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The Dual Path Initiative Framework

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Elizabeth Garrett and Mathew McCubbins

Abstract

In this Article, we focus on two complaints about initiatives that can be addressed through a new legal framework. First, some have argued that the policy choices made through direct democracy are often not socially optimal, and the processes through which initiatives are passed may make welfare-reducing decisions inevitable. Second, initiatives, once enacted, often fail to be implemented by government officials. In response to these two problems, we propose a new comprehensive framework of postqualification reforms that keeps both the spirit and intent of the initiative process: the Dual Path Initiative Process with a Citizens' Initiative Implementation Oversight Commission.

First, the Dual Path Initiative Framework includes three distinct stages for each initiative. The first stage occurs when only a brief description of the proposal, providing the purpose of the initiative and the general outline of the solution to be adopted, is circulated for signatures. This process is designed to gauge public support for the general objective of the proposal's backers. When sufficient signatures have been obtained and the process moves to the second stage, the proponents and legislature have the opportunity to draft legislative or constitutional language to submit to the people for a vote. During this second stage, lawmakers and ballot measure proponents can negotiate so that a compromise can be passed as a statute through the traditional legislative process or a mutually acceptable constitutional amendment can be submitted for a vote. Even if there is no agreement reached, this period provides flexibility so that drafting errors can be identified, likely consequences of the new policy can be assessed, and language can be revised. At the end of this time, if the proponents of change are not satisfied with the legislature's response, they can submit to the people a detailed proposal designed to advance the purpose of the originally-qualified brief policy. The third stage occurs after a popular initiative is enacted through a vote of the people. Popular constitutional initiatives will expire after ten years and must be re-enacted; popular statutory

initiatives will also be less durable because the legislature may, after a period of time, amend or repeal any such initiative.

Second, we propose a Citizens' Initiative Implementation Oversight Commission (CIIOC) to ensure that enacted initiatives are faithfully implemented by state and local officials, who might otherwise work to obstruct or delay ballot measures they opposed. The CIIOC will include a representative named by each successful popular initiative, and it will have the ability to conduct hearings, produce reports, participate in administrative proceedings, and even pursue litigation. A statewide citizens' oversight commission is a novel reform, not currently used by any state.

The Dual Path Initiative Framework

Elizabeth Garrett* & Mathew D. McCubbins**

1. Introduction

The widespread use of the initiative process and the perception that it has led to considerable negative consequences have prompted calls for reform. In this Article, we focus on two complaints about initiatives that can be addressed through a new legal framework.¹ First, some have argued that the policy choices made through direct democracy are often not socially optimal, and the processes through which initiatives are passed may make welfare-reducing decisions inevitable.² Reform proposals often aim to correct this complaint through increasing the hurdles to ballot qualification. This sort of reform is counter-productive in several ways. By increasing the “price” of ballot access, ex ante responses are likely to exacerbate the current disproportionate influence of money.³ Moreover, there is no reason to believe that ex ante

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¹ We do not consider disclosure provisions that should be part of any initiative framework to improve voter competence in direct democracy because these have already been the subject of more scholarly analysis than our other proposals. See, e.g., Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 Ann. Rev. Pol. Sci. 463, 476-77 (2004); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. Rev. 1141 (2003); Elizabeth Garrett, *Voting with Cues*, 37 U. Rich. L. Rev. 1011 (2003); Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 Elect. L.J. 237 (2004) (all reviewing the extensive empirical literature on competence and voting cues and some suggesting legal reforms). Similarly, we do not tackle the issue of campaign finance regulations. See, e.g., Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. Cal. L. Rev. 885 (2005).

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

³ For discussion of the role of money in direct democracy, see Elisabeth Gerber, *Prospects For Reforming The Initiative Process* (June 6, 2000) (paper presented at the National Direct Democracy Conference, University of

responses will block more socially suboptimal policies than policies that are welfare-enhancing and yet stymied in the legislature by powerful interest groups. We argue that a better focus of initiative reform would provide other checks and balances throughout the process, not primarily in the qualification period. Second, initiatives, once enacted, often fail to be implemented by government officials.⁴ Few reform proposals are aimed at this post-enactment problem because they focus only on the process through qualification and sometimes until adoption or defeat, but they do not take account of the likelihood that the government officials who resisted passing the proposal are likely to continue to undermine it during the implementation phase. In contrast, our framework includes a new institution to monitor compliance with popularly-generated initiatives and ensure greater enforcement. We describe these two concerns in greater detail in Part 2.

