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# THE DUAL PATH INITIATIVE FRAMEWORK

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## I. INTRODUCTION

The widespread use of the initiative process and the perception that it has lead to considerable negative consequences have prompted calls for reform. In this Article, we focus on two complaints about initiatives that can be addressed through a new legal framework.<sup>1</sup> First, some have argued that the policy choices made through direct democracy are often not socially optimal, and the process through which initiatives are passed may make welfare-reducing decisions inevitable.<sup>2</sup> Reform proposals often aim

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1. We do not consider disclosure provisions that should be part of any initiative framework to improve voter competence in direct democracy because these have already been the subject of more scholarly analysis than our other proposals. For reviews of the extensive empirical literature, see, e.g., Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237 (2004); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1157–59 (2003); Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 476–77 (2004); Elizabeth Garrett, *Commentaries on Bruce Ackerman and Ian Ayers's Voting with Dollars: A New Paradigm for Campaign Finance Reform: Voting with Cues*, 37 U. RICH. L. REV. 1011 *passim* (2003). Similarly, we do not tackle the issue of campaign finance regulations. See, e.g., Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885 (2005).

2. Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005).

to correct this complaint by increasing the hurdles to ballot qualification. This sort of reform is counterproductive in several ways. By increasing the “price” of ballot access, such responses are likely to exacerbate the current disproportionate influence of money.<sup>3</sup> Moreover, there is no reason to believe that a more difficult qualification process will impede more socially suboptimal policies than policies that are welfare-enhancing and yet stymied in the legislature by powerful interest groups. We argue that a better focus of initiative reform would provide other checks and balances throughout the process, not primarily during the qualification period. Second, initiatives, once enacted, often fail to be implemented by government officials.<sup>4</sup> Few reform proposals are aimed at this post-enactment problem; they do not take account of the likelihood that government officials who resisted passing the proposal are likely to continue to undermine it during the implementation phase. In contrast, our framework includes a new institution to monitor compliance with popularly generated initiatives and ensure greater enforcement. We describe these two concerns in greater detail in Part II.

Our proposal encompasses two main reforms, each targeting one of the two problems we identify. We propose a new comprehensive framework that keeps both the spirit and intent of the initiative process: the Dual Path Initiative Process with a Citizens Initiative Implementation Oversight Commission. To construct the Dual Path Initiative Process, we borrow from the practice in American legislatures to provide each bill three readings on separate days.<sup>5</sup> Our framework establishes three readings—or distinct stages—for each initiative; these are described in Part III.

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3. For a discussion of the role of money in direct democracy, see Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform*, in *THE BATTLE OVER CITIZEN LAWMAKING: A COLLECTION OF ESSAYS* 73, 76–90 (M. Dane Waters ed., 2001); Elisabeth Gerber, *Prospects for Reforming the Initiative Process* (June 6, 2000) (paper presented to the National Direct Democracy Conference, University of Virginia Center for Government Studies), <http://www.ni4d.us/library/prospects.htm>.

4. ELISABETH R. GERBER, ARTHUR LUPIA, MATHEW D. MCCUBBINS & D. RODERICK KIEWIET, *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* 15–26 (2001) [hereinafter GERBER ET AL., *STEALING THE INITIATIVE*]; Elisabeth R. Gerber, Arthur Lupia & Mathew D. McCubbins, *When Does Government Limit the Impact of Voter Initiatives? The Politics of Implementation and Enforcement*, 66 *J. POL.* 43 (2004) [hereinafter Gerber et al., *The Politics of Implementation*].

5. See, e.g., RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 108-241, §§ XXIV–XXVI (2005), available at [http://www.gpoaccess.gov/hrm/browse\\_109.html](http://www.gpoaccess.gov/hrm/browse_109.html) (“The second reading must regularly be on another day. . . . [T]he question will be whether it shall be committed, or engrossed and read a third time?”); STANDING RULES OF THE UNITED STATES SENATE, S. DOC. NO. 106-15, R. XIV, ¶ 2 (2000), available at [http://www.senate.gov/legislative/common/briefing/Standing\\_Rules\\_Senate.htm#14](http://www.senate.gov/legislative/common/briefing/Standing_Rules_Senate.htm#14) (“Every bill and joint resolution shall receive three readings previous to its passage which readings on demand of any Senator shall be on three different legislative days . . . .”);

The first reading of the initiative occurs when only a brief description of the proposal, providing the purpose of the initiative and the general outline of the solution to be adopted, is circulated for signatures. This process is designed to gauge public support for the general objective of the proposal's backers. No legislative language need be drafted at this time; instead, advocates of change provide a relatively brief policy statement that sets out the essential elements of their constitutional or statutory proposal.

When sufficient signatures have been obtained and the process moves to the second reading, there is a period of three months during which the proponents and the legislature have the opportunity to draft legislative or constitutional language to submit to the people for a vote. The legislature must hold hearings on the proposal. During this second reading, lawmakers and ballot measure proponents can negotiate so that a compromise can be passed as a statute through the traditional legislative process, or a mutually acceptable constitutional amendment can be submitted for a vote. Even if there is no agreement reached, this period provides flexibility so that drafting errors can be identified, likely consequences of the new policy can be assessed, and language can be revised. At the end of this period, if the proponents of change are not satisfied with the legislature's response, they can submit to the people a detailed proposal designed to advance the purpose of the policy statement. In essence, the second reading stage takes advantage of the interaction between direct democracy and representative institutions possible in the hybrid democracy that characterizes states with the initiative and referendum processes.<sup>6</sup> If the legislature fails to act in a manner acceptable to the initiative proponents, then they can place a measure on the ballot, offering to the public a substitute for the legislature's action (or inaction).

The third reading period occurs after an initiative—constitutional or statutory—is enacted through a vote of the people. Popular constitutional initiatives will expire after ten years and must be reenacted, perhaps as amended. Constitutional provisions can be placed on the ballot for

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WYO. STATE LEG., RULES OF THE HOUSE OF REPRESENTATIVES, R. 7-1 (2006), available at <http://legisweb.state.wy.us/2006/rules/house.htm> ("Every bill shall receive three separate readings, previous to its being passed . . ."); H.R. Res. 318, 2005 Gen. Assemb., Reg. Sess. R. 41(a) (N.C. 2005), available at <http://www.ncleg.net/house/documents/houserules.html> ("Every bill shall receive three readings in the House prior to its passage."). In reality, bills are seldom read in their entirety, and one or two of the three readings are usually pro forma parliamentary exercises, but representative institutions have other institutional checks that ameliorate any deliberative loss that may occur.

6. See Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096 (2005). A hybrid democracy is one that incorporates both representative and direct democracy as essential elements of lawmaking.

reenactment in two ways: the legislature can resubmit the provision to the people or the proponents can requalify the measure for the ballot by meeting less onerous signature requirements. In both cases, reenactment is permanent. Popular statutory initiatives will also be less durable because the legislature may, after a period of time, amend or repeal any such initiative.

Part IV describes the aspects of our proposal aimed at the implementation problem. Our framework includes an entirely new system for oversight of the implementation and enforcement of popular initiatives. Here we draw on the experience with the few initiatives that have set up special oversight bodies, such as the Fair Political Practices Commission<sup>7</sup> or the commission overseeing the stem cell initiative passed by Californians in 2004.<sup>8</sup> Our framework also taps into the current enthusiasm for increased citizen involvement in policymaking, seen in the increasing use of initiatives over the past three decades<sup>9</sup> and the recent creation of a Citizens' Assembly in British Columbia to consider and propose sweeping reform of the system of political representation.<sup>10</sup> We propose a Citizens Initiative Implementation Oversight Commission ("CIIOC") to ensure that enacted initiatives are faithfully implemented by state and local officials, who might otherwise work to obstruct or delay implementation of ballot measures they opposed. The CIIOC will include members named in each successful popular initiative; it will be provided a staff and funding sufficient to discharge its oversight function; and it will have the authority to conduct hearings, produce reports, participate in administrative proceedings, and even pursue litigation. The CIIOC will also be involved in

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7. CAL. GOV'T CODE §§ 81000–83124 (West 2005).

8. Proposition 71, the California Stem Cell Research and Cures Act, designated state money for stem cell research and created a commission to oversee its disbursement. CAL. CONST. art. XXXV, §§ 1–7; CAL. HEALTH & SAFETY CODE §§ 125290.10–.70 (West 2006). The constitutionality of the initiative was challenged in court by small-government and conservative religious groups, alleging that it did not provide sufficient legislative control over the expenditure of state funds, as required by the California Constitution. CAL. CONST. art. XVI, § 3. The trial court held that the measure was constitutional. *People's Advocate v. Indep. Citizens' Oversight Comm.*, No. HG05 206766, HG05 235177, 2006 WL 1417983 (Cal. Super. Ct. May 12, 2006).

9. See INITIATIVE & REFERENDUM INST., OVERVIEW OF INITIATIVE USE 1904–2006 (2006), [http://www.iandrinstitute.org/IRI%20Initiative%20Use%20\(2006-11\).pdf](http://www.iandrinstitute.org/IRI%20Initiative%20Use%20(2006-11).pdf).

10. See BRITISH COLUMBIA CITIZENS' ASSEMBLY ON ELECTORAL REFORM, MAKING EVERY VOTE COUNT: THE CASE FOR ELECTORAL REFORM IN BRITISH COLUMBIA (2004), available at [http://www.citizensassembly.bc.ca/resources/final\\_report.pdf](http://www.citizensassembly.bc.ca/resources/final_report.pdf). See also Heather Gerken, Op-Ed., *Citizens Must Drive Electoral Reform*, ROLL CALL, Nov. 15, 2005, at 4, available at [http://www.law.harvard.edu/news/2005/11/15\\_gerken.php](http://www.law.harvard.edu/news/2005/11/15_gerken.php). During the 2005–06 session of the California Legislature, Assemblyman Joseph Canciamilla introduced the Citizens Assembly on Electoral Systems Act of 2006. Assemb. Const. Amend. 28, 2005–2006 Leg., Reg. Sess. (Cal. 2006), [http://leginfo.ca.gov/pub/05-06/bill/asm/ab\\_0001-0050/aca\\_28\\_bill\\_20060125\\_introduced.html](http://leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/aca_28_bill_20060125_introduced.html).

the preelection initiative process, determining whether the initiative drafted by proponents is consistent with the initial policy statement and providing analysis of any legislative response. A statewide citizens oversight commission is a novel reform, not currently used by any state. Some individual initiatives establish special commissions to implement and enforce the particular initiative, but we are not aware of any state that relies on an independent body, with a staff, to investigate and enforce all popular initiatives.

Much of our analysis is focused on California, both with regard to the structure of the process and the examples we provide, because its initiative process has the fewest checks and balances of any of the states with hybrid systems. However, the Dual Path Initiative Framework, in whole or in part, could be used by any state with popular statutory or constitutional initiatives. Some states allow only constitutional initiatives to be proposed by the people and thus would adopt only those parts of the framework dealing with constitutional initiatives. Some states, as we will discuss, already have elements of our proposal as part of their initiative process, although none has adopted all aspects of our reform proposal.<sup>11</sup> States without the direct popular initiative might consider this framework to allow an additional element of citizen involvement in lawmaking. All states with popular initiatives face the implementation problem and should consider adopting a reform along the lines of the oversight commission we describe.

Finally, in Part V, we conclude with a brief discussion of some aspects of the new political equilibrium we expect after adoption of the Dual Path Initiative Framework and the CIOOC. The two parts of hybrid democracy—the initiative process and representative institutions—react to changes in each other, and political actors alter their behavior to account for modification in political institutions. We believe that the new equilibrium will be an improvement over the status quo, providing checks and balances in both parts of hybrid democracy, ensuring fuller compliance with initiatives, and allowing for flexibility and change throughout the process and over time to reflect both input during policy consideration and experience as the new policy is implemented.

## II. THE GOALS OF AN INITIATIVE FRAMEWORK

A central element of American democracy is checks and balances. In *Federalist 51*, James Madison argued that “the constant aim is to divide

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11. See *infra* text accompanying notes 25–26 (discussing the indirect initiative); *infra* text accompanying notes 51–53 (discussing aspects of the process in Washington, Colorado, and generally).

and arrange the several offices in such a manner as that each may be a check on the other,"<sup>12</sup> and in *Federalist 47*, he stated that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>13</sup> The numerous vetogates in the legislative process allow time for fact-finding and deliberation, provide opportunities to correct mistakes, and encourage compromise and change in legislative proposals to secure passage. If a proposal manages to navigate through all the legislative roadblocks, it still faces the possibility of a veto by the executive, and in many states, the executive can rewrite some bills through use of a line-item veto. Even with all these procedures, however, legislatures still enact hastily drafted laws with errors and unexpected consequences. But the process is constructed to guard against such bills, and if mistakes occur or an enactment proves unworkable or unwise in practice, the legislature can amend or repeal the bill.

As currently configured, the initiative process in California and other initiative states lacks comparable checks. The requirement that supporters gather signatures within a certain period of time to place an initiative on the ballot can be an obstacle to advocates who lack access to substantial financial or human resources. But a well-funded group is guaranteed access to the ballot because it can hire professional firms and pay petition circulators,<sup>14</sup> and a group with a motivated and large grassroots base may be able to gather enough signatures for ballot access, as long as it has sufficient time for circulation. Once the measure qualifies for the ballot, then the version submitted to a state official at the start of the petition circulation stage appears before the voters, without any further opportunity for amendment. Although opponents or state officials may challenge the initiative before an election on constitutional or other legal grounds, in many cases, courts decline to become involved until after the election.<sup>15</sup>

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12. THE FEDERALIST NO. 51, at 263 (James Madison) (Buccaneer Books 1992).

13. THE FEDERALIST NO. 47, at 244 (James Madison) (Buccaneer Books 1992).

14. See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1849-54 (1999) [hereinafter Garrett, *Money, Agenda Setting*].

