Introduction

The California Initiative Review (CIR) is a non-partisan, objective publication of independent analyses of California statewide ballot initiatives. The CIR is prepared before every statewide election and covers all measures presented on the ballot, and also often contains a report on a topic related to initiatives, elections, or campaigns.

The CIR is written by law students in the California Initiative Seminar course at Pacific McGeorge. This year, we had 19 students enrolled in the course. Editing of each analysis is performed by student editors under my supervision. We were fortunate to have the editorial talents of Andrea Dupray and Adam Cate at work on this issue. In addition to distribution at our California Initiative Forum, the CIR is posted on the Internet as a public service to California. This issue and past issues of the CIR are housed online at: http://www.mcgeorge.edu/Research_Centers_and_Institutes/Capital_Center_for_Public_Law_and_Policy_Home/Publications/California_Initiative_Review.htm.

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Happy Voting,

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CALIFORNIA INITIATIVE REVIEW

Proposition 19:
Regulate, Control and Tax Cannabis

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I. EXECUTIVE SUMMARY

Proposition 19 is a measure that would change California law by allowing legal possession, consumption, and cultivation of cannabis under certain circumstances. Proposition 19 would make California marijuana laws the most lenient of any in the world, surpassing the Netherlands and Portugal where marijuana is merely decriminalized. Proposition 19 leaves several aspects of legalization open for the state and/or local governments to decide. For this reason many of the actual effects remain unknown at this time. California voters have a number of issues to consider before casting their votes on Proposition 19.

A “yes” vote on Proposition 19 means that any person 21 years or older could lawfully possess, cultivate, and consume marijuana in California, subject to the measure’s restrictions. The proposition gives authority to local governments to regulate taxes and controls on marijuana within their respective counties. However, under federal law, activity involving possession, cultivation, or consumption remains unlawful. Finally, Proposition 19 does not purport to interfere with Proposition 215, the Compassionate Use Act.

If Proposition 19 does not pass, marijuana will remain illegal unless authorized by California’s existing Compassionate Use Act.

II. THE LAW

a. Existing Law

i. California law

Under California law, it is currently illegal to possess, cultivate, or distribute marijuana.1 Proposition 215, which voters passed in 1996, legalized marijuana for medical purposes, thus carving out an exception to this general prohibition.2 Under Proposition 215, or the Compassionate Use Act, the laws regarding possession and cultivation of marijuana do not apply to patients or their physicians if possession or cultivation of marijuana is for the patient’s personal medical use and the patient obtained a prescription by the physician.3

In late 2003, the senate passed and the Governor signed California Senate Bill 420. This bill sought to clarify the scope of the application of Proposition 215 and also facilitated identification of those eligible to use or give prescriptions for medical marijuana. The purpose was to avoid unnecessary arrest and prosecution of qualified patients and physicians.4 The identification system under SB 420 is voluntary and not required in order to obtain medical marijuana.5 Proposition 215 and SB 420 set out the only legal way to cultivate and use marijuana in California at this time.

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2 Id.
5 Id.
The penalty for violation of California marijuana laws is not as harsh as federal penalties. Currently in California, possession of 28.5g or less of marijuana constitutes a misdemeanor and a maximum fine of $100.⁶ Possession occurring on school grounds results in a $500 fine and a sentence of 10 days in jail.⁷ Possessing more than 28.5g of marijuana will result in a misdemeanor, a fine of $500, and 6 months in jail.⁸ Further, unlawful cultivation of marijuana can lead to a felony arrest, resulting in 16 to 36 months in jail.⁹ Finally, if an adult attempted to unlawfully sell marijuana in California, he or she would face felony charges and anywhere from 2-7 years in jail, depending on how much was sold and whether it was sold to a minor.¹⁰

However, SB 1449 was passed by the Assembly on August 30, 2010 and was signed by the Governor on October 1, 2010.¹¹ This bill will go into effect on January 1, 2011, and will change the above mentioned penalties for marijuana possession. Senate Bill 1449 reduces the penalty for possessing less than one ounce of marijuana to an infraction rather than a misdemeanor.¹² Depending on what happens on November 2, Proposition 19 may supercede SB 1449 for Californians over 21 years old.¹³

Another bill, AB 2254 (also known as the Ammiano Bill), would legalize marijuana for people 21 and over and would put certain controls and taxes in place to regulate possession, consumption, and sale.¹⁴ More precisely AB 2254 requires a $50-per-ounce excise tax paid at the point of sale in addition to sales tax.¹⁵ It also requires the revenue to be spent exclusively on drug education and rehabilitation programs.¹⁶ Current criminal statutes forbidding driving under the influence or possessing marijuana on school property would remain intact under AB 2254.¹⁷ This bill is currently in the committee process and there are no hearings scheduled at this time.

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⁸ Id.
⁹ Id.
¹⁰ Id.
¹³ Id.
¹⁴ Kilmer, supra note 12.
¹⁵ Id.
¹⁶ Id.
¹⁷ Id.
ii. Federal law

Under the Federal Controlled Substances Act passed in 1970, Marijuana is an illegal substance.\(^{18}\) Violations of this federal law carry harsher penalties than violations under California law.\(^{19}\) For example, under federal law, possession of any amount of marijuana for a first time offender can be punishable by a $1,000 fine and one year in jail.\(^{20}\) A second offense of possession of any amount of marijuana requires a mandatory minimum sentence of 15 days in jail and a fine of up to $2,500; any subsequent offense carries a minimum of 90 days in jail and up to a $5,000 fine.\(^{21}\)

The sale or cultivation of marijuana also holds harsher penalties under federal law, ranging from 5 years to life and from $250,000 to $4,000,000 in fines.\(^{22}\) Furthermore, if marijuana is sold to a minor or within 1,000 feet of a school, the penalty is doubled.\(^{23}\) Federal law also allows for the death penalty to be imposed under certain circumstances if a person is convicted of distributing a controlled substance as part of a continuing criminal enterprise.\(^{24}\)

For the purposes of Proposition 19, the intersection between state and federal law on this subject becomes important. Pursuant to the U.S. Supreme Court Case *Gonzales v. Raich*, the Federal Government has the authority to prosecute Californians for possession, cultivation, and/or the sale of marijuana, even if this activity is legal under state law.\(^{25}\) The most recent Bush administration occasionally raided medical marijuana dispensaries and growers that supplied the dispensaries.\(^{26}\) The Obama administration has stated that it will not prosecute medical marijuana users, growers, or dispensaries as long as they follow state law; however, it will continue to enforce laws against marijuana production and consumption generally.\(^{27}\) However, more recently, Attorney General Eric Holder stated that the federal government will “vigorously enforce” federal law if Proposition 19 is passed.\(^{28}\) If the federal government follows through on this promise, the success of Proposition 19 could be at stake.

\(^{19}\) Legislative Analyst’s Office, *supra* note 1.
\(^{21}\) *Id.*
\(^{22}\) *Id.*
\(^{23}\) *Id.*
\(^{24}\) *Id.*
\(^{25}\) *Gonzales v. Raich*, 545 U.S. 1 (2005).
\(^{26}\) Kilmer, *supra* note 12.
\(^{27}\) *Id.* at 10.
Proposition 19

b. Proposed Changes to the Law

i. In general

Proposition 19 changes California Law regarding marijuana sale, possession and consumption. Specifically, Proposition 19 makes it legal for an individual to possess, share, and transport one ounce of marijuana or less for personal consumption. Personal consumption means use of marijuana in a private residence or other non-public place, or use of marijuana at a facility licensed by state or local law to be used for marijuana sale and consumption. Proposition 19 also makes it lawful for a private property owner, or other lawful resident of the private property, to cultivate marijuana on a plot not larger than 25 square feet. It states that individuals leasing or renting property may also cultivate within these guidelines, but growing may be subject to the permission of the private property owner.

ii. Laws affected by Proposition 19

In order to make legal use of marijuana possible, Proposition 19 would repeal criminal laws relating to marijuana. More specifically, it would make various Health and Safety Code sections, which now criminalize possession of marijuana and drug paraphernalia, growth and sale of marijuana, maintaining a place for the purpose of selling or giving away marijuana, and transporting marijuana in a car, unenforceable.

iii. Restrictions on the right to personal marijuana use

Proposition 19 contains numerous restrictions on marijuana consumption and use. Individuals not licensed by state or local law are prohibited from selling marijuana. Additionally, interstate or international transportation of marijuana is prohibited. Laws prohibiting driving while impaired still stand, thus driving while under the influence of marijuana is prohibited. The proposition would also not affect laws prohibiting use of controlled substances in the workplace by persons whose jobs involve public safety.

Regarding minors, Proposition 19 would not affect California Penal Code § 272, which criminalizes contribution to the delinquency of a minor. In addition, consumption in any space while minors are present is unauthorized, and any laws prohibiting marijuana possession on school

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30 Id.
31 Id.
32 Id.
34 Text of Proposition 19, supra note 29.
35 Id.
36 Id.
37 Id.; Vehicle Code section 23152.
38 Text of Proposition 19, supra note 29.
39 Id.
grounds are not affected by Proposition 19.\textsuperscript{40} The text also provides penalties for those who provide marijuana to a minor, or involve a minor in marijuana transportation. These penalties depend on the age of the minor involved.\textsuperscript{41}

\textit{iv. Local government authority and taxation}

Under Proposition 19, local governments are authorized to create any controls regarding marijuana that are necessary for protection of the public.\textsuperscript{42} Controls that most local governments are expected to enact include rules furthering the goal of prohibiting access to marijuana by persons under age 21, regulations creating civil fines or other remedies for unlawfully obtained or possessed marijuana, and other regulations regarding premises licensed to sell marijuana, such as zoning ordinances and proper hours of operation, advertising limitations, etc.\textsuperscript{43} Proposition 19 does not specifically dictate how marijuana will be taxed, and instead leaves it up to local governments, or the state, to determine what the tax will be.\textsuperscript{44} Revenue raised by marijuana sales will be fed back into the local governments, and does not have to be used for any specific purpose, unlike other marijuana legislation such as the Ammiano Bill mentioned previously.\textsuperscript{45}

The Act can also be amended by the Legislature to establish a statewide system for commercial regulations and taxes. The initiative can be amended by another measure, submitted to a vote at a statewide election, or by a statute passed by the Legislature and signed by the Governor. Any amendment must be to further the purpose of the act.\textsuperscript{46}

\textbf{III. LIKELY EFFECTS OF PROPOSED CHANGES}

\textit{i. Fiscal effect}

Perhaps the most highly anticipated aspect of Proposition 19 is the promise of increased revenue for California, especially in light of the current economic instability. The California Board of Equalization asserts that it is impossible to predict the net revenue that would be generated if Proposition 19 passed.\textsuperscript{47} This is because the initiative leaves it up to local governments to decide how to regulate marijuana and how much of a tax to impose.\textsuperscript{48} In addition, the federal response to legalization would also impact the amount of revenue generated from taxes and regulation.\textsuperscript{49}

Another aspect of legalization that has the potential to generate large amounts of revenue is the spin-off industry. Some sources estimate this industry to be worth $12-18 billion. However, the actual revenue derived from Proposition 19 and the spin-off industry will depend on the extent to

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Legislative Analyst’s Office, \textit{supra} note 1.
\textsuperscript{43} Text of Proposition 19, \textit{supra} note 29.
\textsuperscript{44} Legislative Analyst’s Office, \textit{supra} note 1.
\textsuperscript{45} Text of Proposition 19, \textit{supra} note 29.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 53.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
which the federal government impedes legalization, the level of consumption, retail value of marijuana, and the actual tax and fee rates.\textsuperscript{50}

Along the same line as increased revenue, Proposition 19 purports to aid California’s high unemployment rate by producing both jobs and revenue for job creation. As previously discussed, revenue gained from legalization may not be as high as expected and therefore jobs created from that revenue might be limited. The spin-off industry, however, has the potential to create many new jobs in tourism, souvenirs, coffee houses, and related paraphernalia.\textsuperscript{51} Even the possibility of a marijuana related food product industry exists as a result of legalization that would raise revenues and create jobs.\textsuperscript{52} One estimate claims that if the marijuana industry is just one-third the size of the wine industry it will generate as many as 50,000 jobs.\textsuperscript{53}

Opponents are not quite as optimistic. They argue that the illegal market for marijuana will still exist and that prices will always be lower for illegal marijuana than for legal marijuana.\textsuperscript{54} It follows that the illegal market will circumvent a portion of the revenue gained from legalization. There are also additional costs to legalization that are not always included in the estimates on how much revenue could be gained.

In determining the net revenue that Proposition 19 will generate, it is essential to consider in the costs involved. Costs include regulating marijuana-related activities, enforcing the regulations, and possible litigation arising from federal preemption.\textsuperscript{55} The costs associated with regulation have the potential to be significant, but they are also extremely unpredictable as each local government is given the authority to determine which regulations it will impose and to what extent it will impose them.\textsuperscript{56} This could result in some counties prohibiting marijuana all together, which would reduce the expected amount of revenue. In addition, Proposition 19 would give the Legislature room to amend the act by a simple majority vote. Many predict that the Legislature will amend the initiative to give the state government a uniform power of regulation over marijuana.\textsuperscript{57} Therefore, the amount of revenue that marijuana legalization would raise is heavily dependent on whether regulation occurs at the state or local level.\textsuperscript{58} There are also incidental costs associated with developing the regulatory frame work including publications, paperwork, computer systems, training staff etc.\textsuperscript{59} Finally, there are indirect costs associated with legalization including drug treatment programs, educational programs, health care costs, lost productivity and wages, and loss of quality of life.\textsuperscript{60}

\textsuperscript{50} \textit{Id.} at 192.
\textsuperscript{51} Kilmer, \textit{supra} note 12.
\textsuperscript{52} \textit{Id.} at 52.
\textsuperscript{53} Michael Vitiello, \textit{Legalizing Marijuana: California’s Pot of Gold?}, 6 Wis. L. Rev. 1350, 1367 (2009).
\textsuperscript{54} \textit{Id.} at 1369.
\textsuperscript{55} Michelle Patton, \textit{The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency?} Berkley J. of Crim. Law (2010) at 189.
\textsuperscript{56} \textit{Id.} at 189.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} Text of Proposition 19, \textit{supra} note 29.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 191.
As discussed below, a final factor to consider in the fiscal effect of Proposition 19 is the potential to save money by removing marijuana related offenses from California’s criminal system.

   **ii. Effect on the criminal system and prison overcrowding**

Marijuana related offenses are among the most common reasons for arrests in the United States and more than 80% of these arrests are for simple possession.61 In California, 61,000 people were arrested for misdemeanor marijuana possession.62 By legalizing marijuana cultivation, possession and consumption for adults the majority of these arrests would be eliminated thus saving resources and jail space for more violent criminals. Further, adjudication of these cases would also no longer be necessary. Proponents project a savings of about a billion dollars in California each year stemming from reduced costs associated with the arrests, adjudication and jail sentences.63

Notably, however, arrests for marijuana are less expensive than other types of arrests and are less likely to be prosecuted.64 In addition, in order to obtain increased revenues from the marijuana tax, police officers would have to spend significant resources ensuring that marijuana sales are licensed by local governments and therefore in compliance with Proposition 19.65 Officers would also continue to arrest those who provide marijuana to minors, or minors who cultivate, possess or use the drug. Further, many offenders plead down to a lesser marijuana charge when they have actually been arrested on more serious charges, and therefore legalizing marijuana may not keep this population out of prison.66

In addition, as mentioned earlier, Governor Schwarzenegger recently signed SB 1449, which will reduce simple possession of marijuana from a misdemeanor to an infraction.67 This means that an individual found with 28.5g of marijuana or less will pay a maximum of $100 and will not be required to appear in court.68 Any possession greater than 28.5g will continue to be considered a misdemeanor.69 Therefore, part of the Proponents’ argument that legalization will reduce prison costs and overcrowding will be taken care of when SB 1449 goes into effect on January 1, 2011.

Proposition 19 would have the effect of eliminating the large numbers of misdemeanor marijuana offenses, but due to these other factors, it is not clear whether California would save a significant amount of money from these changes to the criminal system.

   **iii. Effect on drug violence in California and Mexico**

63 Vitiello, *supra* note 53 at 1366.  
64 Kilmer, *supra* note 12.  
65 Vitiello, *supra* note 53 at 1366.  
67 Hecht, *supra* note 11.  
68 Id.  
69 Id.
Many find America’s Prohibition Era instructive on the question of whether legalization of marijuana will help to curb the drug violence in California and Mexico. The motivation of Prohibition Era mobsters was the same motivation fueling modern day drug cartels: profits. After the prohibition on alcohol was repealed, much if not all of the violence surrounding alcohol subsided. The hope is that the violence surrounding marijuana would disappear in much the same way.

The drug war is more complex than the Prohibition Era violence, however, because many cartels traffic various drugs in addition to marijuana and they distribute the drugs to a much larger market than California. While passing Proposition 19 might puncture drug traffickers’ marijuana sales in California, the cartels would likely continue to traffic other drugs in California and the market for marijuana in the rest of the U.S. would continue to flourish. Therefore, it is not clear that drug violence would subside with the passage of Proposition 19.

While it is not clear that passing Proposition 19 would have any effect on curbing drug violence, it would pave the way for other states and even Mexico to follow suit. Therefore, if passed, Proposition 19 would be one step closer to curtailing the cartel business.

iv. Effect on personal consumption

It is difficult at best to determine whether consumption of marijuana will increase if Proposition 19 passes. Marijuana use is already prevalent and widespread in California and the U.S. Some statistics show that more than 25 million Americans have used marijuana in the past year and about 40% of Americans have used marijuana at some point in their lives. As for use in California, 16 million ounces of marijuana are consumed each year and there are over 190,000 patients registered to use medical marijuana. With such a high percentage of people that use or have used marijuana, many argue that increase in consumption after legalization will be slight if any. These same people contend that even if more Californians began to use marijuana, only a very small number of those people would become chronic users.

One of the main reasons that increase in consumption is difficult to predict is that Proposition 19 allows local governments to impose an additional tax on marijuana. If marijuana becomes less expensive after legalization, it is likely that consumption would increase. However, if marijuana becomes more expensive, that tends to suggest that consumption would decrease.

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71 Id.
72 Id.
73 Id.
74 Patton, *supra* note 55 at 170.
75 Id.
76 Vitiello, *supra* note 53 at 1389.
77 Text of Proposition 19, *supra* note 29.
One of the bigger concerns about increased consumption is not whether more adults would use, but rather, whether more teens will use marijuana. The rationale is that the passage of Proposition 19 sends a message that marijuana use is acceptable.\(^79\) This argument hinges on the fact that marijuana will become more readily available and mainstream and teens will jump on the marijuana bandwagon.\(^80\) To rebut this, however, is the example of the Netherlands where marijuana is prevalent, but the rate of teen consumption is much lower than in the United States.\(^81\) The theory is that if teens do not see using marijuana as ‘cool,’ they will be less influenced to use it.\(^82\) This phenomenon occurred with cigarettes use and teens. A contrary example is alcohol, which remains popular among teens despite its legal nature for adults.\(^83\)

In sum, while legalization may send a message to Californians that marijuana is safe and acceptable to use, there will be educational movements to combat this notion and inform citizens of the risks of marijuana use. Because of the foregoing, any attempt to predict the likely effect of legalization on personal usage is a mere hypothesis at best.

v. **Effect on law regarding driving under the influence**

Many people are concerned about the effect that legalizing marijuana will have on traffic safety. If more individuals smoke marijuana as a result of legalization, it is possible more people will drive while under the influence. Because marijuana negatively affects motor skills, more people driving while under its influence could result in increased risk on the roads.\(^84\) However, proponents, point to the Netherlands, where marijuana is decriminalized, but, has one of the lowest road fatality rates.\(^85\) In addition, two of California’s most marijuana friendly counties, Santa Cruz and San Francisco, reported zero marijuana related road fatalities in 2008.\(^86\) It is difficult to say with certainty what the effect of legalization on road safety will be.

Determining when someone is actually “under the influence” is also an issue. California Police Chiefs oppose Proposition 19 because there is no standard set forth in the initiative for what constitutes driving under the influence of marijuana.\(^87\) However, the initiative states that Proposition 19 is not intended to affect Vehicle Code section 23152, which relates to driving while under the influence.\(^88\) Therefore, the procedures that police currently use to determine whether someone is driving under the influence of marijuana will likely continue to be used, and testing will likely proceed in the same manner it does now. Accordingly, the complications that currently

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\(^79\) Vitiello, *supra* note 53 at 1386.
\(^80\) Id.
\(^81\) Id.
\(^82\) Id.
\(^83\) Kilmer, *supra* note 12.
\(^86\) Id.
\(^88\) Text of Proposition 19, *supra* note 29.
exist regarding identifying marijuana related DUlS will persist, but Proposition 19 should not make identifying individuals driving under the influence any better or worse.

vi. Effect on employers and businesses

Opponents have expressed concerns that passing Proposition 19 will require employers to allow employees to smoke marijuana while at work, and that employers will not have control over employees marijuana use until it actually “impairs” performance. However, courts are likely to hold otherwise. In Ross v. RagingWire Telecommunications, Inc. (“Ross”), the court held that the employer could take the plaintiff’s use of marijuana into consideration when making a hiring decision, even though the plaintiff used marijuana for chronic pain upon the recommendation of a physician. In addition, the court stated that because marijuana is still illegal under federal law, California laws regarding fair employment practices do not require employers to accommodate employee use of marijuana. The court reasoned that nothing in the text of the Compassionate Use Act indicated that the law was intended to address the rights of employers. In Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries (“Emerald Steel”), a case analyzing the impact of Oregon’s Medical Marijuana Act, an Oregon court reached the same conclusion as Ross. Specifically, the Emerald Steel court found that, although the plaintiff was authorized to use marijuana under the Oregon Medical Marijuana Act, the employer did not violate antidiscrimination law by failing to provide plaintiff with a reasonable accommodation, or by terminating plaintiff for medical marijuana use authorized by state law.

As stated in Ross, although Proposition 19 makes use of marijuana legal for all people over 21 in California, marijuana is still illegal under federal law. In addition, the text of Proposition 19 states that the initiative is not intended to “affect any law prohibiting use of controlled substances in the workplace or by specific persons whose jobs involve public safety.” Therefore, it is unlikely that courts will interpret Proposition 19 as prohibiting employers from ensuring their employees do not use marijuana, much less requiring employers to allow employees to smoke on the job. Both the Compassionate Use Act and Proposition 19 do not indicate any intent to address the rights of employers; therefore, the court is likely to conclude, as it did in Ross, that employers may still terminate, or refuse to hire, based on an individual’s marijuana use.

vii. Effect on health related matters

The impact that proposition 19 would have on health if it were to pass is highly debated. According to the U.S. Drug Enforcement Administration marijuana is an addictive drug with serious health consequences. The short term effects of marijuana are memory loss, distorted perception, trouble with thinking and problem solving, loss of motor skills, decrease in muscle

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90 Id.
91 Id.
92 Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries 348 Or. 159, 190, 230 P.3d 518, 535 (Or.,2010).
93 Text of Proposition 19, supra note 29.
94 U.S. Drug Enforcement Administration, supra note 84.
strength, increased heart rate, and anxiety.\textsuperscript{95} Studies have also shown that someone who smokes five joints a week may be exposed to the same amount of cancer-causing elements as an individual who smokes a pack of cigarettes a day.\textsuperscript{96} Other research has shown that smoking one marijuana cigarette deposits around four times more tar into the lungs than a filtered tobacco cigarette.\textsuperscript{97} On the other hand, other sources suggest that occasional use of marijuana is rarely seriously harmful. In addition, some sources state that marijuana is only psychologically addictive, not physically addictive.\textsuperscript{98} Cigarettes and alcohol on the other hand are widely known to be physically addictive.

The U.S. Drug Enforcement Administration also states that teens are seeking treatment for marijuana more than alcohol or any other drug.\textsuperscript{99} This fact could be especially disconcerting, if marijuana is a “gateway drug” as some believe.\textsuperscript{100} However, even if marijuana use is correlated with use of other illicit drugs, this does not mean that using marijuana causes people to go on to experiment with other drugs; there could be a third factor, e.g. a personality characteristic, that makes individuals more likely to try marijuana, and other drugs in general.\textsuperscript{101}

One factor mitigating the health risks of marijuana is the fact that it does not need to be smoked. It can be ingested in food or as a tea.\textsuperscript{102} In addition, using a vaporizer to consume marijuana gives patients the same control over dosage that smoking provides, without inhalation of the toxic substances in smoke.\textsuperscript{103}

viii. Effect on Prop 215

It is not likely that Proposition 19, if passed, will affect an individual’s rights under Proposition 215, the Compassionate Use Act. This is because the California principles of statutory interpretation dictate that overlapping statutes are to be interpreted harmoniously if possible.\textsuperscript{104} See the section below on Proposition 215.

IV. CONSTITUTIONAL ISSUES

i. Preemption

\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{99} U.S. Drug Enforcement Administration, \textit{supra} note 85.
\textsuperscript{102} Id.
Although passage of this initiative would legalize personal use of marijuana in California under state law, it would still be prohibited under federal law. Federal law prohibits all marijuana related activities. Previous litigation regarding the conflict between federal and California law legalizing medical marijuana (the Compassionate Use Act) can help predict what will likely happen in the event that Proposition 19 is passed. In Gonzales v. Raich, users of marijuana for medical purposes in California attempted to obtain a judgment holding that the Controlled Substances Act, which is the federal law prohibiting marijuana use, would be unconstitutional if applied to them. The Supreme Court instead held that the federal government has the authority to regulate intrastate growth and use of marijuana, and therefore, the individuals could be federally prosecuted, even though they complied with state law.

Under the Supremacy Clause, when there is a conflict between federal and state law, the federal law is controlling. Accordingly, if Proposition 19 is passed, those who use marijuana in compliance with the proposition could be federally prosecuted. However, it does not mean that the law will be struck down. Whether or not the law is actually struck down will depend on the court’s preemption analysis. The court will determine whether federal law preempts state law by either discerning whether physical compliance with both state and federal law is possible, or by deciding whether state law is an obstacle to the objectives and purposes of federal law. The California Court of Appeals for the Fourth District has heard two cases regarding federal preemption of the Compassionate Use Act, and ruled in both that federal law did not preempt state law authorizing medical use of marijuana. In these two cases, County of San Diego v. San Diego NORML, and City of Garden Grove v. Superior Court, the court concluded that physical compliance with both state and federal law was possible, i.e., state law did not significantly impede accomplishment of federal objectives.

It is possible that a court would come to the same conclusion regarding the conflict between Proposition 19 and federal law. However, the preemption analysis for Proposition 19 could be affected by the fact that the conflict between Proposition 19 and federal law is greater than the level of conflict between the state laws which permit only medical use of marijuana. Also, whether federal law is found to preempt California law permitting personal use of marijuana will depend on the preemption analysis used. If courts determine the preemption issue by looking at whether Proposition 19 is an obstacle to accomplishing the objectives set forth in the Compassionate Use Act, i.e., stopping illicit drug use and trafficking, preemption is likely. Courts may also analyze the preemption issue by determining whether complying with both federal and state law is physically impossible. While Proposition 19 is not in direct conflict with federal law, e.g. by requiring individuals to commit an act that is prohibited by federal law, it does prompt

105 Gonzales, supra note 25.
106 Id.
108 County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d at 461; City of Garden Grove v. Superior Court, 68 Cal. Rptr. 3d 656, 678 2007).
109 Id.
110 Patton, supra note 55 at 180.
111 Id.
112 Id.
local governments to create regulations for taxing and selling marijuana.\textsuperscript{113} Under this analysis, it is possible that federal law would preempt state law.\textsuperscript{114}

Although California courts have not found California’s Medical Marijuana Act to be preempted by federal law, Emerald provides another example of a preemption analysis.\textsuperscript{115} In Emerald Steel, the Oregon Supreme Court determined whether the Oregon Medical Marijuana Act was preempted the Controlled Substances Act.\textsuperscript{116} The court first used the physical impossibility test mentioned above, and held that it was not impossible.\textsuperscript{117} The court, however, went on to state that the physical impossibility test is usually not the test that ultimately determines the outcome of the preemption analysis, and that the dispositive question is whether state law is an obstacle to the accomplishment of the objectives of Congress, and to the purpose behind the federal act.\textsuperscript{118} The court concluded that because the state law “affirmatively authorized” conduct (marijuana use) that the federal law prohibited, the state law was preempted.\textsuperscript{119} It is not mandatory that California courts follow the Oregon court’s decision, but it is possible California courts may follow similar logic in analyzing Proposition 19.

Whether or not the law is challenged on a preemption basis, there still remains the possibility of federal prosecution for individuals engaged in marijuana use even though they are in compliance with state laws. However, under the Obama Administration, the threat of federal prosecution for personal use or licensed sale of marijuana may be minimal. The Obama administration has stated that it will pursue prosecution of individuals who are violating federal and state rules regarding marijuana, not individuals who are only violating federal laws. Some sources though, have expressed concern that full legalization, rather than legalization for medical purposes, will change the federal government’s perspective.\textsuperscript{120} When asked how the federal government would respond to legalization of marijuana, Gil Kerlikowske, Director of the White House Office of National Drug Control Policy, refused to answer the question, stating only that legalization would be a significant issue.\textsuperscript{121} More recently, Attorney General Eric Holder warned that if Proposition 19 passes, the federal government will vigorously enforce federal law against Californians using marijuana recreationally and in compliance with Proposition 19. In sum, if Proposition 19 is passed, there is a good chance that the federal government will prosecute people and businesses for marijuana sale and use that is in compliance with state law.\textsuperscript{122} How this conflict between state law and federal law will ultimately end is unknown.

\section*{V. DRAFTING ISSUES}

\begin{itemize}
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} Emerald Steel Fabricators, \textit{supra} note 92 at 176.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} Patton, \textit{supra} note 55 at 180.
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} Hoeffel, \textit{supra} note 28.
\end{itemize}
i. **Severability clause**

In section 6 of Proposition 19 the drafters incorporated a severability clause, which states that if any provision of the initiative is held to be invalid, it shall be severed and the rest will remain enforceable.¹²³ Severability clauses, however, do not always ensure that the remainder of a severed proposition will be enforced.

Under California law, three criteria must be met for a clause to be severed.¹²⁴ The first is that the invalid provision must be grammatically separate. The second criterion is that the invalid provision must be functionally separate. The final criterion is that the invalid provision must be volitionally separate, i.e., the proposition would have been voted into law without the invalid provision.¹²⁵

If challenged it is difficult to tell at this point which, if any, of the Proposition’s provisions would be severable. Additionally, if challenged, the court would apply the three-part test and if an unconstitutional portion is found in-severable, the entire initiative would be held invalid. One situation where this may occur is if the Federal Government decides to enforce federal prohibition. In that instance it is likely that Proposition 19 would disappear altogether because the main purpose of the bill will be severed and there would be nothing left to enforce.¹²⁶

ii. **Amending the initiative**

The text of Proposition 19 leaves many questions unanswered. For instance, Proposition 19 often refers to ‘licensed premises for sale’ of marijuana, but does not include any provisions describing how a seller would obtain such licensed premises.¹²⁷ It also lacks any mechanism for registration of private cultivators.¹²⁸ It may be up to local governments to decide whether and how to issue a license or register a grower, but without explicit language, an amendment might be necessary to clarify how this process will proceed. Proposition 19 incorporates a process for such amendments that appears to be a workable system, though litigation is likely to arise.

