⁸⁷ In the 1990 general election alone, three citizen measures were balloted against a rival industry-sponsored counter-initiative.²⁸⁸ All three citizen initiatives were complex measures which would probably have qualified as regulatory schemes.²⁸⁹ Given the counter-initiative's proven ability to lower the approval rate of a citizen initiative,²⁹⁰ in the future more citizen-sponsored measures will probably pass by a slim margin while simpler industry measures pass by a wider margin.²⁹¹ By holding that the measure receiving fewer votes may be completely invalidated, the court has only increased the likelihood that more counter-initiatives will be balloted and will end up before the courts.

Finally, the *Taxpayers* court created a bifurcated standard of review for counter-initiatives, further confusing the process of review. In a footnote the court stated:

We hold only that under section 10(b) an initiative is inoperative in its entirety if the voters adopt, by a higher vote, an alternative comprehensive regulatory scheme governing the same subject. Our construction of section 10(b) does not foreclose operation of an initiative measure that receives an affirmative vote simply because one or more minor provisions happen to conflict with those of another initiative principally addressed to the same general subject.²⁹²

The court gave no guidance to the lower courts for determining when conflict among initiative provisions was minor and when it was significant enough to invalidate the measure receiving fewer votes. The counter-initiative cases decided subsequent to *Taxpayers*, discussed in the next section, indicate the confusion created in the lower courts by the *Taxpayers* decision.

V. Judicial Review of Counter-Initiatives After *Taxpayers*

It is currently unclear if all counter-initiatives will be invalidated under *Taxpayers*. Questions remain regarding whether any measure which passes by a smaller margin than a competing measure is invalid,

287. *Taxpayers*, 799 P.2d at 1236.

288. See CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 273-74.

289. *Id.*

290. See *supra* notes 107-18 and accompanying text.

291. For example, Propositions 4 and 114 were both simple measures which passed by greater margins than their more complex companion measures, Propositions 8 and 115.

292. *Taxpayers*, 799 P.2d at 1237 n.12.

or whether measures are only completely invalid in certain situations. The court has apparently created a bifurcated system of review where the measure receiving the lesser number of votes will be invalidated when the measures are in "fundamental conflict," but the provision-by-provision analysis will still be applied where "one or more *minor provisions* happen to conflict."²⁹³ The court now determines when initiatives are in fundamental conflict and when the conflict is minor, based on a bifurcated interpretation of section 10(b) which has no constitutional foundation. An examination of decisions subsequent to *Taxpayers* indicates that distinguishing between minor and fundamental conflict proves difficult.

Later courts have avoided following *Taxpayers* in two ways. The first, holding that a conflict between two initiatives is only minor, is illustrated by a series of retroactive challenges to Proposition 8, the 1982 Victims' Bill of Rights, which made substantial changes to the criminal justice system with the overall goal of increasing criminal convictions.²⁹⁴ Proposition 4, which received the greater number of votes in the same election, simply dealt with the requirements for obtaining bail.²⁹⁵ Several litigants have challenged Proposition 8 on the grounds that Proposition 4 should have invalidated Proposition 8 in its entirety.²⁹⁶ The state courts of appeal have uniformly rejected this contention on two grounds. First, the courts have held that the decision in *Taxpayers* does not have retroactive effect.²⁹⁷ Second, and more importantly, the courts have labelled the conflict between Proposition 8 and Proposition 4 as minor. By finding the conflict minor, the appellate courts have been able to apply the plain meaning of section 10(b). The courts have voided the provisions of Proposition 8 which dealt with bail and conflicted with Proposition 4, but let the rest of Proposition 8 take effect. The appellate courts have done exactly what the California Supreme Court avoided in *Taxpayers*, combining provisions of two initiatives into one comprehensive regulatory scheme.

The second way in which courts have avoided *Taxpayers* is illustrated by *Yoshisato v. Superior Court*.²⁹⁸ Propositions 114 and 115 were passed together in the 1990 Primary Election.²⁹⁹ Proposition 115

293. *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220, 1237 n.12 (Cal. 1990) (emphasis added).