15. California courts are particularly unwilling to block initiatives from the ballot; preelection challenges were successful only three times between 1912 and December 2002. CAL. SEC'Y OF STATE, A HISTORY OF CALIFORNIA INITIATIVES 9 (2002), available at [http://www.ss.ca.gov/elections/init\\_history.pdf](http://www.ss.ca.gov/elections/init_history.pdf). Some other states allow more preelection review. For example, in Colorado a three-member Title Board reviews proposed initiatives to determine whether they comply with the state's formal requirements (including, importantly, the state's so-called "single subject rule.") The process provides an opportunity for interested parties to appeal the Title Board's decisions to the state Supreme Court, and thus the court has a formal filtering role prior to the election.

The only real check on initiative lawmaking authority is the public itself, and an initiative—whether constitutional or statutory—can be enacted in most states if it receives the votes of a majority of those voting on it.<sup>16</sup>

After enactment, a court may strike the initiative down if it is found to be unconstitutional or to violate requirements such as the single subject rule.<sup>17</sup> But, this check is essentially no different from what exists for legislative lawmaking.<sup>18</sup> If the judiciary does not intervene, the only way to correct or repeal most initiatives is by enacting another initiative. In California, the state Constitution prohibits the legislature from amending or repealing a statutory initiative unless the initiative itself allows subsequent legislative involvement.<sup>19</sup> All the other initiative states allow subsequent legislative involvement with respect to statutory initiatives, although sometimes only after a period of time or only by a supermajority vote. A few states prohibit repeal but allow the legislature to amend the initiative.<sup>20</sup> In many states, those who wish to insulate their initiative from the

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Kenneth P. Miller, *The Role of Courts in the Initiative Process: A Search for Standards* 1 n.3 (Sept. 2–5, 1999) (working paper, delivered at the 1999 Annual Meeting of the American Political Science Association), <http://www.iandrinstitute.org/Studies.htm>; COLO. REV. STAT. §§ 1-40-106 to -107 (2006). Like courts in most states, however, those in Colorado are more willing to strike down an initiative at this stage on procedural grounds than substantive ones. *See* Miller, *supra*, at 1 n.3. *See also* Advisory Op. to the Att’y Gen. Re: Indep. Nonpartisan Comm’n to Apportion Leg. and Cong. Dists. Which Replaces Apportionment by Leg., 926 So. 2d 1218 (Fla. 2006) (responding to a request by the attorney general and removing an initiative on reapportionment from the ballot because it violated the single subject requirement).

16. *See* M. DANE WATERS, *INITIATIVE AND REFERENDUM ALMANAC* 26 (2003).

17. Between 1960 and 1999, fifty-five initiatives were adopted in California, thirty-six of which were challenged in court. As of September 1999, final judgment had been rendered with respect to thirty-two initiatives. Of those, fourteen were upheld (44%), eleven were invalidated in part (34%), and seven were invalidated in their entirety (22%). The courts therefore invalidated, at least in part, about 33% of the initiatives enacted in California between 1960 and September 1999. Miller, *supra* note 15, at 12.

18. All legislation can be attacked in court on constitutional grounds, and many state legislatures are subject to single subject requirements. *See* Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957 app. A. Some commentators, however, have observed that courts may more rigorously apply single subject rules to direct legislation than traditionally enacted laws. *See In re Title and Ballot Title and Submission Clause for 2005–2006 #55*, 138 P.3d 273, 283 (Colo. 2006) (en banc) (Coats, J., dissenting) (“Although the majority opinion today pays homage to the [single subject] requirement’s dual concerns for secreting unrelated provisions and combining provisions too unpopular to succeed on their own, it understands the term ‘subject’ to be so elastic as to give this court unfettered discretion to either approve or disapprove virtually any popularly-initiated ballot measure at will.”); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 511 (3d ed. 2001) (discussing California’s single subject rule).

19. CAL. CONST. art. II, § 10(c).

20. *See* WATERS, *supra* note 16, at 27 (providing state-specific details); *infra* notes 72–73.

possibility of legislative tinkering can use the constitutional initiative.<sup>21</sup> Constitutional initiatives can be changed only through another vote of the people.

Another significant difference between representative and direct lawmaking involves the scope of the decisions that are made. Legislators can debate and amend statutes before enacting them, and they can deliberate and compromise over a proposed statute. Even legislatures governed by single subject requirements can alter the details of any bill, and the institutional arrangements in representative bodies allow lawmakers to bargain across several bills to facilitate compromise. Direct lawmaking is far more rigid: voters are presented with a binary choice on a policy—either to accept it or retain the status quo—and logrolling across initiatives is impossible, as is meaningful deliberation or debate among voters. Within the legislature, policymakers are better able to consider tradeoffs in state budget decisions; in contrast, the initiative process is susceptible to the pathologies of “sequential elimination agendas.”<sup>22</sup> When people are asked to choose between alternatives over time without the opportunity to compare among the many alternatives directly, they cannot consider tradeoffs and are “almost certain to pass contradictory measures that have deleterious economic, social, or political consequences.”<sup>23</sup>

Our first set of recommendations for the Dual Path Initiative Process therefore seeks to add appropriate checks into the initiative process. We

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21. See WATERS, *supra* note 16, at 12 (providing a table showing states with constitutional initiatives, statutory initiatives, or both).

22. See Kousser & McCubbins, *supra* note 2, at 963–66. Our proposal does not change the binary, sequential nature of the U.S. initiative process, although other formats for decisionmaking are possible. See, e.g., Elizabeth Garrett, *Who Chooses the Rules?*, 4 ELECTION L.J. 139, 145–46 (2005) [hereinafter Garrett, *Who Chooses the Rules?*] (describing a two-stage, multiple choice format used in New Zealand). However, our proposal requiring constitutional initiatives to expire and allowing subsequent legislative involvement with statutory ones will mitigate the welfare-reducing consequences of this decisionmaking pathology. See *infra* Part III.C.

23. Kousser & McCubbins, *supra* note 2, at 965–66. The structure of direct democracy—presenting a series of questions on single subjects for a “yes” or “no” vote—impedes any straightforward consideration of tradeoffs and tends to obscure the tradeoffs that must necessarily be made in these decisions. Voters are not offered tradeoffs directly, which implies the tradeoffs are not in their choice set and thus would be difficult or impossible to consider. Furthermore, in many states that apply a single subject rule to initiatives, voters are forbidden from considering tradeoffs. A considerable amount of scholarship has determined that voters do not consider tradeoffs unless they are squarely presented with them. See, e.g., V.O. KEY, JR., PUBLIC OPINION AND AMERICAN DEMOCRACY 205–87 (1964); Jack Citrin, *Do People Want Something for Nothing: Public Opinion on Taxes and Government Spending*, 32 NAT'L TAX J. (SUPP.) 113 (1979); James H. Kuklinski, Paul J. Quirk, Jennifer Jerit & Robert F. Rich, *The Political Environment and Citizen Competence*, 45 AM. J. POL. SCI. 410 (2001); Andre Modigliani & Franco Modigliani, *The Growth of the Federal Deficit and the Role of Public Attitudes*, 51 PUB. OPINION Q. 459 (1987).



proceed from a very different starting point than most initiative reformers. Many other reformers work to increase the initial hurdles to ballot access; for example, they often advocate increasing signature thresholds.<sup>24</sup> In our view, raising the costs of obtaining a vote further tilts the playing field in favor of moneyed interests and away from grassroots majoritarian interests seeking to use the process as it was intended to operate. Our preference is to leave the ability to begin the initiative process unchanged—indeed, make the process somewhat easier by requiring only a policy statement and not text before petitions can be circulated—and to include more checks and balances in the process *after* qualification. In that way, groups and individuals with proposals stymied in the legislature can use direct democracy to seek a place on the agenda, but any policy that results is more likely to improve social welfare.

Other reformers have suggested that California eliminate the direct initiative and replace it with a traditional indirect initiative. The indirect initiative currently exists in nine states for either constitutional amendments, statutes, or both.<sup>25</sup> The indirect initiative process allows the legislature a formal role in the process before any measure is submitted to the public. Generally, the legislature is required to hold hearings on an initiative that has gained a certain number of signatures, and legislators must vote on the proposal. In some states, the legislature may amend the initiative; in others, the legal framework requires lawmakers to take an up-or-down vote on the initiative as presented by proponents. Usually in the indirect initiative process, if the legislature enacts the proposed initiative—or, in some states, enacts a law substantially the same as the proposal—the question does not appear on the ballot. If the legislature refuses to act, the measure is submitted to the people. In a few states, supporters are required to obtain additional signatures to move past the legislature to the people

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24. See, e.g., Elisabeth R. Gerber, *Reforming the California Initiative Process: A Proposal to Increase Flexibility and Legislative Accountability*, in CONSTITUTIONAL REFORM IN CALIFORNIA 291, 303 (Bruce E. Cain & Roger G. Noll eds., 1995) (recommending increasing the signature threshold for constitutional initiatives as part of a larger reform proposal with elements of indirect initiatives); Mark Ridley-Thomas & Erwin Chemerinsky, Editorial, *Now That It's Finally Over, Let's Revamp the Recall*, L.A. TIMES, Oct. 29, 2003, at B15. But see John Ferejohn, *Reforming the Initiative Process*, in CONSTITUTIONAL REFORM IN CALIFORNIA, *supra*, at 313, 315 (proposing that once an initiative has qualified, competing initiatives on the same topic could qualify with fewer signatures).

25. For a discussion of the variations on the indirect initiative, see CAL. COMM'N ON CAMPAIGN FIN., DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 104–05, 117 (unz.org 2003) (1992) [hereinafter DEMOCRACY BY INITIATIVE]. Fewer states allow the indirect initiative than the direct initiative; two states have an indirect constitutional initiative process, and nine have an indirect statutory initiative process. See Fred Silva, *The Indirect Initiative Process*, in WATERS, *supra* note 16, at 13–15.

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even if the legislature does nothing. In other states, the supporters' version is placed on the ballot alongside any legislative version that is different.

Although our Dual Path Initiative Process is influenced by the indirect initiative, simply requiring all states to offer only the indirect initiative as currently configured is an unrealistic reform proposal. California had the indirect initiative until 1966, and it was seldom used.<sup>26</sup> Given the public's strong support for the direct initiative, it is unlikely that voters would accede to a reform that replaces the well-liked direct initiative with the scorned indirect one. Instead, we opt to keep the direct initiative, but we add characteristics of the indirect initiative process that might eliminate the need in some cases to take the measure to the people for a vote. Under the Dual Path Initiative Process, initiative proponents remain in the driver's seat; they decide whether the legislature's response is sufficient to ameliorate their concerns or whether they will draft legislative or constitutional language and submit their policy change to the people. Our new framework nonetheless adds checks and balances to the current initiative process that are aimed either to eliminate the problems we have identified or to mitigate their consequences. The latter occurs because of the third reading of the framework, which requires popular constitutional initiatives to be reauthorized and allows legislative involvement with all popular statutory initiatives. The durability of popular change is thereby reduced relative to the status quo.

By itself, the addition of such checks and balances to the initiative process would do much to improve the process. But how valuable are initiatives if they remain unimplemented and subverted, which is often the outcome now? The people vote to enact policy, but then they return to their lives, assuming that government officials will follow their directions. They do not have the ability, or often the interest, to monitor implementation by the executive branch, sometimes with involvement of the legislature. Because elected officials often opposed the policy put into place by direct democracy, they are not likely to eagerly or aggressively work to follow the public mandate.

As a matter of fact, those in charge of implementation are often the very agents the initiative was designed to control. For example, the initiative might enact sweeping reform of the education system, which must then be implemented by the Department of Education, school administrators, and teachers. Or the initiative might enact public financing

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26. DEMOCRACY BY INITIATIVE, *supra* note 25, at 47 & n.43.

of state campaigns, but the legislature has to appropriate money for it.<sup>27</sup> There is ample reason to worry that these lawmakers and administrators will not enthusiastically implement the policies they refused to adopt.<sup>28</sup> In a way, this is the opposite of the problem identified before—rather than too few vetogates, which characterizes the process of proposing and enacting initiatives, there are too many checks standing in the way of effective implementation and most of those are controlled by officials who are likely hostile to the reform.

When courts strike down initiatives and block their implementation, they justify their action because the popular law is unconstitutional or in some other way legally flawed. The people cannot get what they want because their desires conflict with larger principles and values, such as individual rights guaranteed by the federal Constitution. But when state officials block initiatives by surreptitiously undermining them, they follow their own preferences rather than those of the voters, and they do so in ways designed to reduce accountability. Gerber, Lupia, McCubbins, and Kiewiet have found that certain conditions allow government officials to undermine or ignore initiatives more easily.<sup>29</sup> First, substantial technical or political costs will lead to lower levels of compliance because the net value of implementation is reduced. Second, if implementers face significant sanctions for noncompliance, they are more likely to work to effectively implement the initiative. Third, when it is easier for the public or others who support the initiative to observe compliance, it is more likely that officials will comply. Finally, “[u]nder normal conditions, as the number of people required for full compliance increases, the likelihood of full compliance goes to zero.”<sup>30</sup> A new framework for initiatives could increase the likelihood of substantial compliance with initiatives by changing some of these conditions. Our proposed CIIOC improves monitoring and can

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27. It has been suggested to us that, rather than using an enforcement commission, we should just urge initiative writers to put clear enforcement standards into the language of the initiative, such as reporting requirements and strict penalties for noncompliance. GERBER ET AL., *STEALING THE INITIATIVE*, *supra* note 4, at 22–25. These are all good ideas, but the problem is that they do not answer the questions: To whom is the legislature supposed to report? Who decides if a sanction is to be imposed, and, if imposed, who decides the remedy and the penalized party? Who then enforces the enforcement? The CIIOC will be able to determine if the initiative has been implemented or not and can bring to bear the only enforcements possible or necessary, that is, court or electoral sanctions to those who have impeded the implementation of an initiative. The CIIOC will be in a position to bring to the public’s attention the lack of enforcement of an initiative, and it will be up to the public to decide if it is a wrong that is worth righting through the ballot box.