Our proposal encompasses two main reforms, each targeting one of the two problems we identify. We propose a new comprehensive framework of post-qualification reforms that keeps both the spirit and intent of the initiative process: the Dual Path Initiative Process with a Citizens' Initiative Implementation Oversight Commission. First, to construct Dual Path Initiative Process, we borrow from the practice in American legislatures to provide each bill three readings on separate days.⁵ Our framework establishes three readings – or distinct stages – for each initiative; these are described in Part 3. The first reading of the initiative occurs when only a brief description of the proposal, providing the purpose of the initiative and the general outline of the solution to be adopted, is circulated for signatures. This process is designed to gauge public support for the general objective of the proposal's backers. No legislative language need be drafted at this time; instead, advocates of change provide a relatively brief policy statement that sets out the essential elements of their constitutional or statutory proposal.

Virginia Center for Government Studies); Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of its Effects and Prospects for Reform*, in *The Battle Over Citizen Lawmaking* 73 (M.D. Waters, ed., 2001).

⁴ Elisabeth R. Gerber, Arthur Lupia, Mathew D. McCubbins & D. Roderick Kiewiet, *Stealing the Initiative: How State Government Responds to Direct Democracy* (2001); Elisabeth R. Gerber, Arthur Lupia & Mathew D. McCubbins, *When Does Government Limit the Impact of Voter Initiatives? The Politics of Implementation and Enforcement*, 66 J. Pol. 43 (2004).

⁵ See, e.g., 109th Congress House Rules Manual §§ XXIV-XXVI (U.S. House of Representatives); Standing Rules of the Senate, Chapter 14, Rule 2, http://www.senate.gov/legislative/common/briefing/Standing_Rules_Senate.htm#14 (U.S. Senate); 2006 General Session Rules of the House of Representatives <http://legisweb.state.wy.us/2006/rules/house.htm> (Wyoming); Permanent rules of the Regular Sessions of the House of Representatives of the 2005 General Assembly, Rule 41, <http://www.ncleg.net/house/documents/houserules.html> (North Carolina). In reality, bills are seldom read in their entirety and one or two of the three readings are usually pro forma parliamentary exercises, but representative institutions have other institutional checks that ameliorate any deliberative loss that may occur.

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

The third reading period occurs after a popular initiative – constitutional or statutory – is enacted through a vote of the people. Popular constitutional initiatives will expire after ten years and must be re-enacted, perhaps as amended, either through the legislature resubmitting the provision to the people or through proponents requalifying the measure for the ballot, albeit with less onerous signature requirements. In both cases, re-enactment is permanent. Popular statutory initiatives will also be less durable because the legislature may, after a period of time, amend or repeal any such initiative.

Part 4 describes the aspects of our proposal aimed at the implementation problem. Our framework includes an entirely new system for oversight of the implementation and enforcement of popular initiatives. Here we draw on the experience with the few initiatives that set up special oversight bodies, such as the Fair Political Practices Commission⁷ or the commission overseeing

⁶ See Elizabeth Garrett, *Hybrid Democracy*, 73 Geo. Wash. L. Rev. 1096 (2005). A hybrid democracy is one that incorporates both representative and direct democracy as essential elements of law making.

⁷ Cal. Gov. Code §§ 81000 et seq.

the stem cell initiative passed by Californians in 2004.⁸ It also taps into the current enthusiasm for increased citizen involvement in policymaking, seen in the increasing use of initiatives over the past three decades⁹ and the recent creation of a Citizens Assembly in British Columbia to consider and propose sweeping reform of the system of political representation.¹⁰ We propose a Citizens' Initiative Implementation Oversight Commission (CIIOC) to ensure that enacted initiatives are faithfully implemented by state and local officials, who might otherwise work to obstruct or delay implementation of ballot measures they opposed. The CIIOC will include a representative named in each successful popular initiative and taking office upon its passage; it will be provided a staff and funding sufficient to discharge its oversight function; and it will be granted the authority to conduct hearings, produce reports, participate in administrative proceedings, and even pursue litigation. The CIIOC will also be involved in the pre-election initiative process, determining whether the initiative finally drafted by proponents is consistent with the initial policy statement and providing analysis of any legislative response. A statewide citizens' oversight commission is a novel reform, not currently used by any state. Some individual initiatives establish special commissions to implement and enforce the particular initiative, but we are not aware of any state that relies on an independent body, with a staff, to investigate and enforce all initiatives.

Finally, in Part 5, we conclude with a brief discussion of some aspects of the new political equilibrium we expect after adoption of the Dual Path Initiative Framework and the CIIOC. The two parts of hybrid democracy – the initiative process and representative institutions – react to changes in each other, and political actors change their behavior to account for modification in political institutions. We believe that the new equilibrium will be an improvement over the status quo, providing checks and balances in both parts of hybrid

⁸ Proposition 71, the California Stem Cell Research and Cures/Bond Act, designated state money for stem cell research and created a commission to oversee its disbursement. Cal. Health & Saf. Code §§ 125290.10 et seq.; Cal. Const. XXXV. The constitutionality of the initiative was challenged in court by small-government and conservative religious groups, alleging that it did not provide sufficient legislative control over the expenditure of state funds, as required by Cal. Const. XVI § 3. The trial court held that the measure was constitutional. *People's Advocate v. Independent Citizens Oversight Comm.*, Case No. HG052206766 (Alameda Super. Ct. May 15, 2006).