294. *Arguments and Text of Propositions 4 and 8*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 16-19, 32-35, 54-56 (1982).

295. *Id.*

296. *People v. Cortez*, 6 Cal. App. 4th 1202 (1992); *People v. Otto*, 4 Cal. App. 4th 1642 (1991); *People v. Barrow*, 233 Cal. App. 3d 721 (1991).

297. *Otto*, 4 Cal. App. 4th at 1654-55.

298. 831 P.2d 327 (Cal. 1992).

299. *Id.* at 328.

was another comprehensive criminal justice reform package designed to speed and streamline criminal convictions.³⁰⁰ Proposition 114, placed on the ballot by the legislature, dealt only with expanding the definition of "peace officers" for purposes of death penalty sentencing.³⁰¹ Proposition 114 received more votes.³⁰² In order to avoid invalidating the whole of Proposition 115, the California Supreme Court reasoned that the *Taxpayers* holding did not apply where the measures were not "competing" but rather were "complementary."³⁰³ The court determined that since the initiatives were not presented to the voters as competing or alternate measures, the initiatives were complementary and supplementary, regardless of the fact that the two measures made different amendments to the same section of the California Penal Code.³⁰⁴ The court refused to accept the argument that because the voters had been presented with two measures which clearly sought to amend the same provision of the penal code, the measures fell within the *Taxpayers* definition of comprehensive regulatory schemes. The court, however, failed to elaborate on what would meet the definition of a "comprehensive scheme." It simply held that the provisions contained in Proposition 114 would take effect, and that the remainder of Proposition 115 would also remain valid, essentially melding the two initiatives into one law.

The court could have reached the same result with much less confusion by applying a severability analysis to determine that the provisions of Proposition 115 not in direct conflict with Proposition 114 could go into effect.³⁰⁵ The *Yoshisato* decision has further confused counter-initiative review because now it is not only unclear when a conflict between initiatives is minor as opposed to fundamental, but also when initiatives are complementary as opposed to contradictory.

The confusion over "minor," as opposed to "fundamental," conflicts may yet be resolved. As this Note went to print, Proposition 68 and 73 were once again before the California Supreme Court.³⁰⁶ The *Taxpayers* court's decision that only Proposition 73 would have effect was complicated by the federal district court's decision, later affirmed by the Ninth Circuit, that major portions of Proposition 73 were un-

300. *Arguments and Text of Propositions 115*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION, 32-35, 65-69 (1990).

301. *Arguments and Text of Propositions 114 and 115*, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION, 28-31 (1990).

302. See *Yoshisato*, 831 P.2d at 328-29.

303. *Id.* at 333.

304. *Id.* at 333-34.

305. See *supra* notes 228-31 and accompanying text.

306. Claire Cooper, '88 Reform May Be Revived By High Court, SACRAMENTO BEE, Nov. 3, 1993, at A8.

constitutional.³⁰⁷ After the Ninth Circuit invalidated most of Proposition 73, the California Supreme Court accepted a Petition for Writ of Mandate to resolve, once again, whether or not Proposition 68 should go into effect.³⁰⁸ Justice Mosk foresaw this problem in his concurrence in *Taxpayers*, stating: "A dead horse cannot win a race. If one proposition is ultimately declared invalid, the other necessarily prevails by default."³⁰⁹ At oral argument in November of 1993, three Justices, one short of a majority, appeared to accept this view, and seemed willing to reinstate Proposition 68.³¹⁰ Unfortunately, it is not yet clear exactly how the court would go about making the initiative operable.