In general, legislative acts cannot amend a proposition passed by voters unless the amendment is again voted on by the public through the initiative process.¹²⁹ Proposition 19 has incorporated a unique provision, which allows the Legislature to amend the Act through a statute validly passed by the Legislature and signed by the Governor.¹³⁰ A further requirement is that the amendment must further the purposes of the Act.¹³¹

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¹²⁵ *Id.*
¹²⁶ *Patton, supra* note 55 at 189
¹²⁸ *Id.*
¹³⁰ *Id.*
¹³¹ *Id.*
Normally, an amendment to an initiative is passed by a 2/3 vote of the Legislature. Proposition 19 allows for a simple majority vote, which enables the legislature to pass amendments more quickly.\textsuperscript{132} This is important as the sponsors of Proposition 19 left many questions unanswered that will need to be filled in by the Legislature. However, to safeguard the vote of the people, the authors were careful to include a section, which ensures that the Legislature cannot make an amendment to kill the Act, as it would not be in furtherance of its purposes.\textsuperscript{133}

All of the provisions and safeguards surrounding amendments to Proposition 19 may be in response to the difficulties faced when medical marijuana was legalized in California. After Proposition 215 passed in 1996 much litigation arose and continued until the Senate passed A.B. 420 in 2003 to clarify the confusion.\textsuperscript{134} Proponents hope that the specific amendment provisions of Proposition 19 will curb most of the litigation, but opponents are convinced that extensive litigation is inevitable.\textsuperscript{135}

\section*{iii. Harmonization with Proposition 215 (California’s Compassionate Use Act)}

Proposition 19 should not have much effect on California’s medical marijuana laws. Some users of medical marijuana under the Compassionate Use Act have expressed concern that Proposition 19 will detrimentally affect their current rights. For example, under the Compassionate Use Act, individuals with a doctor’s permission to grow marijuana for medicinal purposes are able to grow as much as they want, while Proposition 19 would restrict growing to within a 25 square foot plot.\textsuperscript{136} In addition, Proposition 19 restricts people from consuming marijuana in “any space while minors are present.” To this end, some medical marijuana users are concerned that they will not be able to medicate while minors are present in their homes. In addition, Proposition 19 also provides that all places that sell marijuana must be licensed pursuant to section 11301 of the initiative, while the Compassionate Use Act requires those distributing medical marijuana to obtain a seller’s permit through the state board of equalization.\textsuperscript{137} Medical marijuana users have expressed concern that if Proposition 19 is passed, distributors licensed under the Compassionate Use Act will then be subject to penalty, or forced to close.\textsuperscript{138}

\begin{flushleft}
\begin{scriptsize}
\textsuperscript{132} Id.  \\
\textsuperscript{133} Id.  \\
\end{scriptsize}
\end{flushleft}
However, the concerns listed above may be without warrant. Under California rules of statutory interpretation, overlapping statutes are to be interpreted in harmony if possible, i.e., whenever possible, the court will give effect to both statutes. Courts will only read a new statute to repeal a previous statute when there is no rational basis for reconciling the two. If Proposition 19 were to pass, it is possible that the courts may seek to give effect to both by applying the Compassionate Use Act to those who use marijuana upon the recommendation of a physician, while applying Proposition 19 to anyone else who engages in marijuana use. For example, in *Miranda v. 21st Century Ins.*., the court attempted to reconcile two overlapping statutes regarding discovery procedures for arbitration. One of the statutes was general contractual law that applied to all arbitration. The more specific law applied to uninsured motorist arbitration. The court held that the more specific law, applying to only the uninsured motorists’ discovery procedures, was the exception to the general rule. As such, it is possible the court will similarly interpret the marijuana statutes, i.e., the court will find that Proposition 19 is the general statute and the Compassionate Use Act is the exception. Further, one of the stated purposes of Proposition 19 is to make marijuana access easier for individuals consuming for medical reasons; thus, it is likely that the court will not use this initiative to limit the rights that individuals had under the Compassionate Use Act.

VI. POLICY CONSIDERATIONS

a. Proponents’ Main Arguments

The two main proponents of Proposition 19 are Richard Lee, Executive Director of Oaksterdam University, and Jeffrey Way Jones, former Director of Oakland Cannabis Buyers’ Cooperative. There are hundreds of secondary proponents of Proposition 19 including Congressmen Pete Stark and Dan Hamburg, California Senators Don Perata and Mark Leno, California Assembly members Tom Ammiano and Hector De La Torre, Berkeley Mayor, Tom Bates, U.S. Surgeon General Dr. Joycelyn Elders, the National Black Police Association, the California NAACP, the California Libertarian and Green parties, several branches of the California ACLU, the California Council of Churches IMPACT, and the Interfaith Drug Policy Initiative. These proponents advance many arguments in support of Proposition 19. The proponent’s main arguments are that Proposition 19 will increase revenue for California, create jobs, put police priorities in order and reduce prison costs, put safety controls on the cultivation, sale and consumption of marijuana, and that marijuana has some legitimate uses.

139 Kirby, *supra* note 104 at 1370.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
148 *Id.*
i. Proposition 19 will increase revenue for California

Proponents’ claim that legalization and taxation of marijuana will result in billions of dollars of revenue, which is particularly important as California is facing deficits of historic proportion. According to the Board of Equalization, a tax on marijuana could generate around $1.4 billion dollars per year which can be used elsewhere as vital funding including healthcare, roads, public safety, job funding, etc. Furthermore, proponents assert that there is $14 billion in illegal marijuana sales every year in California, which the state does not currently benefit from. If Proposition 19 passes, California would not only obtain increased revenues from taxing marijuana, it could generate as much as $12-$18 billion dollars in spin-off industries such as coffeehouses, tourism, industrial hemp etc. According to proponents, legalizing marijuana would ensure that the people of California get a stake in this billion-dollar industry.

ii. Proposition 19 will create jobs

California is currently ranked 3rd in the nation with the highest unemployment rate. In this struggling economy, proponents of Proposition 19 suggest that the legalization of marijuana would help to reduce California’s soaring unemployment rate through job creation. Proponents claim that thousands of jobs would be created through both the new marijuana industry and also through the revenue gained from taxation.

iii. Proposition 19 will put police priorities where they belong and reduce prison costs

Along with raising revenue, proponents assert that legalization of marijuana will save millions or even billions of dollars in prison costs. Proponents cite to FBI data from 2008 saying that over 61,000 Californians were arrested that year for misdemeanor marijuana possession, while 60,000 violent crimes were never resolved. It follows that if people were no longer arrested for marijuana consumption, police could focus on apprehension for more violent crimes and spend less taxpayer money arresting the non-violent offenders. Further studies estimate anywhere from $300 million to $1.9 billion in yearly savings in California’s prison costs.

iv. Proposition 19 will help fight the drug cartels and reduce violence in the

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150 Id.
151 Id.
154 Yes on Prop 19, Ballot Argument section, supra note 149.
155 Id.
Proposition 19

U.S. and Mexico

Proponents predict that Proposition 19 would help to dismantle drug cartels in the U.S. and Mexico. They cite to a statistic that 60% of drug cartel revenue comes from the illegal U.S. marijuana market. The proponents hope that by removing California from the illegal market, they will cut off a vital source of funding which will aid in the fight against drug cartels.

v. Proposition 19 will put safety controls on marijuana

Proponents believe that Proposition 19 will help keep marijuana out of the hand of minors. Currently, illegal marijuana dealers have no motivation to be cognizant of whether their buyers are under 18, or over 18, since the sale of marijuana is illegal regardless. Proponents state that the various safety measures in Proposition 19, including strict criminal penalties for driving under the influence, penalties for providing marijuana to minors, and bans on smoking in public, on school grounds, and around minors will actually make marijuana less accessible to minors. Proposition 19 also requires all cultivators and sellers to be licensed and it puts restrictions on the amount one may grow or have on their possession at any given time. Proponents are confident that marijuana can be taxed and controlled in much the same way as alcohol.

vi. Marijuana has legitimate uses

Proponents also point out that marijuana has some legitimate health benefits, which outweigh the negatives of the drug. Marijuana is currently used to relive pain or symptoms from nerve damage, nausea, spasticity, glaucoma, chemotherapy, and movement disorders. It can also be used as an appetite stimulant for patients suffering from HIV or dementia. Additionally, proponents state that marijuana has fewer harmful effects than either alcohol or cigarettes and it does not have long-term toxic effects on the body. Further, they argue that marijuana is not physically addictive and that does not cause its consumers to become violent.

b. Opponents’ Main Arguments

There are as many, if not more, individuals and organizations that oppose Proposition 19 as there are people who support the initiative. Among the opposition is Senator Dianne Feinstein, Governor Arnold Schwarzenegger, Gubernatorial candidates Meg Whitman and Jerry Brown, various current and former candidates for California Attorney General, MADD, California Police Chiefs

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157 Yes on Prop 19, Ballot Argument section, supra note 149.
158 Id.
159 Id.
160 'Text of Proposition 19, supra note 29.
161 Id.
163 Id.
164 'Text of Proposition 19, supra note 29.
165 Id.
Association, and the National Black Churches Initiative. Their main arguments are centered on health and safety concerns, employer concerns, concern for children and teens, and economic concerns.

i. **Health and safety concerns**

Opponents of Proposition 10 are concerned about the various effects legalization of marijuana could have on the health of Californians. Opponents argue that with the legalization of marijuana, consumption of the drug would increase because some people have abstained from using for no reason other than its illegality. They support this argument with research showing that following a period of marijuana commercialization and expansion, there was “a tripling of lifetime use rates and a more than doubling of past-month use among 18- to 20-year-olds.”

In addition, opponents are concerned about the effect that legalization of marijuana will have on traffic safety. MADD, police, and firefighters oppose proposition 19 because they believe it enforcement of laws prohibiting driving under the influence will be harder to enforce. Los Angeles District Attorney, Steve Cooley, and California State Firefighters Association President, Kevin Nida, also feel strongly about the impact proposition 19 will have on traffic safety. They state that the initiative does not provide law enforcement with a definition or objective standard for determining what would constitute “driving under the influence.” In addition, because marijuana is shown detrimental to one’s judgment, motor skills and reaction time, opponents are concerned that legalization of marijuana will lead to more impaired drivers, and thus more vehicle accidents. To demonstrate the potential impact on traffic safety, opponents cite a 2004 meta-analysis that found that between 4 and 14% of drivers who sustained injuries or died in traffic accidents tested positive for delta-9-tetrahydrocannabinol, or THC, the active component in marijuana.

ii. **Negative effects on businesses and employers**

The California Chamber of Commerce opposes Proposition 19 because of its impact on employers. According to the Chamber of Commerce, if Proposition 19 is passed, employers

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167 *Id.*


169 *Id.*


171 *Id.*

may no longer being able to screen potential employees for marijuana use, or terminate employees who use marijuana without showing the use actually impairs work performance. Oponents also argue that because the initiative requires a showing of actual impairment before employers can take disciplinary action, marijuana would be more protected than alcohol.

The Chamber of Commerce also argues that the passage of Proposition 19 allows employees to smoke marijuana while at work. This, opponents argue, will compromise workplace safety and increase the cost of liability insurance. In addition, Proposition 19 opponents state that the initiative will lead to more wrongful termination lawsuits because individuals terminated for poor performance may claim their marijuana use was the actual, and impermissible, motive behind their termination. Further, opponents argue that Proposition 19, because it prevents employers from complying with federal drug-free workplace requirements, will cause businesses to lose public contracts and grants.

iii. Negative impact on neighborhoods and schools

Opponents of Proposition 19 raise concerns that the proposition does not effectively limit where marijuana can be grown, and advertised. Instead, it delegates the regulatory responsibilities to local governments. Specifically, opponents state that Proposition 19 allows for marijuana growth in a person’s front or backyard. It also allows people to grow on their residence, no matter how close they live to courthouses, schools, and hospitals. In addition, there are no restrictions on advertising under the initiative; thus, allowing marijuana advertisements near schools, parks, and libraries, as cigarettes are now.

Regarding schools, opponents state that an employer’s inability to prevent school employees from marijuana consumption will affect education and school children’s safety. They claim this will lead to a devastating loss in federal funding for education. It will also put children who ride school busses in danger, since the schools will have no right to screen bus drivers based on marijuana use.

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173 Id.
175 California Chamber of Commerce, supra note 172.
176 Id.
180 Id.
181 Id.
182 Id.
183 Id.
184 Id.
185 Id.
Opponents also argue that the term “residence” is defined to vaguely in the initiative. As such, they state, this invites the possibility that a person could, for example, park a trailer on public property and begin legally cultivating marijuana.\textsuperscript{186}

\textit{iv. Economic concerns}

Some opponents of Proposition 19 are more concerned with the economic aspects of the initiative. Directors of the Office of National Drug Control Policy oppose the proposition because it would increase social costs while failing to raise the revenue the proponents promise.\textsuperscript{187} Opponents state, for instance, the healthcare and criminal justice costs associated with alcohol and tobacco more than make up for the tax revenue they raise.\textsuperscript{188} The same result is likely to happen with marijuana, opponents say.\textsuperscript{189} Tax revenue concerns are also raised because alcohol and tobacco users do not typically make their own alcohol, or grow their own tobacco, while marijuana do; therefore, the tax generated from marijuana is likely to be much less than that generated from alcohol or tobacco sales.\textsuperscript{190}

In addition, legalizing marijuana may not, as the proponents claim, reduce the police resources that would need to be dedicated to enforcing marijuana related laws.\textsuperscript{191} That is, police still must apprehend individuals who sell marijuana illegally; otherwise there would be no incentive for distributors to become licensed and sell legally, and no tax benefit from these licensed sales.\textsuperscript{192} In addition, because of the threat of federal prosecution, individuals may be discouraged from the licensing process. This would significantly decrease the fiscal benefit that proponents anticipate Californians would reap from licensing fees.\textsuperscript{193}

\textbf{VII. CONCLUSION}

Although other countries, such as the Netherlands, have decriminalized marijuana, none have expressly legalized marijuana as proposition 19 would.\textsuperscript{194} If passed, Proposition 19 would make it legal for individuals 21 years of age and older to possess and transport small amounts of marijuana, to grow marijuana on their private property within a 25 square-foot plot, and to possess items associated with consuming marijuana. The initiative would also authorize local government to license, regulate and tax commercial marijuana-related facilities. Proposition 19 would not affect any law prohibiting use of controlled substances in the workplace, laws regarding contributing to the delinquency of a minor, laws regarding driving under the influence, or laws

\textsuperscript{186} Id.
\textsuperscript{187} Kerlikowske, \textit{supra} note 170.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Vitiello, \textit{supra} note 53 at 1386.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 1356.
prohibiting possession of marijuana on school grounds. The change in law may raise revenue that would be channeled back into local governments.

A “yes” vote would give Californians the right to personal use of marijuana without a doctor’s recommendation, which is currently required by the Compassionate Use Act. Further, if the proposition is passed it would create commercially licensed marijuana distributors in the state of California.

If Proposition 19 is not passed, marijuana related activities remain illegal in California, except when the marijuana sales, growth, or use is authorized by the Compassionate Use Act.
CALIFORNIA INITIATIVE REVIEW

Proposition 20: Redistricting of Congressional Districts. Initiative Constitutional Amendment.

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I. EXECUTIVE SUMMARY

The California State Constitution requires that the State Legislature adjust the boundary lines of districts once every ten years following the federal census for the State Assembly, State Senate, State Board of Equalization, and California's congressional districts for the U.S. House of Representatives (80 Assembly lines, 40 Senate lines, and 53 congressional lines). The boundaries for these districts are adjusted to ensure each contains approximately the same number of people. This process is called “redistricting.” The State Legislature then draws maps for each congressional district.¹

However, in 2008, California voters passed Proposition 11 which created the Citizens Redistricting Commission (“Commission”). The Commission is charged with drawing maps for the various state districts, starting in 2011. Proposition 11 also created a public process and implemented new redistricting guidelines in order to militate against designing districts which favor a candidate or political party.²

Proposition 20 – the topic of this review – extends the Commission’s responsibilities a step further. Proposition 20 would take the boundary determination of California's congressional districts away from the State Legislature and give it, instead, to the Commission.³ Specifically, Proposition 20 seeks to accomplish the following: (1) remove elected representatives from the process of establishing congressional districts and transfer that authority to the recently authorized 14-member Citizens Redistricting Commission; and (2) require any newly-proposed district lines to be approved by nine of the fourteen commissioners including three democrats, three republicans, and three from neither party.⁴

II. EXISTING LAW

a. Historical Background – Catalyst for the Creation of Proposition 20

Gerrymandering has long been a major concern in the creation of a fair and democratic election process. It is, indeed, the major motivation for Proposition 20. Gerrymandering is the process of dividing up geographic regions into voting districts in order to give an unfair advantage to one party in elections or to hinder particular groups of constituents based on their political, racial, linguistic, religion or class status. It takes the form of two different strategies. The first strategy is packing, which concentrates as many voters of one political affiliation into a single district.⁵

² Id.
⁴ Id.
Proposition 20

Packing reduces the voters of a particular type or group representation in a single district while denying them representation across districts.\(^6\) Conversely, it can be positively used to obtain representation for a community of common interest which would otherwise dilute over several districts so as to render them politically insignificant.\(^7\) The second strategy, often called cracking, involves spreading like-minded voters apart across multiple districts to dilute their voting power in each.\(^8\) Cracking denies voters of a particular type or group representation in multiple districts.\(^9\)

Many believe that California’s current redistricting system feeds into the negative aspects of gerrymandering. For example, one article, written by [insert name of person/institution who wrote the article you got this information from] states that in California, the historically Democratic-controlled Legislature has perpetually created oddly shaped district lines which throw Republican incumbents together and carve out new districts that favor Democratic candidates.\(^{10}\) As evidence of this, [name] points to the fact that Democrats, at times, are able to win a majority of California's U.S. Congressional seats, despite earning less than a majority of the votes.\(^{11}\) In the same vein, one Republican consultant commented on California's latest redistricting effort, believing the effort unfairly protected incumbents of both parties. He states such redistricting arrangements “basically [do] away with the need for elections.

The map below contains two districts which some have accused as being a product of gerrymandering based on their distorted configuration.

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\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
\(^{10}\) Douglas J. Amy, How Proportional Representation Would Finally Solve Our Redistricting and Gerrymandering Problems, [http://www.mtholyoke.edu/acad/polit/damy/articles/redistricting.htm](http://www.mtholyoke.edu/acad/polit/damy/articles/redistricting.htm).
\(^{11}\) Id.
b. **Historical Background – Chronology of Events**

Article XXI of the California Constitution requires that the legal process of redrawing the boundaries of California's political districts be conducted through the legislative process.\(^{12}\) In order to comply with the federal Voters Rights Act, the State Constitution requires that the state adjust the boundary lines of districts once every ten years following the federal census for the State Assembly, State Senate, State Board of Equalization, and California's congressional districts for the U.S. House of Representatives.\(^{13}\) Redistricting legislation is introduced, moved through the hearing process, passed out of the Legislature and sent to the Governor much like any other bill.\(^{14}\) In the past, district boundaries for all of the offices were determined in bills that became law after they were approved by the Legislature and signed by the Governor, except when the Legislature and Governor disagreed, in which case the California Supreme court performed the redistricting.\(^{15}\)

In 1999, Republicans gathered enough signatures to propose a redistricting initiative that would put the state Supreme Court in control of redistricting.\(^{16}\) However, the Court found that the initiative violated the California Constitution's single-subject law by including a raise in lobbyist

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\(^{13}\) California Secretary of the State, [Official Voter Information Guide, supra note 3](http://www.sen.ca.gov/ftp/SEN/COMMITTEE/STANDING/EL_/home/Reapportionment/process.htp).


\(^{15}\) California Secretary of the State, [Official Voter Information Guide, supra note 3](http://www.sen.ca.gov/ftp/SEN/COMMITTEE/STANDING/EL_/home/Reapportionment/process.htp).

\(^{16}\) California’s Redistricting Information, [http://archive.fairvote.org/redistricting/reports/remanual/ca.htm](http://archive.fairvote.org/redistricting/reports/remanual/ca.htm).
fees. Other initiative efforts to reform redistricting were pursued, but did not collect enough signatures to win a place on the ballot.18

In 2000, California boasted competitive elections in 9 out of 52 congressional districts.19 (A competitive election is categorized as partisanship measures of 47% to 53%.)20 However, in 2002, following the 2001 redistricting, California only had one competitive district.21 Furthermore, no incumbents were defeated in the 2002 elections, meaning that the only competitive election was between non-incumbents who were not members of the Legislature during the 2001 redistricting process.22

In the 2004 elections there was no change of political party in any of the district-elected offices at either the State or Federal level and win by less than 55% of the vote was the exception to the rule. Only five of 80 State Assembly districts, and two of 39 State Senate district seats realized a more competitive race. Of the 53 U.S. Congressional seats, only three districts are less competitive than the state districts and only three were won with less than 60% majority. Even in those races, no party change occurred.

In 2006, a California constitutional amendment designed to encourage competitive districts was presented to state Congress. This amendment garnered strong political support. For example, Governor Schwarzenegger backed the constitutional amendment because he believed it would restore competition to state politics.23 At a Capitol press conference, Schwarzenegger stated:

> In the past three election periods, as we all know, only 4 out of 459 congressional and legislative seats that were up for grabs in California have changed party hands... To me that is evidence of a system that has become unresponsive and is stuck in the status quo. We must bring competition back into the political process.24

Other supporters of the amendment declared that incumbents have a conflict of interest because their chief goal is buttressing their chances for re-election.25 Former Assembly member Fred Keeley proclaimed that the system permitting legislators to draw their own districts was “essentially an incumbent protection program.”26 Despite the strong political backing of the

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17 Id.
18 Id.
20 Id.
21 Id.
22 Id.
24 Id.
25 Id.
26 Id.
amendment, the issue was killed for the 2006 electoral cycle because State legislators claimed it was turned in late, leaving some observers to question whether the death of the bill was accidental.27

Finally, critics of the redistricting process attributed California's 2008 Budget impasse, which extended 76 days beyond the deadline, as a negative consequence of the districting scheme.28 These critics asserted that the high turnover of legislators, due to term limits, combined with "safe" districts makes it more likely that "hard liners" will be elected. Accordingly, these critics allege, the legislators will lack experience in dealing across party lines in a collegial manner, creating a complete lack of senior leadership capable of building and enforcing cross-party compromise.29

c. Proposition 11

In November 2008, voters passed Proposition 11, which created the Citizens Redistricting Commission to establish new district boundaries for the State Assembly, State Senate, and the State Board of Equalization beginning after the 2010 Census.30 The commission consists of 14 members – 5 democrats, 5 republicans, and 4 non-affiliated members.31 Proposition 11 left in place the Legislature's power to draw the state’s congressional districts, but established new redistricting criteria for the Legislature to follow when redrawing congressional district lines.32 As amended by Proposition 11 in 2008, Article 21 now requires the Legislature to create a congressional redistricting plan that meets the following criteria: (1) The population of all congressional districts shall be reasonably equal; (2) districts shall comply with the federal Voting Rights Act; (3) districts shall be geographically contiguous; (4) the geographic integrity of any city, county, neighborhood, or community of interest shall be respected to the extent possible without violating the requirements of any of the preceding subdivisions. Communities of interest shall not include relationships with political parties, incumbents, or political candidates; (5) to the extent practicable, and where this does not conflict with the criteria above, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant population.33 The criteria included in Article 21 are theoretically enforceable by courts, and in the past efforts to challenge redistricting plans for violating previous versions of redistricting criteria in the Constitution have been attempted. But, as the plaintiffs in Nadler v.

30 California Secretary of the State, Official Voter Information Guide, supra note 3.
31 Id.
33 Id.
Schwarzenegger, 137 Cal. App. 4th 1327 (3rd Dist. 2006) learned the hard way, California courts historically adopt a deferential stance toward redistricting plans drawn by the Legislature.

In Nadler, a case that involved redistricting before the adoption of Proposition 11, the California Court of Appeals for the Third District found that the “provision for geographic integrity . . . is the most flexible of the reapportionment standards and provides the greatest discretion to our State Legislature.” More broadly, “a reapportionment plan enacted by the “[L]egislature and approved by the Governor is entitled to significant judicial deference. Such a plan is presumptively constitutional…”

Given the hierarchy of the standards and the difficulty of deciphering the motivations behind the drawing of legislative district lines, the Nadler Court adopted a deferential stance, stating “petitioners have the burden of proving that the redistricting plans are unconstitutional. There is no merit to the petitioner’s contentions that once they have made a certain showing of a lack of contiguity or a lack of geographic integrity, the burden shifts to respondents to justify the plan.” Petitioners must also show that the Legislature acted “arbitrarily and capriciously” in violating these requirements. Courts “must defer to the Legislature’s determination [that facts exist to support legislation] unless it is palpably arbitrary. Consequently we must uphold the challenged legislation so long as the Legislature could have rationally determined a set of facts that support it.”

The selection of the members of the commission permits any registered California voter to apply. Once the applications are received, the State Auditor, along with a newly created Applicant Review Panel of three independent auditors, screen them for qualifications and conflicts of interest. Applicants' qualifications will be screened based on their analytical skill, impartiality, and appreciation of California's diversity. Applicants will be removed from the process if they, or an immediate relative of theirs, has (1) been a political candidate for state or federal office; (2) been a lobbyist; (3) contributed $2,000 or more in any year to a political candidate; or (4) changed their political party affiliation in the past five years. Additionally, applicants must have voted in at least two of the last three general elections. Upon completing the screening process, the Panel selects 60 recommended applicants.

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35 Id.
36 Id.
37 Id. (quoting Schabarum v. California Legislature, 60 Cal. App. 4th 1205, 1220 (3rd Dist. 1998)).
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
On September 23, 2010, the Panel selected its pool of 60 finalists; consisting of 20 democrats, 20 republicans, and 20 “others.”\(^\text{44}\) The group of applicants is diverse ethnically, consisting of 20 (33%) White, 17 (28%) Hispanic or Latino, 10 (17%) Asian, 8 (13%) Black, 4 (7%) American Indian or Alaskan Native, and 1 (2%) is Pacific Islander.\(^\text{45}\) Additionally, the applicants represent a wide range of economic status, with one applicant reported earning less than $35,000 last year, 9 earning between $35,000 and $75,000, 20 earning between $75,000 and $125,000, 22 earning between $125,000 and $250,000, and 8 earning more than $250,000.\(^\text{46}\) The graph below depicts more details of the distribution of the 60 finalists.

Amongst the 60 finalists, the majority and minority party leaders of the Assembly and Senate may strike up to 24 applicants from the pool.\(^\text{47}\) Following the striking of, the State Auditor randomly draws eight names that then become part of the Commission.\(^\text{48}\) The eight members appoint the final six members from the applicants left in the pool to round out the 14-member Commission.\(^\text{49}\) The redistricting plan must be approved by nine members of the 14-member Commission, requiring three affirmative votes from each political group represented.\(^\text{50}\)

To comply with federal law and other requirements, the Commission must not favor or discriminate against political parties, incumbents, or political candidates.\(^\text{51}\) Additionally, the

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45 Id.

46 Id.


48 Id.

49 Id.

50 Id.

51 California Secretary of the State, Official Voter Information Guide, supra note 3.
commission is required, to the extent possible, to adopt district boundaries that (1) maintain the geographic integrity of any city, county, neighborhood, and “community of interest” in a single district; (2) develop geographically compact districts; (3) place two assembly districts together within one Senate district and place ten Senate districts together within one State Board of Equalization district.52 Notably, Proposition 11 did not define the term “communities of interest.”53

In developing a redistricting plan, the Commission is required to hold public hearings and allow for public comment on proposed redistricting plans developed by the Commission.54 The redistricting plan is subject to voter approval under the state’s referendum process.55 Additionally, registered voters can challenge the constitutionality of a redistricting plan before the state Supreme Court.56 Upon approval, the redistricting plan is implemented for the next decade.57 The process repeats every 10 years, with a new 14-member commission for each future redistricting.58

While Proposition 11 allocated redistricting duties to the Commission with regards to State Assembly, State Senate, and the State Board of Equalization, it did not allocate redistricting duties in regards to Congressional districts. But, Proposition 11 made some changes to the requirement that the Legislature must meet in drawing congressional districts, requiring them to attempt to draw geographically compact districts and maintain geographic integrity of localities, neighborhoods, and communities of interest.59 Additionally, Proposition 11 requires the Legislature to provide public access to data and maps used in the redistricting process, and solicit public comment on its proposals.60 Essentially, Proposition 11 requires the State Legislature to apply the same criteria used by the Commission when drawing district lines.61 However, Proposition 11 does not prohibit the Legislature from favoring or discriminating against political parties, incumbents, or political candidates when drawing congressional districts.62

III. CHANGES TO EXISTING LAW

Proposition 20 amends the California Constitution to change the redistricting process for California's districts in the U.S. House of Representatives, removing the authority for congressional redistricting from the Legislature and giving the authority to the Citizen's

52 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 California Secretary of the State, Official Voter Information Guide, supra note 3.
61 Id.
62 Id.
Redistricting Commission.\textsuperscript{63} This would allow the Commission to draw the district lines for California's 53 seats in the U.S. House of Representatives. The commission would be charged with drawing congressional districts in compliance with federal law, and the requirements of Proposition 11 pertaining to favoring or discriminating against political parties, incumbents, or political candidates, considering geographic integrity of cities, counties, neighborhoods, and communities of interest.\textsuperscript{64}

IV. FISCAL IMPACT

In 2001, the Legislature spent approximately $3 million for redistricting activities.\textsuperscript{65} In 2009, under the Proposition 11 process, the Legislature approved $3 million from the State's General Fund for redistricting activities related to the 2010 census along with approximately $3 million from another state fund to support the application and selection process for commission members.\textsuperscript{66} Proposition 11 specified that each decade the Legislature must provide a three-year appropriation for the Commission totaling the greater of (i) $3 million or (ii) the amount appropriated in the previous redistricting cycle (adjusted for inflation).\textsuperscript{67} These funds would be used to establish the application review process, communicate with the public, compensate commissioners, and employ legal and other experts in the field of redistricting.\textsuperscript{68} Commission members would be compensated at a rate of $300 per day, plus out of pocket expenses.\textsuperscript{69} The Legislative Analyst’s Office estimates that the minimum amount required for 2010 would be about $4 million (the 2001 amount spent on redistricting adjusted for estimated inflation through 2010).\textsuperscript{70}

Under Proposition 20, the Commission would experience increased costs from handling congressional redistricting activities; however, this would be offset by a reduction in the Legislature's redistricting costs.\textsuperscript{71} Any net change in future redistricting costs under this measure probably would not be significant.\textsuperscript{72}

V. CONSTITUTIONAL ISSUES

a. Conflicting Measures

While Proposition 20 was placed on the ballot in order to expand the redistricting responsibilities of the Citizen's Redistricting Commission to include congressional districts, Proposition 27 intends

\textsuperscript{63} California Secretary of the State, \textit{Official Voter Information Guide, supra} note 3.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.}
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} California Secretary of the State, \textit{Official Voter Information Guide, supra} note 3.
\textsuperscript{72} \textit{Id.}
to abolish the Commission altogether. Therefore, Proposition 20 and Proposition 27 are in direct conflict. The California Constitution states, “If provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.” In the event that both Proposition 20 and Proposition 27 are approved, the one receiving the highest number of votes will be enacted, notwithstanding legal challenges.

b. **Constitutional Challenges under the Voting Rights Act and the 14th Amendment**

The United States Supreme Court has ruled, based on the Fourteenth Amendment of the United States Constitution, that the states are required to reconstruct the boundary lines of the Congressional, State Legislative and other districts after the year in which the national decennial census is conducted in order to ensure that the population of each district of a given kind is reasonably equal. If one believes that a legislative district is in violation of the Equal Protection Clause of the Fourteenth Amendment because it is a product of gerrymandering, that person must prove both discriminatory intent and that the apportionment plan has an actual discriminatory effect on an identifiable political group. Additionally, the discriminatory effect of a districting scheme must be presently demonstrable, not speculative or of a type that will only become apparent in the future.