⁹ See Overview of Initiative Use, 1904-2005, Issue Paper of the Initiative and Referendum Institute at USC (May 2006).

¹⁰ See Final Report of the British Columbia Citizens' Assembly on Electoral Reform, Making Every Vote Count: The Case for Electoral Reform in British Columbia (Dec. 2004). See also Heather Gerken, *Citizens Must Drive Electoral Reform*, Roll Call, November 15, 2005, Guest Observer (also available at http://www.law.harvard.edu/news/2005/11/15_gerken.php). In the 2005-06 session of the California Assembly, Assemblyman Joseph Canciamilla introduced Assembly Constitutional Amendment 28, the Citizens Assembly on Electoral Systems Act of 2006.

democracy, ensuring fuller compliance with initiatives, and allowing for flexibility and change throughout the process and over time to reflect input during policy consideration and experience as the new policy is implemented.

2. The Goals of an Initiative Framework

A central element of American democracy is checks and balances. In Federalist 51, Madison argued that “the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other,”¹¹ and in Federalist 47, he stated that “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹² The numerous vetogates in the legislative process allow time for fact-finding and deliberation, provide opportunities to correct mistakes, and encourage compromise and change in legislative proposals to secure passage. If a proposal manages to navigate through all the legislative roadblocks, it still faces the possibility of a veto by the executive, and in many states, the executive can rewrite some bills through use of a line item veto. Even with all these procedures, however, legislatures still enact hastily-drafted laws with errors and unexpected consequences. But the process is constructed to guard against such bills, and if mistakes occur or an enactment proves unworkable or unwise in practice, the legislature can amend or repeal the bill.

As currently configured, the initiative process in California lacks comparable checks. The requirement that supporters gather signatures within a certain period of time to place an initiative on the ballot can be an obstacle for advocates who lack access to substantial financial or human resources. But a well-funded group is guaranteed access to the ballot because it can hire professional firms and pay petition circulators,¹³ and a group with a motivated and large grassroots base may be able to gather enough signatures for ballot access, as long as they have sufficient time for circulation. Once the measure qualifies for the ballot, then the version submitted to a state official at the start of the petition circulation stage appears before the voters, without any further opportunity for amendment. Although opponents or state officials may

¹¹ The Federalist Papers, No. 51, at 261-65 (Buccaneer Books 1992) (Madison).

¹² The Federalist Papers, No. 47, *supra* note 11, at 243-50 (Madison).

¹³ See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex. L. Rev. 1845, 1849-54 (1999).

challenge the initiative before an election on constitutional or other legal grounds, in many cases, courts decline to become involved until after the election.¹⁴ The only real check on initiative lawmaking authority is the public itself, and an initiative – whether constitutional or statutory – can be enacted in most states if it receives the votes of a majority of those voting on it.¹⁵

After enactment, a court may strike the initiative down if it is found to be unconstitutional or to violate requirements such as the single-subject rule.¹⁶ But, this check is essentially no different than exists for legislative lawmaking.¹⁷ If the judiciary does not intervene, the only way to correct or repeal most initiatives is by enacting another initiative. In California, the Constitution prohibits the legislature from amending or repealing a statutory initiative unless the initiative itself allows subsequent legislative involvement.¹⁸ All the other initiative states allow subsequent legislative involvement with respect to statutory initiatives, although sometimes only after a period of time or only by a supermajority vote. A few states prohibit repeal but allow the legislature to amend the initiative.¹⁹ Those who wish to insulate their initiative from the possibility of legislative tinkering in states other than California can use the constitutional

¹⁴ California courts are particularly unwilling to block initiatives from the ballot. See California Secretary of State, History of California Initiatives, available at http://www.ss.ca.gov/election/init_history.pdf (pre-election challenges successful only three times). Some other states allow more pre-election review. For example, in Colorado “a three-member Title Board reviews proposed initiatives to determine whether they comply with the state’s formal requirements (including, importantly, the state’s so-called ‘single subject rule.’) The process provides an opportunity for interested parties to appeal the Title Board’s decisions to the state Supreme Court, and thus the court has a formal filtering role prior to the election.” Kenneth P. Miller, *The Role of Courts in the Initiative Process: A Search for Standards*, note 3 (1999) (unpublished paper presented at the 1999 Annual Meeting of the American Political Science Association, Atlanta, GA), available at <http://www.iandrinstitute.org/Studies.htm>; Colorado Revised Statutes 1-40-106, 107. Like courts in most states, however, those in Colorado are more willing to strike down an initiative at this stage on procedural issues than substantive ones. See Miller, *supra*. See also Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts which Replaces Apportionment by Legislature, Nos. SC05-1754 & SC05-1895 (Fla. Mar. 23, 2006) (responding to request by Attorney General and removing initiative on reapportionment from the ballot because it violated the single-subject requirement).