The federal court decision invalidated the portions of Proposition 73 pertaining to contribution limits.³¹¹ The decision, however, arguably did not invalidate the provisions of Proposition 73 that prohibited public financing of campaigns nor the miscellaneous provisions prohibiting mass mailings at public expense.³¹² If the court chooses to bring back Proposition 68, it must first determine what should happen to the remaining pieces of Proposition 73. The constitutionally valid portions of Proposition 73, taken as a whole, do not rise to the level of a comprehensive regulatory scheme, yet they are not complimentary to Proposition 68 either. Proposition 73's prohibition on public financing is still in direct conflict with Proposition 68's provisions for making public financing available to candidates. Since Propositions 68 and 73 were presented to the voters as competing measures, if the court is true to its decision in *Taxpayers*, Proposition 73 should still control, even in its emasculated form. Judging from the discussion at oral argument, however, the court seems uncomfortable with letting Proposition 68, an initiative passed by a majority of voters, languish

307. *Service Employees Int'l Union, AFL-CIO v. Fair Political Practices Comm'n*, 721 F. Supp. 1172 (E.D. Cal. 1989), *aff'd*, 955 F.2d 1312 (9th Cir.), *cert. denied*, 112 S. Ct. 3057 (1992).

308. As this Note went to print, the California Supreme Court had not yet issued an opinion on the validity of Proposition 68. At oral argument on November 2, 1993, however, Justices Mosk, Kennard, and Arabian appeared to be in favor of reviving Proposition 68. See Todd Woody et al., *Defense Faces Tough Questioning on 'Fear of Cancer'*, THE RECORDER, Nov. 3, 1993, at 1; see also Petition for Writ of Mandate and Supporting Memorandum of Points and Authorities, *Gerken v. Fair Political Practices Comm'n*, No. S-025815 (Cal. filed March 26, 1992).

309. *Taxpayers*, 799 P.2d at 1246 (Mosk, J., concurring and dissenting).

310. Todd Woody et al., *Defense Faces Tough Questioning on 'Fear of Cancer'*, THE RECORDER, Nov. 3, 1993, at 1

311. *Service Employees*, 955 F.2d at 1349.

312. See Petition for Writ of Mandate and Supporting Memorandum of Points and Authorities at 25, *Gerken v. Fair Political Practices Comm'n*, No. S-025815 (Cal. filed March 26, 1993).

while the fragments of Proposition 73 remain.³¹³ The continuing campaign reform morass illustrates the problems with the standard adopted by the court in *Taxpayers*. The more useful analysis, and the one championed by the petitioners is the severability analysis.³¹⁴ If the court were to apply the severability analysis to this situation, it could determine that the voters would not have intended Proposition 73 to go into effect in the absence of the invalidated provisions limiting campaign contributions and the court could then allow Proposition 68 to become fully operative.

VI. Countering the Counter-Initiative: A Proposal for Reform

Because of the impact which counter-initiatives have upon the already problem-wrought initiative process, the courts should establish clear standards for counter-initiatives. The largest failure of the *Taxpayers* decision is its lack of clear guidance to the lower courts. The confusion over whether initiatives are in minor conflict or are competing regulatory measures, combined with the distinction drawn in *Yoshisato* between complementary and competing initiatives, has precluded any clear standard of review for counter-initiatives. The California Supreme Court's approach in the *Taxpayers* decision, simplifying judicial review of counter-initiatives by invalidating the measure receiving the smaller number of votes, is the wrong approach for the courts to take to the counter-initiative problem. The judiciary is responsible to the people of California to maintain the initiative process as a workable tool of government. By engaging in a higher degree of scrutiny, and using the already developed severability analysis, the California Supreme Court could have established a much more helpful and responsible standard of review for counter-initiative measures.

A. A Proposal for Judicial Reform

Several commentators have advanced the idea that the California courts need to apply a higher level of scrutiny to initiative measures.³¹⁵ The need for a higher level of judicial scrutiny is particularly apparent in the counter-initiative context. However, it is not immediately clear what this higher level of scrutiny should be based upon. Professor Eule argues for a "hard judicial look" at initiative measures

313. Claire Cooper, '88 Reform May Be Revived By High Court, SACRAMENTO BEE, Nov. 3, 1993, at A8.

314. Petition for Writ of Mandate and Supporting Memorandum of Points and Authorities at 13-23, Gerken v. Fair Political Practices Comm'n, No. S-025815, (Cal. filed March 26, 1992).