Conduct showing the intent to gerrymander districts for the purpose of minimizing the voting strength of a particular group is unlikely to be proven by direct or specific evidence, but rather by inferences based on particular circumstances. The inferences generally must be proven by the totality of the circumstances. For example, evidence that African Americans constitute a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines. However, this would violate the Equal Protection Clause when the evidence also shows a high correlation between race and party preference. In another example, a claim that Hispanic influence would be impermissibly diluted was insufficient to block

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74 Cal. Const. art. II, § 10(b).
78 *Gilbert v. Sterrett*, 509 F.2d 1389 (5th Cir. 1975).
79 *Cousins v. City Council of City of Chi.*, 503 F.2d 912 (7th Cir. 1974).
Proposition 20

redistricting that moved some Hispanic voters into another district that already had Hispanic voting majority. However, the claim would have been viable if Hispanics were a majority in the district losing Hispanic voters, or evidence showed that Hispanic voters were able to elect candidates by forming coalitions with other minority groups, or where a history of white crossover voting showed possibility that Hispanics could elect candidate of their choice.\(^{82}\) Furthermore, a mere showing that a political or racial group is not represented in a legislature in proportion to its numbers is insufficient to support a finding of unconstitutional vote dilution, since no racial or political group has a constitutional right to be represented in a legislature in proportion to its numbers.\(^{83}\) Rather, the key inquiry is whether the minority group's members have been hindered in their attempts to participate in the political process.\(^{84}\)

In regard to irregularly shaped legislative districts, courts have held that the Fourteenth Amendment does not require regularity of shape in legislative districts.\(^{85}\) But, districts that look like “a bug splattered on a windshield, a Rorschach ink-blot test, a jigsaw puzzle, or a sacred Mayan Bird,” or are so irregular in shape on their face that they can be understood only as an effort to separate voters into different districts on the basis of race, are products of presumptively unconstitutional racial gerrymandering subject to strict scrutiny.\(^{86}\) One such example of irregular districts is found in Bone Shirt v. Hazeltine. In Bone Shirt, the court ruled that the 2001 legislative redistricting plan violates Section 5 of the Voting Rights Act and that State officials must get federal approval under the Act before implementing a new legislative redistricting plan in a district that includes two Indian reservations.

VI. PUBLIC POLICY CONSIDERATIONS

a. Proponents

Proponents of Proposition 20 assert that it will accomplish the following desired goals: (1) create fair congressional districts; (2) make congressional representatives more accountable and responsive to voters; and (3) make it easier to vote out members of Congress.\(^{87}\)

Proponents claim that its passage would empower voters by making it easier for them to vote politicians out of office.\(^{88}\) In turn, the proponents believe, it will be easier to hold politicians accountable.\(^{89}\) Proposition 20 would do this by giving the Citizens Redistricting Commission the


\(^{86}\) Id.

\(^{87}\) Yes on 20/No on 27, http://www.yes20no27.org/.

\(^{88}\) Id.

\(^{89}\) Id.
power to draw election districts for members of Congress, as opposed to politicians in Sacramento.90

In its current format, proponents believe that allowing California state politicians the ability to draw congressional districts ensures that they will get their political friends and allies reelected into Congress.91 As a result, proponents suggest that there is little incentive for politicians to respond to their constituents.92 The proponents cite the Los Angeles Times and Orange County Register as revealing that 32 Members of Congress and other politicians paid political consultants over $1 million to draw district boundaries to guarantee their reelection in the last redistricting.93 In response, according to the proponents, politicians and their consultants drew bizarrely-shaped districts, dividing up cities and communities, thereby stifling the power of voters.94 Proponents contend that Proposition 20’s passage will ensure that the congressional redistricting process is completely open to the public and transparent, whereas in the past redistricting was conducted behind closed doors amongst the politicians themselves.

Proponents contend that even though the California Constitution sets guidelines for redistricting, the Legislature has redrawn districts to the advantage of whatever party is in power and also protects incumbents.95 As a result, proponents’ state, legislative and congressional district lines too often are sprawled out over huge, unrelated regions that needlessly cross county and city boundaries.96 They further opine that time and again "safe" districts have been drawn for incumbents and to maximize election victories for those in the dominant political party.97 Proponents find it is a simple matter of fairness and voter service to have bipartisan commissioners, who do not have a personal stake in the outcome of elections, to draw all district lines for legislative and congressional districts.98

b. Opponents

The League of Women Voters (“LWV”) do not support Proposition 20 in the upcoming November elections.99 LWV in theory supports Proposition 20, which would extend the independent commission’s power to draw Congressional district lines.100 But, for these opponents, problems are tucked into the proposed law.

90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
96 Id.
97 Id.
98 Id.
100 Id.
LWV asserts that Proposition 20 would reduce the amount of time the commission has to do its work while adding to the amount of work they do, and it would narrow the definition of communities of interest in ways that would make it harder for the commission to protect California’s diverse neighborhoods.\textsuperscript{101} Definitions of communities of interest are always open to varying interpretations and subject to lengthy adjudication in the legal system.\textsuperscript{102} However, LW suggests that the new definition in Proposition 20 could restrict the commission’s choices, for example, by making it difficult to see how a community made up of the various Asian and Latino populations in the San Gabriel Valley—multiracial, multilingual, and with wide disparities in income level, education, employment, and political awareness—could easily fit the proposed definition.\textsuperscript{103} As another example, a community of diverse racial, ethnic, social, economic, and educational components that organized around an environmental issue such as pollution from a port or an industrial brown field could also encounter challenges as to whether it fit the narrowed definition.\textsuperscript{104} This is the first time the commission will do this work, and LWV proposes to give the commission a chance to make redistricting reform work before implementing Proposition 20.\textsuperscript{105}

Further arguments in opposition to Proposition 20 are that it wastes taxpayer dollars and it turns back the clock on redistricting law.\textsuperscript{106} Opponents argue that Proposition 20 is a disaster that must be defeated. These opponents include Daniel H. Lowenstein (Founding Chairman of California Fair Political Practices Commission), Aubry L. Stone (President of the California Black Chamber of Commerce), and Carl Pope (Chairman of the Sierra Club).\textsuperscript{107} Their criticisms are directed toward Charles Munger, Jr. who is the sole bank-roller of Proposition 20. They argue that just for the Proposition’s qualification, Munger gave $3.3 million, a figure that will probably multiply many times by Election Day,\textsuperscript{108} and, if Proposition 20 passes, the taxpayers will shoulder this amount instead of Munger Jr.\textsuperscript{109} These opponents argue that Proposition 20’s rival, Proposition 27, is a better choice for California taxpayers.

Opponents in favor of Proposition 27 state, first, non–partisan experts have concluded that voting yes on Proposition 27 will save taxpayer dollars.\textsuperscript{110} These experts claim that a “Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government report that a yes on Proposition 27 will likely decrease in-state redistricting costs

\textsuperscript{101}Id. 
\textsuperscript{102}Id. 
\textsuperscript{103}Id. 
\textsuperscript{104}Id. 
\textsuperscript{105}Id. 
\textsuperscript{107}Id. 
\textsuperscript{108}Id. 
\textsuperscript{109}Id. 
\textsuperscript{110}Id.
Proposition 20 totaling several million dollars every ten years.”\textsuperscript{111} Second, Proposition 20 adds to the cascade of waste that Proposition 27 would avoid, i.e.,\textsuperscript{112} Governor Schwarzenegger has already proposed doubling the redistricting budget and spending millions more dollars to draw lines for politicians while the state is facing a $19 billion deficit.\textsuperscript{113}

Beyond being a waste of taxpayer dollars, these opponents argue that Proposition 20 mandates “Jim Crow” economic districts.\textsuperscript{114} They argue that Proposition 20 turns back the clock on redistricting law, and inexplicably, mandates that all districts (including Assembly, Senate, and Congress) must be segregated by income level.\textsuperscript{115} Proposition 20 mandates that all districts be segregated according to similar living standards and that districts include only people with similar work opportunities.\textsuperscript{116}

\textbf{c. Political Indecision}

As explained earlier, gerrymandering is generally the political strategy employed by the party in power at a particular time in order to maintain their power and assure their incumbents are reelected. Therefore, Democrats and Republicans have both been accused of gerrymandering tactics in the past and both parties support or oppose particular changes to the redistricting process based on political opportunism. This fact is particularly evident given the contrast of party support in California when compared to Florida.

In Florida, Republicans hold two-thirds of legislative and congressional seats due to creative redistricting in 2001. Citizens in Florida will have the opportunity to approve of Amendments 5 and 6, which will set standards the Legislature must follow when drawing the district lines. These standards will give those who wish to challenge a redistricting plan a legal mode of relief, while at the same time, presumably, deterring the Legislature from enacting a heavily partisan gerrymander.\textsuperscript{117}

The notable distinction between California and Florida, in this circumstance, is that the Democratic Party supports the efforts to inhibit gerrymandering in Florida, while vigorously opposing Proposition 20 in California.\textsuperscript{118} At the same time, Republicans also oppose Proposition 20 in California and Florida. The reason that Republicans and Democrats both oppose Proposition 20 (and support Proposition 27) in California is the result of a compromise struck between the two parties during the last round of redistricting in 2001. At that time, the incumbents in both parties

\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{118} Id.
agreed to draw district lines that would ensure they would be reelected for years to come. This has proven to be a savvy political move by both parties, as an incumbent has only lost in an election on 4 occasions in the last 9 years. Considering there are 60 members combined in the State Senate and Assembly who face reelection every two and four years, respectively, 4 incumbent defeats is a relatively low number. This further propagates the view that gerrymandering is prevalent in California politics.

d. Changes in the Makeup of California

California's demographics have shifted dramatically since the last redistricting process in 2001. Such change is likely to cause concern for legislators seeking to assure their own reelection, especially if the redistricting process is no longer in their hands. From 2000 to 2010, the population in California has undergone a major shift eastward, with people moving to California's inland areas from its coastal enclaves. This means that California's congressional district boundaries will certainly undergo major upheaval after the 2010 census.119 As one example, the San Francisco bay area grew less than 1% since the last redistricting, while the central valley area has grown by 21%. Los Angeles County has grown 5%, while San Diego, Orange, Riverside, San Bernardino and Imperial Counties have grown by 17%.120 The manner in which the districts are drawn according to California's current makeup, as well as its anticipated future makeup, will clearly affect the outcome of future elections.

VII. CONCLUSION

If California voters pass Proposition 20, the Citizens Redistricting Commission will assume control of the redistricting authority of California's Congressional Districts. The Commission, which consists of 14 members (5 democrats, 5 republicans, and 4 non-affiliated members), already controls the redistricting authority of the State Assembly, the State Senate, and the Board of Equalization based on the power allocated to it by Proposition 11 in 2008. The Commission would need approval from at least 9 members (at least 3 from the Democratic members, Republican members, and non-affiliated members) in order for the district maps to be adopted.

If Proposition 20 fails, the Commission will only control the redistricting authority of the State Assembly, the State Senate, and the Board of Equalization. The redistricting authority of Congressional Districts will remain with the California Legislature. If Proposition 20 and 27 both pass, the proposition with the most affirmative votes will go into action and the proposition with the least affirmative votes will be negated.

120 Id.
121 Id.
CALIFORNIA INITIATIVE REVIEW

Proposition 21:
Establishes $18 Annual Vehicle License Surcharge to Help Fund State Parks and Wildlife Programs and Grants Free Admission to All State Parks to Surcharged Vehicles. Initiative Statute.

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I. EXECUTIVE SUMMARY

A deep cut in state funds coupled with the threat of state park closure sparked Proposition 21, deemed the “save our state parks” initiative by supporters, but criticized as “just another tax” by opponents. Proposition 21 eliminates the entrance fees for state parks, and establishes a dedicated account funded by an $18 per year surcharge on all vehicles registered in California. The amounts generated by this fee would be used to replace the loss of the entrance fees, pay for the operation and maintenance of the state park system and sponsor nature conservation.

If Proposition 21 passes, state parks will receive 85% of revenues generated from an $18 surcharge fee charged on all California vehicles registered, with the remaining 15% dedicated to state wildlife conservation agencies. In return for the fee, registered California vehicles receive a “State Park Access Pass” allowing free admission and parking at state parks, limited only by the parks need to prevent overcrowding and damages to park resources. The fee allows diversion of current General Funds of about $150 million currently dedicated to state parks to, instead, support other state agencies. The fund expects revenues of approximately $500 million per year based on the number of cars currently registered in California. Supporters anticipate this level of revenue, along with other user fees assessed for park usage, would allow the park system to complete a backlog of maintenance and operations desired to maintain and staff parks. If approved, the measure potentially provides long-term, stable financing for California state parks and conservation activities throughout the state.

The failure of Proposition 21 would maintain the existing funding structure for state parks consisting of General Fund allocation, along with revenue generated from park activities and bond measures.

One potential drafting issue is the inflexible fixed fee aspect of the initiative. Since the fee is fixed at $18 per registered vehicle, the only variable figure is the number of registered vehicles in the state. With no sunset or ability to revisit the fixed fee, the revenue may be inadequate to meet resource needs of the state parks in the future.

II. THE LAW

a. Background

The California Department of Parks and Recreation (DPR), Department of Fish and Game (DFG), State Wildlife Conservation Board, Ocean Protection Council, and other various state conservancies are responsible for the maintenance and operation of California’s State Park
California’s 278 parks welcome an estimated 79.5 million visitors each year, and many consider the California State Park System to be the state’s greatest and most valuable resource. However, in 2008, the Park System was placed on the National Trust for Historic Preservation’s list of America’s 11 Most Endangered Historic Places, due to years of “chronic underfunding” and “deferred maintenance.” In 2009, “unprecedented budget challenges” caused Governor Arnold Schwarzenegger to reduce the amount of funds allocated to the Department of Parks and Recreation (the “Parks”) for park operations. To achieve $14.2 million in General Fund savings, the Parks agreed to reduce spending on maintenance and services, and closed some facilities part-time. With the Parks’ decreased resources and increased maintenance backlog, others proposed to replace the General Fund allocation with new funding sources. In 2008, Assemblyman John Laird, D-Santa Cruz, proposed to create a “State Parks Access Pass” in exchange for a $10 surcharge on vehicle license fees, but it did not pass the Senate. In 2009, the Budget Conference Committee voted to implement changes based on Laird’s proposal, but they were not adopted as part of the final budget. If voters approve Proposition 21, a version of the “State Parks Access Pass” will be realized in exchange for a yearly $18 surcharge on most vehicle registrations, with the capital dedicated to Park maintenance, services, and conservation.

b. Existing Law

Currently, Park management is financed through various sources. In fiscal year 2008-2009, around 32% of the park budget came from the General Fund, 26% from the State Parks and Recreation Fund, and 41% from various other funds, including the Off-Highway Vehicle Trust Fund, Resource Related Fund, Reimbursements, Federal Trust Fund, Tobacco Surtax Fund, Recreational Trails Fund, Habitat Conservation Fund, California Environmental License Plate Fund, Harbors and Watercraft Revolving Fund, Winter Recreation Fund, and California Main Street Program Fund.

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2 Id.
7 Id.
8 Id.
The California State Park system was granted large amounts of money during the early 2000’s. In 2000, California voters overwhelmingly passed the United States’ largest state park bond, totaling $2.1 billion.\(^9\) In 2006, another bond and initiative statute passed, adding $5.4 billion with $4.15 billion of the appropriations from the fund committed or proposed for State Park System acquisitions, development, restoration, nature education and research facilitation.\(^10\) As of January 29, 2010, $1.23 billion remains in this fund for future appropriations.\(^11\)

However, following 2006, the Parks experienced a reduction of money available for maintenance and operations. In fiscal year 2009-2010, the Parks operated on a $464 million budget, receiving $150.5 million from the General Fund, $122 million from the State Parks and Recreation Fund comprised of user fees and concession revenue, and $192 million from the miscellaneous other sources, like bonds, taxes, and park use fees.\(^12\) The reduction in funding, coupled with the part-time closures and reduction in services in 2009, led to a public outcry in support of a steady stream of money to fund State Parks.

c. Changes in the Law

Proposition 21 adds a new section to the Revenue and Taxation Code which would collect $18 per vehicle license and renewal in exchange for the new “State Park Access Pass” and a new section would be added to the Public Resources Code, titled “State Parks and Wildlife Conservation Trust Fund Act” which would be used to fund the California State Park System.\(^13\)

The new section in the Revenue and Taxation Code instructs the Department of Motor Vehicles to collect an $18 surcharge annually when drivers renew their registration or newly register their automobile in the state. Exempt from this charge are commercial vehicles, trailers, and trailer coaches. Also exempt are certain veterans, already qualified to receive free admission to the parks, who would receive a rebate after paying the surcharge.\(^14\) The surcharge will be designated as the “State Park Access Pass”.\(^15\)

In exchange for the $18 surcharge, all California vehicles receive the “State Park Access Pass” which provides free vehicle admission, parking, and day use at State Parks, subject to limitations such as overcrowding and damage. Specific fees will remain, including camping, tour, swimming

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\(^11\) Id.
\(^12\) Quick facts, supra, n. 1.
\(^13\) Proposition 21, State Parks and Wildlife Conservation Trust Fund Act
\(^15\) Id.
All revenues generated by the surcharge would be deposited into the State Parks and Wildlife Conservation Trust Fund in the State Treasury, created by the new “State Parks and Wildlife Conservation Trust Fund Act.” Eighty-five percent of the money collected will go to the Department of Parks and Recreation for operation and maintenance of facilities, wildlife conservation and protection of natural resources, expansion of public access and recreational activities to the Parks, marine resource protection, grants to state and local agencies to offset the resulting loss of day-use revenues, protection of state park cultural and historical resources, auditing and oversight of Proposition 21 implementation, collection costs, and other related costs.

In addition to funding state park costs, the State Parks and Wildlife Conservation Trust Fund dedicates 15 percent of the collected money towards wildlife conservation activities by appropriating funds to the California Department of Fish and Game, Ocean Protection Council, state conservancies, and the Wildlife Conservation Board. The Fund supports operation of lands owned and operated by Fish and Game, protection and conservation of coastal waters, wildlife habitat and grants to local agencies’ conservation activities. The largest portion dedicated to wildlife conservation, seven percent, supports the California Department of Fish and Game. The Ocean Protection Council, a state agency charged with maintaining California’s coastal ecosystems, receives four percent. The Wildlife Conservation Board and state conservancies each receive two percent of the funds generated by the $18 vehicle surcharge fee.

In addition, the Department of Parks and Recreation would be mandated by Proposition 21 to prepare a “strategic plan to improve access to the State Park System.” This plan serves to improve access and benefits of the parks to underserved groups and regions.

The Act also includes detailed administrative supervision to assure fiscal accountability and assure the funds acquired from the vehicle surcharge fee will be utilized according to the propositions guidelines. First, the language of the proposition restricts fund utilization by specifically naming only those agencies designated in the proposition language and only for the specific purposes named. Second, the State Auditor conducts an annual independent audit released to the public.
and published on the California Department of Parks and Recreation’s website.\textsuperscript{22} Lastly, the measure charges the Secretary of Natural Resources with creating a Citizens’ Oversight Committee to review the implementation and expenditures of funding provided by the act.\textsuperscript{23}

d. Fiscal Impact

The Legislative Analysts’ Office (LAO) reports that the initiative will generate an estimated $500 million per year through the annual vehicle surcharge.\textsuperscript{24} This amount may vary each year depending on the number of vehicles registered in the state. The initiative text neglects to state whether a portion of the General Fund would continue to be used for state park maintenance. However, the LAO suggests that the initiative may result in a savings of up to $200 million per year in the state General Fund and other funds. The LAO also reports that state park revenues would decline an estimated $50 million per year due to the elimination of daily use fees, which currently range from $5-$15 per day depending on the park and time of year.\textsuperscript{25} Thus, the net effect of Proposition 21 would be an additional $250 million per year annually in support of the initiatives goals.\textsuperscript{26}

III. DRAFTING ISSUES

California’s initiative process procedures present difficulties in making post enactment changes. The two methods of change are a return to the initiative process, or a post election challenge in which a California court may, in a specific circumstance, correct the challenged language to comply with the law. Specifically, when an initiative’s enactment results in unintended consequences, and no provisions allowing legislative amendments exist, another initiative would need to qualify for the ballot and pass to effect necessary changes.\textsuperscript{27} However, the cost of bringing an additional initiative is high. For example, signature gathering alone amounts to millions of dollars.\textsuperscript{28} In addition, media campaigns to inform voters and garner support can rack up another several million more. These costs may be prohibitive to rectifying flaws in the enacted initiative.

\textsuperscript{22} Yes on 21 FAQ, supra, n. 15.
\textsuperscript{23} Proposition 21, State Parks and Wildlife Conservation Trust Fund Act, p. 3.
\textsuperscript{26} LAO Proposition 21 Report.
\textsuperscript{27} See West’s Ann. Cal. Const. Art 2, § 10(c); Kenneth P. Miller, Constraining Populism: The Real Challenge of Initiative Reform, 41 Santa Clara L. Rev. 1037, 1047 (2001).
Initiatives that are drafted by proponents maximize benefits to meet their particular needs without careful consideration or debate of the potential flaws in the ultimate impact and outcomes when the measures become enacted. Additionally, these flaws may be identified too late - only after the measure qualified for the ballot. Accordingly, these flaws cannot be addressed, leaving voters with discrete choices at the voting booth. 

For example, Proposition 21 imposes an $18 vehicle license surcharge in return for a State Park Access Pass and stable funding for state parks and wildlife. However, the amount per vehicle is inflexible over time. The $18 surcharge would remain in effect until a future initiative receiving voter approval enacted changes in the fee. While the measure reportedly brings in sufficient resources to currently fund state parks and wildlife, there is no evidence to suggest that this amount will continue to be sufficient or necessary over time. Due to the constraints of amending or changing initiatives, the crafters of Proposition 21 failed to allow for adjustment of the fee going forward based on potential changes in the fiscal needs of the parks over time. If the fee becomes insufficient, the state’s General Fund may once again be tapped to meet budgetary shortfalls. Alternatively, if the fee is too high and results in waste, another initiative would need approval to reduce the per vehicle amount.

Further, any fee amount issue cannot be rectified via the Legislature. The legislative process provides thoughtful review and deliberation in identifying solutions to California’s changing priorities. Some initiatives incorporate provisions which allow the Legislature to introduce new bills to modify existing statutory language. If this were the case here, the Legislature could adjust the fee to reflect changing fiscal realities with state park funding. Both Montana and Michigan used legislative means to enact similar vehicle access pass fees via the state registration. Both state’s legislatures have the option to increase or reduce fees, make the fees mandatory or optional, provide exemptions based on need, or make other modifications as needed. Also, both measures resulted in lower, voluntary fees charged to vehicle license registration. Unlike the California initiative, these states have the flexibility to change various aspects of the program to reflect changing needs.


31 Id. at 712.

32 Yes on 21 FAQ, supra, n. 15.

33 Levinson, 37 Hastings Const. L.Q. 689 at 702-705.


35 Id.
IV. CONSTITUTIONAL ANALYSIS

One opponent of Proposition 21 has called the surcharge an “arbitrary, non-transportation related taxation.” Although no opponent has elevated this argument to the level of a California Constitution violation, opponents may attempt to challenge Proposition 21 on the grounds that it violates the “single-subject rule.” This rule derives from the language of the California State Constitution, which requires that no initiative may cover more than a single subject, so as to avoid confusion of voters and prevent “logrolling” propositions, which may contain hidden unpopular provisions coupled with popular proposals.

Challengers to Proposition 21 may claim that the vehicle surcharge has no relation to the funding of California State Parks. It may be difficult to identify a nexus linking the mandatory automobile license renewal surcharge to the operation and maintenance of state parks. Not all California automobile owners will utilize the free access to California State Parks, and there are some California residents who may never visit a State Park, but will have to continue to pay this fee regardless. However, if such a challenge is claimed, Proposition 21 will likely survive the “single-subject rule” test, which requires only that an initiative’s parts be “reasonably germane” to each other. The vehicle taxation and State Park Fund spending provisions included in Proposition 21 will likely be held compliant with the “single-subject” rule, as the courts apply the rule liberally. Proposition 21’s common theme of ensuring adequate funds for state park maintenance provides a reasonably germane umbrella for all of its parts. In addition, Proposition 21 is not unnecessarily complicated, nor does it contain evidence of manipulation or hidden motives which increase the likelihood that an initiative violates the “single-subject” rule. Therefore, a challenge brought on these grounds will probably not be sufficient to prevail on a “single-subject” rule claim; thus, the initiative would not be declared invalid.

V. PUBLIC POLICY ARGUMENTS

a. Supporting Arguments

Proponents argue that California’s state park funding reductions have put routine park maintenance behind the ideal schedule for a safe, sanitary environment for attendees. Proponents claim that

Proposition 21 would fill the deficit in park spending and provide increased funding for routine maintenance and repairs, park staffing, and conservation efforts.\textsuperscript{41} Significant reductions in General Fund resources along with deferred maintenance backlogs prompted park officials to look for alternative means to fund parks during California’s fiscal crisis. At a time when the park funding from traditional General Fund resources decreases, park attendance continues to increase, compounding financial concerns.\textsuperscript{42} Concessions revenues combined with user fees now comprise approximately one-third of the State Park System’s budget to help stave off further General Fund reductions.\textsuperscript{43} While this combination of concessions and user fees keeps parks open, the fact that spending per visitor is down raises concern about the Parks ability to continue services and responsibly manage the system’s environmental, historical and cultural resources.\textsuperscript{44}

To alleviate these funding issues, proponents claim that the State Parks and Wildlife Conservation Trust Fund would assure that all parks become well maintained and staffed through sustained, long-term funding.\textsuperscript{45} Park staff serve as life guards protecting park attendees by providing rescue and medical services, educators presenting interpretive information, rangers patrolling park facilities maintaining order and safety, and maintenance staff responsible for everything from maintaining trails and roads to stocking restrooms to picking up trash to general repairs of buildings and landscape.\textsuperscript{46} The measure allows the state parks to remain open with full staffing and provides resources to rectify the backlog of maintenance required to restore the parks to optimum condition.\textsuperscript{47} Proponents maintain that a dedicated fund for state park maintenance protects California’s natural resources for future generations.\textsuperscript{48} The resource potential from the vehicle license fee potentially provides park goers with the freedom to fully explore and enjoy the full potential that California’s vast park system has to offer.

In addition to providing dedicated funds for park operations, proponents argue that the $18 surcharge offers a valuable trade-off for those who visit state parks, as they will avoid paying daily use fees or purchasing annual passes.\textsuperscript{49} The cost to visit state parks can accumulate quickly at roughly $10 per visit. For single-vehicle families, the cost of just two visits annually to state parks

\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Quick facts, supra, n. 1, at 24.
\textsuperscript{47} Proposed Ballot Measure, supra.
\textsuperscript{48} Id.
\textsuperscript{49} Yes on 21 FAQ, supra, n. 15.
would cost more than the $18 surcharge proposed on their vehicle each year. For those families visiting state parks frequently throughout the year, the $18 surcharge is a bargain compared to the $125 annual pass fee.

Furthermore, proponents state that money from the General Fund will no longer be needed to support state parks. As the state grapples with the prospect of cutting services to the poorest Californians, enactment of Proposition 21 provides the Legislature with an opportunity to divert money previously allocated from the General Fund to the Park budget. Proponents argue that the approximately $130 million currently directed to state parks could be diverted to support services such as education and other social services.50

For example, this year the Governor’s proposed budget purports to eliminate adult day health care services for Medi-Cal recipients.51 Adult day care centers are licensed by the state with the objective of preventing or delaying entry into expensive nursing homes that cost approximately five times the amount of adult day care services per recipient.52 As many elderly depend on government programs for support, delaying entry into nursing homes reduces society’s financial contribution of supporting these individuals.53 The state would save approximately $134 million by eliminating this program, but could cost taxpayers much more if the expense for supporting these individuals shifts to nursing home costs. Passage of Proposition 21 could give lawmakers the ability to keep this program in place due to the General Fund savings.

b. Opposing Arguments

Opponents argue that the measure represents a form of taxation, and that California’s budget challenges cannot be solved through passage of Proposition 21. As the state continues to see revenue deficits and as demand for services increase, the California Legislature and the Governor need to make difficult prioritization for the scarce resources available in the General Fund. Proposition 21 opponents argue that the annual surcharge fee on every vehicle registered in California with very few exemptions for commercial vehicles and trailers is merely another tax imposed on Californians.54 Opponents believe instead that funding for state parks should be based on legislative priorities and user fees assessed on those visiting state parks.

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52 Id.
53 Id.
Opponents of Proposition 21 provide several policy-based reasons to vote no on Proposition 21. First, they argue that this measure simply imposes a new tax on Californians, allowing the state to ignore state parks during the budget process. Opponents argue that the fee mandates a regressive tax. Rather than consider income, the fee results in a flat tax.

Opponents argue that shifting parks funding from the General Fund by way of a vehicle license fee results in a tax increase via ballot box budgeting. Ballot box budgeting refers to the process whereby a simple majority of voters can dictate nearly all aspects of the state’s budget by enacting a proposed initiative instead of the typical legislative procedures for passing a budget. In California, the Legislature is required to pass a budget with a two-thirds majority, whereas initiatives only require passage by a simple majority of 50 percent plus one. In this way legislators are limited in the amounts and distribution of the state’s General Fund. For example, in 1988, California enacted Proposition 98 that mandated a specific percentage of the state’s budget be dedicated to education. Opponents point out that requiring all registered vehicle owners to pay a fee is tantamount to a tax increase that generates revenue to fund a state agency. Thus, the Legislature and Governor are removed from enacting a new law that raises taxes to meet state budget needs.