¹⁵ See M. Dane Waters, *The Initiative and Referendum Almanac* 26 (2003).

¹⁶ The courts block, at least in part, 56 percent of the initiatives enacted in California. See Miller, *supra* note 14, at 12-13 (between 1960 and 1999, there were 55 initiatives adopted in California, of which 36 were challenged in court. Of those, 14 were upheld (44%), 11 were invalidated in part (34%), and 7 (22%) were invalidated in their entirety).

¹⁷ All legislation can be attacked in court on constitutional grounds, and many state legislatures are subject to single-subject requirements. See Bannon Denning & Brooks Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 Utah L. Rev. 257, App. A. However, some commentators have observed that courts may more rigorously apply single-subject rules to direct legislation than traditionally-enacted laws. See William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation: Statutes and the Creation of Public Policy* 511 (3d. ed. 2001); see also *In the Matter of the Title and Ballot Title and Submission Clause for 2006-2006 #55*, 2006 Colo. Lexis 521 (Colo. 2006) (en banc) (applying single-subject rule aggressively to void initiative that had two purposes but arguably not multiple subjects).

¹⁸ Cal. Const. art. II, § 10(c).

¹⁹ See Waters, *supra* note 15, at 27 (providing details).

initiative. In all states, constitutional initiatives can be changed only through another vote of the people.

Another significant difference between representative and direct lawmaking involves the scope of the decisions that are made. Legislators can debate and amend statutes before enacting them, and they can deliberate and compromise over a proposed statute. Even legislatures governed by constitutional single-subject requirements can alter the details of any bills, and the institutional arrangements in representative bodies allow lawmakers to bargain across several bills to facilitate compromise. Direct lawmaking is far more rigid: voters are presented with a binary choice on a policy – either to accept it or retain the status quo – and logrolling across initiatives is impossible, as is deliberation or debate among voters. Within the legislature, policymakers are better able to consider tradeoffs through the state budget process; in contrast, the initiative process is susceptible to the pathologies of “sequential elimination agendas.”²⁰ When people are asked to choose between alternatives over time without the opportunity to compare among the many alternatives directly, they do not consider tradeoffs and are “almost certain to pass contradictory measures that have deleterious economic, social and political consequences.”²¹

Our first set of recommendations for Dual Path Initiative Process therefore seeks to add appropriate checks into the initiative process. We proceed from a very different starting point than most initiative reformers. Many other reformers work to increase the initial hurdles to ballot access; for example, they often advocate increasing signature thresholds.²² In our view, raising the costs of obtaining a vote merely further tilts the playing field in favor of moneyed interests and away from grassroots majoritarian interests seeking to use the process as it was

²⁰ Kousser & McCubbins, *supra* note 2, at 963-65. Our proposal does not change the binary, sequential nature of the U.S. initiative process, although other formats for decision making are possible. See, e.g., Elizabeth Garrett, *Who Chooses the Rules?*, 4 Elect. L.J. 139, 145-46 (2005) (describing two-stage, multiple choice format used in New Zealand). However, our proposal to requiring constitutional initiatives to expire and allowing subsequent legislative involvement with statutory ones will mitigate the welfare-reducing consequences of this decision making pathology. See *infra* Sections 3.3.1 & 3.3.2.

²¹ *Id.* at 966.

²² See, e.g., Mark Ridley Thomas & Erwin Chemerinsky, *Let's Revamp the Recall*, L.A. Times, Oct. 29, 2003, at B15; Elisabeth R. Gerber, *Reforming the California Initiative Process: A Proposal to Increase Flexibility and Legislative Accountability*, in *Constitutional Reform in California* 291, 303 (B.E. Cain & R.G. Noll, eds. 1995) (recommending increasing the signature threshold for constitutional initiatives as part of a larger reform proposal with elements of indirect initiative). See also Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. Pa. L. Rev. 239, 243-44 (2004) (describing such reforms). But see John Ferejohn, *Reforming the Initiative Process*, in *Constitutional Reform in California*, *supra*, at 313, 315 (proposing that once an initiative has qualified, competing initiatives on the same topic could qualify with fewer signatures).

intended to operate. Our preference is to keep the ability to begin the initiative process unchanged, indeed somewhat easier because we require only a policy statement and not text before petitions can be circulated, but to change the process after qualification to include more checks and balances. In that way, groups and individuals with proposals stymied in the legislature can use direct democracy to seek a place on the agenda, but any policy that results is more likely to improve social welfare.