315. See generally Lee, *supra* note 43, at 3; Eule, *supra* note 18.

because the initiative process shuts out minority voices and contains none of the protections for minorities that have been built into the legislative process.³¹⁶ He points to initiative measures declaring English the official language, banning public funding of abortions, authorizing involuntary HIV testing for sex crime suspects, and repealing anti-discrimination laws against homosexuals as examples of how minorities are often disadvantaged in the initiative process.³¹⁷ Professor Eule's formulation of a hard judicial look is premised largely on concern for individual rights and equal application of the laws, neither of which is necessarily implicated in the counter-initiative context.³¹⁸ Professor Eule acknowledges that he is unsure how judicial scrutiny should be increased where an initiative measure does not clearly have a disproportionate impact upon a discrete group.³¹⁹

Professor Eule makes an important point in analyzing the 1988 insurance counter-initiatives. "To suggest that the voters approved, let alone understood, the many facets of Proposition 103 is pure mythology."³²⁰ The vote on the counter-initiatives was more a visceral reaction against the insurance industry and towards the consumer movement represented by Ralph Nader than a considered enactment of legislation.³²¹ The courts must be attuned to these visceral actions of the electorate and do their best to effectuate them. Because it is so difficult for voters to sort out the provisions of counter-initiatives, much less to determine the motivations of their sponsors, the courts must accept a larger share of this burden.

Factors that the court needs to consider in reviewing counter-initiatives include: whether the financial resources of sponsors of competing initiatives are imbalanced, whether the intent of a counter-initiative's sponsorship is really to enact legislation or simply to defeat or compromise another initiative,³²² and whether the sponsors of a counter-initiative presented the measure to the electorate in a deceptive or confusing form. These factors should be taken into account by courts whenever they are confronted with a situation where two initiatives with conflicting provisions receive electoral majorities. Where an industry counter-initiative secures the lower margin of votes, these factors may cause the court to conclude that no provisions of the

316. See Eule, *supra* note 18, at 1555.

317. *Id.* at 1551.

318. *Id.* at 1559.

319. See *id.* at 1568-73.

320. *Id.* at 1571.

321. *Id.* at 1570.

322. In *Marblehead v. San Clemente*, 226 Cal. App. 3d 1504 (1991), the court invalidated an initiative on the ground that it was a resolution calling for a general plan amendment, rather than an enactment of legislation. An expansive reading of this case could support a holding that counter-initiatives drafted solely to undermine another initiative also do not enact legislation. *Id.*

counter-measure may take effect. The severability analysis would be particularly helpful here. If in fact a counter-initiative was qualified largely to undermine another initiative, it should be harder for any portion of the initiative to stand independent of the invalid portions.

Where a counter-initiative which has some of the features discussed above secures the greater number of votes, the court should be more willing to combine provisions of the measure receiving the lower amount of votes. In this way the court would give full effect to the intent of the voters communicated by their approval of two conflicting initiatives. For example, in the Proposition 68 and 73 context, the voters clearly wanted reform of the campaign finance laws. Combining the provisions of the two initiative measures was the best way to effectuate this goal. On the other hand, if one of the auto insurance industry-sponsored initiatives had passed along with Proposition 103, the intent of the electorate to reduce auto insurance premiums would not have been clear, nor appropriately effectuated by combining the provisions of the two initiatives.

The California Supreme Court wrote in *Taxpayers* that the initiative process would be better served by "presentation at a subsequent election of a new initiative measure which the voters can consider in light of the scheme established by the measure that prevailed in the earlier election," rather than by combining the provisions of two initiatives.³²³ But the court fails to recognize the tremendous pressures which voters face in attempting to enact reform initiatives. The California judiciary needs to recognize the threat posed to the integrity of the initiative process by the counter-initiative and be more willing to take a close look at these measures.