28. Gerber et al., *The Politics of Implementation*, *supra* note 4, at 52–56.

29. GERBER ET AL., *STEALING THE INITIATIVE*, *supra* note 4, at 20–25. *See also* Lupia & Matsusaka, *supra* note 1, at 475–76 (discussing scholarship on the “implementation problem”).

30. GERBER ET AL., *STEALING THE INITIATIVE*, *supra* note 4, at 24.

better ensure that there are sanctions, political and legal, for noncompliance. It thus responds to the first three conditions identified above.

Although one response to the problems in the initiative process is to eliminate direct democracy, we do not advocate that path. First, we do not believe it is realistic. Polls consistently demonstrate that citizens like the initiative process and trust its outcomes more than they trust legislation enacted by their representatives.<sup>31</sup> Because sweeping changes to the initiative process require constitutional amendment, the people will be involved in any reform, and they are unlikely to get rid of initiatives altogether. Polls suggest, however, that reforms along the lines of our three readings proposal—at least the first two stages—would be viewed favorably by many Californians.<sup>32</sup>

Second, we view a properly constructed initiative process as a necessary component of a well-functioning democracy because it provides a way around the conflicts of interest that legislators possess with regard to some matters of institutional structure. Often lawmakers themselves determine the rules of democracy (for example, in enacting campaign finance laws or in establishing electoral districts). Under such circumstances, there is the well-founded concern that self-interest will prevail over the public interest and that rules will be chosen to entrench the already powerful, decrease competition from the outside, and silence new voices.<sup>33</sup> Thus, one advantage of hybrid democracy is that it allows the people a formalized role in institutional design decisions.

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31. See, e.g., MARK BALDASSARE, PPIC STATEWIDE SURVEY AUGUST 2004: CALIFORNIANS AND THEIR GOVERNMENT 17 (2004) (stating that 74% of California residents think the initiative process is a “good thing” and 59% believe that policy decisions made by voters through initiatives are probably better than policy decisions made by elected officials); Jack Citrin & Jonathan Cohen, *Viewing the Recall from Above and Below*, in ESSAYS ON THE CALIFORNIA RECALL 68, 74–82 (Shaun Bowler & Bruce E. Cain eds., 2006) (citing several recent polls confirming California’s strong and increasing support of direct legislation). Even after the 2005 special election in California, in which voters rejected all the initiatives, Californians are still enthusiastic about direct democracy. See MARK BALDASSARE, PPIC STATEWIDE SURVEY NOVEMBER 2005: SPECIAL SURVEY ON CALIFORNIANS AND THE INITIATIVE PROCESS 13 (2005) [hereinafter BALDASSARE, SPECIAL ELECTION POLL] (stating that nearly half (48%) of voters in the November 2005 special election said that public policies generated by the initiative process are probably better than those developed by the governor and legislature; only three in ten thought the voters’ decisions are probably worse).

32. BALDASSARE, SPECIAL ELECTION POLL, *supra* note 31, at 17 (stating that 77% of special election voters favored creating a new system of review and revision of proposed initiatives to avoid legal issues and drafting errors; 83% favored allowing time for the legislature and the proponents to reach a compromise before initiatives can be presented on the ballot).

33. Given the inherent conflicts of interest faced by lawmakers in designing the rules that will shape their careers, even some who have substantial reservations about the initiative process nonetheless argue that more directly involving the people in decisionmaking about democratic

Similarly, the initiative process can provide a majoritarian escape valve if the legislative process is captured by special interests. The absence of checks and balances in the initiative process reduces the influence of minority interests with strong preferences that can use legislative vetogates to block policies they oppose or force compromise to gain special benefits. Even though the agenda of direct democracy tends to be determined by well-funded groups who can use paid signature gatherers to assure ballot access, policy is enacted only when it can obtain majority approval on election day. Thus, the majoritarian initiative process can provide a counterbalance to the legislative process; indeed, the presence of a robust initiative process may change the output from the traditional legislature so that it enacts policies closer to the median voter's preference.<sup>34</sup> Thus, we believe complete elimination of direct democracy is not warranted—the better answer is to improve the initiative process.

### III. A FRAMEWORK TO PROVIDE CHECKS AND BALANCES IN THE INITIATIVE PROCESS: A DUAL PATH INITIATIVE PROCESS

Our reforms allow initiatives to continue to play a necessary role to check the self-interest of legislators in the arena of government reform and to circumvent the power of well-funded, organized groups who block policy favored by a majority. We do not favor unchecked populism, however. Our goal is to strengthen *both* the initiative process and representative institutions, and we believe meeting that objective requires a

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institutions is justified. *See, e.g.*, DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 14 (2002); Dennis F. Thompson, *The Role of Theorists and Citizens in Just Elections: A Response to Professors Cain, Garrett, and Sabl*, 4 ELECTION L.J. 153, 158–60 (2005). For a less guarded advocacy of direct democracy to design democratic institutions, see Garrett, *Who Chooses the Rules?*, *supra* note 22. Whether the initiative process actually leads to different electoral institutions is a matter of scholarly contention. Compare Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997 (2005) (finding the initiative process related to states' adopting nonpartisan redistricting commissions, legislative term limits, and public financing for legislative races), with John G. Matsusaka, *Direct Democracy and Electoral Reform*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS (Michael P. McDonald & John Samples eds., 2006) (finding that the initiative has little effect on electoral laws except for the adoption of legislative term limits).

34. *See* JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY 83–92 (2004) (discussing the various “frictions” that cause representatives to get out of step with their constituents); Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99, 107–17 (1996) (analyzing when and how the legislature will be constrained by the threat of initiatives); John G. Matsusaka, *Direct Democracy Works*, J. ECON. PERSP., Spring 2005, at 185, 192 (2005) (“Since ballot propositions are filtered through the electorate, only policies that make the median voter better off can gain approval in an election or credibly threaten the legislature.”).

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fundamental restructuring of the popular initiative process. Our reform package would itself require a vote of the people to be adopted as an amendment to the state constitution.<sup>35</sup> Figure 1 on the following page presents a graphical representation of the first set of reforms we propose, dubbed the Dual Path Initiative Process.

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35. In California, it could be argued that our package of reforms is a revision of the California Constitution, rather than an amendment, because it alters the power of the electors in the initiative process through the three readings framework and alters the power of the legislature through the oversight commission. Constitutional revision cannot be done through the initiative process but can be done by the legislature, if two-thirds of each house votes to put the revision on the ballot, or by constitutional convention. CAL. CONST. art. XVIII, §§ 1–3. Courts have defined what constitutes a revision rather than an amendment, but the line between the two is not clear. *See, e.g.*, *Legislature v. Eu*, 816 P.2d 1309, 1319 (Cal. 1991) (finding that an initiative that imposed legislative term limits and other reforms was an amendment, because it did not “necessarily or inevitably appear from [its] face . . . that the measure [would] substantially alter the basic governmental framework set forth in our Constitution”); *McFadden v. Jordan*, 196 P.2d 787, 799 (Cal. 1948) (finding that a wide-ranging initiative that, among other things, created a Pension Commission would “substantially alter the purpose and . . . attain objectives clearly beyond the lines of the Constitution as now cast” and thus constituted a revision). Given the restructuring we propose, it is possible our framework would be considered a revision in California; in which case, it should originate in the legislature. We believe, however, that our framework does not effect such “far reaching changes in the nature of our basic governmental plan” to necessarily rise to the level of revision. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1286 (Cal. 1978). We do not know if similar issues would be raised in other states considering reform along the same lines we suggest.

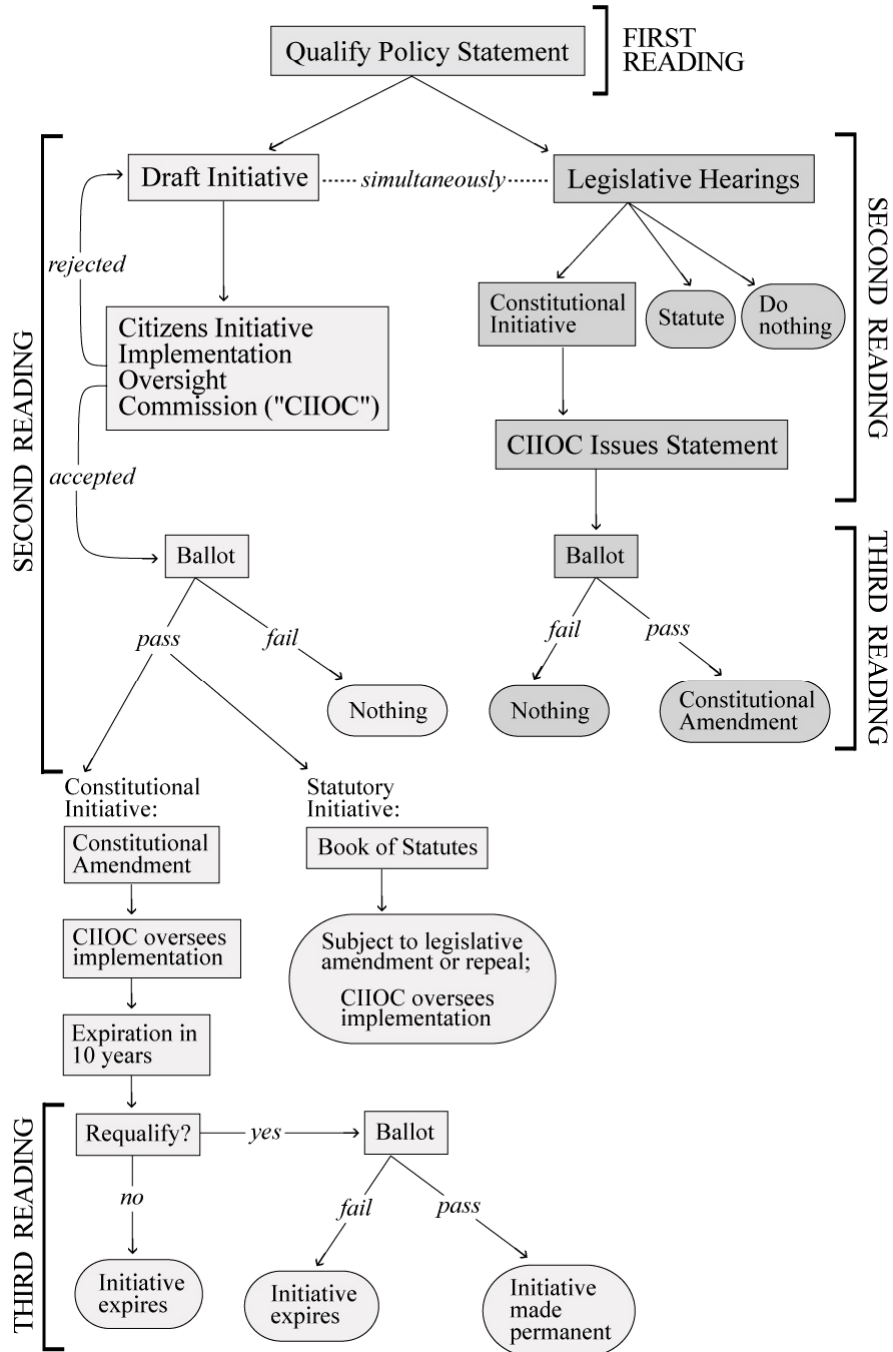


Figure 1

A. THE FIRST READING OF AN INITIATIVE: QUALIFYING A GENERAL  
POLICY STATEMENT

When citizens sign a petition to put an initiative on the ballot, few, if any, spend time reading the actual text and considering the details of the proposal. At most, they make their decision on the basis of the objective of the initiative.<sup>36</sup> Do they want the state to play a larger role in funding stem cell research? Are they unhappy with the current laws regulating parental notification in the case of minors seeking an abortion? Should the state establish more community mental health services and pay for them with a tax on millionaires? In many cases, citizens decide whether to sign a petition on the basis of who is advocating the change. Do they tend to favor policies put forward by insurance companies? Are they sympathetic to the goals of the Sierra Club? Of course, many are willing to sign anything pushed in front of them on their way in to shop at Costco or Wal-Mart, and they are sometimes willing to sign several petitions at one time, without even knowing the subject matter of the measures. They simply want to get past the petition circulator and have no objection to anything being placed on the ballot. After all, they do not have to vote for it.

Given the reality of the signature gathering phase, there is no benefit to requiring that legislative or constitutional language be included with the petitions at this stage in the process. All citizens need is a brief, straightforward description of the policy supported by the proponents and a clear identification of the major groups behind the signature drive. This policy statement represents the first reading period in Figure 1. We propose that at the ballot qualification stage, initiative advocates submit a policy

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36. We know of no direct evidence revealing how voters decide to sign initiative petitions. We note, however, that every state provides a brief summary of the ballot initiative on the petition. In addition, voters generally do not know much about public policy when asked. Taken together, these realities suggest that most voters are unlikely to know much about policy specifics and may often decide only on the basis of general policy goals. It may be the case that many voters are not even aware of the general policy objectives when they sign petitions, perhaps signing because they want to end the interaction with the signature gatherer and get on with their shopping, because they believe any question should be posed to voters, without coming to a conclusion about the merits, or because they believe their interests are aligned with those groups coordinating the petition drive and therefore they do not need to know more about the measure's substance. These voters would be made no worse off by our proposal; very few voters will find themselves denied information they need to make the decision whether to sign a petition or not. Literature on general voter ignorance is copious. *See, e.g.*, ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER & DONALD E. STOKES, *THE AMERICAN VOTER* (1960); MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996); Larry M. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, 3 *PERSP. ON POL.* 15 (2005); Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 *AM. J. POL. SCI.* 194 (1996).



statement of no more than 500 words. Although the statement can be generally phrased, proponents will have an incentive to provide clear information about all major pieces of their proposal because, in later stages of the process, the legislative or constitutional language they develop will be measured against this policy statement. Material in the final version of the initiative that is not fairly encompassed by the initial statement will be stricken from the text presented to voters. The standard used to assess whether particular text is consistent with the policy statement is one of reasonable notice: Did the formulation provide notice of this aspect of the measure to a reasonable citizen asked to sign the petition? If not, would that citizen consider this a material aspect of the policy or merely a reasonable means of implementing the objective that had been clearly described?