Additionally, opponents suggest that the impact from the added fee may in fact increase the likelihood that low income families would not be able to afford travel to state parks to take advantage of the compulsory park passes. As proposed, the current language only provides rebates for veterans who already qualify for an exemption. Provisions for families with low incomes remain non-existent. The mandatory fee contains no provision to apply for a hardship rebate. Whether California vehicle owners choose to visit state parks or not, the measure commands a fee assessed on every vehicle owned regardless of ability to pay or park utilization. Currently, user fees are predicated on the theory that those who utilize the park facilities fund that usage. This law mandates that every vehicle owner subsidize the park system regardless of usage.

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56 Id.
57 Id.
59 Levinson, 37 Hasting Const. L.Q. 689 at 689.
60 Id. at 720-21.
63 Quick facts, supra, n. 1.
Opponents also argue that if park funding ranks as one of the state’s highest priorities, the Legislature ought to consider parks a priority in the annual budget process, not through a new tax. Opponents claim that current appropriations to parks adequately fund the system, and the recent reductions were prompted solely to influence passage of Proposition 21. Thus, the Legislature can reallocate funds to other purposes. Opponents point to Senator Lowenthal’s suggestion that the state reduce General Fund expenditures to parks to drive support for Proposition 21, as evidence of the Legislature’s plan of purposefully creating a critical financial situation for the parks in order to induce voters to pass the vehicle surcharge.

Opponents postulate that these mandatory fees might also result in increased park utilization, causing unforeseen increased costs. Californians, who, without the fee, might chose to stay home, would instead visit a state park knowing that no fees would be paid. As park utilization increases, so will the cost to staff and maintain the parks. If traffic into the parks increases, preservation costs could correspondingly increase as well. The cost to maintain these areas could likewise increase. Thus, opponents argue that the State Park Access Pass does not provide the conservation benefits promised.

Opponents also argue that Proposition 21 fails to provide free access to all of the parks as claimed. According to the proposed measure, the state could exempt certain parks from accepting the “State Park Access Pass” and charge additional fees for access. Currently a $125 unlimited “all-access” state park parking pass excludes 25 parks and visitors must pay additional fees to access them. Opponents argue that the same 25 parks will remain excluded from the State Park Access Pass proposed. Opponents believe that since these fees remain in place, as well as fees for tours, swimming pool entrance, boating facilities, per-person entry park fees and overnight fees, the measure is not being properly portrayed as free access to state parks.

Another potential issue is that the fee is charged per vehicle, not per family. Many families in California are multi-vehicle families where the fee is compounded annually for every vehicle they register. This measure comes at a time when vehicle license registration is increasing as a way to close California’s deficit. Proposition 21 asks voters to increase the amount vehicle owners pay

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64 *Cal-Tax Car Tax, supra,* n. 58.
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
to register their cars in order to subsidize the state’s budget shortfalls generally and resulting reductions in state park funding specifically.

Lastly, unlike previous funding measures on the ballot comprised mainly of bond measures, the surcharge continues until voters pass another initiative to either sunset the fee or otherwise adjust the amount. Opponents argue that once the state parks complete the backlog of scheduled maintenance, the fund continues to collect surplus money, resulting in economic waste in a climate where funds could be better utilized elsewhere.

VI. CONCLUSION

A “yes” vote on Proposition 21 provides a stable source of income to the California State Parks and other state wildlife conservation agencies, with an estimated revenue stream of $500 million annually offsetting current budget resources estimated at $300 million annually. The measure requires the Department of Motor Vehicles to impose a mandatory $18 surcharge fee on all vehicles registered in California, except larger commercial vehicles, mobile homes and permanent trailers. In return for paying the vehicle surcharge fee, California vehicles will be able to enter state parks without paying day use fees costing $5-$15 or purchasing an annual pass costing $125. Passage of Proposition 21 potentially allows the Governor and Legislature to divert General Funds, currently allocated to state parks, to other state funding priority areas like education and social programs including health care.

A “no” vote on Proposition 21 would result in maintaining the current funding process for state parks, with the Parks receiving support from the General Fund allocated by the yearly budget, park user fees, and other sources. The backlog of maintenance will need to be funded from increased General Fund sources, user fee increases, or bond measures. California vehicle owners will not be subjected to a mandatory vehicle pass fee and will continue to pay parking and daily use fees for State Park entrance.
CALIFORNIA INITIATIVE REVIEW

Proposition 22:
Prohibits the State from Borrowing or Taking Funds Used for Transportation, Redevelopment, or Local Government Projects and Services.
Initiative Constitutional Amendment.

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I. EXECUTIVE SUMMARY

Proposition 22, also known as the Local Taxpayer, Public Safety and Transportation Protection Act of 2010,1 is a proposed amendment to the California Constitution. The Proposition would prohibit the state from delaying distribution of funds such as fuel taxes and local property taxes designated for local government services, even during a severe, state-wide fiscal hardship.2 If Proposition 22 is passed, the changes it would make to the California Constitution cannot be altered except by approval of a future constitutional amendment by California voters.3

Under the California Constitution, state and local government funding sources are interrelated.4 Both state and local governments receive revenue from, for example, fuel and sales taxes.5 There are also certain policy areas where responsibility is shared by both the state and local government, such as education.6 In recent years, Californians have attempted on several occasions to limit the state’s ability to redirect local funds.7 Proposition 22 is the most recent in this string of voter-sponsored initiatives.

A “yes” vote on Proposition 22 will prohibit state government from accessing designated local government funding sources. The goal is to safeguard local government funding for transportation, public safety, emergency response, and other vital local services.8 While protecting funding for local governments, a yes vote on Proposition 22 will also reduce General Fund spending in the amount reserved to localities, potentially reducing funding for state programs.9 A “no” vote on Proposition 22 will leave the state’s current authority to borrow local fuel tax and property tax funds unchanged.10 The state will remain able to tap these sources of funds to finance state services, including education and programs for seniors.11 However, using this funding for state programs may result in a parallel loss of funding for local programs dependent on local tax revenues.12

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4 Id.
5 Id.
6 Id.
7 Id.; see infra Part II.C (discussing Propositions 1A, 2004 & 2006).
8 Yes on 22, Protect Local Services, Stop State Raids and Vote Yes on Proposition 22, http://www.savelocalservices.com/node/20 [hereinafter Yes on 22].
9 Voter Information Guide, supra note 2; LAO Analysis, supra note 3.
11 No on Proposition 22! Bad for Children, Seniors and Taxpayers! http://votenoprop22.com/ [hereinafter No on 22].
12 Yes on 22, supra note 8.
II. BACKGROUND AND EXISTING LAW

a. State Use of Fuel Tax Revenues

The current law was enacted through two separate initiatives, both legislatively-referred constitutional amendments, both numbered Proposition 1A, approved by California voters in 2004 and 2006, respectively.13

Under existing law, the State of California is authorized to use fuel tax revenues, deposited in the Highway Users Tax Account, for transportation issues and bonds.14 The Legislative Analyst’s Office reports that the state annually collects approximately $5.9 billion in fuel taxes for transportation purposes.15 The state uses some of these funds to pay for highway, road, and transportation projects as well as servicing debt on voter-approved transportation bonds.16

Fuel tax revenues generally are earmarked for transportation projects.17 However, there are certain circumstances in which the state is permitted to “borrow” from the fuel tax revenues to fund other projects, specifically for:

Cash Flow Purposes: The state can borrow fuel tax funds to help stabilize an uneven cash flow throughout the calendar year. According to the Legislative Analyst, cash flow loans of fuel tax revenues often top more than $1 billion per year.18

Budget-Balancing Purposes: When a severe fiscal hardship exists, the state may temporarily borrow fuel tax revenue to meet budgetary needs. These funds must be repaid within three years.19 The Legislative Analyst reports that at the time of its analysis in July 2010, the 2010-2011 state budget included $650 million in fuel tax revenue loans to the state’s General Fund.20

Approximately two-thirds of fuel tax revenues are spent by the state; the remaining third is allocated by the Legislature to cities, counties, and transit districts. Changes to funding allocations

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13 *See infra* Part C (discussing both initiatives in detail).
14 *See LAO Analysis, supra* note 3 (describing current system for state use of fuel tax revenues).
15 *Id.* at figure 2.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Article XIX, Section 6,* of the California Constitution currently permits loans to the state General Fund from tax revenues under that Article, provided that one of the following conditions is met:
   1) The amount loaned is repaid in full to the fund from which it was borrowed within the same fiscal year, or within thirty days of the date of enactment of the budget for the subsequent fiscal year; or
   2) The amount loaned is repaid in full within three years of the date it was borrowed, if one of the following has occurred:
      a. The Governor has proclaimed a state of emergency and declared that the emergency will result in a significant negative fiscal impact to the General Fund; or
      b. The aggregate amount of General Fund revenue for the current fiscal year is projected to be less than the aggregate amount of General Fund revenue for the previous fiscal year.
20 *LAO Analysis, supra* note 3.
Proposition 22 can be accomplished by passing legislation in each house with a majority vote, subject to approval by the Governor.\textsuperscript{21}

b. State Use of Property Tax Revenues

Currently, as a result of Proposition 13, California homeowners pay a 1\% tax on the value of their home, plus additional taxes for voter-approved debt.\textsuperscript{22} These revenues are distributed by county auditors among local governments, including cities, counties, redevelopment agencies, school districts, community colleges, and special districts.\textsuperscript{23} State law allows the state to order local governments to “shift” the allocation of these funds toward schools, thereby reducing the state’s costs to fund the programs. Recently, this resulted in the state ordering redevelopment agencies to shift $1.9 billion in property tax funds to schools, thereby reducing the state’s General Fund burden for school programs in the same amount.\textsuperscript{24}

In times of severe fiscal hardship, the state may temporarily shift these funds away from local governments. However, this amount must be repaid within three years, plus interest.\textsuperscript{25}

c. Prior Initiatives Addressing Issues Related to Proposition 22

Proposition 22 is the most recent in a series of initiatives designed to protect local government funding sources from state “raids.”\textsuperscript{26} These include two legislatively-sponsored propositions, each numbered Proposition 1A, on the ballot in 2004 and 2006 respectively.\textsuperscript{27}

Proposition 1A (2004)

California voters overwhelming approved Proposition 1A – “Protection of Local Government Revenues” - in the November 2004 general election.\textsuperscript{28} Proposition 1A was a legislatively-referred constitutional amendment, designed to provide predictability for local government funding. Proposition 1A generally prohibited the state from shifting property tax revenues from local

\textsuperscript{21} Id.
\textsuperscript{22} Examples of voter-approved debt include bonds approved by voters through bond act initiatives to pay for specific services such as transportation and school district funding. LAO Analysis, supra note 3.
\textsuperscript{23} Id. at figure 3.
\textsuperscript{24} Id.
\textsuperscript{25} Cal. Const. Art. XIX A, §6 (amended through Proposition 1A in 2006; see infra Part II.C for full discussion of this prior initiative); California Secretary of State, Text of Proposed Laws – Proposition 22, available at http://www.voterguide.sos.ca.gov/pdf/english/text-proposed-laws.pdf#prop22.
\textsuperscript{26} See Stephen A. Strain, Proposition 1A: Protection of Local Government Revenues, CAL. INIT. REV., (Fall 2004) and Christopher Chaffee, Proposition 1A: Transportation Funding Protection, CAL. INIT. REV., (Fall 2006) (discussing the 2004 and 2006 initiatives, respectively, in detail).
\textsuperscript{27} Yes on 22, supra note 8.
government agencies to schools and community colleges without a two-thirds legislative majority and a declaration of fiscal necessity by the Governor.\(^\text{29}\)

Proposition 1A (2006)

California voters approved Proposition 1A – “Transportation Funding Protection” – in the November 2006 general election. Proposition 1A was a legislatively-referred constitutional amendment, designed to protect fuel tax revenues. Specifically, it limited how frequently the state can use fuel tax revenues to fund non-transportation projects during a fiscal emergency.\(^\text{30}\)

### III. PROPOSED CHANGES TO EXISTING LAW

#### a. Transportation Funds

Proposition 22 would amend Article XIX of the California Constitution in several significant ways. First, it would add a new Section 1, stating, “The Legislature shall not borrow revenue from the Highway Users Tax Account, or its successor, and shall not use these funds for purposes, or in ways, other than those specifically permitted by this Article.”\(^\text{31}\)

The former Section 1 would be amended to provide that all fuel revenues and taxes shall be deposited into the Highway Users Tax Account, or its successor, which shall be a trust account.\(^\text{32}\) These funds may be used solely for the purposes stated in the Constitution, which are limited to transportation projects.\(^\text{33}\)

Section 3 of Article XIX B would be renumbered and amended to specify the exact procedure by which the Legislature may change the allocation of transportation funds.\(^\text{34}\) Along with requiring a two-thirds supermajority, the amendments would require that prior to any re-allocation of funding or revenue under this article, the Legislature must identify another equitable basis for distributing the funds among cities, counties and other state areas, taking into account geography and jurisdictions.\(^\text{35}\) Any legislative action would have to comply with the procedure laid out in the new subdivision (c).\(^\text{36}\) This procedure would require the California Transportation Commission to hold public hearings, accept public comment, and create a published report supporting its recommendations.\(^\text{37}\) Once this process is completed, the Legislature would have to approve the


\(^{32}\) Id.

\(^{33}\) Id.

\(^{34}\) Id. at 101-102.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) Id.
changes by a two-thirds vote in each house, approving a bill that contains no unrelated provisions.\textsuperscript{38}

Proposition 22 would entirely repeal Article XIX, Section 6, effectively prohibiting loans to the state General Fund.\textsuperscript{39}

Article XIX A, Section 1, would be amended to provide that the Public Transportation Account is a trust fund and that the Legislature may not borrow funds from that account except as provided by that article.\textsuperscript{40} This account must remain a trust fund, and no funds may be loaned from this account to the General Fund or any other fund.\textsuperscript{41}

Article XIX A, Section 2, covers the use of local transportation funds. It would be amended to provide that the Legislature cannot change the status of local transportation funds as trust funds, and that only the local government that created the fund may allocate from the fund for limited transportation purposes.\textsuperscript{42} In addition, this section would provide that the percentage of revenue allocated to local transportation funds shall not drop below 2008 levels.\textsuperscript{43}

\textbf{b. Property Tax Revenues}

In addition to limiting state access to fuel taxes and changing the way that transportation funding is allocated between the state and local governments, Proposition 22 also would place new restrictions on the state’s ability to borrow revenue from local property taxes.\textsuperscript{44}

Proposition 22 would amend Section 25.5 of Article XIII of the California Constitution to limit the ability of the state to modify allocation of ad valorem property tax funds.\textsuperscript{45} Currently, the state is authorized to modify the allocation of these funds if the Governor declares a state of severe financial hardship, the Legislature passes an urgency statute to suspend subparagraph (A), and a statute is enacted to provide for full repayment to local agencies for their losses.\textsuperscript{46} The proposed amendments would limit that procedure to only the 2009-2010 fiscal year.\textsuperscript{47}

In addition, Proposition 22 would amend Section 25.5 to provide that local redevelopment agencies are not required to provide tax revenues for the benefit of the state.\textsuperscript{48} However, the proposed amendment protects the state’s ability to appropriate funds from redevelopment agencies to fund low-to-moderate income housing.\textsuperscript{49}

\textsuperscript{38} Id.
\textsuperscript{39} Id. at 102.
\textsuperscript{40} Id. at 102-103.
\textsuperscript{41} Id. at 103.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 100.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
Finally, the proposition would add Article XIX C to the Constitution, which provides that when state action is successfully challenged under Articles XIX, XIX A, XIX B, or Sections 24 or 25.5 of Article XIII, funds must be appropriated to either the controller or the local government agency to restore the amount lost by the unlawful action. Article XIX C would also provide for the payment of interest and protect plaintiffs from indemnifying government defendants.

IV. DRAFTING ISSUES AND PRE-ELECTION LEGAL CHALLENGE

a. Statutory Interpretation and Drafting Issues

From the text of the initiative, it is unclear how the protections for city funding sources will affect county funds. For example, counties are placed in the same category as the Legislature in Section 6.1 of the initiative (amending Article XIX A, Section 2 of the California Constitution) and forbidden from authorizing uses of transportation revenues that do not comport with the limited purposes listed in that section.

However, counties are also mentioned in language similar to that used to refer to cities in other sections of the California Constitution that would be affected by the initiative, stating, for example, that the state would no longer be able to enact statutes that modify counties’ allocation of their designated tax revenue funds among the agencies within their bounds. Nowhere in the text of the initiative does it clearly state how county funding sources will be affected by the changes to the constitution that the initiative proposes. This ambiguity in the text of the initiative has led some counties to oppose the proposition.

b. Pre-Election Legal Challenge

On August 6, 2010, Sacramento Superior Court Judge Michael Kenny ruled in favor of the proponents of Proposition 22 in a legal challenge to the Legislative Analyst’s Office’s wording of the Fiscal Impact statement. The plaintiff, the League of California Cities, argued that the statement was “misleading and inconsistent with the requirements of the Election Code” because it contained no reference to local governments. Specifically, plaintiff stated that of the 58 words in the Fiscal Impact statement, 51 centered on the impact to state government and only 7 were related to local government. The court agreed, stating that the ballot label should contain some express reference to local government.

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50 Id. at 105.
51 Id.
52 Id. at 103.
53 Id.
54 Id. at 100.
55 See id. at 100-103 (referring to counties in two different contexts).
56 See infra Part V.B (discussing Contra Costa County’s opposition to Proposition 22).
57 See http://www.cocities.org (describing the League of California Cities).
60 Id.
The original wording read: “Comparable increases in transportation and redevelopment resources.” It now reads: “Comparable increases in funding for state and local transportation programs and local redevelopment.”

Proponents were pleased with the outcome of the suit, but still believe the Fiscal Impact statement does not articulate adequately the initiative’s projected effect on funding sources for local services.

Despite their continued dissatisfaction, the proponents now focus their energies on their campaign, rather than continuing litigation. Because of this change in focus, it is unlikely that the proponents would raise this issue again if the initiative does not pass.

V. POLICY CONSIDERATIONS

The debate surrounding Proposition 22 is largely a conversation about which policy choice is best for California. In a fiscal climate overshadowed by tense budget negotiations and a soaring deficit, any discussion that touches on the allocation of increasingly scarce public funds is likely to attract strong opinions on each side. This section will summarize the policy positions of both the proponents and opponents of Proposition 22.

a. Proponents

Proposition 22 is supported by Californians to Protect Local Taxpayers and Vital Services, which describes itself as “a coalition of local governments, transportation advocates, businesses, labor, public safety and others.” The coalition receives major funding from the League of California Cities, the California Transit Authority and the California Alliance for Jobs, Rebuild California Committee.

The proponents of Proposition 22 argue that despite past efforts from California voters to protect local services, the state government continues to “raid” local funding sources. They argue that these actions have resulted in: cutting of police, fire and emergency 9-1-1 services; slashing of health care services; risk to road repair and maintenance, as well as congestion safety and relief; slashing of public transportation services, combined with an increase in the cost of fares; closing of parks and libraries, and shutting down of other vital local government services; and decreases in local economic development activity and job creation.

61 Id.; Voter Information Guide, supra note 2.
63 Id.
64 See id. (describing proponents’ reaction to the outcome of the pre-election suit).
66 Yes on 22, supra note 8.
67 Id.
68 Id.
The proponents argue that restricting state authority to tap funds such as the fuel and property tax revenues allocated to local governments is the best way to protect funding for local government projects. Proposition 22, they argue, will “once and for all” prevent the use of fuel taxes for any purposes other than transportation services and will ensure greater accountability by keeping local tax revenues dedicated to local issues.

Testifying at a joint informational hearing on Proposition 22 before the Senate Committee on Transportation and Housing and the Senate Committee on Local Government, Chris Mackenzie, Executive Director of the League of California Cities, called Proposition 22 “a serious reform measure” necessary to protect local government funding sources. One point in particular, during Mr. Mackenzie’s testimony summarized the proponents’ fundamental position regarding Proposition 22. Discussing the use of “rainy day funds” at the state and local levels, Mr. Mackenzie stated that “[the Legislature] can use local funds as your rainy day fund. That…is fundamentally wrong.” This showcases the core sensibility of those supporting Proposition 22: it is wrong for the state to shift or borrow funds from local governments.

b. Opponents

Proposition 22 is opposed by Citizens Against Taxpayer Giveaways, with major funding from California Professional Firefighters. Other high-profile opponents include the California Teachers Association and the Contra Costa County Board of Supervisors.

The opponents of Proposition 22 argue that, instead of “protecting local government,” the proposed amendments will, “reduce funding for education, shrink budgets for fire and public safety and make it even harder to balance the state’s budget for education, health care and services for seniors, the blind and disabled.”

The opponents argue that the amendments are aimed, not at protecting local services, but at protecting local redevelopment agencies’ funding. These agencies, they argue, “freeze the amount of your tax dollars that can go to fire, paramedic and other critical neighborhood services, and go into debt for 30 to 40 years committing your tax dollars without voter approval. Redevelopment agencies are often used to funnel large taxpayer-funded subsidies to for-profit developers for housing and commercial development.”

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69 Id.
70 Id.
71 Joint Informational Hearing on Proposition 22 Before California State Senate Committee on Transportation and Housing and Senate Committee on Local Government, Sept. 22, 2010, video available at https://www.calchannel.com/channel/viewvideo/1760/sName/asc/.
72 Id.
73 No on 22, supra note 11.
77 Id.
78 Id.
Contra Costa County Supervisor Federal Glover has stated that while Proposition 22 protects cities and transit authorities, it is not clear that there will be similar protection for counties. Richard Stapler, the Communications Director for the campaign against Proposition 22, explained that the reservations of county officials such as Supervisor Glover stem from the lack of protections for county funds in the text of the initiative. Since no such protections are expressly included, Stapler argues, the only safe assumption is that counties will be unable to protect their funding sources when the cities within them can protect theirs.

Stapler also described the purported protections for transportation funding in the initiative as a “sweetener,” further asserting that Proposition 1A already created these protections in 2006. He also argues that under the constraints imposed by the two versions of Proposition 1A, since the state has already borrowed funds twice in ten years, “they can’t do it again for a long, long time,” making the protections Proposition 22 proposes to enact unnecessary. Contending again that the underlying purpose of Proposition 22 is to protect redevelopment agencies, Stapler said it is “beyond the pale” that there would be no way for the Legislature to override city funds protections in a fiscal emergency if Proposition 22 is passed.

VI. CONCLUSION

Proposition 22 poses an important question to California voters this November: how far should the state be able to go to solve the tangled budget problems it faces? In essence, voters must decide which level of government is best suited to manage the limited tax revenues available. Does Proposition 22 protect vital local services such as transportation and public safety, preserving local control and authority? Or does it reduce necessary funding for state sponsored education and health care programs?

It comes as no surprise to the average Californian that our state faces serious financial hurdles. How to best allocate and prioritize our scarce resources is an important question, one which voters will answer in November.

79 Vorderbrueggen, supra note 75.
80 Telephone Interview with Richard Stapler, Communications Director, No on Proposition 22! Bad for Children, Seniors and Taxpayers! (Oct. 2, 2010).
81 Id.
82 Id.
83 Id.
84 Id.
CALIFORNIA INITIATIVE REVIEW

Proposition 23:
Suspension of Global Warming until Unemployment Drops
Initiative Statute.

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I. EXECUTIVE SUMMARY

In 2006, Governor Schwarzenegger signed Assembly Bill 32, “The Global Warming Solutions Act of 2006.” Pursuant to AB 32, the California Air Resource Board (CARB) set the goal of reducing California’s greenhouse gas emissions to its 1990-emissions level by 2020. In order to achieve this goal, CARB created the AB 32 Scoping Plan, which laid out a five-year timeline for various emission-reducing regulations and market measures that would all take effect no later than January 1, 2012. CARB expects that implementation of these measures will reduce California’s greenhouse gas emissions significantly over the course of several years and improve the state’s economy as the need for clean technology sparks innovation in the marketplace.

Due to California’s current diminished economic state, Proposition 23 seeks to suspend AB 32 until California’s unemployment rate drops to 5.5% for four consecutive quarters. Currently, the state has a 12% unemployment rate that is not showing any major signs of improvement, and there is significant debate over whether suspending AB 32 will actually benefit the state’s economy. It will likely be several years before California’s unemployment rate drops to 5.5%; accordingly, it is unclear if the AB 32 Scoping Plan would ever be reinstated. Opponents of Proposition 23 believe that the temporary suspension contemplated by Proposition 23 will translate into a permanent one, and they worry that suspending AB 32 will cause California to lose its leading foothold in the struggle against global warming.

Should Proposition 23 pass, all AB 32 regulations already in effect would be halted, and all future actions of CARB that would otherwise occur under the authority of AB 32 would be suspended. Proponents argue that suspending AB 32 will allow California businesses to avoid increased costs that the new emissions regulations would demand, thus maintaining their operation costs, spending at the current status quo, and ultimately keeping jobs safe. Opponents argue that suspending AB 32 will result in depletion to jobs in California’s growing clean technology market because foreign and domestic businesses will no longer want to invest in clean technology innovations that California is currently developing. The coalitions behind and against Proposition 23 are attached as Appendix A and B, respectively.\(^1\)
Proposition 23

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A drastic change in the Earth’s climate that may potentially be fatal to many of Earth’s life forms. This is known as the “greenhouse effect.”

Certain everyday activities, such as the burning of fossil fuels to run cars, factories and power plants, have been causing steady increases in the amount of greenhouse gases in Earth’s atmosphere. The state of California in particular is a significant emitter of greenhouse gases; following Texas, California is the second largest emitter of greenhouse gases in the country. Of the major sectors in the State, the transportation sector is the biggest producer of greenhouse gases, followed by the electric power sector. The figure below indicates California’s greenhouse gas emissions by sector between 2000 and 2008.

b. California seeks to address the problem of global warming with Assembly Bill 32, the Global Warming Solutions Act of 2006.

In September 2006, California passed Assembly Bill 32, the Global Warming Solutions Act of 2006. Pursuant to the Act, California set a goal of reducing greenhouse gas emissions to 427 million metric tons of carbon dioxide by 2020. This amounts to a 25 percent reduction in carbon emissions and mirrors the emissions levels in California during the year 1990.

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4 Id.
5 World Resources Institute, Climate Analysis Indicatory Tool, available at http://cait.wri.org/.
7 Id.
In large part, the motivation behind AB 32 was the greater issue of worldwide global warming and California’s desire to continue its tradition of environmental leadership.\textsuperscript{11} The California Legislature found and declared that global warming will have detrimental effects on some of California’s largest industries, including agriculture, wine, and recreational and commercial fishing.\textsuperscript{12} Describing California as a “national and international leader on energy conservation and environmental stewardship efforts,” the Legislature declared that efforts to reduce greenhouse gases through AB 32 would have “far-reaching effects by encouraging other states, the federal government, and other countries to act.”\textsuperscript{13} As a result, AB 32 required CARB to “achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions,” as specified in the bill.\textsuperscript{14}

c. **CARB is making steady progress in implementing AB 32 and is on track to meet its final deadline of January 1, 2012.**

AB 32 “[e]stablishes the first-in-the-world comprehensive program of regulatory and market mechanisms to achieve real, quantifiable, cost-effective reductions of greenhouse gases.”\textsuperscript{15} The bill charges CARB with the responsibility for monitoring and reducing GHG emissions. In order to achieve its 2020 target, CARB is following a strict timeline and expects all regulations to take effect by January 1, 2012. The table below depicts this timeline.\textsuperscript{16}

<table>
<thead>
<tr>
<th>AB 32 Implementation Timeline</th>
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<tr>
<td>September 27, 2006</td>
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<td>January 25, 2009</td>
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<td>June 21, 2007</td>
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<td>October 25, 2007</td>
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<td>April 23, 2009</td>
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<td>May 22, 2009</td>
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<td>June 25, 2009</td>
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<td>2009-2010</td>
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\textsuperscript{11} Cal. Health & Safety Code § 38501(c).
\textsuperscript{12} Cal. Health & Safety Code § 38501(b).
\textsuperscript{13} Cal. Health & Safety Code § 38501(c)-(d).
\textsuperscript{14} Cal. Health & Safety Code § 38560.
\textsuperscript{16} *Id.*
The “AB 32 Scoping Plan” released in December 2008 outlines how CARB intends to achieve the 2020 greenhouse gas target. The Scoping Plan proposes to implement both regulatory and market-based discrete measures to reduce emissions. The proposed regulatory measures demand specific actions by businesses and individuals, and the market-based measures provide “greater flexibility in how to achieve GHG emission reductions.” As of January 1, 2010, CARB has enforced nine of these discrete early action measures to reduce carbon emissions.

1) Low Carbon Fuel Standard

The Low Carbon Fuel Standard (LCFS) is the world’s first global warming standard for transportation fuels. This early action is intended to reduce the state’s reliance on fossil fuels and help the state reach its AB 32 emissions target. Specifically, the LCFS Executive Order, issued in 2007, establishes both a LCFS for transportation fuels sold in California and an initial LCFS goal of reducing greenhouse gas intensity of passenger vehicle transportation fuels by ten percent by 2020.

2) Landfill Methane Capture

CARB is collaborating with California Integrated Waste Management Board to develop a control measure that provides enhanced control of methane emissions from municipal solid waste landfills. The control measure works to reduce methane emissions by requiring gas collection and control systems on landfills where these systems are not currently required. Other ways to increase energy recovery from landfill methane gas will also be explored through this program.

3) HFC Emission Reduction Measures for Mobile Air Conditioning

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Hydrofluorocarbons (HFCs) are a class of replacements for chlorofluorocarbons (CFCs), some of which are known to have high global warming potential (GWP). GWP gases’ impact on the climate is “hundreds or thousands of times greater” than that of carbon dioxide. A predominant refrigerant currently in use in California is HFC-134a, an HFC that is a powerful greenhouse gas and therefore has a high GWP. It has been projected that global emissions of HFC-134a will continue to rise as the global vehicle population grows and mobile air conditioning (MAC) systems grow in number. In response, this measure proposes to reduce HFC emissions associated with MAC systems by:

- Creating a regulation to control emission from smaller containers of automotive refrigerant
- Creating a requirement for low GWP refrigerant in new MAC systems
- Creating a requirement to add an air conditioning leak tightness test
- Enforcing existing federal requirements to recover refrigerant from MAC at end of life
- Creating a measure to reduce GHG emissions from refrigerated shipping containers

The last three proposals of the measure are currently on hold, and it is unclear if and when those proposals will go forward.

4) Semiconductor Reduction

The purpose of this early action is to reduce fluorinated gas emissions from the semiconductor industry. The regulation applies to any owner or operator of a semiconductor or related devices that use fluorinated gases or heat transfer fluids.

5) SF6 Reductions from Non-Electric and Non-Semiconductor Applications

Sulfur hexafluoride (SF6) is GHG with a GWP of 23,900 – the highest GWP identified by the Intergovernmental Panel on Climate Change. In addition to actions taken to reduce SF6 from non-electric and non-semiconductor applications, CARB developed measures to reduce SF6 emissions in magnesium die-casting, fume vent hood testing, tracer gas use, and other “niche uses.” This regulation was approved in February 2009 and became effective on January 1, 2010, with restrictions on use and sale becoming effective on January 1, 2011.