B. A Proposal for Legislative Change

The counter-initiative morass could be better and more simply resolved by legislative action. An amendment to the California Elections Code providing for the redesign of the ballot and the ballot pamphlet could restore voters' ability to comprehend and choose between competing measures.³²⁴ First, grouping counter-initiatives together on the ballot and summarizing how they conflict would better alert voters to problem initiatives.³²⁵ Second, voters should be made to choose between counter-initiatives on the ballot. Three states already make voters choose between conflicting measures, but they do so by different procedures.³²⁶

323. *Taxpayers*, 799 P.2d at 1235-36.

324. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 252-53.

325. *Id.* at 253.

326. *Id.* at 253-54.

In Washington, voters are first presented with a choice between voting "for either measure" and "for neither measure."³²⁷ The voters may then take the additional step of voting for the measure they prefer.³²⁸ The problem with this two-step process is that it causes considerable confusion among voters.³²⁹ Also, since many of the voters who choose the option of "neither measure" do not go to cast an affirmative vote, an initiative can be enacted into law by a very small plurality of the voters.³³⁰

Maine presents voters with three options.³³¹ Voters are instructed to vote for measure A, measure B or neither measure.³³² Voters are advised that if they vote for more than one measure their vote will not be counted.³³³ This system suffers from the same deficiency as the Washington system, although to a lesser degree. Initiative measures can be enacted by a small plurality of voters if the vote is split closely between the three options.³³⁴ Washington and Maine also only require the voter to choose between counter-initiatives when one measure is citizen-sponsored and the other is placed on the ballot by the state legislature.

Massachusetts deals with the problem of counter-initiatives by placing a notice at the top of the section indicating that only one measure can take effect. As in Maine, voters are presented with three choices, measure A, measure B and neither measure, but unlike Maine, voters are free to vote for both measures A and B if they support both.³³⁵ This system addresses the California Supreme Court's concern in the *Taxpayers* decision, that the same majority may not have voted for both propositions, by clarifying what proportion of the electorate supported each measure.³³⁶ The Massachusetts system applies to both citizen-versus-citizen counter-initiatives and citizen-versus-legislative initiatives.³³⁷ The primary advantage of this system is that it puts the voter on notice that only one of two measures can become law.³³⁸ The Massachusetts system ensures that a majority of voters supported an initiative while still having voters choose between

327. *Id.* at 253.

328. *Id.*

329. *Id.*

330. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 253. An initiative could pass simply by receiving 51% of the votes cast by those voters who chose "either measure," which could conceivably be as low as 26% of the voters as a whole.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 254.

335. *Id.*

336. *See supra* note 269 and accompanying text.

337. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 253, n. 84.

338. *Id.* at 311.

conflicting measures. This simple restructuring of the ballot in California would eliminate the need for much of the judicial intervention that currently pervades the initiative process.

Of course, there would be additional consequences of presenting conflicting initiatives to voters as a choice. It would increase the burden on the courts to determine in pre-election review if initiatives actually conflicted to the extent that they should be presented as mutually exclusive. California already provides, however, for rapid review of the Voter's Pamphlet by any voter who charges that the pamphlet contains false or misleading information.³³⁹ Pre-election challenges to the ballot pamphlet are already quite common, and courts have proven willing both to hear petitions and to order changes to the ballot pamphlet prior to an election.³⁴⁰ While there would probably be a pre-election challenge to each counter-initiative that the Secretary of State determined should be presented to voters as a choice, the burden of reviewing the measures for conflict at the pre-electoral stage may actually relieve the judiciary of the more onerous task of post-election initiative review.