Other reformers have suggested that California eliminate the direct initiative and replace it with a traditional indirect initiative. The indirect initiative currently exists in nine states for either constitutional amendments, statutes or both.²³ The indirect initiative process allows the legislature a formal role in the process before any measure is submitted to the public. Generally, the legislature is required to hold hearings on an initiative that has gained a certain number of signatures, and legislators must vote on the proposal. In some states, the legislature may amend the initiative; in others, the legal framework requires lawmakers to take an up or down vote on the initiative as presented by proponents. Usually in the indirect initiative process, if the legislature enacts the proposed initiative – or, in some states, enacts a law substantially the same as the proposal – the question does not appear on the ballot. If the legislature refuses to act, the measure is submitted to the people. In a few states, supporters are required to obtain additional signatures to move past the legislature to the people even if the legislature does nothing; and in other states, the proponents' version is placed on the ballot alongside any legislative version that is different.

Although our Dual Path Initiative Process is influenced by the indirect initiative, simply requiring all states to offer only the indirect initiative as currently configured is an unrealistic reform proposal. California had the indirect initiative until 1966,²⁴ and it was seldom used. Given the public's strong support for the direct initiative, it is unlikely that voters would accede to a reform that replaces the well-liked direct initiative with the scorned indirect one. Instead, we opt to keep the direct initiative, but we add characteristics of the indirect initiative process that might eliminate the need in some cases to take the measure to the people for a vote. Under the

²³ For a discussion of the variations on the indirect initiative, see California Commission on Campaign Financing, *Democracy by Initiative: Shaping California's Fourth Branch of Government* 104-05, 117 (1992) [hereinafter *Democracy by Initiative*]. Fewer states allow the indirect initiative than the direct initiative; two states have an indirect constitutional initiative process, and nine have an indirect statutory initiative process. See Waters, *supra* note 15, at 13-15 (essay written by Fred Silva).

²⁴ *Democracy by Initiative*, *supra* note 23, at 47.

Dual Path Initiative Process, initiative proponents remain in the driver's seat; they decide whether the legislature's response is sufficient to ameliorate their concerns or whether they will draft legislative or constitutional language and submit their policy change to the people. Our new framework nonetheless adds checks and balances to the current initiative process that are aimed either to eliminate the problems we have identified or to mitigate their consequences. The latter occurs because of the third reading of the framework that requires popular constitutional initiatives to be reauthorized and allows legislative involvement with all popular statutory initiatives. The durability of popular change is thereby reduced relative to the status quo.

By itself, the addition of checks and balances to the initiative process through adopting aspects similar to the indirect initiative and changing the durability of popular initiatives would do much to improve the process. But how valuable are initiatives if they remain unimplemented and subverted, which is often the outcome now? Once passed, initiatives must be implemented by the executive branch; moreover, some legislative involvement is often required for the policy to be successful. The people vote to enact policy, but then they return to their lives, assuming that government officials will follow their directions. They do not have the ability, or often the interest, to monitor implementation. Because elected officials often opposed the policy put into place by direct democracy, they are not likely to eagerly or aggressively work to follow the public mandate. As a matter of fact, those in charge of implementation are the very agents the initiative was designed to control. For example, the initiative might enact sweeping reform of the education system, which must then be implemented by the Department of Education, school administrators and teachers. Or the initiative might enact public financing of state campaigns, but the legislature has to appropriate money for it.²⁵ There is ample reason to worry that these lawmakers and administrators will not enthusiastically implement the policies they refused to adopt.²⁶ In a way, this is the opposite of the problem identified before – rather than too few

²⁵ It has been suggested to us that rather than using an enforcement commission that we should just urge initiative writers to put clear enforcement standards into the language of the initiative, such as reporting requirements and strict penalties for non-compliance. These are all good ideas, suggested by Gerber, Lupia, McCubbins & Kiewiet, *supra* note 4, but the problem is that it doesn't answer the question, to whom is the legislature supposed to report? Who decides if a sanction is to be imposed, and if imposed who decides the remedy and the penalized party? Who then enforces the enforcement? The CIIOC will be able to determine if the initiative has been implemented or not and can bring to bear the only enforcements possible or necessary, that is court or electoral sanction to those who've impeded the implementation of an initiative. The CIIOC will be in a position to bring to the public's attention the lack of enforcement of an initiative and it will be up to the public to decide if it is a wrong that is worth righting through the ballot box.