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6) **High GWP consumer products**

This measure seeks to reduce compounds with high GWP used in consumer products. CARB identifies this measure as a long-term effort and “only a small part of a much larger program, ARB’s Consumer Products Program.” The goal of this measure is to reduce the impact of compounds with high GWPs when alternatives are available. Some products with high GWP GHG’s include pressurized containers that utilize nitrous oxide, such as aerosol cheese and dessert toppings.

7) **Heavy-Duty (Tractor-Trailer) Greenhouse Gas Regulation**

This measure, adopted in December 2008, works to reduce GHGs by improving the fuel efficiency of heavy-duty tractors that pull 53-foot or longer box-type trailers. This is done by improving tractor and trailer aerodynamics and using low rolling resistance tires. With this regulation alone, the ARB expects GHG emissions to be reduced by approximately one million metric tons of carbon dioxide-equivalents by 2020.

8) **Tire Inflation Regulation**

The Tire Pressure Regulation was approved on August 30, 2010 and became effective on September 1, 2010. This measure ensures that tires in older vehicles be checked and inflated at regular service intervals.

9) **Shore Power for Ocean-going Vessels**

The purpose of this action is to reduce emissions from diesel auxiliary engines on container ships, passenger ships, and refrigerated-cargo ships while berthing at a California port. Fleet operators berthing their vessels at these ports may either turn off auxiliary engines for most of the stay at the

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28 The Consumer Products Regulatory Program is an “overall effort to reduce the amount of volatile organic compounds (VOCs), toxic air contaminants (TACs), and greenhouse gases that are emitted from the use of chemically formulated product used by household and instructional consumers, including, but not limited to, detergents; cleaning compounds; polishes; floor finishes; cosmetics; personal care products; home, lawn, and garden products; disinfectants; sanitizers; aerosol paints; and automotive specialty products; but does not include other paint products, furniture coatings, or architectural coatings. See California Air Resources Board, Background on Consumer Products, available at http://www.arb.ca.gov/consprod/background.htm.


32 California Ports, for purposes of this regulation, are ports of: Los Angeles, Long Beach, Oakland, San Diego, San Francisco, and Hueneme.
port and connect the vessel to some other source of power, or use alternative control techniques that achieve equivalent emission reductions.33

ii. Cap-and-Trade Program

A cap and trade program is “an environmental policy tool that delivers results with a mandatory cap on emissions while providing sources flexibility for compliance. Successful cap and trade programs reward innovation, efficiency, and early action and provide strict environmental accountability without inhibiting economic growth.”34 CARB is currently finalizing regulations for its cap-and-trade program.35 CARB identifies its cap-and-trade program as one of the main strategies to reduce emission and projects that the program will ultimately achieve an 80% reduction in GHG emissions from 1990 levels by 2050.36

iii. Future regulations

More regulations are still in development, with another regulation adoption goal approaching in January 2011. The AB 32 timeline requires that all regulations that make up the Scoping Plan be in effect by January 2012.

III. PROPOSED CHANGES BY PROPOSITION 23: SUSPEND IMPLEMENTATION OF AB 32 UNTIL UNEMPLOYMENT DROPS TO 5.5%.

Proposition 23 seeks to suspend the operation and implementation of AB 32 regulations until the unemployment rate in California is 5.5% or less for four consecutive calendar quarters.37 A “calendar quarter” is a 3-month period beginning on January 1, April 1, July 1, or October 1. Thus, the proposition would halt California’s current and future efforts to reduce carbon emissions until the unemployment rate is significantly reduced for at least 12 consecutive months.

a. Suspending AB 32 may effect the continued and future implementation of some other state measures.

i. Regulations that would be suspended if Proposition 23 passes

In addition to suspending the nine discrete early actions38 adopted to date, Proposition 23 would also suspend the state cap-and-trade program and delay the 2020 Renewable Portfolio Standard.39 The economic effects of this action are described below in Section C.

35 Elkind, supra note 21 at 19.
37 Elkind, supra note 21 at 17.
38 See Section II(D)(i)(1-9).
39 Elkind, supra note 21 at 19-20.
Other state measures that would not be affected by Proposition 23

Not all of the Air Resources Board’s measures to reduce GHG emissions are done under the legal authority of AB 32. Thus, if Proposition 23 passes, other state actions (see below) associated with reducing greenhouse gas emissions that are part of the Scoping Plan but are not done under the authority of AB 32 will remain unaffected by this Proposition. Notably, the Legislative Analyst’s Office estimates that more than half of greenhouse gas emission reduction that would result from the implementation of CARB’s Scoping Plan would be a result of state actions unrelated to AB 32.40 Among others, the following measures will presumably still remain in effect:

**AB 118**

In 2008, the California Energy Commission was authorized to develop the Alternative and Renewable Fuel and Vehicle Technology Program. This program was instituted to reduce GHG emissions from vehicles.41

**AB 1493**

AB 1493 (“Pavely”) was another keystone statute, passed in 2002, which gave CARB authority to develop GHG standards for vehicles.42 In 2009, CARB adopted amendments to the Pavley regulations, “cementing California’s enforcement of the Pavley rule . . . while providing vehicle manufacturers with new compliance flexibility.”43

**Zero Emission Vehicles**

This program was adopted in 1990 as part of the Low Emission Vehicle Program. It seeks to “pursue zero emission transportation technologies” in order to reduce greenhouse gas emissions, and reduce dependency on foreign oil.44

**California Solar Initiative**

This program encourages citizens to install solar panels in their homes and businesses. As an incentive, the program offers cash back for the installation.45

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42 Elkind, *supra* note 21 at 23.
High-Speed Rail

The recent passage of Proposition 1A in 2008 approved a bond measure that would finance a construction of a high-speed rail connecting cities in Northern California and Southern California.\(^\text{46}\) On September 30, 2010, the California High-Speed Rail Authority received $194 million by the Federal Railroad Administration for preliminary engineering and environmental analysis.\(^\text{47}\)

b. It is unlikely that AB 32 will be reinstated in the near future because California has only rarely achieved an unemployment rate of 5.5%.

Based on the low unemployment rate that Proposition 23 demands, it is likely that the implementation of AB 32 will be suspended for several years. As the diagram below indicates, the unemployment rate has been below 5.5% only three times in the last 30 years. At each of those periods, the unemployment rate remained low for about ten quarters. Experts do not see California achieving this rate in the near future.\(^\text{48}\) During the first two quarters of 2010, the unemployment rate was over 12 percent. Economists project that the unemployment rate will still be over 8 percent in the next five years.\(^\text{49}\) Given this forecast, in 2015 – five years from the original deadline for achieving the GHG emission cap – AB 32 would still be in suspension.

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\(^{46}\) Elkind, \textit{supra} note 21 at 24.

\(^{47}\) Press Release, California High-Speed Rail Authority, $194 Million Grant to California High-Speed Rail (Sept. 30, 2010) (on file with California High Speed Rail Authority).


\(^{49}\) \textit{Id.}
c. The economic impact of Proposition 23 is unclear because the economic impact of AB 32 cannot accurately be predicted until its measures are implemented.

There is significant debate among economists, environmentalists, and policy makers over what the impacts of implementing AB 32 regulations will have on California’s economy.\textsuperscript{50} On the other hand, it is just as unclear what kind of impact suspending AB 32 will have on the economy in the long-term.\textsuperscript{51}

\textit{i. Uncertainty over the impact of AB 32 Scoping Plan}

There are a number of reasons why authorities have not been able to agree on what the true economic impact of AB 32 will be. First, AB 32’s Scoping Plan is still in development and is not set to be fully complete until January 2012.\textsuperscript{52} Thus, because the Scoping Plan is still in a developmental state, the economic impacts will greatly depend on how the measures are designed in the public regulatory process.\textsuperscript{53} Second, part of the Scoping Plan is phasing in different measures over an extended period of time. As a result, the economic impacts of such measures would not be felt for several years.\textsuperscript{54} Lastly, implementing the Scoping Plan has the potential to create both positive and negative impacts on the specific sector of the economy.\textsuperscript{55} A number of studies, looking at economic impacts from a broad perspective, have generally concluded that there will be a small reduction in California’s gross state product.\textsuperscript{56} In sum, the debate over whether AB 32 will actually have a positive impact on the overall economy is not known at this time.

\textit{ii. Uncertainty over suspending AB 32 Scoping Plan}

There is also significant debate over whether suspending the Scoping Plan would improve California’s diminished economic state. Opponents of Proposition 23 believe that suspending AB 32 could be “fatal” to California’s clean technology industry,\textsuperscript{57} while proponents claim that continuing implementation of AB 32 will be detrimental to California’s economy overall.\textsuperscript{58} Studies have been commissioned on both ends and lead to different conclusions as to what the true effect Proposition 23 will be.

It is at least apparent that the passing of the initiative would lead to some direct loss in future employment within the clean technology sector.\textsuperscript{59} The clean technology sector has been a blooming industry in California, especially since the passage of AB 32 in 2006. California’s

\begin{itemize}
\item[\textsuperscript{50}] LAO Report, \textit{supra} note 15, at 4.
\item[\textsuperscript{51}] Elkind, \textit{supra} note 21 at 28.
\item[\textsuperscript{52}] LAO Report, \textit{supra} note 15, at 4.
\item[\textsuperscript{53}] \textit{Id.}
\item[\textsuperscript{54}] \textit{Id.}
\item[\textsuperscript{55}] \textit{Id.}
\item[\textsuperscript{56}] Gross state product is a measurement of the economic output of a state. It is the sum of all value added by industries within the state. The gross state product is used a a comprehensive measure of economic activity for the state.
\item[\textsuperscript{58}] California Jobs Initiative, \textit{Yes on 23}, http://www.yeson23.com/ (last visited Oct. 6, 2010).
\item[\textsuperscript{59}] Elkind, \textit{supra} note 21 at 28.
\end{itemize}
Employment Development Department (EDD) reports that the expansion of clean technology has sparked job growth despite California’s rising unemployment rate. Over 500,000 people have been employed in the clean technology sector, with 93,000 employed in manufacturing, and 68,000 in construction.

iii. Economic leakage

Because AB 32 creates increased demands on various industries in the state, it is likely that its implementation will adversely affect the state’s economy with higher energy prices and the need for new investments in order to comply with the regulations’ standards. This will lead to “economic leakage.” Economic leakage occurs when the cost of doing business in a place rises, and businesses must adjust by relocating, choosing not to expand, or make other similar types of adjustments. This phenomenon tends to have a significant impact on jurisdictions that are small relative to their competitors. It follows that, while economic leakage will likely occur due to the adverse economic impacts of AB 32, it is unlikely that such an effect will be severely detrimental to the state, since California has a very large economy.

iv. Decreased costs to consumers in certain sectors

Economic studies commissioned by the California Small Business Roundtable conclude that implementing AB 32 may result in increased costs to consumers. This is based on the assumption that costs to businesses resulting from complying with the AB 32 regulations will be passed on to consumers. Increases may occur in five areas: (1) housing, (2) transportation, (3) natural gas, (4) electricity, and (5) food.

Consumers may face an increase of housing costs due to the expense of new housing and possible retrofitting of existing homes in order to adjust to higher costs of utilities. One study commissioned by the proponents of Proposition 23 has estimated that AB 32 would add approximately $50,000 to the cost of a new home. There will also be an increase in transportation costs due to consumers having to purchase new cars or have their cars retrofitted to obtain better gas mileage, or paying higher fuel costs. For new car buyers, this will be an expected expense increase of $30 per month. Further, the price of natural gas will also increase.

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61 Id.
62 Letter from Mac Taylor, Legislative Analyst, Legislative Analyst’s Office, to Hon. Dan Logue, Assembly Member, Third District (May 13, 2010) (on file with the Legislative Analyst’s Office).
63 Id.
64 The Legislative Analyst’s Office notes, however, that the ARB’s economic model used in creating the Scoping Plan is “not well suited” to analyze economic leakage. See Letter from Mac Taylor, Legislative Analyst, Legislative Analyst’s Office, to Hon. Dan Logue, Assembly Member, Third District (May 13, 2010) (on file with the Legislative Analyst’s Office).
66 Id.
67 Id. at 32.
68 Id.
possibly an increase of 7.8%, if not more.\textsuperscript{69} Electricity may also be 11.1% higher than current prices.\textsuperscript{70} Lastly, due to higher costs of transportation and utilities, among other things, the cost of food will also increase for consumers.\textsuperscript{71} In suspending AB 32, Proposition 23 would eliminate any potential increase in costs to consumers.

\section*{IV. CONSTITUTIONAL ISSUES}

Proposition 23 does not directly implicate the Constitution of the United States nor the Constitution of the State of California. However, insofar as it is inextricably linked to the suppression of AB 32, Proposition 23 does indirectly give rise to an issue under the federal Constitution’s dormant Commerce Clause.

\begin{quote}
\textbf{a. The dormant Commerce Clause makes it unlawful for California to discriminate against out-of-state entities attempting to do business in California.}
\end{quote}

The dormant Commerce Clause, which functions as a corollary of Article I, Section 8, Clause 3, states, “Congress shall have the power to regulate Commerce with foreign Nations, and among the several States.” The purpose of the clause is to ensure the even flow of interstate commerce by preventing discrimination against out-of-state entities that choose to do business in any particular state\textsuperscript{72} and keeping each state from economically isolating itself.\textsuperscript{73} Where legislation affects economic protectionism, the legislation will more likely than not be struck down as unconstitutional and held invalid.\textsuperscript{74}

\begin{footnotesize}
\begin{itemize}
\item[(70)] \textit{Id.}
\item[(71)] Varshney, supra note 63, at 33.
\item[(72)] \textit{United Haulers Assn. v. Oneida-Herkimer}, 550 U.S. 330, 338 (2007).
\end{itemize}
\end{footnotesize}
Proposition 23

b. The effects and burdens of AB 32 cross state lines, thereby implicating the dormant Commerce Clause.

(Source: EIA Natural Gas Summary)

AB 32 seeks to cut down on greenhouse gas emissions by requiring major polluters in the State of California to meet emissions standards set by CARB. As these standards will burdensome California businesses more than others, AB 32 contemplates the installment of a “cap-and-trade” program.\textsuperscript{75} Under this program, businesses will be able to buy and sell their emissions permits to each other, and California businesses will be able to obtain additional emissions permits from out-of-state businesses.\textsuperscript{76} Because the permits will be treated like assets or property rights,\textsuperscript{77} the dormant Commerce Clause will be triggered once California businesses begin buying or selling these permits across state lines. The dormant Commerce Clause will also be triggered if California businesses move their operations out of state but continue to supply California with their services. This latter scenario is the “economic leakage” effect, which triggers the dormant Commerce Clause because California is more likely to favor its “home-grown” businesses over foreign companies.\textsuperscript{78}

c. Should Proposition 23 fail, California faces possible lawsuits from Alabama, Nebraska, Texas and South Dakota.

Attorney Generals of Alabama, Nebraska, Texas and South Dakota have threatened to sue California under the dormant Commerce Clause if Proposition 23 fails to pass.\textsuperscript{79} California

\textsuperscript{75} Elkind, \textit{supra} note 21 at 10.
\textsuperscript{76} \textit{Id}.
\textsuperscript{77} Letter from Mac Taylor, \textit{supra} note 60.
\textsuperscript{78} \textit{Id}.
\textsuperscript{79} Mark Schapiro, Four States Prepare Legal Assault on California’s Climate Law, \textit{available at} http://californiawatch.org/watchblog/four-states-prepare-legal-assault-californias-climate-law-4564.
obtains 30% of its power from beyond its borders with most of it coming from states in the Pacific Northwest and Southwest.\textsuperscript{80} Should Proposition 23 fail, AB 32’s emissions standards could threaten to shut out any out-of-state company that is unable to comply with California’s set emissions rates, and thus, disrupt the flow of interstate commerce. As AB 32 envisions emission levels more severe than even the federal government contemplates, it is possible that many out-of-state entities will no longer be allowed to conduct business in the state of California unless they cut down their emissions. Should any such shut out occur, the Attorney Generals may argue that AB 32 discriminates against out-of-state business and sue pursuant to the dormant Commerce Clause.\textsuperscript{81}

d. **AB 32 will likely be found constitutional if challenged because it does not facially discriminate against out-of-state businesses and has a legitimate purpose beyond economic protectionism.**

If the Attorney Generals challenge the validity of AB 32 in court pursuant to the dormant Commerce Clause, the court will have to determine if AB 32 discriminates against out-of-state businesses on its face or in effect.\textsuperscript{82} If the court finds that AB 32 does discriminate against out-of-state businesses, it will apply a strict scrutiny standard of review to decide whether AB 32 is constitutional, and it will deem the law void if it finds that it is unconstitutional.\textsuperscript{83} However, if the court finds that AB 32 regulates even-handedly to effectuate a legitimate public interest and that its effects on interstate commerce are only incidental, it will likely uphold AB 32 as constitutional under the looser rational basis standard of review and allow AB 32 to be implemented.\textsuperscript{84} Lastly, if the court finds that the purpose of AB 32 is simple economic protectionism, it will deem AB 32 as per se invalid.\textsuperscript{85}

It is unlikely that AB 32 will be found unconstitutional because the purpose of AB 32 is not to isolate California economically, but to combat the effects of global warming, a legitimate government interest.\textsuperscript{86} The Communications Director of CARB recently acknowledged that CARB was aware of possible dormant clause implications and was crafting its regulations to address those concerns.\textsuperscript{87} Should a suit be brought, CARB may point to its multi-state cap-and-trade program with WCI (discussed below) to show that it is working with out-of-state entities, and it may point to its declared intent behind passing AB 32 of exercising a global leadership role and “continu[ing] the tradition of environmental leadership by placing California at the forefront of national and international efforts to reduce emissions of greenhouse gases.”\textsuperscript{88}

\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Pike v. Bruce Church, 397 U.S. 137, 142 (1970).
\textsuperscript{87} Id.
\textsuperscript{88} Cal. Health & Safety Code § 38500 et. seq.
V. POLICY ISSUES

Voters choosing to vote for or against Proposition 23 face the difficulty of balancing the desire for a future less reliant on carbon fuels against a slowed economy whose recovery may be negatively impacted by increased costs associated with implementing AB 32. Allowing AB 32 regulations to move forward may cement California’s role as a frontrunner in “green” technology, encourage foreign and domestic investments in our State’s green energy industries, and ultimately promote the health of California citizens by decreasing the amount of pollution in the State. However, passing the initiative may also result in increased costs to businesses as they attempt to meet the Scoping Plan’s lowered emissions standards. This could lead to a spike in California’s unemployment rate as companies are forced to eliminate jobs in order to meet the increased costs of meeting AB 32’s emissions rates.

a. The cost of implementing AB 32 may cause an increase in California’s unemployment rate.

The correlation between California’s unemployment rate and AB 32 is somewhat attenuated. Supporters have dubbed Proposition 23 the “California Jobs Initiative” and advocate passing the proposition on the ground that a temporary suspension of AB 32 will prevent job losses across California. This correlation is not unreasonable because CARB’s Scoping Plan does contemplate regulations that will result in increased costs to California businesses and could likely force businesses to re-evaluate their expenditures, including the number of positions they offer. However, passing Proposition 23 will not necessarily decrease California’s current unemployment rate by creating jobs, and failing to pass Proposition 23 will not necessarily result in job cuts. Realistically, temporarily suspending AB 32 will simply preserve the status quo of California’s job market by allowing businesses to carry on in their current conditions for the time being.

AB 32 will impact California’s economy by mandating new measures in various business sectors, including energy, construction, transportation and industry. CARB seeks to install solar electric systems in new homes and businesses under the Million Solar Roofs Program, proposes measures to increase California’s RPS from 20% to 33%, and intends to implement various building and appliance efficiency measures, such as installing programmable thermostats in new and refurbished buildings. Additionally, CARB proposes combined heat and power systems, provides incentives for the installation of a solar water heating system, and intends to implement the Pavley standards (AB 1493) in order to reduce greenhouse gas emissions from passenger vehicles by about 22%. Indeed, many of these proposals may result in increased costs to California businesses.

However, increased costs to businesses may not necessarily result in automatic job loss. California is one of the largest consumer states in the western half of the United States, and it is possible that businesses will shift the higher costs associated with energy prices onto consumers, workers or

89 See Section II(C) (1-9).
90 Varshney, supra note 63, at 35.
shareholders before they begin to eliminate jobs.\textsuperscript{92} Furthermore, transitioning to alternative fuels may spur new jobs in California’s research and technology sectors.\textsuperscript{93} There are already 12,000 clean technology companies in California\textsuperscript{94} and currently 500,000 employees working in clean technology jobs.\textsuperscript{95} Additionally, “green” jobs are continuing to expand all over the state\textsuperscript{96} because the clean technology sector receives billions of dollars in venture capitalist investment.\textsuperscript{97} Clean-energy jobs currently make up a key portion of California’s available jobs and are expected to remain an integral part of the job market as AB 32 takes effect.\textsuperscript{98}

In conclusion, while the loss of jobs may be a consequence of implementing AB 32, it is not a foregone conclusion.

b. Temporary suspension of AB 32 may negatively impact the health of California citizens by allowing emissions level to remain unchanged.

Another major policy concern underlying Proposition 23 is the effect that suspending environmental reform will have on the health of Californians. Air pollution is a major threat to public health in California,\textsuperscript{99} but Proposition 23 would put a hold on AB 32’s proposed environmental reforms and allow the current emissions levels to remain in place. These levels are particularly concerning to African Americans and Latino Americans because they tend to live closer to sources of industrial pollution, and to children and immigrants living in poverty-stricken areas (see “Figure 2” below). AB 32 seeks to lower overall emissions, and its implementation would undoubtedly be beneficial to the health of Californians in the long term once pollution levels decrease and the air quality improves. However, AB 32 may not have the positive short-term impact on pollution levels that CARB anticipates. AB 32’s cap-and-trade system, in driving down pollution levels through a market-based system, may allow industries already releasing the highest amount of emissions to buy their way out of immediately reducing any of their emissions levels. In such a case, emissions levels will remain as they are even if Proposition 23 fails, and the state of Californian’s health will not be significantly improved.

\textsuperscript{92} Letter from Mac Taylor, \textit{supra} note 60.
\textsuperscript{93} Id.
\textsuperscript{94} Clean Economy Network, Resources, \textit{available at} http://cleaneconomynetwork.org/resources.
\textsuperscript{96} Collaborative Economics and Next 10, Many Shades of Green, \textit{available at} http://nextten.org/next10/publications/green_jobs.html.
\textsuperscript{97} Cleantech Group, LLC, Research on Clean Technology, \textit{available at} http://cleantech.com.
\textsuperscript{98} George P Shultz, \textit{Viewpoints: Clean air law is key to our future}, Sacramento Bee, Sept. 12 2010, at E1.
\textsuperscript{99} California Air Resources Board, AB Scoping Plan, \textit{available at} http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm\textit{supra} note 89.
High emissions levels are particularly dangerous for those living in poverty-prone areas, and they tend to affect African Americans, Latino Americans and immigrants more than Asians and Caucasians.\textsuperscript{100} Five of the smoggiest cities in California have the highest densities of people of color and low-income residents,\textsuperscript{101} and on average, people of color are exposed to 70% more of the dangerous particulate matter linked to greenhouse gas pollution than white people.\textsuperscript{102} The Latino community is also adversely impacted, as more than half of Latinos live within one or two miles of a Toxic Release Inventory facility tracked by the EPA.\textsuperscript{103} In many Latino neighborhoods, asthma rates are four times the national average and 1 in 6 Latinos are diagnosed with asthma.\textsuperscript{104} Beyond race and ethnicity, immigrants and youth are also affected. Immigrants from the 1980s and 1990s are overrepresented in areas six miles or closer to major polluters, and children in poverty are disproportionately near facilities.\textsuperscript{105} In general, there are more renters, lower per capita incomes, and lower household incomes near polluting facilities.\textsuperscript{106}

\textsuperscript{100} Id.
\textsuperscript{101} Manual Pastor, \textit{Minding the Climate Gap: What's at Stake if California's Climate Law isn't Done Right and Right Away}, 10 (April 2010).
\textsuperscript{102} Id.
\textsuperscript{103} Manuel Pastor, James Sadd, Rachel Morello-Frosch, \textit{Still Toxic After All These Years: Air Quality and Environmental Justice in the San Francisco Bay Area}, 6 (2007)
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 10.
\textsuperscript{106} Id.
The cap and trade system, while seeking to reduce overall emissions over time, may not necessarily benefit the communities most impacted by high pollution rates in the short-term. The lowered emissions rates would place the heaviest strain on top-emissions industries by forcing them to considerably improve their rate of emissions; however, the cap-and-trade system will allow these industries to buy more emissions permits and allowances and thereby delay lowering their high emissions rates.107 Because the cap-and-trade program contemplates a market-based system for lowering emissions, AB 32 may not have a positive impact on high polluters at all and the communities surrounding major sources of pollution may continue to experience adverse health effects.108 Certain trades or allowance allocations could result in a disproportionate burden on poverty-prone communities as the facilities already emitting less pollution meet the more stringent emissions levels and sell their permits to the higher polluters.109

The bottom line is that Proposition 23 may not necessarily impact the health of California citizens one way or the other. Passing the initiative will allow emissions to remain as they are for the time being, which means that communities already suffering from the health effects of pollution will continue to suffer from the health effects of pollution. Allowing AB 32 regulations to move

107 Letter from Mac Taylor, supra note 60.
109 Id. at 21.
forward may result in an overall improvement to the health of Californians once state-wide emissions are lower.\textsuperscript{110} However, the short-term health benefits, especially in the less affluent communities, may not be drastic. As with the unemployment rate, Proposition 23 will simply preserve California’s status quo with regard to pollution-related health problems.

c. Passing Proposition 23 could lead to conflicting emissions regulations among various California industries and disrupt a regional cap-and-trade program involving several western U.S. states and Canada.

A further policy concern underlying Proposition 23 is that disrupting environmental regulations by suspending AB 32 will result in a nationwide ripple effect on progressive environmental legislation. California’s more stringent emissions guidelines could result in economic leakage across state lines,\textsuperscript{111} and a corollary to this effect would be the slowing or abandonment of environmental regulation by other states as they experience an economic high from California’s newly re-located businesses. Moreover, if nationwide environmental progress isn’t stagnated by AB 32, allowing AB 32 to go forward may cause inconsistent nation-wide emissions standards, as California’s proposed emissions are more stringent than even federal regulations.\textsuperscript{112} These varying regulations may impact interstate commerce.\textsuperscript{113}

The cap-and-trade program contemplated by AB 32 is not limited to California’s borders, and California has already developed a regional cap-and-trade program with Western Climate Initiative that is designed to link with the state and provincial-level programs of other WCI jurisdictions.\textsuperscript{114} Under this program, California businesses will be able to trade emissions permits with other western U.S. states as well as within California, and it will also have access to permits in some provinces of Canada, including British Columbia, Ontario and Quebec.\textsuperscript{115} Other states and provinces, such as New Mexico and Manitoba, are in the process of developing legislation to authorize similar cap and trade programs for their jurisdictions.\textsuperscript{116} Should Proposition 23 suspend AB 32, California may be forced to withdraw from its agreement with WCI and thereby sever a uniform cap-and-trade agreement between several states.

Since California’s progressive environmental policies are believed to have attracted investors to California,\textsuperscript{117} the State risks losing billions of dollars by suspending AB 32. Clean energy investment in California has tripled since 2006 when AB 32 was first passed, and about three of

\textsuperscript{110} Id. at 21.
\textsuperscript{111} See Section III(d), supra.
\textsuperscript{112} Maeve Reston, California Election 2010, L.A. Sept. 11, 2010, at LATExtra.
\textsuperscript{113} See Section IV, supra.
\textsuperscript{114} Ethan Elkind, Daniel Farber, et al., California at the Crossroads: Proposition 23, AB 32, and Climate Change, 10 (U.C. Berkeley School of Law’s Center for Law, Energy & the Environment, Sept. 2010). Elkind, supra note 21 at 10.
\textsuperscript{115} Id. at 10-11.
\textsuperscript{116} New Mexico Environment Department, New Mexico Climate Change Initiatives, available at http://www.nmenv.state.nm.us/cc/.
\textsuperscript{117} George P. Shultz, Viewpoints: Clean air law is key to our future, Sacramento Bee, Sept. 12, 2010. , at 1E.
every five venture capital dollars nationwide has been invested in California companies.\textsuperscript{118} California has also gained in about $2.1 billion worth of clean energy investment in just 2009.\textsuperscript{119} If California were to stall on environmental legislation by suspending AB 32, California may lose many of these investments to other states or even to other countries,\textsuperscript{120} while jeopardizing its reputation as a frontrunner in environmental legislation. Furthermore, suspending AB 32 may encourage various State agencies to make their own emissions regulations, which could result in piecemeal litigation that may make it difficult for out-of-state entities to do business in California.\textsuperscript{121}

Ultimately, AB 32 may affect environmental legislation across state borders whether or not Proposition 23 passes. Suspending AB 32 may cause environmental policies to stagnate nationwide, and passing AB 32 will affect the several states as economic leakage and high varying emissions standards become a reality.

\textbf{VI. \hspace{20pt} CONCLUSION}

Proposition 23 essentially seeks to preserve the pre-January 1, 2012 status quo of environmental regulations in order to prevent businesses from undergoing costly changes to their modes of operation. Proponents of the initiative raise the argument that forcing businesses to undergo major changes in operation to meet AB 32’s stringent emissions standards will result in a drastic cutback of available jobs. As this summary has discussed in some detail, this argument is not unreasonable

\textsuperscript{118} Id.
\textsuperscript{119} Id.

\textsuperscript{121} Steven Maviglio, \textit{UC Study: Prop 23 Kills Jobs, Hurts Cities, Causes Legal Chaos}, available at \url{http://www.californiaprogressreport.com/site/?q=node/8146}. 
because it is feasible that businesses could cut back on jobs in order to save on operational costs. However, eliminating jobs is not the only option California businesses will have. It is possible that consumers, shareholders or even investors may take the hit of increased costs to businesses before existing or potential employees do, and it is also possible that implementing AB 32 will lead to an eventual decrease in the unemployment rate as new “green jobs” are made available.

Those who oppose Proposition 23 do not see the connection between suspending AB 32 and lowering California’s unemployment rate. They argue that the initiative is backed primarily by out-of-state oil companies whose interests lie solely in ensuring that California maintains its dependency on oil. A major reason for enacting AB 32 was to establish California as a leading force in the worldwide mission to combat global warming, and opponents argue that implementing AB 32 regulations will help California’s economy in the long-term as more businesses continue to invest in its continuously growing clean technology sector. However, if Proposition 23 passes, it will threaten the current and emerging jobs throughout the new clean technology sector and businesses may choose not to invest in clean technology any longer, thereby withdrawing their financial support from California. Opponents also believe that the threat of global warming is a serious concern that must be addressed. Proposition 23, they argue, will indefinitely suspend California’s major regulations that are necessary to reduce its greenhouse gas emissions.