An additional change that would help voters is disclosure of the major sources of financing of counter-initiatives, as well as the amounts of the contributions. The now defunct Proposition 105 required this type of disclosure in political advertising.³⁴¹ Including such disclosures in the ballot pamphlet could be very informative to voters. The problem with requiring disclosure of funding in the ballot pamphlet, however, is the time constraints in the ballot pamphlet process. A great deal of opposition money pours in during the final weeks of a campaign.³⁴² Requiring disclosure of funding may give groups added incentive to defer contributing until after the ballot pamphlet has been printed. Nonetheless, some disclosure of the financial resources behind counter-initiatives would be helpful to voters in deciding between conflicting measures.

Simple and straightforward though these changes may be, they require legislative action. Although there have been periodic grumblings and some moves toward reform of the initiative process,³⁴³ very few of the logical procedural reforms have been passed.³⁴⁴

339. CAL. GOV'T. CODE § 88006 (West 1993); CAL. ELEC. CODE § 3576 (West 1977).

340. CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 242.

341. *See* Chemical Specialties Mfrs Ass'n v. Deukmejian, 227 Cal. App. 3d 663 (1991).

342. Telephone interview with Duane Peterson, *supra* note 76.

343. *See Package of Bills Introduced to Reform Initiative Process*, S.F. CHRON. Mar. 5, 1991, at A2.

344. *See* Ray Sotero, *Lawmakers' Battle Against Ballot Initiative Fizzles*, GANNETT NEWS SERVICE, June 21, 1991; Ray Sotero, *Grassroots Democracy Survives Legislative Backlash*, GANNETT NEWS SERVICE, Sept. 26, 1991.

In the absence of legislative reform, the counter-initiative quagmire could be alleviated by clarifying section 10(b). However, since section 10(b) is a constitutional provision, an alteration to clarify whether it invalidates an entire measure receiving fewer votes would require a two-thirds vote of the legislature.³⁴⁵ Despite considerable unhappiness with the initiative process within the legislature, this issue neither carries enough passion nor is the subject of a clear enough consensus to enable a constitutional amendment to be passed.

The only other way to alter section 10(b) is, of course, by initiative. The same lack of consensus over and lack of commitment to the issue prevent the legislature from placing this issue on the ballot. Furthermore, the burden of qualifying a constitutional amendment by signature-gathering is considerable. Again, no single group is affected by this problem enough to warrant the commitment of sufficient financial resources to deal with the issue.

Conclusion

To realize how incredibly complicated initiative measures have become, one has only to attempt to sort out the provisions of Propositions 68 and 73. Voters are faced with multiple issues of this complexity on almost every ballot. The million-dollar campaigns waged around many initiative issues, with one side tending to exaggerate the effects while the other side tries to over-simplify the issues, make it all the more difficult to sort out what the impact of an initiative will be.³⁴⁶ Making informed decisions on the issues has become a Herculean task. Each time a particularly dense ballot comes around, talk of reforms begins again. Voters, however, remain very protective of their initiative power; they are hesitant to have it tampered with and are cautious of reforms.³⁴⁷ The initiative system and its accompanying problems are going to be a continuing presence in California politics.

The judiciary is currently the only institutional check on the initiative process. In the absence of legislative reform, the judiciary needs to acknowledge that various factors have made it more difficult for voters to make informed decisions, and that initiative votes cannot always be taken at face value. The increase in initiative complexity needs to be accompanied by a corresponding increase in judicial activism. Despite an understandable reluctance to tamper with the express will of the electorate, the California Supreme Court needs to acknowledge the difficulty that voters face in making a decision and must be more willing to closely scrutinize initiative measures. Finally,

345. CAL. CONST. art. XVIII, § 1.

346. See CALIFORNIA COMM'N ON CAMPAIGN FIN., *supra* note 10, at 180-81.

347. Sotero, *Lawmakers' Battle*, *supra* note 344; Sotero, *Grassroots Democracy*, *supra* note 344.

procedural reforms could alleviate some of the need for enhanced judicial scrutiny. In the meantime, the current absence of checks on the process is increasing the already rampant voter frustration with government.