²⁶ Gerber, Lupia and McCubbins, *supra* note 4, at 52-56.

vetogates which characterizes the process of proposing and enacting initiatives, there are too many checks standing in the way of effective implementation and most of those are controlled by officials who are likely to be hostile to the reform.

When courts strike down initiatives and block their implementation, they justify their action because the popular law is unconstitutional or in some other way legally flawed. The people cannot get what they want because their desires conflict with larger principles and values, for example, individual rights guaranteed by the federal Constitution. But when state officials block initiatives by surreptitiously undermining them, they follow their own preferences rather than those of the voters and they do so in ways designed to reduce accountability. Gerber, Lupia, McCubbins and Kiewiet have found that certain conditions allow government officials to undermine or ignore initiatives more easily.²⁷ First, substantial technical or political costs will lead to lower levels of compliance because the net value of implementation is reduced. Second, if implementers face significant sanctions for noncompliance, they are more likely to work to effectively implement the initiative. Third, when it is easier for the public or others who support the initiative to observe compliance, it is more likely that officials will comply. Finally, “[u]nder normal conditions, as the number of people required for full compliance increases, the likelihood of full compliance goes to zero.”²⁸ A new framework for initiatives could increase the likelihood of substantial compliance with initiatives by changing some of these conditions. Our proposal establishes a Citizens’ Initiative Implementation Oversight Commission (CIIOC). Such a commission improves monitoring and can better ensure that there are sanctions, political and legal, for noncompliance. It thus responds to the first three conditions identified above.

Although one response to the problems in the initiative process is to eliminate direct democracy, we do not advocate that path. First, we do not believe it is realistic. Polls consistently demonstrate that citizens like the initiative process and trust its outcomes more than they trust legislation enacted by their representatives.²⁹ Because sweeping change to the

²⁷ Gerber, Lupia, McCubbins & Kiewiet, *supra* note 4, at 20-25. See also Lupia & Matsusaka, *supra* note 1, at 475-76 (discussing scholarship on the “implementation problem”).

²⁸ Gerber, Lupia, McCubbins & Kiewiet, *supra* note 4, at 24.

²⁹ See, e.g., Mark Baldassare, *Californians and Their Government: PPIC Statewide Survey 17 (2004)* (74% think initiative process is a “good thing” and 59% think that policy made through initiatives is better than policy made by elected officials); Jack Citrin & Jonathan Cohen, *Viewing the Recall from Above and Below*, in *Essays on the California Recall* 68, 74-82 (S. Bowler & B.E. Cain, eds., 2006). Even after the 2005 special election in California, in which voters rejected all the initiatives, Californians are still enthusiastic about direct democracy. See Mark Baldassare, *Special Survey on Californians and the Initiative Process 13 (2005)* (nearly half of those who voted in

initiative process requires constitutional amendment, the people will be involved in any reform, and they are unlikely to get rid of initiatives altogether. However, polls suggest that reforms along the lines of our three readings proposal – at least the first two stages – would be viewed favorably by many Californians.³⁰ Second, we view a properly constructed initiative process as a necessary component of a well-functioning democracy because it provides a way around the conflict of interest legislators possess with regard to some matters of institutional structure. Often lawmakers themselves determine the rules of democracy (e.g., in enacting campaign finance laws or in establishing electoral districts), in which case the regulated are the regulators. Under such circumstances, there is the well-founded concern that self-interest will prevail over the public interest and that rules will be chosen to entrench the already powerful, decrease competition from the outside, and silence new voices.³¹ Thus, one advantage of hybrid democracy is that it allows the people a formalized role in institutional design decisions.

Similarly, the initiative process can provide a majoritarian escape valve if the legislative process is captured by special interests. The absence of checks and balances in the initiative process reduces the influence of minority interests with strong preferences that can use legislative veto gates to block policies they oppose or force compromise to gain special benefits. Even though the agenda of direct democracy tends to be determined by well-funded groups who can use paid signature gatherers to assure ballot access, policy is enacted only when it can obtain majority approval on Election Day. Thus, the majoritarian initiative process can provide a counterbalance to the legislative process; indeed, the presence of a robust initiative process

the election believe policies enacted by the people are better than those passed by the legislature, and less than one-third thought they were worse) [hereinafter Baldassare, Special Election Poll].

³⁰ Baldassare, Special Election Poll, *supra* note 29, at 17 (77 percent of special election voters favor a new system of review and revision of initiative to reduce errors; 83 percent favor allowing time for legislature and proponents to reach a compromise).