Because the second reading period allows drafters to change their proposal to reflect new information and encourages negotiations with the legislature or other groups, the policy statement should be drafted so that it can encompass a proposal that may be somewhat different from the original vision. The statement must contain some specifics, however, both to provide voters enough sense of the proposal to decide whether to sign the petition and to meaningfully shape the second reading period. We suggest that each policy statement follow the outline of the Mischief Rule set out in *Heydon's Case*,<sup>37</sup> one of the classic statutory interpretation cases. A legislative act involves describing the status quo, identifying the “mischief and defect” in the status quo, providing a “remedy” to solve the defect, and determining its benefits and any costs. Over time this format will become familiar to voters so they can quickly grasp the import of any petition being circulated.

So, for example, a policy statement in the area of legislative redistricting could describe the absence of competition because of partisan and bipartisan gerrymanders, argue that this reality reduces electoral choices and undermines the responsiveness of lawmakers to voters, identify nonpartisan redistricting commissions as the solution because they remove some of the partisanship from the redistricting process, and provide an estimate of any costs relative to the status quo. Drafters would want to provide enough information so that voters would have a relatively clear sense of the reform being proposed, but allow enough flexibility to refine and change the proposal during the second reading phase. Language that

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37. *Heydon's Case*, (1584) 76 Eng. Rep. 637 (Exch.). See also LAWRENCE E. FILSON, *THE LEGISLATIVE DRAFTER'S DESK REFERENCE* 29–51 (1992) (describing a similar kind of approach to drafting statutes, that is, identify the problem and choose a solution from policy alternatives).

generally identifies a nonpartisan redistricting commission as a solution postpones to the second reading period the determination of whether that commission will consist of judges, citizens, or people appointed by political officials. Although drafters could specify one of these models in the policy statement, they would not need to. Indeed, further specification could rule out possible compromises during negotiations in the second reading period. If voters who signed the general policy statement disagree with the drafters' ultimate choice—for example, voters prefer citizens commissions and the drafters decide to use judges—they can defeat the proposal at the polls.

The signature thresholds and time to gather signatures would remain unchanged from current law. It is not the number of signatures or the length of time provided for petition circulation we object to; rather, we want to provide only necessary information to those who sign the petitions while allowing proponents time during the next stage to develop the details of the initiative's text that will implement their policy objectives. Thus, unlike other reform proposals focused on making ballot access more difficult, the framework we propose does not increase the "price" of qualifying initiatives for the ballot, which would further amplify the role of money in the process.<sup>38</sup> Instead, the new process may somewhat reduce the costs of qualifying a ballot measure, because fewer resources would be required to draft this sort of a statement. Any reduction in costs is likely to be relatively minimal, however, because most of the expense of qualifying a ballot measure is in the form of payment for petition circulators, an expense that remains unchanged. Thus, our framework does not eliminate the influence of money in the qualification stage; presumably, well-funded groups and individuals will still find it relatively easy to qualify policy statements as long as they can pay signature gatherers, and they will use their resources to frame their policy statements so they motivate people to sign petitions.<sup>39</sup>

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38. See *supra* note 3 and accompanying text.

39. To get an initiative on the ballot in California, the cost has been estimated at "anywhere from one to two million dollars," a substantial chunk of which goes to paying petition circulators. DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 69, 72 (2000). Eliminating paid petition circulators is not an option under current constitutional jurisprudence. *Meyer v. Grant*, 486 U.S. 414, 423–24 (1988). There might be, however, some flexibility to regulate how they are paid. See ANDREW M. GLOGER, *INITIATIVE & REFERENDUM INST., REP. 2006-1, PAID PETITIONERS AFTER PRETE* (2006), <http://law.usc.edu/academics/assets/docs/PaidPetitionersafterPrete.pdf>.

## 1. Emphasizing Policy Objectives over Detailed Language

There are at least two disadvantages to the current system of requiring a formal text of the initiative at the petition circulation stage; we eliminate both. First, presently the legislative or constitutional text is emphasized at the beginning of the initiative process, even though the actual language plays little role in citizens' decision to sign petitions. In California, proponents must submit the text of the initiative to the secretary of state to obtain permission to begin gathering signatures. The attorney general then drafts a title and summary, which are typically relatively legalistic in tone.<sup>40</sup> All of this information—title, official summary, and text—are provided with the petition.<sup>41</sup> In contrast, our proposal focuses attention on writing an easily understood description of the general policy objective behind the initiative and providing voters a sense of the interests funding the petition circulation effort.<sup>42</sup> The attorney general will still provide a title for the policy statement that would appear on petitions and the ballot, but no official summary is required at this stage.

One might object to circulating only a general policy statement, because it somehow undermines the validity of signatures. Citizens who sign the petition, the argument goes, want a particular statutory or constitutional proposal placed on the ballot; if the proponents can later develop the text of that proposal without somehow clearing it with the hundreds of thousands of signers, then there is no way to be certain that the voters who signed the petition would still favor putting this measure on the ballot. We find this argument unpersuasive. The details of a ballot measure play virtually no role in the decision to sign a petition. Moreover, in the end, the ballot measure becomes law only if it receives a majority vote. If those who signed the petitions accompanied by the general policy statement no longer support the initiative because they view the text presented to them as inconsistent with the original objective, they can vote against it. Most initiatives fail to pass,<sup>43</sup> and voters tend to vote “no” when they are uncertain or worried about the effect of an initiative. We expect that one issue in any initiative campaign under our framework will be

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40. “In providing the ballot title, the Attorney General shall give a true and impartial statement of the purpose of the measure in such language that the ballot title shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.” CAL. ELEC. CODE § 9051 (West 2003).

41. *Id.* §§ 9008, 9011.

42. We do not discuss this disclosure requirement at length. *See* Garrett, *Money, Agenda Setting*, *supra* note 14, at 1884–86 (providing a fuller discussion of disclosure statutes).

43. *See* WATERS, *supra* note 16, at 7. The rates at which popular initiatives pass vary among the states. For example, 68% of initiatives in Florida passed between 1976 and 2000, while only 35% of initiatives passed in California from 1912 until 2000. *Id.* at 174, 93.

whether the text presented to the voters conforms to the policy statement that was circulated. Voters will, therefore, have ample opportunity to punish any opportunistic behavior. We note that one positive development from our new framework may be clearer drafting of the legislative or constitutional text so that initiative supporters will be able to credibly claim to voters that they are acting consistently with the policy objectives they identified generally during the first reading stage.

## 2. Allowing Flexibility in Drafting

Second, in all states with the popular initiative, once the text of the statutory or constitutional proposal has been submitted to the relevant state official to obtain permission to circulate petitions, virtually no changes are allowed.<sup>44</sup> The current initiative process is a rigid one, unforgiving of mistakes and not amenable to compromise and revision during the campaign period. A recent case in California demonstrates this rigidity. In the fall 2005 special election, the legislative redistricting initiative supported by Governor Arnold Schwarzenegger was nearly removed from the ballot when it was learned that supporters had submitted one version to the secretary of state and circulated petitions with another version. Although supporters argued that the differences were minor and technical, the attorney general went to court to remove the measure from the special election ballot. The California Supreme Court allowed the initiative to remain on the ballot, ruling tersely that there had been no showing that the people who signed the initiative had been misled.<sup>45</sup> In the final decision after the initiative's defeat, the California Supreme Court held that the proposition was properly submitted to the voters, notwithstanding the discrepancies, because the voters would not have been misled about the initiative if they relied on the version that did not appear on the ballot.<sup>46</sup> It seems clear that if the proponents had purposefully made changes in the initiative after it was submitted to state officials at the beginning of the circulation process—even if the changes were to correct mistakes—or if

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44. States with the direct initiative process prohibit changes in the text of the proposal after a very early stage in the process. Although some allow revisions to reflect advice provided by legislative drafters or other officials, *see, e.g.*, IDAHO CODE ANN. § 34-1809(1)(a)–(b) (2006), none allow changes once proponents begin to circulate petitions. In some indirect initiative processes, the proposal can be changed after the legislature has considered it and refused to act but before it is presented to the citizens for a vote. *See, e.g.*, MASS. CONST. art. XLVIII, § 2, cl. V (allowing a change that is “perfecting in its nature and does not materially change the substance of the measure”).

45. *Costa v. Super. Ct.*, 128 P.3d 149 (Cal. 2005), *rev'd*, 128 P.3d 675 (Cal. 2006).

46. *Costa v. Super. Ct.*, 128 P.3d 675, 700 (Cal. 2006).

the discrepancies had not been relatively minor,<sup>47</sup> the petitions would have been invalid, and the measure pulled off the ballot. In contrast, our framework contemplates that such substantial changes could be made after the policy statement qualifies because a process providing such flexibility is a better process than the rigid status quo. The California Supreme Court's reaction is noteworthy for our purposes for another reason: the Court's view of the signature gathering process mirrors ours in that the justices did not believe the details of the proposal played a significant role in a citizen's decision to sign the petition.

Our Dual Path Initiative Framework allows proponents to take a general policy proposal to the people through the petition process. Once initiative backers get sufficient signatures, they earn the right to move into the stage of second reading. Essentially, they have earned an option to place an initiative on the ballot to implement the policy statement. In the second reading period, the proposal's language is drafted in a process that allows major as well as minor revisions, and the legislature plays a role in the process, a role that can be substantial if lawmakers decide to negotiate with proponents or put their own proposal on the ballot.

#### B. THE SECOND READING: DRAFTING THE TEXT AND NEGOTIATING WITH THE LEGISLATURE

As is evident in Figure 1, there are two pathways through which an initiative can influence public policy. First, once a proposal has met the signature requirement, a three-month period will begin during which the proponents of the proposal can develop text to implement the policy objectives.<sup>48</sup> Second, the legislature can submit text on the same general topic or otherwise reach a compromise that satisfies proponents.<sup>49</sup>

No other group can submit an initiative related to this policy statement for the ballot, although presumably some competing groups may also

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47. *Id.* (calling discrepancies between the version of the initiative measure submitted to the attorney general and the version circulated for signature "inadvertent"); *id.* at 694 (referring to "numerous relatively minor departures" from constitutional and statutory requirements that still substantially comply with applicable provisions).

48. Another recent scholarly proposal includes a step in the initiative process similar to ours. It would also allow flexibility in drafting after qualification and would provide a preelection period similar to notice-and-comment rulemaking in federal administrative agencies. This process would allow better drafting and time for compromise; it would also provide a record for subsequent judicial review. See Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 55–59.

49. Because the legislature has a role in this process, the three months must overlap with a legislative session, a requirement that presents greater logistical challenges in states with part-time legislatures.

qualify their own general statements of policy as a response to a petition drive. In many cases, developing competing ballot measures is a strategy to defeat the first one; the competitors may not particularly care if their measure is enacted because their main objective is to defeat the proposal they oppose. In 2005, for example, pharmaceutical companies used this tactic to defeat a measure placed on the California ballot by consumer groups to provide discounts on prescription drugs.<sup>50</sup> The main goal of qualifying the second measure was to defeat the first; thus, the drug companies were not very disappointed when both failed. In other cases, competing groups simply have different ways of achieving the same goal. In this case, either both would have to qualify policy statements to get their versions on the ballot, or they would have to compromise during the second reading period on text that fits the policy statement that has qualified and proceed to the ballot with a consensus proposal. To allow voters to more easily understand the relationship among ballot measures, related measures—whether put on the ballot by the legislature or by another group that qualified a competing policy statement—should be grouped together on the ballot and identified in a way that allows voters to see them as linked.

Early in the second reading period, proponents will post proposed text on a state website to elicit suggestions, amendments, and discussion. This text need not be the final text but rather a proposal that is likely to change during this stage of the process. In addition, the legislature will be required to hold hearings in both houses on the proposal. Initiative proponents should have access to state-provided services to assist in drafting effective legislative language. Some states currently provide such services. For example, Washington's code reviser is required to review all initiative proposals and provide advice to sponsors on form and language; indeed, if the sponsor merely submits a memo sketching out the objective and proposal, the staff of the code reviser will draft the legislative language.<sup>51</sup>

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50. Proposition 78 on the 2005 special election ballot was sponsored by the pharmaceutical companies and would have created a state-run drug discount program in which the pharmaceutical companies could voluntarily participate. Proposition 78: Discounts on Prescription Drugs, Initiative Statute, *reprinted in* OFFICIAL VOTER INFORMATION GUIDE: SPECIAL STATEWIDE ELECTION, 36–41, 66–69 (Cal. Sec'y of State, 2005), *available at* [http://www.ss.ca.gov/elections/bp\\_nov05/voter\\_info\\_pdf/entire78.pdf](http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/entire78.pdf). It was a reaction to Proposition 79, which was sponsored by consumer groups such as Consumers Union, AARP, and the League of Women Voters, and would have created a mandatory drug discount program. Proposition 79: Prescription Drug Discounts, *reprinted in* OFFICIAL VOTER INFORMATION GUIDE: SPECIAL STATEWIDE ELECTION, 42–49, 69–72 (Cal. Sec'y of State, 2005), *available at* [http://www.ss.ca.gov/elections/bp\\_nov05/voter\\_info\\_pdf/entire79.pdf](http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/entire79.pdf).

51. WASH. REV. CODE ANN. § 29A.72.020 (LexisNexis 2006). *See* DEMOCRACY BY INITIATIVE, *supra* note 25, at 102.

In Colorado, there is a mandatory public hearing on measures that will appear on the ballot,<sup>52</sup> and the advice provided by experts and the public during this deliberation results in revisions in seventy to eighty percent of initiatives before petitions are circulated.<sup>53</sup> These review periods all occur before the petition circulation stage; our framework would change that timing so that drafting and legislative resources are deployed only after a significant number of voters have indicated a desire to submit the policy to a popular vote.