In sum, California voters must choose between implementing progressive environmental measures and revitalizing an economy that may be acutely impacted by AB 32.
Proposition 24:
Repeal Corporate Tax Loopholes Act.
Initiative Statute.

By,

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I. EXECUTIVE SUMMARY

Each year the California Legislature creates the state’s yearly budget. During the 2008 and 2009 closed-door process the Legislature enacted three business tax structures for businesses, scheduled to go into effect in stages between 2010 and 2011. Proposition 24, an initiative statute, is a response to these three tax structures and their expected effect on the California economic crisis.

Proposition 24, the Tax Fairness Act, seeks to remove 2008 and 2009 legislative changes to the business tax structure. The Legislature’s 2010-2011 planned corporate tax structure allows for (1) a business to shift their operating losses from one tax year to prior or future tax years, (2) a multistate business to use a sales-based income calculation, and (3) a business to share tax credits among affiliated businesses.

A “yes” vote on Proposition 24 will revert the business tax provisions back to what they were prior to the 2008 and 2009 legislative changes. This means (1) a business will not as easily shift losses from one tax year to another, (2) California incomes of multistate businesses will be determined by a three-factor calculation, and (3) a business will not be able to share tax credits among an affiliated business.

A “no” vote on Proposition 24 will allow for the Legislature’s enacted business tax structure to go into effect as planned in 2010-2011 with no change. This means (1) a business will be able to shift losses from the current tax year to two prior years and shift them forward for twenty years, (2) most multistate businesses may choose to have their California incomes calculated by a single sales factor or the three-factor calculation, and (3) a business will be able to share tax credits among affiliated businesses.

II. THE LAW

a. History and Background

In 2009, the state of California faced a $42 billion budget deficit. In the process of passing the budget, over twenty separate bills were passed. As part of the budget process, the Legislature passed business-friendly tax measures in an effort to attract businesses to California, which would ideally increase employment opportunities and stabilize the economy.

3 Prop 24 Full Text, supra note 1, at p. 2., sec. 3.
5 Id.
Because this legislation still has not gone into effect, this repeal could have been brought as a referendum rather than an initiative. In order to file a referendum, you need to submit the required signatures within 90 days after the statute goes into effect.\(^7\) Under *Rossi v. Brown*, the California Supreme Court held that a tax measure could be repealed prospectively by initiative, making the more difficult referendum process unnecessary.\(^8\)

States differ in the way they calculate state corporate income tax liability. Many states use a three-factor formula, but there has been some movement in the last decade toward a single factor formula based on a business’ sales in the state. In some cases states have not moved entirely to a “single sales” factor, but instead have given it greater weight in the three-factor formula.\(^9\) This reduces the weight of the property and payroll factors; thus, creating a greater incentive for businesses to increase production.\(^10\) Proponents of the “single sales” factor formula believe it will increase jobs. Further, they claim it reduces overall state corporate income tax liability for a business, while creating other tax revenues. State income taxes (through additional workers hired) and sales tax revenues (through increased production and sales of products), as well as business property tax (through additional property purchased to expand production) would be affected.\(^11\) Most recently, in 2006, five states switched to the “single sales” factor including: Georgia, Louisiana, New York, Oregon, and Wisconsin.\(^12\)

Corporate tax revenues make up approximately 10% of the State General Fund and are expected to account for 11.3% of the General Fund in the 2010-2011 fiscal year.\(^13\) Approximately 52%-55% of the General Fund is spent on education each year.\(^14\) Because a significant portion of the General Fund revenues come from corporate taxes, the proponents of Proposition 24 argue corporate tax breaks will have a significant negative impact on education funding due to an overall reduction in the General Fund.\(^15\) The State General Fund is financed by several different taxes, including but not limited to: income, sales, and corporate taxes. Propositions that affect the amount of money in the State General Fund directly impact education funding due to Proposition 98. Proposition 98, which was passed by the voters in 1988, was designed to provide K-14 schools (K-12 schools and community colleges) with a guaranteed source of

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\(^7\) Cal. Const. Article II, sec. 9(b).
\(^10\) *Id.*
\(^11\) *Id.*
\(^15\) *Prop 24 Full Text, supra note 1, (accessed October 2, 2010)* at p. 2., sec. 2., no. 10. See also *Yes on 24: The Tax Fairness Act*, BALLOT ARGUMENT: IN FAVOR OF PROPOSITION 24 (October 2, 2010), http://yesprop24.org/learn-more/ballot-argument.
funding.\textsuperscript{16} Proposition 98 provides three tests for determining how much of the State General Fund is spent on education.\textsuperscript{17} These tests vary based on the growth of the economy and the General Fund.\textsuperscript{18} When the General Fund decreases, as the proponents argue it will if Proposition 24 does not pass, education funding will decrease due to the Proposition 98 formula being calculated as a proportion of the total General Fund.

b. Prior Law

The law prior to the passage of the 2008 and 2009 State Budget comes from California Revenue and Taxation Code sections 17276 and 24416.

\textit{Use of Operating Losses:} Carrybacks, which are business losses applied to prior years in order to offset income and receive a refund, are not allowed.\textsuperscript{19} Carryovers allow businesses to offset future income for up to 10 years following a loss.\textsuperscript{20}

\textit{Income of Multistate Businesses:} Multistate businesses use a three-factor formula to calculate their income based on the proportion of sales, property, and payroll the business has in California.\textsuperscript{21} The three-factor formula uses a weighting factor to apportion each area—sales, property, and payroll; the weighting factor for sales is usually the largest but the three add to one.\textsuperscript{22} The proportion of sales a business conducts in California to total sales nationally is multiplied by the sales weighting factor.\textsuperscript{23} The proportion of a business' California payroll to payroll nationally is multiplied by the payroll weighting factor.\textsuperscript{24} The proportion of property in California to property nationally is multiplied by the property weighting factor.\textsuperscript{25} These three figures are added together and multiplied by the businesses total net income.\textsuperscript{26}

\textit{Tax Credit Sharing:} Tax credits are given to businesses engaging in activities the State wants to promote. For instance, a business developing valuable technology can earn a “research and development” credit.\textsuperscript{27} Tax credits can be used to offset the amount of tax owed. In some cases a business might have credits exceeding their tax liability, these can usually be carried forward into future years (the number of years varies based on the text of the statute providing for the

\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{20} CAL. REV. & TAX. §§17276(c), 24416(d) (West 2008).
\textsuperscript{21} LAO Analysis at 2.
\textsuperscript{22} Dubin, \textit{supra} note 9, at 5.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} LAO Analysis, \textit{supra} note 19, at 3.
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Credit).\textsuperscript{28} Tax credits given to a business can only be used by that business. They cannot be shared among entities in the same group of businesses.\textsuperscript{29}

c. Existing Law

Existing law represents modifications and additions to Revenue and Taxation Code sections 17276, 23663, 24416, and 25128 adopted in the budgets passed by the Legislature and Governor in 2008 and 2009.\textsuperscript{30}

\textit{Use of Operating Losses:} Beginning in 2010, business would be allowed to carry losses back two years prior to the year the loss occurred and apply them against income to receive a refund.\textsuperscript{31} The carryover provisions are extended from 10 years to 20.\textsuperscript{32}

\textit{Income of Multistate Businesses:} Beginning in 2011, multistate businesses would get a choice between the prior law, the three-factor formula, and the “single sales” factor formula for calculating income.\textsuperscript{33} The “single sales” factor looks to the proportion of a business’ sales in California to sales across the nation. Businesses can choose either method in any given year.\textsuperscript{34}

\textit{Tax Credit Sharing:} Beginning in 2010, tax credits given to one business can be transferred to related business entities.\textsuperscript{35}

Passage of Proposition 24 would repeal existing law, reverting the corporate tax structure back to its pre-budget form.

In the 2010-2011 Governor’s Budget Summary Introduction, it was proposed that the implementation of the following provisions be delayed one year:

- Delay use of business credits by unitary groups of corporations and instead retain current law [that] requires subsidiaries to have their own tax liability to use research and development and other credits ([revenue increase of] $315 million).

\textsuperscript{28} \textit{CAL. REV. & TAX.} § 17039(c)(2) (West 2008), \textit{amended by} 2010 Cal. Legis. Serv. Ch. 14 (West).
\textsuperscript{29} \textit{LAO Analysis}, supra note 19, at 3.
\textsuperscript{30} \textit{Prop 24 Full Text}, supra note 1, (accessed October 3, 2010) at p. 2., sec. 3. “The people enact this measure to repeal three tax breaks that were granted to corporations in 2008 and 2009: the elective single sales factor provisions contained in ABx3 15 and SBx3 15 of 2009; (2) the net operating loss carryback provisions contained in AB 1452 of 2008; and (3) the tax credit sharing provisions in AB 1452 of 2008.” \textit{Id.}
\textsuperscript{31} A business utilizes the carryback provision by filing an amended state corporate income tax return for the year in which the entity wants to apply the loss and then if accepted would receive a refund check in the amount the loss offset the previously reported gain.
\textsuperscript{32} \textit{CAL. REV. & TAX.} §§ 17276(c), 17276.9(c), 17276.10, 24416(d), 24416.9(c), 24416.10 (West 2008), \textit{amended by} 2010 Cal. Legis. Serv. Ch. 14 (West).
\textsuperscript{33} \textit{CAL. REV. & TAX.} § 25128.5 (West 2010).
\textsuperscript{34} \textit{CAL. REV. & TAX.} § 25128.5(a) (West 2010).
\textsuperscript{35} \textit{CAL. REV. & TAX.} § 23663 (West 2008).
• Delay the change to the single sales factor allocation method for multi-state corporate income and instead retain the [three factor formula] ([revenue increase of] $300 million).
• Lower to 30 percent the first year phase-in of the ability of corporations to carry back losses two years to offset prior tax profits ([revenue increase of] $20 million).36

However, when the budget passed, only the carryback provision was affected. Therefore, if Proposition 24 does not pass, the following existing law provision will take effect over a three-year period beginning in 2013:

• The ability to carry back losses for two years will be delayed until 2013. Carrybacks will be limited to 50 percent of losses for tax years beginning in 2013, 75 percent of losses for tax years beginning in 2014 and 100 percent of [Net Operating Losses] NOLs will be allowed to be carried back for tax years beginning tax year 2015 and later.37

d. Fiscal Effects of Proposed Changes to the Law

If Proposition 24 passes and reverts the tax-structure back to the pre-budget form, it is expected to have a positive effect on state revenues. These effects are summarized as follows:

*Effect on State Revenues:* Repeal of the business friendly modifications and additions to Revenue and Taxation Code, sections 17276, 23663, 24416, and 25128 are expected to increase State revenue through the continuation of the prior corporate taxation method. This is expected to increase revenues by $1.3 billion annually when in full effect in 2012-13.38 More than half of this revenue is expected to come from multistate businesses due to the elimination of the “single sales” factor option in calculating corporate income.39

*Effect on State General Fund and Education Funding:* State tax revenue goes to the State General Fund. An increase in corporate tax revenues would increase the General Fund. Under Proposition 98, this is expected to increase the funding for education. The General Fund is responsible for other programs and services including healthcare and public safety. However, proponents focus on increased revenues for education because under Proposition 98 a specific portion of the General Fund must be spent on education and cannot be discretionarily cut.40

38 LAO Analysis, *supra* note 19, at 5-6.
39 Id.
40 The Proponents major sponsor is the California Teachers Association, so this is another likely reason they are focusing so heavily on education funding.
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Effects of Proposition 24 on California Business Tax Law  

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<th>Prior Law</th>
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<td>Use of Operating Losses</td>
<td>Carrybacks. Business losses cannot be used to get refunds of taxes previously paid.</td>
<td>Carrybacks. Beginning in 2010, business losses can be used to get refunds of taxes paid in the prior two years.</td>
<td>Same as prior law.</td>
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<td>Income of Multistate Businesses</td>
<td>A single formula determines the level of a multistate business’ income that California taxes based on the business’ sales, property, and payroll in California.</td>
<td>Beginning in 2011, most multistate businesses will choose every year between two options to determine the level of income that California can tax: (1) the formula under prior law, or (2) a formula that considers only the business’ sales in California relative to its national sales.</td>
<td>Same as prior law.</td>
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<tr>
<td>Tax Credit Sharing</td>
<td>Tax credits given to a business entity can only reduce that entity’s taxes. That entity cannot share its tax credits with entities in the same group of businesses.</td>
<td>Beginning in 2010, tax credits given to a business entity can be used to reduce the taxes of other entities in the same group of related businesses.</td>
<td>Same as prior law.</td>
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**III. CONSTITUTIONAL ISSUES**

*United States Constitution*: One potential but unlikely source of post-election litigation may lie within the Commerce Clause and the way that California determines taxes for multistate businesses. If Proposition 24 does not pass, and the current law remains, California, in essence, will be favoring in-state businesses, in hopes of bringing more business and more jobs to the state. The Commerce Clause has been interpreted to protect out-of-state businesses from discrimination and prohibits states from giving preferential treatment solely to in-state businesses. However, it is unlikely a Commerce Clause challenge would be successful here because multi-state businesses as well as California-only businesses will benefit from the proposed breaks.  

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42 Interview with Leslie Jacobs, Director of the Capital Center, University of the Pacific, McGeorge School of Law, McGeorge School of Law (Sept. 13, 2010).
state and are subject to tax in California, would still qualify for the tax benefits by electing either the “single sales” factor or the three-factor formula.\footnote{Id.} In Mobile Oil Corp. v. Commissioner, taxpayer Mobil, a New York domiciled business argued taxation by Vermont violated the Commerce Clause. The court determined that if the tax was fairly apportioned and applied uniformly and the business conducted an activity taxable in the state, there was no Commerce Clause issue.\footnote{Id.}

*California Constitution:* Proposition 24 does not appear to raise any issues under the California Constitution.

**IV. POLICY CONSIDERATIONS**

a. **Proponents’ Arguments**

The Proponents of Proposition 24 claim that the estimated $1.7 billion in corporate tax breaks allowed by the current tax-structure will instead be used to benefit public schools, healthcare, and public safety.\footnote{Voter Guide, supra note 4.} The Proponent’s primary backer is the California Teachers Association (CTA). Other supporters include: California Nurses Association (CNA), CALPIRG, Consumer Federation of California, Congress of California Seniors, League of Women Voters of California, and California Tax Reform Association.\footnote{Yes on 24: The Tax Fairness Act FAQ, 7 (Sept. 7, 2010), http://yesprop24.org/wordpress/learn-more/FAQs/ [hereinafter FAQ].}

Proponents of Proposition 24 focus on four points. First, Proponents claim that the current law does not ensure increased employment opportunities. Proponents argue, that the corporations receiving these tax breaks “made no guarantees that a single job would be created or saved.”\footnote{Official Voter Information Guide, Proposition 24 – Arguments and Rebuttals, http://www.voterguide.sos.ca.gov/propositions/24/arguments-rebuttals.htm [hereinafter Voter Guide A&R].} Further, they highlight that the Legislature did not write in a requirement to create new jobs in order for multistate corporations to receive these tax savings.\footnote{Id.} Accordingly, corporations receiving the tax breaks may still send jobs overseas or to other states.\footnote{See Yes on 24: The Tax Fairness Act, http://www.yesprop24.org/index.html} Additionally, “in 2009 alone, the big corporations [contributing] to defeat Proposition 24 laid off over 100,000 employees.”\footnote{FAQ, supra note 45.} 

Second, Proponents argue that the tax provisions will not help small businesses because “less than 2% of California’s wealthiest multistate corporations” benefit from the tax provisions, while the other 98% of California businesses, “especially small businesses[,] would get virtually no benefit.”\footnote{Voter Guide A&R, supra note 46.} Proponents allege the tax provision will allow “6 multistate corporations [to] receive
new cuts averaging $23.5 million each in 2013-2014.”52 And, for example, “87% of the benefits from one tax break [will only] go to 0.03% of California corporations...all of which have gross incomes over $1 billion.”53 Proponents contend, “instead of creating unfair tax loopholes for giant out-of-state corporations, we could be giving tax incentives to California’s small businesses that actually create jobs for Californians.”54

Third, proponents argue that businesses should pay their share of state taxes, highlighting that corporate tax breaks “put an even bigger burden on the average individual tax payer.”55 In last year’s budget, the “Legislature gave corporations $1.7 billion in tax breaks,” “made $30 billion in cuts,” and “raised $18 billion in taxes on people.”56 While big corporations want to use “tax credits they did not earn to reduce their taxes and shift losses” the Legislature’s cuts resulted in “laying off 16,000 teachers, raising college tuition by more than 30 percent, and putting 6,500 prisoners back on the street.”57

Finally, Proponents argue Proposition 24 will help increase education funding. The proposition will “increase state general fund revenues by increasing the taxes paid by businesses.”58 Proposition 98 determines the minimum amount of state and local funding for K–12 schools and community colleges each year.59 Under Proposition 98’s formulas “a significant part of Proposition 24’s revenue increases would be allocated to schools and community colleges.”60 Although there will be “smaller increases in 2010-2011 and 2011-2012, “when fully implemented by 2012-2013, revenues would increase by an estimated $1.3 billion each year.”61 Proponents allege, “more than one-half of these estimated increased taxes would be paid by multistate businesses as a result of the elimination of the ‘single sales’ factor option.”62

b. Opponents’ Arguments

The opposition to Proposition 24 is organized but has been working behind the scenes. They have structured themselves as a “coalition of taxpayers, employers and biotechnology associations” against the jobs tax.63 They represent themselves as the voice of the small

52 Id.
53 Id.
54 Id.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id.
62 Id.
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Opponents of Proposition 24 argue four points. First, opponents couch the measure as a jobs tax that will substantially decrease employment opportunities for California workers. They argue, “the Jobs Tax Initiative would take us back to an outdated formula that increases [corporate] income taxes every time [businesses] create a new job here, which an economic study reveals would cost California 144,000 jobs.” This is based on the theory that using the three-factor formula rather than the “single sales” factor discourages in-state production, which decreases jobs.

Second, opponents allege that getting rid of the carrybacks provision harms small businesses. “To help them survive the recession, federal tax laws were recently updated to allow small businesses to carry back net operating losses five years. The recent state tax update allows businesses two years. Proposition 24 takes away that lifeline altogether. It would force more small businesses to close shop, causing even more layoffs.”

Third, opponents argue the disallowance of tax credit sharing hits the job producing industries hardest. Further, they argue this will drive businesses out of state. “We’re counting on our high tech, clean technology, biotechnology, and other innovative, high-growth industries to help pull California out of the recession and provide tomorrow’s high-paying jobs. But Proposition 24 would tax them for each new job they create here, prohibit the full use of earned research and development tax credits, and limit their ability to level out their losses over their natural business cycles.”

Finally, opponents counter the proponents’ arguments about education funding. Opponents believe Proposition 24 will have an overall negative impact on the economy and will actually reduce the state’s tax revenue in the long-term: “The slower our recovery, the fewer long-term tax revenues we’ll have to fund our schools and hospitals and roads.”

V. CONCLUSION

Proposition 24 will have short-term and long-term effects on California. If passed, the tax provisions set to go into effect starting 2010-2011 will not occur, and instead the tax provisions will return to what they were prior to the 2008-2009 budget. Business losses will not be shifted as easily between tax years, multistate business tax will continue to be determined by a three-

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64 Genentech is expanding its operations into Oregon, a neighboring state that recently moved to the “single-sales” factor. Genentech contributed $1 million to the no on proposition 24 efforts.
67 Id.
68 Id.
69 Id.
factor calculation, and tax credits will not be shared among related business. This may mean more money for public schools, healthcare, and public safety.

If Proposition 24 does not pass the tax provisions set to go into effect starting 2010-2011 will continue as planned. Businesses will be able to shift losses from the current tax year to either of the prior 2 years or shift losses into future years. California will join thirteen other states in giving multistate corporations the choice to use a “single sales” factor tax determination, and tax credits may be shared among related businesses. This may mean more businesses and more jobs in California.

The fate of Proposition 24 is with the voters and depends on whether they believe corporate tax cuts will add to California’s economic crisis, or help to rebuild the economy.
CALIFORNIA INITIATIVE REVIEW

Proposition 25:
The On-Time Budget Act of 2010
Initiative Constitutional Amendment

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I. EXECUTIVE SUMMARY

For the past forty-eight years, the California budget approval process has required approval by a two-thirds vote in each house of the Legislature.\(^1\) While the annual budget approval process has long been the source of partisan bickering and missed deadlines, citizens’ concerns over this often-contentious process have been amplified by one of the worst economic recessions that California has ever experienced.\(^2\)

Proposition 25, the On-Time Budget Act of 2010, aims to reform the budget approval process. Proposition 25 seeks to amend Article IV, Section 12 of the California Constitution and eliminate the two-thirds voting requirement that is currently needed to pass the annual state budget. The amended section would instead only require a simple majority vote in each house for a budget to be approved before being submitted to the Governor.\(^3\) The measure is also designed as a means to pressure lawmakers into passing and enacting a budget on time. For every day that the budget is late, the measure would withhold all salaries and reimbursements from both the Governor and legislators alike.\(^4\)

Proponents of Proposition 25 argue that the measure will break the gridlock in the Legislature that has caused late budgets, which can depress the state economy, disrupt state services, and damage the state’s credit rating.\(^5\) Opponents maintain that Proposition 25 will cede too much control to the dominant party in the Legislature and allow the Legislature to sidestep the Constitution’s two-thirds legislative voting requirement for raising state taxes.\(^6\)

Early polling released on September 29, 2010, suggests that 48% of likely voters favor Proposition 25, 35% oppose it, and 17% remain undecided.\(^7\)

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4 Id. § 2.


II. BACKGROUND AND EXISTING LAW

d. The Two-Thirds Vote

i. Origins

Today’s process for creating and passing a budget primarily traces its roots to measures approved by Californians in 1922, 1933 and 1962. In 1922, voters approved a constitutional amendment aimed at modernizing the state budget process.\(^8\) The amendment required that the Governor begin the budget process each year by submitting a budget to the Legislature containing itemized statements of all proposed expenditures and estimated revenues for the fiscal year, along with comparisons to the same expenditures and revenues from the previous year.\(^9\) This amendment also granted the Governor a line-item veto power to reduce or eliminate any itemized expenditure in the proposed budget.

In 1933, voters approved a measure that required any appropriation, which exceeded the appropriation in the previous budget year by five or more percent to pass by a two-thirds vote in both the Senate and the Assembly. Because budgets typically increased more than five percent from year-to-year, this proposition effectively required a two-thirds majority vote for the passage of any budget. In 1962, this two-thirds voting requirement was extended to all budgets, regardless of size.\(^10\)


Submitted to voters in the 2004 spring election, the Budget Accountability Act (Proposition 56) was defeated by sixty-five percent of the vote.\(^11\) The measure’s key provisions would have eliminated the two-thirds vote requirement for budget approval in favor of a fifty-five percent vote requirement in each house. The measure would also have required that the Legislature stay in session until a budget was passed and would have docked the pay of legislators and the Governor for each day that the budget was late.

Proposition 56 also sought to reform the manner in which the State’s reserve monetary fund was managed. The measure would have established minimum requirements for depositing and withdrawing money from the state reserve fund. The Legislature would have been required to deposit at least 25% of any excess revenues until the reserve reached 5% of the prior year’s spending. Reserve funds could only be spent during emergencies and years in which spending exceeded state revenues.\(^12\)

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\(^8\) Corcoran, supra note 1.
\(^9\) See CAL. CONST. art IV, § 12(a).
\(^10\) Corcoran, supra note 1.
\(^12\) Id.
iii. Passing the Budget

The state budget is the primary vehicle by which the Legislature appropriates state spending for the fiscal year, which runs from July 1 to June 30 of the following year. The Governor is required to submit the budget for the upcoming fiscal year by January 10 and the Legislature is required to approve the budget by June 15. Once the Governor receives a budget approved by the Legislature, he may approve or reject the budget in its entirety or exercise his line-item veto power to reject certain parts of the budget. This veto power can only be overridden by a two-thirds vote in each house of the Legislature.

The California Constitution requires a two-thirds majority vote in each house of the Legislature for the passage of measures that take effect immediately. Because the budget includes appropriations that necessarily have immediate effect, passage of the budget requires a two-thirds vote in each house of the Legislature.

While the deadline for the the passage of a budget appears to be strict, the Constitution only mandates the date by which a budget must be passed by the Legislature, not a specific time by which the budget must be enacted into law by the Governor. In making full use of this loophole, the Legislature has seldom met its June 15 deadline for submitting a budget to the Governor and since 1980, has met this deadline just five times. And during this same period, a final budget, approved by both the Legislature and the Governor, has been enacted into law, prior to the start of the fiscal year (July 1), just ten times. Many state expenses are not paid in years where the fiscal year begins without a budget, including payments to various vendors, state employees, and Cal-Grants (financial aid money) to college students.

e. Other States Requiring Supermajorities For Budget Approval

Legislatures in nine states have voting requirements that sometimes require a supermajority. Six of these states—Connecticut, Hawaii, Illinois, Maine, Mississippi and Nebraska—require a
supermajority only in very rare instances. Only three states—Arkansas, California, and Rhode
Island—typically require a supermajority to pass an annual budget.23

The special circumstances that trigger the supermajority requirement vary in the states that only
require supermajorities in limited circumstances. In Connecticut and Hawaii, a supermajority is
only required when the state exceeds its general fund expenditure ceiling. Illinois requires a
three-fifths vote when the Legislature has failed to approve a budget before a constitutionally
mandated deadline. Maine and Nebraska have provisions, similar to Illinois, which require a
two-thirds vote only when the budget is late and being passed as emergency legislation.24
Similar to California’s specific supermajority requirement for raising taxes, Mississippi requires
three-fourths approval in the Legislature for all revenue bills and property tax increases.25

Although Rhode Island and Arkansas join California as the only states in the country that require
at least a two-thirds vote to pass a budget,26 California is the only state in the nation that requires
a two-thirds vote to pass both budgets and tax increases.27 In Arkansas, the Legislature is
required to obtain a three-fourths majority on appropriations for all purposes other than
education, highways, and paying down the state debt. Appropriations for these exceptions
require only a simple majority. Although Rhode Island only requires a two-thirds majority for
local or private appropriations, the state often drafts major appropriations bills into a single
budget bill. This effectively results in a two-thirds majority requirement to pass the budget each
year.28

III. PROPOSED CHANGES TO THE CURRENT LAW

a. Lowers Legislative Vote Requirements for the Budget and Related Legislation

If approved, Proposition 25 would amend the Constitution to lower the vote requirement
necessary for each house of the Legislature to approve a budget and submit it to the Governor.29
The voting requirement would be reduced from the current two-thirds majority to a simple
majority in each house of the Legislature.30 This reduced voting threshold for approving a
budget would also apply to trailer bills that are identified by the Legislature “as [being] related to
the budget in the budget bill.”31 The measure would not impact the two-thirds majority required

23 NAT’L CONFERENCE OF STATE LEGISLATURES, SUPERMAJORITY VOTE REQUIREMENTS TO PASS THE
BUDGET, available at
http://www.ncsl.org/IssuesResearch/BudgetTax/SupermajorityVoteRequirementstoPasstheBudget/tabid/1
24 Id. (stating that Connecticut requires a three-fifths majority and Hawaii requires a two-thirds majority
approval in the Legislature when the states’ expenditure fund ceilings have been expended).
25 Miss. CONST. art. IV, § 70; see also National Conference of State Legislatures, supra note 23.
28 NAT’L CONFERENCE OF STATE LEGISLATURES, supra note 23.
30 LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 25, supra note 13, at 2.
31 Id. at 3.
to override a Governor’s veto and the text of the measure explicitly states that it is not intended to amend the two-thirds voting requirement for state tax increases.32

b. Forfeiture of Legislators’ Pay and Reimbursements For Each Day that the Budget is Late

The Proposition contains a provision that would prevent legislators from being paid their salaries, as well as reimbursements for travel and living expenses, during the past-deadline (June 15) period. Pay and reimbursements would be suspended beginning June 15 and last until a budget is submitted to the Governor.33 The legislators would permanently forfeit their benefits—they would not recoup them at a later date.34

IV. PRE-ELECTION CHALLENGES AND DRAFTING ISSUES

a. Pre-Election Challenges

On July 26, 2010, opponents of Proposition 25 filed a lawsuit in an effort to remove language from the measure that they considered misleading. These opponents argued that the provision stating that the measure “retains two-thirds vote requirement (for) taxes” was misleading because the measure makes no substantive reference to the preservation of the two-thirds vote requirement for raising taxes.35 The opponents acknowledged the initiative’s statement of intent, which reads, “This Measure will not change Proposition 13’s tax limitations in any way. This measure will not change the two-thirds requirement for the Legislature to raise taxes[.]” However, the opponents argued that statements of intent could not alter the clear substantive provisions of a measure, which they believe would permit tax increases through a simple majority vote.36 The Superior Court held that the language should be removed, but for a different reason. In a bench ruling, Judge Marlett indicated that the language might mislead voters into believing that they must support the initiative in order to preserve the current two-thirds vote requirement for taxes.37

Proposition 25 supporters immediately filed an appeal on August 6, 2010. In an unpublished opinion, the Court of Appeals overturned the lower court’s decision and held that the challenged language does not misleadingly suggest the approval of Proposition 25 is necessary to maintain the existing two-thirds vote requirement for raising taxes. And we find nothing in the substantive provisions of

32 Cal. Proposition 25 § 3 (2010); LEGISLATIVE ANALYST’S OFFICE, supra note 13, at 3.
34 LEGISLATIVE ANALYST’S OFFICE, supra note 13, at 3.
36 Petition for Peremptory Writ of Mandate, supra note 35, at 3.
37 Van Oot, supra note 35.
Proposition 25 that would allow the Legislature to circumvent the existing constitutional requirement of a two-thirds vote to raise taxes.\textsuperscript{38}

Thus, Proposition 25 will be submitted to the voters containing language stating that the measure will not alter the Constitution’s requirement that tax increases be approved by a the two-thirds vote in each house.\textsuperscript{39}

\textbf{b. Drafting Issues}

Proposition 25 contains a severability clause which purports to allow provisions to be severed from any portions of the initiative that are later found invalid. Specifically, section 5 of the initiative states:

\begin{quote}
If any of the provisions of this measure or the applicability of any provisions of this measure to any person or circumstances shall be found to be unconstitutional or otherwise invalid, such finding shall not affect the remaining provisions or applications of this measure to other persons or circumstances, and to that extent the provisions of this measure are deemed to be severable.\textsuperscript{40}
\end{quote}

Although the severability clause found in Proposition 25 contains language that mirrors the severability language used in most initiatives, the mere inclusion of a severability clause is not determinative. If a court finds that a provision of an initiative is unconstitutional, it will apply the three-pronged \textit{Gerken} test to determine whether the unconstitutional provision should be severed. For a provision to survive this test and be severed from portions that are deemed unconstitutional, (1) it must grammatically make sense to sever it; (2) it must be complete and functional in and of itself; and (3) the provision as severed must be something the electorate considered separately and would have adopted without the invalid provisions.\textsuperscript{41}

Proposition 25 is clearly drafted and does not appear to contain provisions that would render any part of the measure unconstitutional. Furthermore, the text of the initiative has been carefully structured to preserve the remaining provisions should there be a successful constitutional challenge. Because the text of the initiative has such deliberate grammatical structure, Proposition 25 would likely satisfy the first two prongs of the \textit{Gerken} test.