³¹ Given the inherent conflict of interest faced by lawmakers in designing the rules that will shape their careers, even some who have substantial reservations about the initiative process nonetheless argue that more directly involving the people in decision making about democratic institutions is justified. See, e.g., Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* 14 (2002); Dennis F. Thompson, *The Role of Theorists and Citizens in Just Elections: A Response to Professors Cain, Garrett, and Sabl*, 4 *Elect. L.J.* 153, 158-60 (2005). For a less guarded advocacy of direct democracy to design democratic institutions, see Elizabeth Garrett, *Who Chooses the Rules?*, *supra* note 20. Whether the initiative process actually leads to different electoral institution is a matter of scholarly contention. Compare Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 *S. Cal. L. Rev.* 997 (2005) (finding initiative process related to states' adopting nonpartisan redistricting commissions, legislative term limits, and public financing for legislative races), with John G. Matsusaka, *Direct Democracy and Electoral Reform, in The Marketplace of Democracy* — (M. McDonald & J. Samples, eds., 2006) (forthcoming) (finding initiative has little effect on electoral laws except for adoption of legislative term limits).

changes the output from the traditional legislature so that it enacts policies closer to the median voter's preference.³² Thus, we believe complete elimination of direct democracy is not warranted – the better answer is to improve the initiative process.

3. A Framework to Provide Checks and Balances in the Initiative Process: A Dual Path Initiative Process

Our reforms allow initiatives to continue to play a necessary role to check the self-interest of legislators in the arena of government reform and to circumvent the power of well-funded, organized groups who block policy favored by a majority. However, we do not favor unchecked populism. Our goal is to strengthen *both* the initiative process and representative institutions, and we believe meeting that objective requires a fundamental restructuring of the popular initiative process. Our reform package would itself require a vote of the people to be adopted as an amendment to the state constitution.³³ Figure 1 on the following page presents a graphical representation of the first set of reforms we propose, dubbed the Dual Path Initiative Process.

³² Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 Am. J. Pol. Sci. 99 (1996); John G. Matsusaka, *For the Many or the Few: The Initiative, Public Policy, and American Democracy* (2004); John G. Matsusaka, *Direct Democracy Works*, 19 J. Econ. Persp. 185, 192 (2005).

³³ It could be argued that our package of reforms is a revision of the California Constitution, rather than an amendment, because it alters the power of the electors in the initiative process through the three readings framework and alters the power of the legislature through the oversight commission discussed in Part 4. Constitutional revision cannot be done through the initiative process, but can be done by the legislature, if two-thirds of each house votes to put the revision on the ballot, or by constitutional convention. Cal. Const. Art. XVIII, §§ 1-3. Courts have defined what constitutes a revision rather than an amendment, but the line between the two is not clear. See, e.g., *McFadden v. Jordan*, 32 Cal. 2d 330 (Cal. 1948) (finding wide-ranging initiative that, among other things, created a Pension Commission, a revision); *Legislature v. Eu*, 54 Cal. 3d 492 (Cal. 1991) (finding initiative that imposed legislative term limits and other reforms to be an amendment). Given the restructuring we propose, it is possible our framework would be considered a revision in California, in which case it should originate in the legislature. We believe, however, that one could argue that it does not effect such “far reaching changes in the nature of our basic governmental plan,” *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208, 223 (Cal. 1978), to necessarily rise to the level of revision.

Figure 1: Dual Path Initiative Process

3.1. The First Reading of an Initiative: Qualifying a General Policy Statement

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

Given the reality of the signature gathering phase, there is no benefit to requiring that legislative or constitutional language be appended to the petitions at this stage in the process. All citizens need is a brief, straightforward description of the policy supported by the proponents and a clear identification of the major groups behind the signature drive. This policy statement represents the First Reading in Figure 1. We propose that, at the ballot qualification stage, initiative advocates submit a policy statement of no more than 500 words. Although the statement can be generally phrased, proponents will have an incentive to provide clear information about all major pieces of their proposal because, in later stages of the process, the legislative or constitutional language they develop will be measured against this policy statement. Material in the final version of the initiative that is not fairly encompassed by the initial statement will be stricken from the text presented to voters. The standard used to assess whether particular text is consistent with the policy statement is one of reasonable notice: Did the formulation provide a reasonable citizen asked to sign the petition notice of this aspect of the measure, and, if not, would that citizen consider this a material aspect of the policy or merely a reasonable means of implementing the objective that had been clearly described?

Because the second reading period allows drafters to change their proposal to reflect information that they receive and encourages negotiations with the legislature or other groups, the policy statement should be drafted so that it can encompass a proposal that may be somewhat different from the original vision. The statement must contain some specifics, however, both to provide voters enough sense of the proposal to decide whether to sign the petition and to meaningfully shape the second reading period. We suggest that each policy statement follow the outline of the Mischief Rule set out in *Heydon's Case*,³⁴ one of the classic statutory interpretation cases. Any legislative act involves describing the status quo, identifying the “mischief and defect” in the status quo, providing a “remedy” to solve the defect, and describing its benefits and any costs. This format provides voters all the necessary information during the first reading period, and over time it will become familiar to voters so that they can quickly grasp the import of any petition being circulated.