Qualifying a policy statement in the first reading period can be viewed as just a new way to introduce a bill into the legislative process. Once proponents gather the required number of signatures, they begin a process that involves legislative hearings and the possibility of negotiation with other groups and the legislature. Just as with a bill introduced in the traditional manner, the legislature may choose not to act, or it may revise the proposal significantly. Unlike other bills, however, the initiative proponents can choose to take their reform to the people for enactment if they are not satisfied with the legislative response. Given this difference, we may see legislators using this new route of bill introduction, as well as groups and individuals with the financial or human resources to mount successful petition campaigns. This development would be a new aspect of hybrid democracy as the legislative agenda would be partially set by the petition process, and strategic political actors would increasingly consider this avenue of moving an issue to the forefront of policymakers' attention.

#### 1. Time to Draft and Revise

The flexibility provided by the second reading stage of the framework will result in better statutory and constitutional language. Currently, a scrivener's error is sometimes identified during the petition circulation period or during the campaign, and drafters would be eager to amend the proposal to gain additional support if they had the ability to make such changes. For example, Governor Schwarzenegger had to take a pension reform initiative out of circulation in 2005 because the attorney general interpreted his proposal not only as changing the structure of state pensions, but also as abolishing death benefits for survivors of police

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52. COLO. CONST. art. V, § 1, cl. 5; COLO. REV. STAT. § 1-40-105(1) (2006) (requiring that a hearing be held on each initiative submitted, before petitions are circulated).

53. DEMOCRACY BY INITIATIVE, *supra* note 25, at 102. *See also* WATERS, *supra* note 16, at 15 (detailing similar assistance provided in other states).

officers and firefighters killed in the line of duty.<sup>54</sup> Although the Governor contested this interpretation as one adopted by a Democratic official seeking to undermine his agenda,<sup>55</sup> the current structure of direct democracy denied him the easy and uncontroversial response of just changing the language to clarify that death benefits were protected.

Sometimes gaps in an initiative become apparent during the campaign; under our framework, proponents could modify their proposals to address such problems. For example, Proposition 71, the stem cell bond measure on the California ballot in November 2004, arguably contained inadequate conflict of interest and disclosure provisions. These concerns were raised during the campaign,<sup>56</sup> providing the opportunity for amendment before the popular vote. This example also demonstrates that a framework providing this kind of flexibility may not solve all the problems of poorly worded or inadequately comprehensive initiatives. In this case, Robert Klein, the main force behind Proposition 71 and now Chair of the Independent Citizens Oversight Committee of the California Institute for Regenerative Medicine, has denied the need for such provisions.<sup>57</sup> Of course, if he had the chance to make changes to respond to the concerns, he might have been willing to do so. The position he has taken in the campaign and after his victory could be a function of the inflexibility of the process and his desire to ensure that the measure takes effect. Nonetheless, as with most framework laws, an initiative framework would provide the opportunity for revision; it would not require proponents to respond to all criticisms. It is important to leave the decisions about changes to a ballot measure in the hands of the proponents, even though they may resist beneficial changes. Empowering state officials or legislators to change the language of an initiative undermines the reason for direct democracy in the first place—to circumvent entrenched political players who may be

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54. See Press Release, Cal. Sec'y of State, Secretary of State McPherson Reports Three Proposed Initiatives Enter Circulation 2-3 (Apr. 4, 2005), [http://www.ss.ca.gov/executive/press\\_releases/2005/05\\_037.pdf](http://www.ss.ca.gov/executive/press_releases/2005/05_037.pdf) (providing the attorney general's official title and summary of the "Prohibition Against Defined Benefit Public Pensions. Exception for University of California. Initiative Constitutional Amendment and Statute.").

55. See Robert Salladay, *Lockyer Is Accused of Stacking Deck Against Initiatives*, L.A. TIMES, Aug. 1, 2005, at A1.

56. See, e.g., Francis Fukuyama, *Big Science, Big Giveaway*, WALL ST. J., Oct. 25, 2004, at A18; Jonathan Knight, *Critics Slate Ethical Leeway in California Stem-cell Proposal*, NATURE, Sept. 16, 2004, at 232.

57. Klein has said that voters approved the initiative "with their eyes open" and that "[t]he institute needs time to go through the process" and "have thoughtful due diligence." Bernadette Tansey, *Stem Cell Program in Limbo; Hayward Judge Reviewing Lawsuits that Block Research*, S.F. CHRON., Nov. 18, 2005, at C1; Carl T. Hall, *Stem Cells: The \$3 Billion Bet*, S.F. CHRON., Apr. 11, 2005, at A1.



motivated by self-interest or influenced by special interests at a cost to the public interest.

As advocates consider the best way to implement the policy objective, they also have an opportunity to build support for their proposal by involving other groups in the drafting. In this way, the initiative process can incorporate some aspects of the traditional legislative process where tradeoffs can be made and compromises can be reached. The scope of any logrolling will be limited by both the breadth of the general policy statement and the requirement that the text voted on by the people fairly fit within the objectives it set out. We also envision that states will retain the single subject requirement<sup>58</sup> under this new framework, a restriction that further constrains the scope of negotiations and compromise.

The second reading stage promises other systemic benefits. More drafting flexibility before the vote may reduce litigation after election day, which often revolves around awkward wording. Moreover, the discussion that will accompany the decision to amend an initiative's language and the record from legislative hearings provides courts with helpful evidence to interpret vague or ambiguous language in subsequent lawsuits.<sup>59</sup> Requiring a second reading in the initiative process may reduce the use of crypto-initiatives for which policy change is at best a secondary consideration.<sup>60</sup> The need to negotiate with legislators before an initiative is actually placed on the ballot may reduce the purely political use of initiatives. Also, the information developed during this period can better inform those providing fiscal analyses of the initiatives. Importantly, unlike the indirect initiative in many states, the legislature cannot unilaterally deny proponents access to the ballot by passing an alternative formulation. In our Dual Path Initiative Framework, the proponents always have the option to put their reform on the ballot, even if the legislature has responded with a statute or a constitutional ballot measure.

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58. For a discussion of the single subject requirement in the context of initiatives, see Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35 (2002).

59. For a discussion of how courts find "legislative intent" for initiatives, see Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 114–23 (1995).

60. See Kousser & McCubbins, *supra* note 2, at 969–74 (discussing the rise of crypto-initiatives). For a further discussion of the likely equilibrium after the adoption of the Dual Path Initiative Framework, see Part V, *infra*.

## 2. A Formal Role for the Legislature

The second reading stage also formalizes an appropriate role for the legislature in analyzing the policy, drafting legislative or constitutional language, and negotiating with the supporters of the initiative. Mandatory legislative hearings provide the avenue for the first two aspects of legislative activity and set the stage for negotiations if lawmakers are interested in bargaining.

It is likely that at least some initiative advocates will be willing to explore legislative alternatives because they currently use ballot measures to gain leverage in the legislature. Initiative proponents often prefer to avoid an election, which is costly and risky. Even if their change is constitutional and thus necessitates a vote, ballot measures backed by the legislature pass at significantly higher rates than do popular initiatives.<sup>61</sup> Accordingly, initiative proponents hope that the credible threat of ballot victory encourages legislative leaders to work out a mutually agreeable compromise. Currently, if a compromise is reached before signatures have to be filed with the California Secretary of State, there is no difficulty because the supporters can decide not to turn the petitions in. The complication arises when a compromise comes *after* the signatures have been verified and the question certified for the ballot. In most states, proponents cannot pull a question from the ballot once it is certified.<sup>62</sup>

This inflexibility can cause confusion if the compromise requires the legislature to submit a different but related question to the people. Then the ballot contains two incompatible measures, and the parties to the deal have to specify to voters which measure they should vote for and which one they should ignore or vote against. In some cases, this message can be successfully conveyed. For example, in 2004, Governor Schwarzenegger hammered out an agreement with local government officials that allowed

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61. In California, 65% of legislative initiatives pass, while around a third of popular initiatives succeed at the polls. Bruce E. Cain, Sara Ferejohn, Margarita Najjar & Mary Walther, *Constitutional Change: Is It Too Easy to Amend Our State Constitution*, in CONSTITUTIONAL REFORM IN CALIFORNIA, *supra* note 24, at 265, 269. See also THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 197 (1989) (providing similar national figures); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 107 (1984) (providing voters' self-reported drop-off for ballot propositions by demographic category).

62. Most states limit the ability of proponents to withdraw the ballot measures after signatures have been submitted or verified. See, e.g., OKLA. STAT. tit. 34, § 8(A) (1999). South Dakota, however, allows proponents to withdraw an initiative if the election is at least 120 days away, and if at least two-thirds of the named sponsors request withdrawal, in writing, with the secretary of state. S.D. CODIFIED LAWS § 2-1-2.2 (2003). See also COLO. REV. STAT. § 1-40-134 (2006) (allowing proponents to pull a measure from the ballot no later than thirty-three days before the election).

him to get a budget through the legislature. In return for the local leaders' support, the legislature put Proposition 1A on the ballot to amend the Constitution to protect, somewhat, local governments' property tax and sales tax proceeds from state raids in the future.<sup>63</sup> To increase the likelihood that the governor and legislators would deal with them, local governments had already qualified Proposition 65 for the November ballot, which would have much more severely limited the ability of the state to use these revenues in an emergency.<sup>64</sup> Once a deal was reached, the local governments dropped their support of Proposition 65 and joined the campaign for Proposition 1A, but both measures still appeared on the ballot in November.<sup>65</sup>

In this case, the compromise passed and the initiative used as a threat in the bargaining did not. But it surely would have been simpler and less confusing had the supporters of Proposition 65 been allowed to remove that measure from the ballot. If our framework had been in place, these negotiations would have occurred in the second reading stage, and only the compromise constitutional amendment would have appeared on the ballot. When a statutory compromise is sufficient to satisfy all the parties, then nothing needs to be taken to the people after a successful bargain.

The second reading stage encourages negotiation and compromise with the legislature in other ways. Not only does the legislature necessarily become involved as it conducts mandatory hearings on the proposal, but also the legislature has leverage to encourage initiative supporters to deal with it. Our framework permits both the legislature and the group qualifying the policy to place initiatives on the same topic on the ballot. If no mutually acceptable compromise is reached, then the legislature has the right to place its own measure on the ballot. Our framework does not limit the legislature to achieving policy goals identified in the statement that had

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63. See Tom Chorneau & Doug Haberman, *Local Officials Seek End to State Raids on Funds*, PRESS ENTERPRISE, Oct. 25, 2004, at A6; Proposition 1A: Protection of Local Government Revenues, reprinted in OFFICIAL VOTER INFORMATION GUIDE: SUPPLEMENTAL 4-9 (Cal. Sec'y of State, 2004), available at [http://www.ss.ca.gov/elections/bp\\_nov04/supplemental/vig\\_sup\\_1a\\_entire.pdf](http://www.ss.ca.gov/elections/bp_nov04/supplemental/vig_sup_1a_entire.pdf).

64. See Proposition 65: Local Government Funds, Revenues. State Mandates. Initiative Constitutional Amendment, reprinted in OFFICIAL VOTER INFORMATION GUIDE 10-15 (Cal. Sec'y of State, 2004), available at [http://www.ss.ca.gov/elections/bp\\_nov04/supplemental/vig\\_sup\\_65\\_entire.pdf](http://www.ss.ca.gov/elections/bp_nov04/supplemental/vig_sup_65_entire.pdf) (requiring voter approval for any reduction of local governments' vehicle license fee revenues, sales tax revenues, or share of local property taxes).

65. See *id.* at 14-15 (providing no argument in favor of Proposition 65 and urging voters to pass Proposition 1A, "a new and better measure . . . to prevent state raids on local government funding"). Proposition 1A passed with 84% of the vote; Proposition 65 was handily defeated. CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION, NOVEMBER 2, 2004, STATE BALLOT MEASURES, STATEWIDE RETURNS (2004), available at <http://vote2004.ss.ca.gov>Returns/prop/00.htm>.

been circulated; rather, the legislature can put any initiative on the ballot, as it can under current law. Thus, the legislature has the flexibility to achieve the objective identified in the policy statement but in a different way—or to achieve a different and perhaps incompatible objective. The state may use its power to cause enough confusion to result in the defeat of both proposals, or it may actually succeed in passing its ballot measure. The California legislature used this strategy in 2004 to defeat an initiative proposing nonpartisan primaries. Instead, voters passed a legislatively initiated ballot measure amending the constitution to allow political parties control over their own primaries, essentially a codification of the status quo.<sup>66</sup>

Initiative proponents also have some clout in this bargaining game. As we have noted, they can walk away from any bargain and take their proposal directly to the people for enactment. If they choose that route and succeed, then the CIIOC will play a role in the implementation of the initiative.<sup>67</sup> If the legislature wishes to avoid the possibility of involvement by the CIIOC in the future, then lawmakers will have to reach a deal that proponents support. Thus, each side has reasons to bargain with the other, and our framework changes the bargaining dynamics in significant ways relative to the status quo. It also provides additional information to voters, who can learn of the legislature's response to any initiative proposal. Indeed, even the decision not to bargain or respond to the proposal beyond the mandated hearings provides credible information to voters.<sup>68</sup>

### 3. Certifying the Text for the Ballot

At the end of the second reading stage, when initiative sponsors propose final text, the CIIOC will determine whether the text fits fairly within the scope of the general policy that appeared on the petition. The CIIOC has the option of certifying the initiative for the ballot, severing

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66. The legislature-sponsored proposal was Proposition 60, which was placed on the ballot to react to Proposition 62, the nonpartisan primary initiative. *See* Proposition 60: Election Rights of Political Parties. Legislative Constitutional Amendment, *reprinted in* OFFICIAL VOTER INFORMATION GUIDE 16–19 (Cal. Sec'y of State, 2004), *available at* [http://www.ss.ca.gov/elections/bp\\_nov04/prop\\_60\\_entire.pdf](http://www.ss.ca.gov/elections/bp_nov04/prop_60_entire.pdf); Proposition 62: Elections. Primaries. Initiative Constitutional Amendment and Statute, *reprinted in* OFFICIAL VOTER INFORMATION GUIDE 28–31 (Cal. Sec'y of State, 2004), *available at* [http://www.ss.ca.gov/elections/bp\\_nov04/prop\\_62\\_entire.pdf](http://www.ss.ca.gov/elections/bp_nov04/prop_62_entire.pdf). Proposition 60 passed overwhelmingly with 68% of the vote, while Proposition 62 failed (only 46% in favor). CAL. SEC'Y OF STATE, VOTES FOR AND AGAINST STATEWIDE BALLOT MEASURES (2004), *available at* [http://www.ss.ca.gov/elections/sov/2004\\_general/sov\\_pref21\\_votes\\_for\\_and\\_against.pdf](http://www.ss.ca.gov/elections/sov/2004_general/sov_pref21_votes_for_and_against.pdf).