The final prong of the \textit{Gerken} test is typically the most difficult to satisfy because it calls for \textit{post hoc} analysis. However, because the initiative is limited to two main provisions, both of which are relatively straightforward, a reviewing court would likely find that the electorate separately considered these two provisions, and would have adopted each independently. For these reasons, a reviewing court would likely find that the third prong of \textit{Gerken} has also been met. Having satisfied all three prongs of the \textit{Gerken} test, the measure’s valid provisions could be severed from any provision later deemed invalid.

\textsuperscript{39} Cal. Proposition 25 § 3 (2010).
\textsuperscript{40} Cal. Proposition 25 § 5 (2010).
V. CONSTITUTIONAL ISSUES

a. Federal Constitution

Proposition 25 does not appear to conflict in any way with the United States Constitution.

b. California Constitution: Single Subject Rule

All California initiatives must conform to the single-subject rule. The California Constitution states that “[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect.” 42 The test created by the California Supreme Court, commonly known as the “reasonably germane test,” does not require that each of the “provisions of a measure effectively interlock in a functional relationship[,]” only that the various components of an initiative measure pursue a common objective. The court in Senate v. Jones explained that this test does not mandate that each provision be unified in a functional relationship; rather, “it is enough that the various provisions are reasonably related to a common theme or purpose.” 43 Proposition 25 does not appear to violate the single subject rule. By (1) lowering the number of votes needed to get the budget passed, and (2) by giving the lawmakers a financial incentive (or disincentive, as it were) to get the budget passed on time, the main provisions of the initiative appear to be reasonably related to the common theme of passing of the budget by the July 15th constitutional deadline. However, if this initiative were somehow found to violate the single subject rule, it would be invalid in its entirety because the single subject rule does not provide for severability. 44 Despite this remote possibility, the measure’s provisions are reasonably germane to the common theme of getting the budget passed by the constitutional deadline, and likely do not violate the single subject rule.

VI. IF PROPOSITION 26 PASSES, IT MAY IMPACT SOME PROVISIONS OF PROPOSITION 25

This edition of the CALIFORNIA INITIATIVE REVIEW contains an article that provides an in-depth analysis of Proposition 26. 45 Therefore, the scope of the following section is intended only to address the manner in which Proposition 25’s simple majority requirement might be curtailed by the passage of Proposition 26, in the event that voters approve both propositions.

If passed, Proposition 25 would require only a simple majority for the passage of a budget bill, which may contain trailer bills that the Legislature identifies as “related to the budget in the budget bill.” 46 Proposition 26 however, would place limits on the Legislature’s ability to pass, with a simple majority, bills that contain many types of user fees, regulatory fees and property

42 CAL. CONST., art. II § 8(d).
43 21 Cal. 4th 1142, 1157 (1999).
44 Id. at 1155.
45 Julia DaVos and Amber Simmons, Proposition 26: Vote Requirements for State Levies and Charges, CAL. INIT. REV., (Fall 2010), infra.
46 Legislative Analyst’s Office, Proposition 25, supra note 13, at 3.

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charges, even if the Legislature determines they are “related to the budget.” Proposition 26 would invoke the two-thirds vote requirement by expanding the definition of “tax” to include many payments that are currently considered fees or charges. It would also broaden the definition of “tax increase” to include any bill that requires any single taxpayer to pay a higher tax, regardless of whether that same bill offers an equal or even larger reduction in taxes for other taxpayers. Thus, while Proposition 25 would require a simple majority in each house of the Legislature to approve a budget bill, if Proposition 26 also passes, any budget bill containing “fees” or “charges” that fall within the expanded definition of tax or increase would require approval by a two-thirds vote in each house of the Legislature.

**VII. POLICY IMPLICATIONS**

**a. Proponents’ Arguments**

1. **Breaks Legislative Gridlock by Allowing a Budget Approval by a Simple Majority Vote in Each Legislative House**

Proponents highlight that California, Arkansas, and Rhode Island are the only states that require a two-thirds vote of the Legislature to pass a budget, and that the two-thirds requirement hurdle is the biggest cause of dysfunction in these states’ legislatures. In California, this claim is evidenced by the fact that in the past 30 years, lawmakers have passed a budget by the June 15 deadline on just five occasions. Furthermore, proponents of the initiative argue that this requirement allows a handful of lawmakers to holdout on approving the budget until their personal pet projects, tax breaks, or special interests groups are satisfied. The proponents of Proposition 25 believe that by requiring only a simple majority, these self-interested lawmakers will lose their bargaining positions and no longer be able to delay the budget.

In response to the opponents’ claim that the measure will discourage bipartisanship and embolden the dominant party, proponents point to the Governor’s line-item veto power, which would still require a two-thirds vote in each house of the Legislature to override the veto. Proponents argue that because this veto power hangs over the Legislature like the Sword of Damocles, the dominant party would continue to have an incentive to reach across party lines, especially in years where the Governor is not a member of the dominant party in the

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48 Id. at 6.  
49 Legislative Analyst’s Office, Proposition 25, supra note 13, at 3.  
50 Legislative Analyst’s Office, Proposition 26, supra note 47, at 3-6.  
51 Skelton, supra note 22.  
52 Legislative Analyst’s Office, Proposition 25, supra note 13, at 3.  
53 OFFICIAL VOTER INFORMATION GUIDE, supra note 5, at 54.  
54 CAL. CONST., art IV, § 12(e).  
55 This expression alludes to the legend of Damocles. Damocles was a servant to King Dionysius, and frequently expressed his awe at the power and apparent happiness of his king. The king, tired of such flattery, held a banquet and seated Damocles under a sword that was suspended from the ceiling by a single hair — thus demonstrating that kingship came not only with pleasures, but fears and worries as well. It has come to be understood as an ever-present threat or impending disaster.
Legislature. Ultimately, proponents argue that the current two-thirds requirement has managed to strangle democracy by allowing the minority party to control or obstruct many major decisions in the Legislature.

ii. Holds Legislators Accountable if They Fail to Pass a Budget on Time

Each day that the budget is late, state lawmakers would permanently lose their salaries and reimbursements for living and travel expenses. If the budget does not pass on time, the state would save $50,000 per day in salary and expenses until the budget is passed, thereby mitigating some of the costs associated with the delayed passage of the budget. As lawmakers would not be able to recover these “losses” once the budget is passed, they would have a strong financial incentive to reach an agreement before the June 15th constitutional deadline.

Proponents also argue that the measure will force more accountability from both the dominant and minority parties. Currently, the dominant party, which controls both houses in the Legislature, can characterize members of the minority party as obstructionists and thereby blame the minority party for the state’s budget woes. At the same time, the minority can blame the dominant party for the delays, and each has little incentive to compromise. Proponents claim that Proposition 25 will eliminate this endless cycle of blame by making legislators from both parties accountable for the budgets that are passed.

iii. Late Budgets Waste Money and Cost Jobs

When the Legislature failed to pass the 2009 budget on time, the state was forced to issue over 450,000 IOUs to state workers, small businesses, and other state contractors. These IOUs cost taxpayers over $8 million in interest alone. Proponents argue that because the legislature failed to pass the 2009 budget on time, schools were unable to accurately determine what the state’s contribution would be and thus were unable to adequately prepare their budgets. This resulted in the issuance of 26,000 pink slips and 16,000 teachers to be laid off. Additionally, proponents argue that because of the budget delay in 2009, public works projects were suspended, only to be restarted days later. While obviously inefficient, this unnecessary delay cost the taxpayers millions of dollars and damaged California’s credit rating.

See OFFICIAL VOTER INFORMATION GUIDE, supra note 5, at 53.


Legislative Analyst’s Office, Proposition 25, supra note 13, at 4.

OFFICIAL VOTER INFORMATION GUIDE, supra note 5, at 54.


OFFICIAL VOTER INFORMATION GUIDE, supra note 5, at 54.
Proposition 25

iv. **Preserves the Requirement That a Supermajority Vote is Required to Raise Taxes**

Proponents argue that Proposition 25 has no effect on the two-thirds vote requirement to raise taxes and that the measure focuses only on addressing the two-thirds vote requirement to pass the budget. They point to the text of the initiative itself which states, “This measure will not change the two-thirds vote requirement for the Legislature to raise taxes[,]”\(^{63}\) and also cite the Attorney General and the non-partisan Legislative Analyst’s Office, who have both stated that the initiative does not alter the two-thirds vote that is required to raise taxes.\(^{64}\)

b. **Opponents’ Arguments**

i. **Gives the Dominant Party Too Much Control With No Guarantees that the Budget Will be Passed On-Time**

Opponents argue that the current two-thirds vote requirement preserves needed checks and balances in the Legislature.\(^{65}\) Based on the current makeup of the Legislature, eliminating the two-thirds vote requirement in favor of a simple majority would allow the dominant party to approve a budget without the support of a single member of the minority party.\(^{66}\) Opponents argue that this would eliminate bipartisanship in the Legislature and allow the dominant party to freely enact spending programs, taxes, and also reward party supporters and other special interests groups.\(^{67}\)

Opponents also argue that requiring only a simple majority vote for budget approval would not necessarily ensure the timely passage of the budget.\(^{68}\) In support of their argument, opponents point to the fact that California was not the only state that began the 2010 fiscal year without a budget. Eight other states failed to pass a budget on time, and all eight of those states require only a simple majority to pass budgets. In addition, Rhode Island and Arkansas, the two states that have a two-thirds vote requirement similar to that of California, both had budgets in place at the start of the fiscal year.\(^{69}\)

ii. **Legislators Will Not Be Held Accountable**

Opponents also criticize the provision of the initiative that would permanently withhold pay from lawmakers for each day that the budget is late, as being an ineffective check on the State’s lawmakers. While proponents of the initiative claim that the lawmakers would have an incentive

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64 **LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 25, supra note 13, at 2.**
65 Skelton, supra note 22.
66 **LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 25, supra note 13, at 4.**
69 **OFFICIAL VOTER INFORMATION GUIDE, supra note 5, at 54; CAL-TAX, PROPOSITION 25, supra note 67, at 2.**
to pass the budget on time because they would not be paid or reimbursed for time spent working on a late budget, opponents claim that an obvious loophole would make this provision meaningless. Opponents claim that lawmakers would give themselves pay raises the following year’s budget, which would only require a simple majority vote. Thus, any lost wages resulting from budget delays could be made up in future budgets.

In response to the argument that this measure will prevent each party from blaming the other for the State’s budget problems, opponents claim that the measure will only serve to remove a necessary restraint on the dominant party’s endless spending, thereby making the government less accountable to the people. The budget process would remain broken and the dominant party would have no incentive to work to with the minority party in instituting needed reforms.

iii. A Budget that Rewards Special Interests and Wastes Money Will Hurt California

Opponents argue that any money saved by the quick passage of the budget will be eclipsed by the tax dollars that will be wasted on rewards to the dominant party’s pet projects and special interests groups. The opponents cite wasteful spending as the main source of budget delays and gridlock, and once the minority party is unable to prevent these wasteful programs from being included in the budget, the dominant party will continue deficit spending and only worsen the state’s already dire financial crisis. Therefore, opponents maintain that the costs associated with a delayed budget will pale in comparison to the debts that will accrue in the long run, under the dominant party’s unchecked control over the budget.

iv. Legislators Will Be Allowed to Increase Taxes With Only a Simple Majority

Opponents also maintain that Proposition 25 would allow the Legislature to circumvent the two-thirds voting requirement for tax increases by characterizing tax hikes as “fees” deemed by the Legislature as being “closely related to the budget.” And, because these fees would go into effect immediately, voters would not be given the opportunity use the referendum process to stop these fees before they are enacted.

Beyond the Legislature’s ability to increase taxes disguised as fees, opponents point to the text of the measure itself as misleading the public into believing that the measure will not eliminate the two-thirds vote requirement for tax increases. While the measure does contain an intent statement indicating that the measure does not intend to eliminate the two-thirds vote requirement for tax increases, opponents argue that an intent statement cannot change the clear substantive provisions of the measure. The measure contains no substantive exception that preserves a two-thirds vote for tax increases, but contains substantive provisions that would
Proposition 25

allow a simple majority to pass a budget bill and appropriations bills related to that budget bill.\textsuperscript{76} Opponents claim that the absence of an exception to the simple majority provision for tax increases will allow the Legislature to sidestep the two-thirds vote requirement by characterizing tax increases as being related to the budget, thus allowing the Legislature to enact tax increases by a simple majority vote.\textsuperscript{77}

VIII. CONCLUSION

In many ways, the public debate surrounding Proposition 25 reflects the discontent towards both national and local legislatures that has been sweeping the nation. In California, recent polling indicates that the State Legislature’s approval rating is just 9\%.\textsuperscript{78} Perhaps a reflection of this sentiment, Proposition 25 will be included on the November 2010 election ballot.

If approved, Proposition 25 will lower the requisite votes needed to pass a budget bill from two-thirds to a simple majority vote in each house of the Legislature. Additionally, lawmakers will not be paid a salary or reimbursed for their expenses for any amount of time spent working on the budget after the constitutional deadline of June 15.

Proponents argue that these provisions will streamline the budget process and give each individual lawmaker a personal financial incentive to pass the budget on time. Opponents are primarily concerned that these changes will eliminate bipartisanship in the Legislature and allow the dominant party to freely enact spending programs that reward party supporters and special interests groups.

If Proposition 25 is not approved, the passage of the annual budget will continue to require a two-thirds vote in each house of the Legislature. While voters are certainly frustrated with the Legislature's recent track record, it remains to be seen whether Proposition 25 will be the silver bullet that many hope it will be.

\textsuperscript{76} \textit{Id.} at 4.
\textsuperscript{77} \textit{Id.} at 3-4; NO ON 25 FACT SHEET, \textit{supra} note 68.
CALIFORNIA INITIATIVE REVIEW


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I. EXECUTIVE SUMMARY

Proposition 26 is a Constitutional amendment proposed by the California Chamber of Commerce.\(^1\) The proposition requires that any revenue increases be approved by a two-thirds vote in each house of the Legislature or local voters.\(^2\) Proposition 26 has three main provisions.\(^3\) First, Proposition 26 expands the definition of taxes to include fees and charges which state and local governments can currently increase with a simple majority vote.\(^4\) Second, Proposition 26 raises the vote requirement to a two-thirds majority to approve any law that increases taxes on any taxpayer, even if the overall fiscal effect does not increase state revenues.\(^5\) Third, Proposition 26 is retroactive and repeals state laws passed on or before November 2010 that conflict with this measure, unless they are approved by a two-thirds majority in each house of the Legislature before November 2011.\(^6\)

California voters face a difficult choice in deciding how to vote on Proposition 26: A “yes” vote on Proposition 26 will make it more difficult for state and local governments to raise revenues – something some taxpayers will look forward to.\(^7\) However, by making it increasingly difficult for governments to raise revenues, this measure could exacerbate California’s budget deficit and financial problems.\(^8\)

A “no” vote on Proposition 26 means that the laws controlling how state and local governments can raise revenue will remain unchanged.\(^9\) A two-thirds majority vote in both houses of the Legislature would still be required to increase taxes, and only a simple majority vote would be necessary to increase or implement fees.\(^10\)

II. BACKGROUND AND EXISTING LAW

a. History of California Tax Laws

In 1978 California voters overwhelming approved Proposition 13, which amended the California Constitution to provide that increases in state taxes could not be approved without a minimal

\(^2\) Id.
\(^4\) Id. at 4.
\(^5\) Id. at 6.
\(^6\) Id. at 6-7.
\(^8\) LAO Prop 26 Analysis at 8-9.
\(^9\) Id.
\(^10\) Id. at 6, 9.
two-thirds majority vote in each chamber of the Legislature. California voters again amended the Constitution in 1996 through Proposition 218 to require that local tax increases be approved by the voters. These measures did not affect the imposition of fees and charges by state and local government, which increase the amount of money Californians pay to the government. Because these revenue increases are labeled as fees rather than as taxes, they can be passed with a simple majority vote. In 2000, Proposition 37, a measure that would have changed the requirement for fee increases to a two-thirds majority rather than a simple majority, was placed on the ballot. Proposition 37 was narrowly defeated, leaving the voting requirements for fees unchanged.

b. Current Definition of Taxes and Fees

The California Constitution defines a tax as a law created “for the purpose of increasing revenues,” and stipulates that such laws must be passed with at least a two-thirds majority in both the State Assembly and State Senate. However, a law that increases the burden on some taxpayers, but is offset by offering an equal tax reduction to other taxpayers, is not considered a tax because it does not increase the State’s overall revenues. These laws are “revenue neutral” because the government is not receiving any more money or increasing revenue despite the change in laws. Consequently, revenue neutral laws may be enacted with a simple majority vote in both Legislative houses.

While taxes are considered revenue increases that provide for general public services, fees typically pay for a particular service or program. There are three major types of fees and charges – property charges, user fees, and regulatory fees. Property charges are imposed on developers and owners to pay for roads, improvements, or services. User fees offset the cost of a particular public service or program; examples include state park entrance fees and garbage collection fees. Proposition 26 would not affect most property charges and user fees because they “comply with Proposition 26’s requirements already, or are exempt from its provisions.”

Many regulatory fees would be affected by Proposition 26. Regulatory fees place additional burdens on certain types of businesses and activities to offset the public or environmental impact

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12 Id.
13 Id.
14 Id.
15 LAO Prop 26 Analysis at 6.
16 Id.
18 LAO Prop 26 Analysis at 6.
19 Id. at 1.
20 Id.
21 Id.
22 Id. at 5.
23 Id. at 4.
of these activities.24 Examples of regulatory fees include oil recycling fees, hazardous material fees and fees on alcohol retailers.25 Regulatory fees often provide revenues in excess of what the public program requires. As such, regulatory fees can pay for broad public services, which is why many businesses consider them to be a tax.26 However, in 1997 the California Supreme Court ruled that regulatory fees that provide for broad public services, rather than a targeted program, are not taxes.27

III. PROPOSED CHANGES

a. New Definition of Taxes and Fees

Proposition 26 would change Section 3 of Article XIII of the California Constitution to define a tax as any statutory change that results in any taxpayer paying a higher tax.28 This new definition broadens what may be considered a tax to include fees and charges that are currently passed by a simple majority vote.29 In addition, revenue neutral legislation – legislation that increases the tax burden on certain individuals, but decreases the burden on other taxpayers – would also require a two-thirds majority vote.30

b. Retroactive Provisions

Proposition 26 not only impacts the voting requirement to approve future fee increases, it would also apply to laws passed prior to its enactment.31 The retroactive provision would apply to state laws that conflict with the standards of Proposition 26 adopted between January 1, 2010 and November 2010.32 These measures would be repealed “one year after the proposition is approved” unless they were subsequently passed by a two-thirds majority vote in the Legislature.33 This “window period” would apply only to measures passed by the Legislature; Proposition 26 would not affect local government decisions until November 3, 2010.34

c. Taxpayer Litigation

Proposition 26 places the burden of proof on the government to show that a charge is not a tax.35 State and local governments would be required to show that the moneys raised by a proposed fee on certain activities equal the reasonable costs of the governmental activity needed to mitigate

24 Id. at 1.
25 Id. at 5.
26 Id. at 2-3.
27 Id. at 3.
28 Prop 26 Text at 114.
29 LAO Prop 26 Analysis at 4.
30 Id. at 4.
31 See Id. at 6-7 (explaining Proposition 26’s impact on state laws in conflict with the proposition).
32 Id.
33 Id.
35 Prop 26 Text at 115.
the negative impacts of that activity.\(^{36}\) If the government failed to meet that burden of proof, yet continued to pass the proposed fee with only a majority vote in both houses, taxpayers would be able to challenge the law in court.\(^{37}\) The litigation phrase of Proposition 26 is similar to the language in Proposition 218 and reflects existing law.\(^{38}\) Proposition 26’s burden of proof provision uses the standard of proof of a preponderance of the evidence, the lowest standard of proof in the court system, which would help define Proposition 218’s undefined burden of proof provision.\(^{39}\)

### IV. DRAFTING ISSUES AND CONSTITUTIONAL IMPLICATIONS

There are no apparent conflicts between Proposition 26 and the Federal Constitution or the California Constitution. There is, however, a potential conflict between Proposition 26 and Proposition 25, a measure which would lower the legislative vote requirement for passing a budget “from two-thirds to a simple majority.”\(^{40}\) Proponents for Proposition 25 say that it retains the two-thirds vote requirement for tax measures.\(^{41}\) Opponents of Proposition 25 disagree, however, stating that the measure gives the Legislature the ability to pass taxes with only a majority vote.\(^{42}\) See the analysis of Proposition 25 for a more in-depth explanation of the impact of the measure. If both Proposition 26 and Proposition 25 were to pass in the November elections, the measures would be harmonized.

The California budget generally consists of a series of bills, rather than only one legislative measure.\(^{43}\) If the budget legislative packet kept revenue and non-revenue raising bills separate, then it would be possible to meet the provisions of both Propositions 25 and 26.\(^{44}\) By allowing the non-tax provisions of the budget to be separate pieces of legislation, it would be possible to have them passed with a simple majority vote.\(^{45}\) Placing all of the budget-related legislation which would increase taxes under the new definition set forth in Proposition 26 in separate bills would allow these measures to be subject to the two-thirds vote requirement. Therefore, certain budget provisions could be passed with a simple majority vote and tax increases would still be subject to the supermajority requirement.\(^{46}\)

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36 Cal-Tax Analysis at 2.
37 Id. at 2.
38 Colantuono & Coleman Article, supra note 34.
39 Id.
42 Id.
43 LAO Prop 25 Analysis at 1.
44 See Id. at 3; LAO Prop 26 Analysis.
45 See generally LAO Prop 25 Analysis; LAO Prop 26 Analysis.
46 Id.
Although unlikely, if Proposition 25 and 26 are passed and not subsequently harmonized, California Constitution provides that the proposition receiving the most votes would be enacted and the other proposition would be void.  

V. POLICY IMPLICATIONS

a. Arguments in Support

Proponents of Proposition 26 include the California Chamber of Commerce, the California Taxpayers’ Association, and the Howard-Jarvis Taxpayers’ Association, as well as many other organizations. In an effort to educate voters about Proposition 26, Stop Hidden Taxes, a proponent of the measure, launched the No on 25/Yes on 26 campaign (“No25Yes26’). Stop Hidden Taxes believes that state and local government officials have been making an end-run around the Proposition 13 requirements by inaccurately labeling revenue increases as fees instead of taxes.

Proponents cite the proposed 2010 increase in taxes on alcohol as one example of an attempt to circumvent the two-thirds vote requirement. This measure referred to the increase as a “mitigation fee” rather than a tax so that only a majority vote was necessary for the measure to be passed. Proponents believe Proposition 26 will prevent efforts such as the one on alcohol taxes but still allow the government to impose truly regulatory or user fees with a simple majority.

Proponents also argue that clearly defining a tax will stop the government from taking more money from Californians and force more responsible behavior when spending California tax dollars. By placing the burden of proof on the government, the proponents feel that the government will be more accountable for their spending and that taxpayers will have better chances of successfully litigating taxes labeled as fees. Thus, taxpayers would be protected and government would not be prevented from performing its administrative and regulatory functions.
b. Arguments in Opposition

Proposition 26 has a number of opponents, including California Tax Reform Association, California League of Women Voters, and California League of Cities.57 The California League of Cities argues that the Proposition 26 will have a negative impact on the ability of local governments to impose fees on certain business activities.58 Opponents are concerned that Proposition 26 will have negative effects on the environment by preventing the assessment of fees against for environmental impacts on businesses and corporations – such as oil companies – whose actions can sometimes have a harmful and costly impact on the environment.59

Other opponent groups voice concern over the repeal of the changes to fuel taxes passed in the spring of 2010 by a simple majority vote in each house.60 These laws increased taxes paid by suppliers of fuel, while decreasing taxes paid by the retailers of fuel, which allowed $1 billion annually to be shifted to the General Fund of the California budget.61 Opponents claim that Proposition 26 will cost the state $1 billion and increase the budget deficit as a result of the repeal of the fuel taxes and the increased difficulty in increasing state revenues. In response to these concerns, No25Yes26 released a statement calling the fuel tax legislation “an accounting gimmick . . . which simply moved money among various accounts and determined winners and losers,” and further stating that “Prop. 26 will not cost taxpayers a dime.”62

c. Fiscal Impact

The fiscal impact of Proposition 26 is indiscernible at this time.63 However, the impacts would likely be significant.64 By increasing the voting requirement for fee increases, it will be more difficult for such increases to be approved.65 The repeal of some state laws would likely “decrease state revenues (or in some cases increase state General Fund costs).”66 State revenue and spending amounts could be reduced by billions of dollars per year if Proposition 26 is enacted.67

58 Colantuono & Coleman Article, supra note 34.
60 LAO Prop 26 Analysis at 7.
61 Id. at 7.
63 LAO Prop 26 Analysis at 8.
64 Id.
65 Id.
66 Id. at 9.
67 Id.
VI. CONCLUSION

Proposition 26 would broaden the Constitutional definition of taxes and require a two-thirds vote to increase fees.\(^{68}\) The measure would also repeal certain conflicting state laws and would place the burden of proof on the government to show that a proposed fee increase is in fact regulatory and does not provide broad public services.\(^{69}\) It is difficult to discern the exact impact, both short and long term, which Proposition 26 would have on California because of the effects of multiple provisions.\(^{70}\) It will likely be more difficult for state and local governments to impose fees, due to the two-thirds requirement, which could substantially reduce government revenues and spending.\(^{71}\) The state revenue may also be decreased by the repeal provision in the measure.\(^{72}\) Additionally, by requiring the government to carry the burden of proof when fees are challenged, there may be more successful taxpayer lawsuits.\(^{73}\) If Proposition 26 fails, the definitions of taxes and fees and the California constitutional voting requirements for taxes and fees would not change.\(^{74}\)

\(^{68}\) Id. at 3.
\(^{69}\) Id. at 6-7; Prop 26 Text at 115.
\(^{70}\) LAO Prop 26 Analysis at 8-9.
\(^{71}\) Id. at 8.
\(^{72}\) Id. at 8-9.
\(^{73}\) Cal-Tax Analysis at 2.
\(^{74}\) LAO Prop 26 Analysis at 10.
CALIFORNIA INITIATIVE REVIEW


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I. EXECUTIVE SUMMARY

Proposition 27 repeals Proposition 11, passed by voters in 2008. Proposition 11 created the Citizens Redistricting Commission, whose stated purpose is to open up the redistricting process so that the political party in control of the Legislature is not able to draw its own districts, ensuring their own reelection. The Commission, set to be comprised in 2011, will include 14 citizens charged with the task of drawing the new district lines for both the Legislature and the Board of Equalization. Proposition 27 would eliminate the Commission. The task of drawing boundaries for legislative and Board of Equalization districts would be returned to the Legislature. (The power to draw Congressional districts would remain with the Legislature, as Proposition 11 did not affect this power). Proposition 20, however, also on the ballot this November, would add Congressional redistricting to the powers of the Citizens Redistricting Commission.

Even though redistricting would be returned to the Legislature, Proposition 27 would change the rules for drawing lines in several ways. First, a firm spending cap of $2.5 million would be placed on the amount of money that the Legislature could spend on the entire redistricting process. Second, all districts would be required to be exactly equal in size. The integrity of cities, counties and “communities in interest,” a term to be defined by the Legislature, must be taken into account when selecting district borders. Finally, and perhaps most importantly, the Legislature would be required to open up the redistricting process to the public, publicizing maps, and allowing public comment and input at nearly every stage of the process.

Proposition 27 would also eliminate a number of factors that are currently required to be taken into account when considering district lines. This enables the Legislature to consider political factors, such as incumbency when drawing district lines.

In sum, a “yes” vote on Proposition 27 will return the power of redistricting the State Legislature and Board of Equalization districts to the Legislature, while a “no” vote allows the Citizens Redistricting Commission to continue to be the entity responsible for redistricting.

II. THE LAW

a. Existing Law

i. Proposition 11

The Citizens Redistricting Commission (the “Commission”) was approved by voters via Proposition 11 in 2008 and was referred to as the Voters FIRST Act (the “Act”).\(^1\) The measure transfers redistricting responsibilities from the Legislature to a 14-member Commission.\(^2\) The reason behind this reallocation of power was to avoid the potential conflict of interest for legislators who have been accused of drawing districts to serve their own needs, such as benefitting their political party or their own chances at reelection, rather than the needs of the


\(^2\) Id.
ii. General Provisions

The Commission is made of up 14 Commissioners. The Act mandates that five of the Commissioners will be from the largest political party in California, five from the second largest political party and four who are not registered with either of the two largest parties.

The Act establishes certain criteria that the Commission must meet when drawing district lines. The Commission must respect the geographic integrity of any city, county, neighborhood or community of interest, should encourage geographical compactness when drawing district lines and must place two Assembly districts together within one Senate district and ten Senate districts together within one Board of Equalization district. The Commission must also comply with the federal Voting Rights Act as well as the United States Constitution. By September 15, 2011, the Commission is required to issue three final maps which show the district boundaries for the Senate, Assembly and Board of Equalization districts along with a report that describes the basis for its division of those districts. The final maps will be certified to the Secretary of State and will be subject to voter challenges through the use of the referendum process.

iii. Selection Process

The Act imposes a lengthy selection process to create a Commission that would be independent from legislative influences and reflect the diversity of California’s voters. The State Auditor initiated the application process through the elimination of applicants with conflicts of interest. The State Auditor then selected three Qualified Independent Auditors which are currently serving on the Applicant Review Panel by randomly drawing names of those that were eligible.