67. *See infra* Part IV (discussing the CIIOC).

68. *See infra* Part V (discussing the possible equilibrium outcome of no negotiation between proponents and the legislature).

provisions that are beyond the scope of the policy statement, or disqualifying the entire initiative as inconsistent with the statement. There should be expedited appeals of a CIIOC decision through the state courts. We advocate this role for the CIIOC, and not the attorney general or secretary of state who has similar responsibilities now, because a state official, likely hostile to any initiative that has not been embraced by the established political actors, may not rule fairly on the ballot measures. Current rules allowing the legislature to place initiatives on the ballot would remain in place, so the legislature can put its own competing proposal on the ballot in cases where no compromise is reached. In that event, the CIIOC will provide a statement about how the legislative proposal fits, if at all, with the goals of the original policy statement.

Our framework injects a new issue into any initiative campaign. Opponents may argue that the version submitted to the voters diverges from the policy statement that was circulated for signatures. This argument may influence people to vote against the initiative either because it is not what they originally supported or because this sort of strategic behavior casts doubt on the motives and honesty of the proponents. Anticipating this kind of attack, proponents are more likely to draft straightforward and relatively clear text so that concerned voters can check the language and assess the accuracy of campaign claims. Simplicity will not always be a tactic available to proponents; some reforms are necessarily complicated. But, on the whole, we expect that our framework will improve transparency in the text of initiatives.

The bargaining during the second reading period may involve logrolling between initiative supporters and legislators that, in some cases, will result in deals that “buy off” the initiative supporters without instituting meaningful reform along the lines described in the policy statement. Some of these deals may be welfare-reducing for society as a whole although beneficial to the leaders of the initiative drive. When such a deal is embodied in a statute, there are no safeguards other than those in the traditional legislative process to bring attention to the compromise. However, when the deal requires a popular vote to enact it because it is part of a constitutional change, the framework provides several protections. First, in the description of a legislatively backed constitutional ballot measure, the CIIOC should identify any side deal that deviates from the purported policy objectives. This description, produced by an entity that is not a party to any bargain, will make dubious compromises more transparent to the press, opponents of the initiative, and voters. Second, as described above, the campaign will likely include discussions of whether

the measure on the ballot is really the same reform that qualified during the first stage of the framework. This dynamic makes it more difficult for proponents to slip in special provisions benefiting them or their allies, or for the legislature and proponents to include side deals in the text submitted for a vote. Logrolling will certainly occur—as it occasionally does now in the initiative process<sup>69</sup>—but our framework provides sufficient checks and balances to make the deals salient to voters.

Even with these changes in the process of proposing and drafting initiatives, we expect some to contain mistakes or to cause consequences not fully understood when they were enacted. After all, even with many vetogates, expert staff, and time for deliberation in the traditional legislature, some statutes are poorly written, hastily conceived, and prone to unanticipated consequences.<sup>70</sup> Thus, the third reading stage of our framework focuses on the ability to revise popularly enacted laws and constitutional amendments after they are passed.

### C. THE THIRD READING: ALLOWING REVISION AFTER ENACTMENT

The issue of post-enactment change to initiatives must be resolved differently for statutory initiatives and constitutional initiatives. In every state that allows popularly generated constitutional amendments, a subsequent popular vote is required to amend or repeal such an initiative. Statutory initiatives, on the other hand, are more amenable to subsequent revision. All states except California allow legislatures some latitude to modify statutory initiatives; in California, statutory initiatives are insulated from subsequent legislative involvement unless such involvement is specifically authorized by the initiative itself.<sup>71</sup> A few states prohibit

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69. See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 314–15 (2005) (describing logrolling engaged in by Gerald Meral, president of the nonprofit Planning and Conservation League Foundation, in California, to determine which projects would be included in a bond measure on the November 2002 ballot).

70. John Copeland Nagle observes that the legislature sometimes fails to take advantage of vetogates in his interesting piece comparing initiatives with hastily enacted statutes. John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y 163, 170–81 (1997). Certainly, we do not want to compare an ideal legislative process with a realistic, or even cynical, view of direct democracy. But our point is that the legislative process provides checks and balances—including the executive's veto power—that the initiative process simply lacks. Our goal is to suggest additional checks for the latter process, in the hope that they will be used to improve policy but with awareness that they will not be foolproof.

71. CAL. CONST. art. II, § 10(c) (“The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.”).

repeal, at least for the first few years the statutory initiative is effective.<sup>72</sup> Other states require supermajority legislative votes to amend or repeal popularly enacted laws,<sup>73</sup> and Arizona requires that any amendment further the purposes of the initiative and be passed by three-fourths votes in both houses.<sup>74</sup> We will discuss the framework for statutory initiatives first and then deal with the harder issue of revision of more durable constitutional initiatives. Our focus is on initiatives that are placed on the ballot by individuals and groups, not by the legislature. Legislatively backed constitutional initiatives have navigated through the checks and balances in the legislative process and thus do not require the additional check of the third reading stage.

### 1. Statutory Initiatives

Under our proposed framework, some proposals for statutory changes qualified in the first reading stage will never appear on the ballot because a successful negotiation with the legislature culminates in the enactment of a compromise through the traditional legislative process. Some proponents, however, will not be satisfied with the legislature's response and will place their statute on the ballot. Unlike the current regime in California, the initiative framework should allow legislative repeal and amendment of such statutory initiatives with the following limitations. First, repeal by two-thirds vote of the legislature should be possible, but only after two years of experience with the initiative. Second, a two-thirds vote of the legislature should be required for amendments, which must further the objectives of the popularly enacted law.

Some protection from the legislature is required; lawmakers can be hostile to initiatives, which are often used to circumvent the traditional process to enact policy. We thus allow repeal but limit amendments to those consistent with the purpose of the law. This design better ensures accountability for lawmakers who seek to undermine the statute. If they

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72. See, e.g., NEV. CONST. art. 19, § 2, cl. 3 ("An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the legislature within 3 years from the date it takes effect."); WYO. CONST. art. 3, § 52(f) ("An initiated law . . . may not be repealed by the legislature within two (2) years of its effective date. It may be amended at any time.").

73. See, e.g., ARK. CONST. art. 5, § 1 ("No measure approved by a vote of the people shall be amended or repealed by the General Assembly . . . except upon a yea and nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly . . ."); N.D. CONST. art. 3, § 8 ("A measure approved by the electors may not be repealed or amended by the legislative assembly for seven years from its effective date, except by a two-thirds vote of the members elected to each house.").

74. See ARIZ. CONST. art. IV, pt. 1, § 1, cl. 6(C); WATERS, *supra* note 16, at 27. Arizona also prohibits repeal of an initiative by the legislature. ARIZ. CONST. art. IV, pt. 1, § 1, cl. 6(B).

want to negate the law, they must do so directly by repeal, not through amendments that gut the proposal surreptitiously while still leaving it on the books. This latter course of action is much more likely to occur without the public's knowledge, whereas outright repeal is apt to be noticed.

One problem with this solution is that supporters of the law must remain vigilant in monitoring the amendments passed by the legislature and challenging those they believe are inconsistent with the law's purposes. Grassroots groups sponsoring an initiative often do not remain organized or funded past the campaign, and even those that remain somewhat active may not have the resources to mount judicial challenges. In this case, money will remain influential because only those groups with long-term organizations and sufficient funds will be able to protect their initiatives from legislative meddling. We will suggest one solution to this problem later: the CIIOC will keep track of legislative involvement with statutory initiatives. It will also have standing to bring lawsuits to challenge amendments that commissioners believe incompatible with the initiative's purposes. We note that the oversight commission will focus only on statutes passed through the initiative process, not on compromises enacted through the legislature. The possibility of ongoing oversight may encourage some reformers to pursue the initiative route if they fear legislators and other state officials may not implement a compromise, and the specter of oversight may encourage the legislature to offer an attractive compromise to proponents.

## 2. Constitutional Initiatives

Currently, many initiatives are constitutional amendments and thus cannot be changed by the legislature, but only by a subsequent popular vote. If an initiative framework makes statutory initiatives more susceptible to legislative tinkering, presumably the number of constitutional initiatives relative to statutory ones will increase. Although constitutional initiatives usually require more signatures for ballot access, few states require higher voting thresholds to pass constitutional initiatives (a simple majority of those voting is the typical requirement for enactment of any type of initiative).<sup>75</sup> Groups with sufficient resources find obtaining the additional signatures relatively unproblematic, although more expensive, and thus

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75. Nevada requires that initiative constitutional amendments pass by a majority vote in two successive general elections. NEV. CONST. art. 19, § 2, cl. 4; WATERS, *supra* note 16, at 26. *See also* INITIATIVE & REFERENDUM INST., REP. 2006-3, CONSTITUTIONAL AMENDMENTS (2006), <http://www.iandrinstitute.org/REPORT%202006-3%20Amendments.pdf> (detailing other deviations from the requirement of a simple majority to pass).



often choose the more durable constitutional route rather than the statutory form, in states where they have a choice.<sup>76</sup>

We propose that any constitutional initiative proposed entirely through the petition process, rather than placed on the ballot by legislatures, should require popular reauthorization after a certain period of time. Either the legislature can resubmit the initiative to the people, or proponents can again gather signatures to place it on the ballot for extension. Constitutional provisions passed as initiatives should be subject to a one-time reapproval after ten years.<sup>77</sup> Although this seems a relatively long period of time, we believe at least a decade of experience is necessary for some initiatives to produce a record necessary to evaluate them fairly. For example, initiatives that affect structures of representation such as redistricting and campaign finance reform must be in place for at least a decade or they will expire before they can have any significant impact on governance. In addition, there is a cost to reauthorizing initiatives. The framework applies to all initiatives; therefore, even those that enhance welfare will expire and require reenactment. Finally, a long enough period of implementation is needed to encourage people to continue to use the initiative process; it is not our intention to construct a framework that destroys direct democracy by making initiatives so unattractive that no one will spend time qualifying and passing them. Ten years is the period of time that we think balances the costs and benefits of reduced durability.

Although one could argue that constitutional initiatives passed by a landslide, say by three-fourths of those voting on the measure, should not face reauthorization, Kousser and McCubbins's analysis suggests that politicians construct some welfare-reducing initiatives to face little opposition. Thus, these initiatives might be enacted by a substantial margin, in an environment that undermines the ability of voters to vote competently.<sup>78</sup> Therefore, no special treatment should be afforded to initiatives on the basis of their popularity on election day.

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76. In states that allow both constitutional and statutory initiatives, there have been slightly more statutory initiatives placed on the ballot through the petition process than constitutional initiatives. Data from the *Initiative and Referendum Almanac* reveal that 703 constitutional amendments have appeared on the ballot in the eleven states that allow both direct constitutional and statutory initiatives, while 758 statutory amendments have qualified. This data covers the period from the beginning of the initiative process in the United States through 2000. See WATERS, *supra* note 16, at 12 and *passim*.

77. For a discussion of the effects of requiring traditional legislation to expire, including some similar to those we discuss here in the context of initiatives, see Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. (forthcoming 2007).

78. Kousser & McCubbins, *supra* note 2, at 957–60.

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For popular initiatives that expire and are not placed on the ballot by the legislature for permanent enactment, fewer signatures will be required for reauthorization to gain ballot access than were required initially. Because part of the rationale for a one-time reauthorization requirement is to allow constitutional initiatives to be modified to reflect experience with the law, proponents will qualify for the reduced signature threshold even if the measure is slightly different from the original enactment. This may necessitate some judgment calls by the official certifying the petitions for circulation, but the general rule should be that changes furthering the purpose of the measure will be allowed without triggering the higher signature thresholds. The process for placing the initiative on the ballot will include the two reading periods described above to allow an opportunity for evaluation of the experience with the provision and to encourage revisions that improve its operation.

We anticipate many constitutional initiatives will be extended either by legislative action or through requalification. Once a law has been in effect, new interest groups often form as a result of the law, and they may join the original supporters to advocate for reenactment. In addition, groups will often work harder to retain a benefit than to obtain it in the first place. But the one-time reauthorization allows for modification of the proposal to adjust to developments that were unanticipated when the initiative was passed or to account for changed circumstances. Moreover, proponents will still need to convince a majority of voters to support the proposal again on election day, even if the threshold for ballot access is somewhat reduced. Once reauthorized, however, the initiative becomes permanent until repealed by another initiative or constitutional revision.