By August 1, 2010 the State Auditor was required (and will be in every year that ends in a “0” hereafter) to publicize the name of the applicants and provide their applications to the Applicant Review Panel. From the remaining applicants the Panel selected the 60 most qualified and separated them into sub-pools of 20 Democratic applicants, 20 Republican applicants and 20 unregistered applicants. The Panel assessed and selected these applicants based on their ability

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3 Id.
4 Id.
6 Text of Proposition 11, supra note 6.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id. (Qualified Independent Auditors are required to be licensed by the California Board of Accountancy and must have been in practice for 10 years prior to their appointment.).
13 Id.
14 Id.
to be impartial, their analytical skills and each applicant’s interest in preserving California’s diverse demographics and geography. \(^\text{15}\)

As of October 1, 2010, the Applicant Review Panel was required to have submitted the 60 selected applicants to the Secretary of the Senate and the Chief Clerk of the Assembly which will in turn present the sub-pools of applicants to the President Pro Tempore of the Senate, the Minority Floor Leader of the Senate, the Speaker of the Assembly, and the Minority Floor Leader of the Assembly. \(^\text{16}\) Each of these leaders will have the ability to remove two applicants from each of the sub-pools of 20 applicants. Therefore, there can be up to eight removals per sub-pool. \(^\text{17}\) These strikes must be submitted to the Applicant Review Panel no later than November 15, 2010. \(^\text{18}\)

After receiving the selection of the legislative leaders, the State Auditor will randomly select eight names (three democratic applicants, three republican applicants and two non-registered applicants). \(^\text{19}\) The eight selected applicants will serve on the Commission and will appoint six additional applicants from the remaining pool (two from each sub-pool) with 5 affirmative votes (two registered Democrats, 2 registered Republicans and 1 unregistered Commissioner must consent) no later than December 1, 2010. \(^\text{20}\)

\textbf{b. Proposed Changes to the Law}

\textit{i. Returns State Legislature and Board of Equalization Redistricting to the Legislature}

Proposition 27 eliminates the Citizens Redistricting Commission described above. \(^\text{21}\) As currently structured, the Citizens Redistricting Commission is solely responsible for creating State Legislative and Board of Equalization districts, and the task of determining congressional seat boundaries remains with the Legislature. \(^\text{22}\) If Proposition 27 passes, the Legislature would assume the responsibility of redistricting for this and all future censuses, including the 2010 census which took place earlier this year. \(^\text{23}\)

\textit{ii. New Requirements for boundaries}

New requirements would be created for district boundaries with the passage of Proposition 27. Under Proposition 27, the population of each district would be required to be equal. Only a population variation of plus or minus one person would be permitted in cases where precise

\(^{15}\) Id.
\(^{16}\) Id.
\(^{17}\) Id.
\(^{18}\) Id.
\(^{19}\) Id.
\(^{20}\) Id.
\(^{22}\) Id.
\(^{23}\) Id.
population equality is mathematically impossible.\textsuperscript{24} This would bring the Legislature and the Board of Equalization requirements into conformity with the population requirements already in place for the United States House of Representatives, which require equal districts.\textsuperscript{25} This standard was enacted by the United States Supreme Court in \textit{Baker v. Carr}, which held that unequal legislative districts violated the Equal Protection Clause of the 14\textsuperscript{th} Amendment.\textsuperscript{26} The Court came to this conclusion because the drawing of unequal legislative districts results in legislators with smaller districts having the same voting power as those with larger districts, who represent a larger portion of the population, therefore resulting in unequal representation.\textsuperscript{27}

The measure also requires that the geographical integrity of cities, counties, or “communities of interest” be taken into account to reduce division of those communities.\textsuperscript{28} Under Proposition 27, the term “community of interest” would be defined by the Legislature.\textsuperscript{29} The definition of “community of interest” has been defined in the past differently by each Legislature undertaking the redistricting process. Proposition 20 pre-defines the term “community of interest” as a “contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation.”\textsuperscript{30}

\textit{iii. Public Accessibility to the Redistricting Process}

The Legislature would be required to provide notice 14 days before any meeting regarding redistricting. It could not amend redistricting bills within three days of their passage, and would need to provide public access to data regarding the redistricting process.\textsuperscript{31} All hearings would be conducted with public input and maps would be disseminated for public comment for at least 14 days.\textsuperscript{32}

\textit{iv. Spending Cap}

Under Proposition 27, the Legislature would be strictly limited to a spending cap of $ 2.5 million for the entire redistricting process.\textsuperscript{33} The proposal would adjust the amount in accordance with the California Consumer Price Index or its equivalent for future years.\textsuperscript{34}

\textsuperscript{24} Text of Proposition 27 (available at http://www.voterguide.sos.ca.gov/pdf/english/text-proposed-laws.pdf#prop27)
\textsuperscript{25} \textit{Informational Hearing: Propositions 20 and 27. Before the Senate Elections and Constitutional Amendments Committee and the Assembly Elections and Redistricting Committee, 2009-2010 Leg.}, (Ca. 2010) (Statement of Jason Sisney, Director, State Finance, Legislative Analyst’s Office).
\textsuperscript{26} 369 U.S. 186, (1962).
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} Text of Proposition 27, \textit{supra} note 24.
\textsuperscript{29} \textit{Informational Hearing: Propositions 20 and 27. Before the Senate Elections and Constitutional Amendments Committee and the Assembly Elections and Redistricting Committee, 2009-2010 Leg.}, (Ca. 2010) (Statement of Jason Sisney, Director, State Finance, Legislative Analyst’s Office).
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.}
v. **Deletion of Current Requirements**

Proposition 27 would eliminate certain existing constraints on factors that must be considered during the redistricting process. These requirements include not using political parties, incumbents, or political candidates as factors in deciding district boundaries, creating geographically contiguous districts, and creating Senate districts composed of two complete Assembly Districts and Board of Equalization Districts composed of ten complete Senate districts.

vi. **Power of Referendum**

Proposition 27 would alter Article 2, section 9 of the California Constitution by specifically stating that none of the exceptions to the referendum power will apply to statutes approving the final redistricting maps for the Congressional, Senate, Assembly or State Board of Equalization. The proponents of Proposition 27 believe that under the current law, Californians can be denied the right of referendum but the proponents fail to provide a more detailed explanation as to how this could occur. It appears from the text of the Constitution that the power of referendum could be bypassed by certain exceptions such as urgency statutes, statutes providing for tax levies, statutes calling elections or appropriations for current expenses of the State. Proposition 27 provides that any redistricting maps would not be vulnerable to these exceptions and would therefore still be subject to the people’s referendum power.

c. **Likely Fiscal Effect**

During the last redistricting process in 2001, the Legislature spent about $3 million on redistricting activities. Under the Proposition 11 process, which is already underway, the Legislature has approved a $3 million expenditure for redistricting activities in 2011. However, an additional $3 million has already been spent by the State on the Proposition 11 process of selecting citizen commissioners to preside over the 2011 redistricting process. In the future, under current law (Proposition 11), the Citizens Redistricting Commission would be required to be funded at a level equal to the previous level taking into account inflation. It must be noted, though, that because the Commission members have yet to begin their work, and because no similar process has ever been undertaken, it cannot be said that the amount budgeted will be enough money to complete the process, and more funds may be required.

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35 *Id.*  
37 *Id.*  
38 *Id.*  
40 *Id.*  
41 *Id.*  
42 *Informational Hearing: Propositions 20 and 27. Before the Senate Elections and Constitutional Amendments Committee and the Assembly Elections and Redistricting Committee, 2009-2010 Leg., (Ca. 2010) (Statement of Jason Sisney, Director, State Finance, Legislative Analyst’s Office).*
Because spending under Proposition 27 would be capped at a lower level than what is currently allocated (the proposal prohibits spending more than $2.5 million on redistricting every 10 years), the State would potentially save several million dollars over the Proposition 11 process every ten years. However, because funds have already been expended on the Citizen’s Redistricting Commission selection process, the savings in 2011 would be minor. The Legislative Analyst’s office estimates that the savings in the next year would amount to about $1 million as well as a possible reduction of a few million dollars in redistricting costs every ten years beginning in 2020.

III. STATUTORY INTERPRETATION/DRAFTING ISSUES

Proposition 27 may face a post election challenge if both Proposition 27 and Proposition 20 are passed since they involve conflicting redistricting issues. Proposition 20 proposes to extend the jurisdiction of the Commission to include the authority to adjust the boundary lines for Congressional Districts while Proposition 27 seeks to eliminate the Citizens Redistricting Commission in its entirety. Currently, the process for Congressional redistricting plans is approved by the Legislature.

If both measures receive enough votes to become effective the courts will likely invoke Article II, section 10 of the California Constitution, which states, “if provisions of two or more measures at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.” Therefore, if Proposition 27 and Proposition 20 are both passed, the Proposition which receives the highest number of affirmative votes will become effective.

IV. CONSTITUTIONAL ANALYSIS

Proposition 27 does not appear to conflict with either the United States Constitution or the California State Constitution.

V. PUBLIC POLICY CONSIDERATIONS

a. Proponents’ views

Proponents of Proposition 27 include the Democratic State Central Committee of California and the American Federation of State, County and Municipal Employees. Among some of the

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43 Id.
44 Id.
46 Id.
major private donors for Proposition 27 are several California Democratic Lawmakers and Haim Saban, a Los Angeles-based entertainment executive.49

The proponents point out that the elimination of the Citizens Redistricting Commission will reduce State Redistricting costs and claim that the salary for the selected Commissioners could add up to $1 million dollars.50 The proponents strongly advocate that the passage of Proposition 27 will ensure that the legislators would be accountable to the voters, since the law as it stands can deny voters of their right to pass a referendum against unfair Congressional district gerrymanders.51

In addition the proponents argue that Proposition 27 would return control of redistricting to a democratically elected body that is accountable to the people, reduce the number of cities and communities that are split between districts, and strengthen community representation.52 Proponents also emphasize that Proposition 27 would ensure that all districts are same size and that every person’s vote counts equally.53

Supporters of this proposition have expressed their concern with potential deficiencies of the Commission in regards to representation. Proponents point out that despite the amount of research that the Commission would engage in once it is established; the members will never know and understand the communities as well as the legislators that represent them.54 At a recent hearing of the of the Senate Committee on Elections, Reapportionment and Constitutional Amendments, Assemblymember Sandre Swanson voiced his opinion that there could be no sufficient substitute for the Legislature in terms of understanding their communities and deciding where to draw the redistricting lines.55

Proponents are concerned that a variety of different people selected from throughout the state to be on the Citizens Redistricting Commission would not necessarily be representative of the people in the same way that elected officials are, due to their elected status.56 In addition, while the Commission would select five Democrats, five Republicans and four unregistered voters to serve as members, those numbers are not subject to change in order to more accurately represent the people of the State of California. In contrast, if the power to draw redistricting lines was

49 Id.
51 Id.
53 Id.
55 Id.
returned to the Legislature, the amount of Democrats and Republicans would vary based on the vote of the people and would arguably be able to better represent the people.57

b. Opponents’ views

The most notable opponent of Proposition 27 and proponent of Proposition 20 is Charles Munger, Jr., who is the son of Charles Munger, a billionaire and financial partner of Warren Buffett. As of September 24, 2010, he has spent $ 5.9 million on Proposition 20. He also donated $ 1 million towards the passage of Proposition 11 in 2008.58

Both traditionally non-partisan and traditionally conservative groups are opposing Proposition 27 and simultaneously backing Proposition 20. Opposition to the measure includes the California NAACP, the League of Women Voters, AARP, the National Federation of Independent Business/California, the California Hispanic Chambers of Commerce, California NAACP, CalTax, the California Chamber of Commerce, California Common Cause and the Asian Pacific American Public Affairs Association.59

The opponents’ main argument is that the passage of Proposition 27 will allow legislators to continue to draw their own districts and that it would be too much of a conflict of interest to be tolerated. The opponents argue that we should keep the power of redistricting with the voters and the Citizen’s Redistricting Commission which voters have already approved.60 The opponents have repeatedly stated that Proposition 27 was solely put on the ballot to confuse voters and that its very presence on the ballot is an insult to the voters.61

Opponents of Proposition 27 also refute the proponent’s statements that Proposition 27 will save California money. They contend that hidden costs, such as legislative staffers’ salaries and paid political consultants would not be included in the spending cap and would therefore result in the same or higher spending than redistricting under the Commission process.62

To buttress their argument, opponents of Proposition 27 point to large amounts of funding that the Proposition 27 campaign has received from incumbent politicians. The vast majority of funding for the Proposition has come from sitting politicians. For example, sitting Assemblyman Charles Calderon, D- Whittier, and Assemblyman Mike Eng, D- Monterey Park, both gave $100,000 to the campaign. Senator Alex Padilla, D- Pacomina, gave $24,000, Assemblyman Felipe Fuentes, D- Los Angeles, gave $30,000 and Assemblyman Bob Blumenfield, D- Santa

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57 Id.
59 Yes on 20, No on 27 Media Kit, http://www.yes20no27.org/pdf/MediaKit.pdf
60 Informational Hearing: Propositions 20 and 27. Before the Senate Elections and Constitutional Amendments Committee and the Assembly Elections and Redistricting Committee, 2009-2010 Leg., (Ca. 2010) (Statement of Kathay Feng, Executive Director, California Common Cause).
61 Informational Hearing: Propositions 20 and 27. Before the Senate Elections and Constitutional Amendments Committee and the Assembly Elections and Redistricting Committee, 2009-2010 Leg., (Ca. 2010) (Statement of Alice Huffman, President, California NAACP).
62 Id.
Monica gave $75,000. The Speaker of the Assembly, John Perez, gave $49,000 to the campaign. Other major donors include labor backed groups and over a dozen Congressional Democrats, including House Speaker Nancy Pelosi. Opponents argue the sole reason for this showering of funding is that these “career politicians” are deathly afraid of losing power.

VI. CONCLUSION

If approved, Proposition 27 will eliminate the Citizens Redistricting Commission and will return the redistricting authority for State Assembly, Senate and Board of Equalization districts to the Legislature. There will be a spending cap on how much money the Legislature can spend for redistricting and could potentially save the State several million dollars that would have otherwise been spent on the selection process for future Citizens Redistricting Commissions. The legislature will be required to draw district boundaries that ensure that all districts are equal and will receive input from the voters through the use of mandatory public meetings. If Proposition 20 passes as well, the initiative with the greatest number of votes will become effective.

If Proposition 27 fails, the implementation of the Citizens Redistricting Commission will continue pursuant to Proposition 11. Costs could become significant as the funding level for the Commission must be maintained in future years and would include room for inflation. Costs would also be incurred due to salary for the Commissioners. If Proposition 20 is passed, the Citizens Redistricting Commission’s jurisdiction would be extended to include drawing the district boundaries for California Congressional Districts.

63 Capitol Weekly, *Incumbent Democrats Open Wallets to Abolish Redistricting Commission*, September 2, 2010
Primary Elections

A Look into Four Primary Election Systems

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I. INTRODUCTION

One of the founding principles of our nation is the idea that the people should choose who will govern them. However, at our nation’s founding, the vehicle for choosing a candidate for office was not political party affiliation. In fact, George Washington, in his farewell address, warned against the dangers of factions.\(^1\) He feared political parties would corrupt and divide the nation. However, absolute unity was hard to maintain in the United States, and the first political parties began to form: the Federalists and Anti-Federalists.

Over two-hundred years later, the United States still maintains a two-party system: Democrats and Republicans. It is estimated that approximately 33.1% of Americans identify as Republicans, 34.6% identify as Democrats, and 32.3% are not affiliated with either major party.\(^2\) In California, 44.5% of registered voters identify as Democrats, 30.8% identify as Republicans, 4.5% identify with another party, and 20.2% decline to state a party affiliation.\(^3\) This identification plays an important role in primary elections. Party affiliation along with the type of primary election system determines whether a voter may participate in a primary election.

First, this report will discuss the four major types of primary election systems: closed, semi-closed, open, and blanket. Next, it will explore each system’s supporting and opposing arguments, constitutionality, and effects on the general election. Finally, this report will discuss the influence political party affiliation has on these systems.

II. HISTORY OF PRIMARY ELECTIONS

Primary elections did not exist until the Progressive Era in the late nineteenth and early twentieth centuries - a time when citizens began to develop distrust of their governments and supported moving closer to a direct democracy.\(^4\) Prior to the Progressive Era, candidates were chosen at party conventions or caucuses in which only a small number of powerful party members and interest groups controlled the nomination process.\(^5\) Proponents of the primary election system wanted to remove the power from the hands of these high-powered party members and give all registered voters the opportunity to choose the party’s candidate for the general election.\(^6\) Progressive visions soon became reality when individual states began to democratize the process in which candidates were chosen for the general election.\(^7\) In 1904, Wisconsin became the first

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\(^3\) Historical Voter Registration Statistics, CALIFORNIA SECRETARY OF STATE (May 24, 2010), http://www.sos.ca.gov/elections/orr/orr-pages/15day-prim-10/.


\(^6\) Id.

\(^7\) Id.
Primary elections are used to determine which party nominee will advance as the party’s candidate in the general election. The type of primary election system determines which voters may participate in a party’s primary election: registered party members, unaffiliated voters, and registered party members of another political party.

a. Closed Primary

Under a closed primary election system, only registered party members may vote in the party’s primary election. For example, a registered Democrat may only vote in a Democratic primary election. Unaffiliated or Decline-to-State ("DTS") voters may not vote in a closed primary election.

Proponents of the closed primary system believe the chances of crossing-over and “raiding” are practically eliminated. Crossing-over refers to members of one party voting in another party’s election, which some believe dilutes the vote of the registered members. Raiding involves crossing-over, but the voters of another party intentionally vote for the opposing party’s weakest candidate. This results in an advantage in the general election. Lastly, proponents contend that a closed primary encourages loyalty to the party.

Opponents dislike the closed primary system because it prevents DTS voters from voting in the primary. Some take this argument a step further and declare that limiting primary elections to registered party members is a violation of unaffiliated members’ right to vote (discussed below). It may also discourage more moderate voters from participating in elections since they may only vote in the primary of the party in which they are registered.

Numerous courts have held that there is no federal or state constitutional violation where political parties have chosen to limit participation in primary elections to registered party members. The leading case is Nader v. Schaffer, which challenged a Connecticut statute providing that no person may vote in a party primary unless he is on the last-completed enrollment list of such party. The court reasoned that when a voter chooses not to affiliate with a party it does not affect their right to vote in the general election; therefore, the fundamental

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8 Allison, supra note 6 at 61.
14 Id. at 840.
right to vote has not been violated. 15 Also see Ziskis v. Symington (holding that Arizona’s closed primary election law in which unaffiliated voters were denied the opportunity to vote in a party’s primary did not violate their right to freedom of association, right to vote, and right to equal protection because there was no indication that the voter was interested in nominating candidates who were most faithful to the policies and philosophies of either party, and the state had legitimate interest in protecting associational rights of party members and preserving integrity of electoral process);16 Ferency v. Secretary of State (holding that a closed primary does not violate the First Amendment right of association because any voter may choose to affiliate himself with a party and participate in that party’s primary election by registering as a member).17

One Washington court did declare a closed primary election system unconstitutional. In State v. Mitchell, the court invalidated a Washington state closed primary election law on the grounds of impossible performance.18 The statute violated the state’s voter registration act, which does not allow voters to register with a political party.19

A few courts have also declared that a state’s closed primary election law is unconstitutional where at least one party wants to open its primary election to unaffiliated, or DTS, voters. In Tashjian v. Republican Party of Connecticut, the Connecticut statute required that voters be registered members in order to vote in the party’s primary election. The Republican Party of Connecticut adopted a rule that allowed unaffiliated voters to vote in the party’s primary elections, and as a result brought an action challenging the statute on the grounds that it violated the party’s right of association. The Supreme Court in Tashjian agreed, and held that Connecticut’s closed primary law violated the right of association protected by the First and Fourteenth Amendments because the statute interfered with a party’s right to define associational boundaries.20

In sum, closed primaries are constitutional when all political parties limit participation to registered members. Closed primaries become unconstitutional when at least one party wishes to open its primary to nonmembers because it violates the associational rights of a political party and its members.21 Specifically, the outcome of a case challenging a closed primary election law depends on who is bringing the action: a political party and its members or a non-party, DTS voter. A closed primary violates a political party’s right to associate because it restricts the party’s ability to determine with whom it associates, while a DTS voter’s right to associate is not infringed upon because he may associate by simply registering as a party member.

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15 Id.
16 Ziskis v. Symington, 47 F.3d 1004, 1006 (9th Cir. 1995).
19 Id.
21 Ziskis, 47 F.3d at 1005.
b. Semi-Closed Primary

A semi-closed primary election system is similar to a closed primary. However, it also allows unaffiliated, or DTS, voters to participate in the party’s primary election. For example, a DTS voter may vote in a Democratic primary election. However, the DTS voter may only request one party’s ballot when voting. The DTS voter may select his favored party’s primary ballot publicly, privately, in the voting booth, or by registering with the party on Election Day, depending on the state.

Proponents of the semi-closed system argue that since DTS voters are allowed to vote in a party’s primary, these voters are more likely to vote in the general election. Since only registered party members and DTS voters may participate, crossing-over and raiding is practically nonexistent. Conversely, opponents argue that allowing DTS voters to participate in a party’s primary dilutes the vote of the party.

The Supreme Court in Clingman v. Beaver held that the Oklahoma’s semi-closed primary election law did not violate the right of association. The plaintiffs, the Libertarian Party of Oklahoma (“LPO”) and registered members of two other political parties, argued that the semi-closed primary law burdened their right to freedom of association because it did not allow the party to open its primary to members of other parties, e.g., Democrats and Republicans. The Supreme Court found that the law did not violate associational rights because any burden imposed by the law was minor and justified by the state’s interest in preserving viable, identifiable interest groups as well as ensuring that the primary results accurately reflected party members’ voting.

However, Rhode Island’s semi-closed primary election system violated the right of association in Cool Moose Party v. Rhode Island. Nonetheless, this case is reconcilable with Clingman because the associational rights at issue were not those of a political party which desired to open its primary, but the rights of political parties which desired to restrict participation in its primary. In Clingman, Connecticut asserted an interest in protecting the associational rights of political parties wishing to restrict participation in its primaries. The burden on these other parties would have been great if the state had allowed LPO an open primary while the burden would be minimal on LPO under the current semi-closed primary law. The Court is forced to decide between LPO’s right to associate with Democrats and Republicans and the Republican and Democratic parties’ right to preserve party loyalty. The Court concluded that there’s a greater interest in protecting the latter.

22 Cherry & Kroll, supra note 11 at 390.
24 Id. at 581.
25 Id. at 585.
26 Cool Moose Party v. Rhode Island, 183 F.3d 80 (1st Cir. 1999).
28 Id. at 614.
In *Cool Moose Party*, the litigating political party wanted to open its primary, but Rhode Island asserted an interest in protecting the Cool Moose Party from raiding.\(^29\) However, the court found that a state may not assert an interest in protecting the party from itself because it takes away the party’s autonomy and associational rights.\(^30\) A state may only assert an interest in protecting associational rights when other political parties seek that protection.\(^31\) If all political parties agree to an open primary, it is likely that a semi-closed primary will fail before a court.

c. Open Primary

Under an open primary election system, all registered voters may vote in a party’s primary regardless of party affiliation.\(^32\) However, voters may only participate in one party’s primary election for all offices. For example, a registered Democrat may vote in a Republican primary election, however, he may not vote in a Democratic primary as well. If a voter is not registered with a particular party, it is often referred to as “pick-a-party” because the voter will choose which party’s primary to participate.\(^33\)

Proponents of the open primary election system believe that open primaries provide voters with more freedom.\(^34\) Since voters do not have to commit to only one party’s policies and philosophies, a voter can change his mind. An open primary is especially advantageous for moderates, i.e., if a moderate does not agree with the candidates of his registered party, then he may be more likely to participate in the general election. Lastly, proponents contend that open primaries result in a candidate who better represents voters as a whole.\(^35\)

The opposition believes that open primaries invoke crossing-over and raiding.\(^36\) Also, some opponents argue that open primaries lead to less people participating in the nomination process. This is attributed to the fact that voters do not have pledge loyalty to a party. It is believed that more voters will actually pledge loyalty under a closed primary system.

In *State v. Frear*, the court upheld the state’s “Primary Election Law,” which opened the polls to members of other parties.\(^37\) The court concluded that the law did not interfere with the right to assemble.\(^38\) Plaintiff also brought up the issue of raiding, however, the court rejected his argument stating that the problem was political, not judicial.\(^39\) The open primary was also challenged in *Miller v. Brown*, but the *Miller* court concluded that Virginia’s open primary

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\(^{29}\) *Cool Moose Party*, 183 F.3d at 84.

\(^{30}\) Aisenbrey, *supra* note 28 at 616.

\(^{31}\) *Id.* at 611.

\(^{32}\) Cherry & Kroll, *supra* note 11 at 390.


\(^{34}\) Allison, *supra* note 6 at 64.

\(^{35}\) Cherry & Kroll, *supra* note 11 at 393.

\(^{36}\) *Id.* at 392.

\(^{37}\) *State v. Frear*, 125 N.W. 961, 962 (Wis. 1910).

\(^{38}\) *Id.*

\(^{39}\) *Id.*
statute did not, on its face, violate a party’s First Amendment right to associate. The court stated that an election law could survive constitutional scrutiny if the state shows a compelling state interest and is narrowly tailored to serve the interest.

d. Blanket Primary

The blanket primary election system is similar to an open primary, but goes a step further, i.e., registered voters may vote for any party’s candidate for any office. For example, a registered Democrat may vote for a Republican candidate for governor, an Independent candidate for Secretary of State, and a Democrat candidate for Attorney General.

There are two types of blanket primary systems: partisan and nonpartisan. Under a partisan blanket primary system, the candidate who receives the most votes within each party becomes the nominee in the general election for that party, regardless of whether candidates from other parties received more votes. However, under a nonpartisan blanket primary system, the two candidates with the most votes are put on the ballot for the general election, regardless of party affiliation.

Proponents of the blanket primary election system believe that voters should not have to commit to one party; voters should have absolute independence when it comes to voting for candidates. Proponents also suggest that blanket primaries increase voter participation and increase the likelihood of moderates being elected to office. Opponents, on the other hand, believe that a blanket primary election system would eliminate party loyalty. Further, the fear of raiding is also present in this system. Moreover, opponents dislike the fact that two candidates from the same party may appear on general election ballot.

Most courts are reluctant to uphold a partisan blanket primary election system. In 2000, the Supreme Court struck down a blanket primary initiative in California Democratic Party v. Jones (“Jones”). In 1996, California voters approved Proposition 198, the “Open Primary Initiative.” While Prop 198 was called the “Open Primary Initiative,” in actuality it followed a partisan blanket system framework. The Court expressed concern about raiding. Justice Scalia stated, “having a party's nominee determined by adherents of an opposing party is far from

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40 Miller v. Brown, 503 F.3d 360 (4th Cir. 2007).
41 Id. at 364.
42 Cherry & Kroll, supra note 11 at 388.
43 Aisenbrey, supra note 28 at 605.
44 Id.
45 Allison, supra note 6 at 64.
47 Allison, supra note 6 at 64.
48 Aisenbrey, supra note 28 at 610.
49 Hill & Ulrich, supra note 47.
51 Id. at 568.
52 Id. at 567.
remote—indeed, it is a clear and present danger.”53 The Court reasoned that the state’s interest in expanding voter participation was not sufficient enough to justify an intrusion on the right to associate.54

Similar outcomes followed the Supreme Court decision in Jones. For example, the court in Democratic Party of Washington State v. Reed found that Washington’s partisan blanket system was materially identical to California’s and struck down the statute for violation of the right of association.55 The same was said of Alaska’s attempt at a partisan primary election in O’ Callaghan v. State, Director of Elections.56

Not all hope is lost for states that desire a blanket primary system. The nonpartisan blanket system has had some luck with the Supreme Court. In 2004, Washington voters made another attempt to implement a blanket primary, this time using a nonpartisan framework. Washington’s top-two primary law advances the top-two votegetters for each office to the next general election regardless of party affiliation. For partisan offices such as the United States Senate and House of Representatives candidates may list their party preference, but these designations do not necessarily mean the party endorses the candidate.57 In Washington State Grange v. Washington State Republican Party (“State Grange”), the Court held that the initiative did not violate the right of association because it did not “provide for the nomination of candidates or compel political parties to associate with or endorse candidates, and there is no basis . . . for presuming that candidates’ party-preference designations will confuse voters.”58

However, the fight against Washington’s blanket primary law is not over. In January 2010, the same complaints against the Washington initiative were revived.59 Plaintiffs contend that the law falsely led voters to believe that the two candidates on the ballot for the general election would be Democratic and Republican candidates. The Supreme Court in State Grange, called this “sheer speculation” because no empirical evidence existed at the time to support their argument.60 Two years since the law has passed, the plaintiffs believe that they now have enough evidence of voter behavior to convince a court that the law does confuse voters. A court is expected to hear the case in November.61

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53 Id. at 577.
54 Id. at 568.
55 Democratic Party of Washington State v. Reed, 343 F.3d 1198, 1203 (9th Cir. 2003).
56 O’ Callaghan v. State, Director of Elections, 6 P.3d 728 (Ak. 2000).
60 Washington State Grange, 552 U.S. at 443.
IV. THE PAST AND FUTURE OF CALIFORNIA PRIMARY ELECTIONS

As a part of the Progressive Era previously discussed, California established a closed primary election system in 1909. In 1913, cross-filing was allowed, which permitted a candidate to appear on more than one party’s ballot. This practice was ended in 1959 by initiative. As discussed above, in 1996, California voters approved Proposition 198, the “Open Primary Initiative,” and in 2000, the United States Supreme Court struck down the proposition in Jones.

In response to the Supreme Court’s ruling, the California legislature adopted a modified semi-closed primary in which unaffiliated voters are allowed to vote in a party’s primary election if approved by that party. Both the Democrats and Republicans allowed unaffiliated voters to vote in their primaries until the 2008 Presidential Primary when the Republican Party closed their primary to allow only registered members to participate. California is currently under this modified semi-closed primary election system, but may not be for long.

In June 2010, California voters approved Proposition 14, which again used the name “Open Primary.” However, the initiative follows a nonpartisan blanket primary format. Voters will receive one ballot, which will list all candidates. They may vote for any candidate regardless of political party affiliation. The two candidates with the highest number of votes will advance to the general election. The change is expected to take effect for elections after January 1, 2011.

In July 2010, a lawsuit was filed challenging the proposition. The complaint seeks removal of a provision that allows write-in votes to be cast off arguing that this provision violates state and federal rights. The complaint also seeks removal of a provision that only allows candidates to affiliate with parties that have been qualified for the ballot arguing that this provision is discriminatory. On September 13, 2010, a San Francisco Superior Court judge denied a motion for an injunction against Proposition 14.

63 Id.
64 Id.
65 California Democratic Party, 530 U.S. at 567.
68 Id.
69 Id.
71 Id.
72 Id.
However, the constitutionality of Proposition 14 has not yet been attacked on the ground of violation of the right to associate. If challengers brought such an action, the proposition is likely to survive. The California initiative is structurally similar to the nonpartisan blanket primary initiative passed in Washington in 2004, which the Supreme Court held as constitutionally sound. The Court stated that since the law does not require political parties to associate with or endorse candidates the right of association is not violated.

V. CONCLUSION

Each of the four primary election system has faced constitutional challenges; the most frequent challenge being the First Amendment right to freedom of political association. The closed primary is often attacked when at least one political party wishes to include more than only registered members in their primary election. The semi-closed primary is likely to be threatened when all political parties holding primaries wish to include registered members of other parties. The open primary has been challenged by parties wishing to exclude registered members of other parties arguing that it violates the political parties right of association, nonetheless, the open primary has had the most luck surviving constitutional challenges. The blanket primary has only survived in its nonpartisan format, but the current lawsuits concerning Washington and California’s nonpartisan blanket primaries may shed more light on its constitutionality. Regardless of challenges each system has faced, all have survived the courts in one form or another, and remain an important part of the nomination process in the United States.