#### IV. A FRAMEWORK FOR THE IMPLEMENTATION OF INITIATIVES: A CITIZENS OVERSIGHT COMMISSION

The checks and balances provided by our Dual Path Initiative Framework do not explicitly address the concern that legislatures often flaunt or simply ignore the mandates of an initiative. This is called the “implementation problem,”<sup>79</sup> and it occurs because initiative proponents have to delegate to others the responsibility to implement and enforce the initiative once it has been passed. Because the initiative process is a costly way to circumvent the traditional lawmaking process, it tends to result in policies that elected officials—often a large majority of them—do not like

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79. Lupia & Matsusaka, *supra* note 1, at 475.

or support.<sup>80</sup> Otherwise, reformers would have used the route of traditional lawmaking. Gerber, Lupia, and McCubbins identify two groups of post-enactment actors vital to the initiative's success: "implementation leaders" who provide instructions for compliance (for example, state legislators who often must pass implementing legislation), and "implementation agents" who carry out those directions (for example, bureaucrats who oversee the day-to-day governmental activities required by the initiative and any subsequent instructions).<sup>81</sup> Not only are both these groups likely to be hostile to the initiative's objectives, but also initiative supporters often disband after their victory or lack the resources to monitor compliance and sanction noncompliance. For greater compliance, we need to create a third group—call them "implementation intervenors"<sup>82</sup>—whose interests are more closely aligned with the proponents and the voters. We propose to create such a group by establishing a statewide CIIOC.

#### A. DESIGN OF THE CIIOC

To reduce the ability of initiative leaders and agents to disregard popular measures that the voters approve, we advocate establishing a CIIOC, comprised of members appointed through the initiative process. Each initiative will name a representative to the CIIOC, who will take office if the measure passes. The primary role of the CIIOC will be to oversee the actions of the implementation leaders and agents; provide information on compliance with initiatives through hearings, press conferences, and publications; and bring enforcement actions through the courts and administrative procedures. It is first and foremost an oversight mechanism, a component of a "fire alarm" network that will provide information to the public about each initiative and its implementation.<sup>83</sup> It is an additional intervenor designed to enhance the chances of implementation; it will not replace current mechanisms like lawsuits, other enforcement actions, and publicity resulting from the efforts of private individuals or groups.

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80. Gerber et al., *The Politics of Implementation*, *supra* note 4, at 55–56.

81. *Id.* at 47.

82. *Cf.* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 264–66 (1987) (describing intervenors in the legislative and administrative processes).

83. *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (arguing that "fire-alarm" oversight, which involves little direct intervention by Congress into executive agency activities, is likely to be more effective, on balance, than "police patrol" oversight, which is comparatively centralized, active, and direct).

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The CIIOC will have oversight jurisdiction with respect to initiatives placed on the ballot by petition, but not with respect to measures put before the people by the legislature, even if the original motivation was a petition qualified during the first reading period of our framework. The rationale for the CIIOC is that initiatives most likely to be resisted by implementation leaders and agents need additional resources to ensure compliance; if the measure was ultimately supported by the legislature, there is less justification for this new form of oversight.

The CIIOC and its staff could play additional roles in the Dual Path Initiative Framework. For example, we noted previously that the CIIOC could determine whether the text of an initiative submitted to the voters after the second reading period conformed to the policy statement that had been qualified in the signature gathering stage. Additionally, the CIIOC could release a statement describing how any measure placed on the ballot by the legislature related to an earlier policy statement. There are other opportunities to use the CIIOC, rather than an elected or appointed official who may have a conflict of interest with respect to a ballot measure, to make crucial decisions. The CIIOC could play a role in determining whether a constitutional initiative submitted for popular reauthorization after a decade of experience is sufficiently related to the previously enacted initiative to be considered a reauthorization rather than a new policy. Although the CIIOC provides an alternate decisionmaker to political actors apt to be generally hostile to initiatives, the Commission should be used for purposes other than oversight only when necessary. The oversight role will demand significant attention and resources from the commissioners and their staff, and it should remain the central focus of the CIIOC.

We are not aware of any similar initiative oversight commission with jurisdiction over all popularly initiated ballot measures. Some statewide and local initiatives establish oversight commissions with responsibilities only with regard to the particular initiative creating them. For example, the Political Reform Act enacted by statutory initiative in California in 1974 established the Fair Political Practices Commission (“FPPC”) with five members, appointed by the governor, attorney general, secretary of state, and controller, to oversee and administer the Act.<sup>84</sup> The 2004 stem cell initiative established a California Institute for Regenerative Medicine to regulate research and to administer the grants. The twenty-nine members of the Independent Citizen’s Oversight Committee that runs the Institute are appointed by various elected officials and the chancellors of some of the

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84. CAL. GOV’T CODE §§ 83100–83102 (West 2005).

University of California universities.<sup>85</sup> Other states have similar initiative-specific oversight commissions, such as the Citizens Clean Elections Commission established in Arizona as part of the public campaign financing system,<sup>86</sup> and the Citizens' Utility Board established by a 1932 initiative in Oregon.<sup>87</sup>

Local initiatives also can create citizens commissions designed to monitor compliance with the particular ballot measure. For example, an initiative passed in Marin County, California in June 2006 established a Citizens Oversight Commission to ensure that money from an education bond was spent according to the terms of the ballot measure. The Commission is appointed by the Board of Trustees of the school district, however, undermining the proponents' claims that it would be independent. These provisions of the ballot measure were explicitly designed to respond to the implementation problem: the opponents' arguments against the measure began with a recitation of past promises related to educational infrastructure that politicians had repeatedly broken.<sup>88</sup>

Some of these initiative-specific commissions also function as the implementation leader or agent, such as the FPPC that promulgates regulations and brings enforcement actions against those who violate ethics or campaign rules. Others, such as the local oversight commission for the education bond, are purely initiative intervenors charged with auditing the behavior of leaders and agents and publicizing any noncompliance.

The CIIOC eliminates the need for separate oversight commissions at the state level and replaces them with one well-staffed and permanent commission.<sup>89</sup> Each statewide initiative will be required to name one

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85. CAL. CONST. art. XXXV, §§ 1-7; CAL. HEALTH & SAFETY CODE §§ 125290.10-20 (West 2006).

86. ARIZ. REV. STAT. ANN. § 16-955(A) (Supp. 2005).

87. OR. REV. STAT. §§ 774.010-.990 (2005).

88. For the arguments that appeared in the Marin county ballot pamphlet for and against this measure, see MARIN REGISTRAR OF VOTERS, MEASURE STATEMENTS JUNE 6, 2006, REBUTTAL TO ARGUMENT IN FAVOR OF MEASURE A (2006), *available at* <http://www.co.marin.ca.us/depts/RV/main/Prime60606/Measures/21-554.pdf>; MARIN REGISTRAR OF VOTERS, MEASURE STATEMENTS JUNE 6, 2006, ARGUMENT AGAINST MEASURE A (2006), *available at* <http://www.co.marin.ca.us/depts/RV/Main/Prime60606/Measures/21-555.pdf>.

89. Initiatives might still set up initiative-specific agencies to implement the new policy; the CIIOC does not eliminate the need for such administrative agencies. However, because many of these are appointed by elected officials, the CIIOC should improve compliance in such cases because the appointed officials may have preferences more aligned with those who appointed them than with the voters or initiative proponents.

representative to serve on the CIIOC if the initiative is enacted.<sup>90</sup> This representative will serve one ten-year term in the case of constitutional initiatives, or, in the case of statutory initiatives, one ten-year term or until the initiative is repealed, whichever is shorter. Each initiative will also name a group of potential replacements for the representative in case the representative does not serve the full ten-year term.<sup>91</sup> The CIIOC will randomly select from that group of replacements when the need to fill a vacancy occurs.<sup>92</sup> If none of the replacements is willing to serve, or the initiative fails to name replacements, then the vacancy will not be filled.<sup>93</sup> This method of selection ensures that the interests of the commissioners will be more aligned with the voters and proponents of the reform, allowing their objectives to remain in play for at least a decade. It also avoids the specter of elected officials nominating people to the commission who are likely not to be sufficiently supportive of the popularly enacted laws and constitutional amendments.

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90. Thus, the number of commissioners will fluctuate as the number of initiatives fluctuates. Commissioners will be part-time positions, with compensation for expenses and perhaps a very modest honorarium. As initiatives conflict, so might the commissioners, but this conflict is just a reflection of state politics and the decisions of the voters in passing conflicting initiatives. The commission then provides another forum for these conflicts to be made public and explicit and to be brought to a resolution. We object to a commission run by experts, such as former legislators or judges, who are often part of the problem being addressed by an initiative. The commission may not need to meet very often but should meet and publish reports on implementation each fall and will meet to approve the language of new initiatives as needed. The commission should meet as often as needed by circumstances and should have a budget large enough to allow a sufficient number of meetings. One reader of an earlier draft worried that the CIIOC will encourage a new kind of crypto-initiative, symbolic ballot measures designed only to pack the CIIOC with allies of a particular group or movement. We think it unlikely that many would be willing to spend the resources necessary to qualify and enact enough ballot measures to capture the CIIOC. We also anticipate that the reading periods in the Dual Path Initiative Framework will work to reduce the number of crypto-initiatives, identify any that are designed purely for questionable purposes, and publicize that aspect of any proposal. Moreover, the legislature has the opportunity during the second reading period to co-opt a proposal and eliminate the possibility of CIIOC involvement. Thus, although this sort of commission-packing behavior is theoretically possible, we do not anticipate that it will occur much, if at all, in practice. *Cf.* Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1407–14 (2005) (discussing commission-packing in a related context).

91. Like the FPPC, commissioners would be removable by the governor, with the concurrence of the Senate, for “substantial neglect of duty, gross misconduct in office, inability to discharge the powers and duties of office . . . after written notice and an opportunity for a reply.” CAL. GOV’T CODE § 83105 (West 2005).

92. For a recent use of random selection as part of a political process, see George A. Papandreou, Opinion, *Picking Candidates by the Numbers*, INT’L HERALD TRIB., June 8, 2006, at 8 (discussing how Greece’s Socialist Party revived the ancient Athenian practice of deliberative democracy to select its candidates in municipal elections).

93. The ability to fill a vacancy on the commission reflects how much people care about the implementation of an initiative.

To establish the CIIOC immediately, members from current initiative-specific commissions will be randomly selected to serve terms staggered to end as the CIIOC begins to be filled by representatives of initiatives passed after its creation. Thus, in California, the CIIOC might first be formed with a representative from the FPPC, the stem cell Independent Citizen's Oversight Committee, the Children and Families First Commission,<sup>94</sup> and other similar initiative-created commissions that act in whole or in part as implementation intervenors. After five to seven years, all these members will have rotated off the CIIOC, replaced by representatives of newly enacted initiatives.

The CIIOC will elect one member to serve as chair for a two-year term; no chair can serve more than three terms. The commission will make decisions by majority vote of the members present when there is a quorum of a majority of eligible commissioners. A commissioner cannot also hold any other elected or appointed political office at the federal, state, or local level, although commissioners can participate in campaigns and other partisan political activity. Commissioners will be subject to aggressive disclosure laws so their political activities are publicized and any potential conflicts of interest known. Recusal policies consistent with a citizens oversight commission such as the CIIOC will be developed by the state's political practices and ethics commission.

The CIIOC will employ an executive director, a legal counsel, a director of communications, a director of research, a director of information services and technology, and other appropriate professional staff. The compensation and the budget will be tied to another state administrative agency's budget, such as the Legislative Analysts Office, and increased automatically according to the number of initiatives overseen and by changes in the cost of living. This mechanism avoids the possibility that the legislature will hamstring the CIIOC by denying it funding. Thus, in California, the funding structure could be similar to the one governing the FPPC: the FPPC chair is paid the same salary as the president of the Public Utilities Commission, other commissioners receive a modest honorarium for each day they are engaged in official duties,<sup>95</sup> and the budget of the FPPC is set by law and increases automatically by the cost of living.<sup>96</sup>

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94. CAL. HEALTH & SAFETY CODE § 130110 (West 2006).

95. CAL. GOV'T CODE § 83106 (West 2005).

96. *Id.* § 83122.

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Although the CIIOC will be given enforcement authority beyond the ability to hold hearings, it is not necessarily the case that it will bring substantial numbers of lawsuits or other enforcement actions for at least four reasons. First, legislators and bureaucrats will be aware of the CIIOC and its power and will alter their behavior to take account of the increased probability of sanctions. The CIIOC can threaten sanctions through hearings and publicity, saving the possibility of more intrusive enforcement actions if publicity is not sufficient to increase compliance. In other words, the mere existence of the CIIOC will change the political game surrounding initiative compliance, increasing the willingness of leaders and agents to implement the initiative more fully. Although this threat may not be sufficient to ensure complete compliance, few laws are fully enforced, and the CIIOC may decide it is content with the level of enforcement that it observes. This behavioral change will also be influenced by the increased likelihood that citizens or interest groups will challenge lackadaisical enforcement, encouraged by the information produced by the CIIOC through hearings and reports.

Second, although the CIIOC will have a budget that cannot be eliminated or reduced by lawmakers, it will not have an unlimited budget. Thus, it will have to make choices about how to deploy resources. It will have to prioritize, choosing only publicity as an enforcement method in some cases, bringing lawsuits and other proceedings in others, and choosing to do nothing in still others.

Third, the CIIOC will include a wide range of viewpoints among its members. The members will have in common only their use of the initiative process and will not necessarily share policy or other ideological goals. Thus, any decision to pursue enforcement will be the result of compromise among CIIOC commissioners, who will strike bargains and make strategic decisions like any other collective entity in politics. This requirement of collective action among relatively diverse members acts as an internal check and balance on the activity of the CIIOC.

Finally, initiative sponsors, knowing that continuing oversight by the CIIOC will occur, are likely to use more general language when they draft initiatives than they do now because they will trust the CIIOC as their agent more than they trust the legislature or bureaucrats. Vague language increases the uncertainty about any outcome of litigation or agency enforcement, a factor the CIIOC will take account of when deciding how to deploy its resources. Of course, initiative sponsors can also predict this effect and thus will presumably work in the second reading stage to produce somewhat more specific language that will strengthen the position



of the CIIOC. The ability to specify fully, however, is limited for a variety of reasons.<sup>97</sup> Thus, the CIIOC will nearly always face some possibility of losing when it seeks to enforce its view of the initiative, and this will affect its willingness to bring action in the first place.

We anticipate that the CIIOC will be popular with the voters. Various kinds of citizens assemblies are an increasingly attractive solution to political problems caused when entrenched political actors pursue their self-interest at the expense of the public interest—or are perceived to be doing so. For example, a Citizens' Assembly on Electoral Reform in British Columbia, Canada, consisting of 160 citizens selected randomly from the province's electoral districts, conducted fifty hearings on electoral reform in 2004.<sup>98</sup> With the help of an expert staff, these ordinary citizens proposed changing the system of representation from first-past-the-post, single-member districts to a single transferable vote system.<sup>99</sup> The proposal was submitted to the people in a referendum. To pass, the referendum had to receive both a supermajority of 60% of all those voting and a simple majority in 60% of the seventy-nine electoral districts. The referendum failed, but it only barely missed the threshold: it received over 57% support and achieved a simple majority in all but two districts.<sup>100</sup> A similar citizens assembly has been proposed in California to consider election reform.<sup>101</sup> Although these citizens assemblies are law-proposing bodies and thus serve a function different from the CIIOC's, and their members are selected in different ways,<sup>102</sup> such assemblies reflect the current enthusiasm for

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97. For a discussion of the reasons initiatives use vague language now, see Gerber et al., *The Politics of Implementation*, *supra* note 4, at 58.

98. See Keith Archer, *Redefining Electoral Democracy in Canada*, 3 *ELECTION L.J.* 545 (2004) (examining the reform of Canada's electoral system as a case study in reforming political institutions). The Citizens' Assembly website is <http://www.citizensassembly.bc.ca/public> (last visited Dec. 21, 2006).

99. See BRITISH COLUMBIA CITIZENS' ASSEMBLY ON ELECTORAL REFORM, *supra* note 10, at 3–8.

100. See FINAL REFERENDUM RESULTS: REFERENDUM ON ELECTORAL REFORM (2005), available at <http://www.elections.bc.ca/elections/ge2005/finalrefresults.htm>.

101. See Assemb. Const. Amend. 28, *supra* note 10 (dying in committee after being introduced by Assembly Members Canciamilla and Richman). In addition, a citizens assembly is under consideration in Ontario. See News Release, Office of the Premier, Ontarians to Have a Say on Electoral Reform (Nov. 18, 2004), <http://www.premier.gov.on.ca/news/Product.asp?ProductID=251>. See also ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004) (proposing an institution like a citizens assembly, a fourth, "popular," branch of government in a creative proposal to make direct democracy more deliberative).

102. Although the CIIOC members are not selected by lot, as in the British Columbia Citizens' Assembly, they are more like ordinary citizens than are legislators. Even in a world of term limits, most legislators have extensive political experience and are more likely to be professional politicians than

mechanisms that facilitate increased citizen involvement in policymaking. Moreover, they demonstrate the reality that institutional innovation is necessary to deal with inevitable conflicts of interest when laws regulating the political process would otherwise be crafted or implemented by those active in the political process.

B. THE EFFECTIVENESS OF THE CIIOC AS AN IMPLEMENTATION  
INTERVENOR

In the most comprehensive analysis of the implementation problem, Gerber, Lupia, McCubbins, and Kiewiet identify four conditions affecting the degree of compliance with popular initiatives.<sup>103</sup> The CIIOC, particularly as part of the larger Dual Path Initiative Framework, implicates three of the four conditions and does so in ways that will result in fuller compliance with the wishes of voters than occurs now.

First, lowering the technical and/or political costs of implementation leads to greater compliance by a legislature.<sup>104</sup> Technical costs are affected by the clarity of drafting an initiative because they include “the time and monetary costs of having legislative staff determine how to implement aspects of the initiative.”<sup>105</sup> The first and second reading periods should reduce the technical costs of implementation and thereby increase the probability of compliance. The CIIOC can tilt the balance of political costs in favor of implementation, as well as positively affect technical costs of monitoring mandated programs. Most initiative sponsors do not have the financial resources to oversee the post-election process, and many disband after the measure has passed. Thus, they currently find it difficult to impose significant political costs on legislators for ignoring voter-passed initiatives. An oversight commission, however, that provides “sunshine” and has enforcement authority creates a greater chance that there will be political costs for undermining voter-passed initiatives. By creating political costs for failing to implement an initiative’s dictates, oversight helps to equalize the costs politicians face if they implement an initiative that works against their self-interest and the costs of not following the voters’ wishes. To the extent that oversight shifts the balance toward implementation, the oversight committee will have a positive effect on the probability of implementation.

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citizen legislators. In contrast, CIIOC members cannot be elected or appointed politicians and will have been selected through the mechanism of direct democracy.

103. See GERBER ET AL., STEALING THE INITIATIVE, *supra* note 4, at 15–25.

104. *Id.* at 20.

105. *Id.*

Second, an initiative is more likely to be implemented if those supporting the measure can impose effective sanctions on initiative leaders or agents who do not comply with the initiative.<sup>106</sup> Currently, initiative proponents have very limited sanctioning ability.<sup>107</sup> Under our proposal, their power to punish recalcitrant politicians and bureaucrats is greatly augmented. Initiative sponsors select who sits on the commission, and they will choose agents who are likely to have common interests and push forcefully for fuller implementation. The oversight commission will have the ability to publicize the actions of the implementers through hearings, publications, press conferences, and enforcement actions. By bringing lawsuits and other proceedings, they can use the coercive power of the state to increase compliance. Politicians are primarily concerned about reelection;<sup>108</sup> if they anticipate that the information and attention created by the oversight commission is likely to affect their reelection prospects, they will exercise greater energy in policy implementation. Not all politicians will change their behavior as a result of the additional publicity brought by the CIIOC. Some represent districts that did not support the initiative and thus face no electoral backlash;<sup>109</sup> others will anticipate that different issues will dominate any reelection campaign. However, the CIIOC will increase the chance that failure to implement popular initiatives will result in some punishment for some legislators on election day.

A third condition that increases compliance is the ability and willingness of the public or others who support the initiative to observe the actions of the legislature.<sup>110</sup> For example, although initiatives imposing legislative term limits are enormously unpopular with lawmakers themselves, they are fully complied with because the failure to leave office at the end of the term is easily observable. Even if the voters forget how long a particular representative has served, the representative's challenger and the press can bring the matter to the voters' attention.<sup>111</sup> Term limits are an unusual case; in most circumstances, voters and information

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106. *Id.* at 21.

107. See Gerber et al., *The Politics of Implementation*, *supra* note 4, at 51–52.

108. This is the standard assumption in the legislation scholarship. See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 14–15 (1974) (“It seems fair to characterize the modern Congress as an assembly of professional politicians spinning out political careers.”).

109. See Daniel A. Smith, *Homeward Bound? Micro-level Legislative Responsiveness to Ballot Initiatives*, 1 ST. POL. & POL’Y Q. 50, 56–57 (2001).

110. GERBER ET AL., STEALING THE INITIATIVE, *supra* note 4, at 22.

111. An additional factor in the success of the term limits initiatives is that they were backed by several well-funded national organizations that did not disband after succeeding in passing the measures. For a discussion of the term limits provision of California Proposition 140 of 1990, and the implementation problem, see *id.* at 57–59.

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intermediaries face substantial difficulties in learning of the actions of initiative leaders and agents. Our framework directly addresses this issue by creating a standing entity with the resources to oversee implementation and with the incentive to ensure fuller compliance. Importantly, the technical staff and budget of the CIIOC will help to level the playing field between the legislators and the public, thereby increasing compliance with the initiative's dictates.

The fourth condition affecting implementation is the number of people required for full compliance: as that number grows, the probability of full compliance goes to zero.<sup>112</sup> The addition of an oversight commission does not address this concern with implementation. Proponents concerned about this factor, however, can use the time during the first two reading periods to design legislation that minimizes the number of required participants. We suspect, however, that reforms often require many agents to implement them appropriately, so the ability of proponents to reduce the threat to their measures by reducing the number of parties involved is limited.

Although the CIIOC, together with the Dual Path Initiative Framework, is not a panacea for the problems associated with initiative implementation, creating this sort of innovative oversight mechanism will reduce problems with compliance. By improving the execution of initiative policy, public policy will better represent the goals of citizens.

#### V. CONCLUSION: MORE THOUGHTS ON THE POLITICAL EQUILIBRIUM AFTER ADOPTION OF THE DUAL PATH INITIATIVE FRAMEWORK

Our previous discussion has suggested some aspects of the political equilibrium that would result from adoption of our proposal. It is worth noting briefly several other changes to the political landscape that we expect. First, we do not anticipate that our reforms will significantly change the balance between statutory and constitutional initiatives because we do not alter the qualification requirements for either type of initiative. Currently, initiative proponents with the choice use statutory initiatives more than popularly generated constitutional amendments, even though legislatures have the ability to amend and/or repeal statutory initiatives in all states except California.<sup>113</sup> Adding new restrictions (mandatory reauthorization after a decade of experience) to constitutional initiatives will make popular constitutional change relatively less attractive than it is

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112. *Id.* at 24.

113. *See supra* note 76.

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now. So if there is any shift, it should favor increased use of the statutory route, with the corresponding benefit of the possibility of legislative involvement after enactment, allowing flexibility to change the policy over time.

Second, the new equilibrium will result in a different number of initiatives appearing on the ballot, although the direction of the change is uncertain because there are several cross-cutting factors at play. Our proposal is intended to give initiative proponents an opportunity to qualify policy statements more easily than they can now qualify either type of initiative. The policy statements are less complicated than the text of an initiative, making them easier to sell to voters in a signature gathering drive and reducing the costs for drafting them. Thus, we predict that more policy statements will be qualified to move to the second reading period than are currently qualified for the ballot now. Furthermore, the lower costs of qualification (because there is no need to draft detailed text) will encourage more small groups and grassroots efforts to pursue the initiative process than do so in the current, more costly system. Although our proposal does not reduce the power of money in the qualification stage, we do level the playing field for those groups whom the inventors of direct democracy hoped to empower: grassroots groups that are more likely to reflect majoritarian preferences somehow blocked in the legislative process.

Countervailing forces, however, may discourage the expenditure of money and effort on an initiative. The institutionalized possibility of legislative action during the second reading stage makes any policy gains less certain. Although proponents can still place the measure on the ballot no matter what happens in the second reading stage—legislative action does not foreclose this possibility—voters often defeat both proposals when there are competing initiatives, and legislatively backed ballot measures tend to succeed more than popularly generated ones. The combined effect of more legislative involvement and reduced durability (through mandatory reauthorizations for constitutional initiatives and legislative involvement in statutory ones) will decrease the value of initiatives. By lowering the value of an initiative, our reform should result in fewer initiatives on the ballot. In other words, more policy statements may qualify, but fewer initiatives may appear on the ballot, as proponents bargain with legislators more readily under our proposed incentive structure. As we observed above, one way to think of the first reading stage is as a new route of bill proposal in the legislature.<sup>114</sup>

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114. See *supra* Part III.B.

Of course, if the legislature does not bargain with proponents or create policy in response to policy statements qualified during the first reading period, then we expect there to be even more initiatives on the ballot, as citizens and interest groups attempt to pass their preferred legislation. Legislators may refuse to bargain for various reasons. They may want to avoid any blame for a policy that fails (although for compromise constitutional reforms, which require a vote of the people, some of the blame will be shared by voters themselves). Lawmakers may be unable to bargain successfully when government is divided and the parties are split over the appropriate response strategy. The failure of the legislature to engage directly with citizens in policy making may lead to electoral consequences in the next election, however.

Another factor affecting the number of initiatives on the ballot is the effect of the reapproval requirement for constitutional amendments, which requires that supporters place them back on the ballot to remain effective. We expect that most constitutional provisions will be requalified for the ballot when they expire because the original proponents will be joined in this effort by others who benefit from the law. This possibility may encourage the legislature to bargain on a compromise, although the willingness to bargain will be influenced by the likelihood of success at the polls. Whether those initiatives that are requalified through the popular path are enacted more easily than those appearing on the ballot in the first place is unclear. Voters will have more information about the provisions that are being resubmitted to them, a reality that may be positive or negative depending on the information. While there may be additional beneficiaries campaigning for passage, there may also be groups and people who have concretely felt the costs of the law during the decade it has been in place, and who will even more aggressively campaign for its defeat. Presumably, after some experience, the bargaining dynamics will be shaped, and fewer initiatives will actually be put before the people for reenactment either because the legislature will eagerly bargain (if reenactment rates are high), or proponents will not pay the costs of requalification and a new campaign (if reenactment rates are low).

Third, although the analysis above suggests that initiatives will have lower value to proponents because of their reduced durability, the CIIOC will actually increase another aspect of the value of popular initiatives. The CIIOC will ensure that initiatives enacted by the voters at the polls are more fully implemented, at least until they expire, in the case of constitutional initiatives, or are repealed by the legislature, in the case of statutory measures (an action for which there may be electoral

consequences). If, in the end, this effect outweighs the former effects, and more initiatives end up on the ballot because of the promise of citizen oversight, at least they will have had three readings and a chance for legislative involvement before they become the law. The role of the CIIOC with respect to popularly generated initiatives will encourage the legislature to bargain with initiative proponents because a compromise—whether statutory or constitutional—will foreclose involvement by the independent group of citizen overseers. Proponents may be willing to give up the protection of the CIIOC in return for permanent enactment of a legislatively supported constitutional amendment or a statutory solution that lawmakers are more likely to enforce since they played a role in its design.

The equilibrium outcome under the new framework for initiatives—with its dual path process of three readings and the creation of the CIIOC—hinges in large part on how the legislature reacts to initiative proponents during the second reading bargaining game. An active legislature will reduce the number of initiatives under this scheme, but an inactive one will increase, perhaps greatly, the number of initiatives, and representative democracy will trend toward direct democracy within our hybrid system. However, all of the initiatives will, ultimately, produce better policy under this framework, given the addition of checks and balances into the process and the greater probability of compliance. In short, this framework promises substantial improvement to institutions of governance and the policies they produce.