So, for example, a policy statement in the area of legislative redistricting could describe the absence of competition currently because of partisan and bipartisan gerrymanders, argue that this reality reduces electoral choices and undermines the responsiveness of lawmakers to voters, identify nonpartisan redistricting commissions as the solution because they remove some of the partisanship from the districting process, and provide an estimate of any costs relative to the status quo. Drafters would want to provide enough information so that voters would have a relatively clear sense of the reform being proposed, but allow enough flexibility to refine and change the proposal during the second reading phase. Language that generally identifies a nonpartisan redistricting commission as a solution postpones to the second reading period determining whether that commission will consist of judges, citizens, or people appointed by political officials. Although drafters could specify one of these models in the policy statement, they would not need to. Moreover, further specification could rule out possible compromises during negotiations in the second reading period. If voters who signed the general policy statement disagree with the drafters' ultimate choice, i.e., voters prefer citizens' commissions and the drafters decide to use judges, they can defeat the proposal at the polls.

The signature thresholds and time to gather signatures would remain the same in the Dual Path Initiative Framework. It is not the number of signatures we object to or the length of time

³⁴ 30 Co. 7a, 76 Eng. Rep. 637 (Exchequer 1584). See also Lawrence E. Filson, *The Legislative Drafter's Desk Reference* Chapter 4 (1992) (describing similar kind of approach to drafting statutes, i.e., identify the problem, determine a solution from policy alternatives).

provided for petition circulation; rather, we want to provide only necessary information to those who sign the petitions while allowing proponents time during the next stage of the initiative process to develop the details of the text that will implement their policy objectives.

3.1.1. Emphasizing Policy Objectives Over Detailed Language

There are at least two disadvantages to the current system that requires a formal text of the initiative at the petition circulation stage; we eliminate both. First, now the legislative or constitutional text is emphasized at the beginning of the initiative process even though the actual language plays little role in citizens' decision to sign petitions. In California, proponents must submit the text of the initiative to the Secretary of State to get permission to begin gathering signatures; then the Attorney General drafts a title and summary, which is typically relatively legalistic in its tone.³⁵ All of this information – title, official summary, and text – are provided with the petition.³⁶ In contrast, our proposal focuses attention on writing an easily-understood description of the general policy objective that the initiative will address and providing voters a sense of the interests funding the petition circulation effort.³⁷ The Attorney General would still provide a title for the policy statement that would appear on petitions and the ballot, but no official summary would be required during this stage.

One might object to circulating only a general policy statement, plus the identities of major financial backers,³⁸ because it somehow undermines the validity of signatures. Citizens who sign the petition, the argument goes, want a particular statutory or constitutional proposal placed on the ballot; if the proponents can later develop the text of that proposal without clearing it

³⁵ “In providing the ballot title, the Attorney General shall give a true and impartial statement of the purpose of the measure in such language that the ballot title shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.” Cal. Elec. Code § 9051.

³⁶ Cal. Elec. Code §§ 9008, 9011.

³⁷ This new process might have an additional benefit of reducing the costs of qualifying a ballot measure because fewer resources would be required to draft this sort of a statement. Any reduction in costs is likely to be relatively minimal, however, because most of the expense of qualifying a ballot measure is in the form of payment for petition circulators, an expense that would remain unchanged. In 2000, it cost between one and two million dollars to get an initiative on the ballot in California, of which all but about \$100,000 went to paying petition circulators. See David S. Broder, *Democracy Derailed* 69, 72 (2000). Eliminating paid petition circulators is not an option under current constitutional jurisprudence, see *Meyer v. Grant*, 486 U.S. 414 (1988), although there might be some flexibility to regulate how they are paid, see Andrew M. Gloger, *Paid Petitioners After Prete*, IRI Report 2006-1 (May 2006) (report issues by the Initiative and Referendum Institute at USC), available at <http://law.usc.edu/academics/assets/docs/PaidPetitionersafterPrete.pdf>.

³⁸ We do not discuss this disclosure requirement at length. See Garrett, *supra* note 13 (providing fuller discussion).

somehow with the hundreds of thousands of signers, then there is no way to be certain the voters who signed the petition would still favor putting the measure on the ballot. We find this argument unpersuasive. The details of a ballot measure play virtually no role in the decision to sign a petition. Moreover, in the end, the ballot measure becomes law only if it receives a majority vote. If those signing the petitions that were accompanied by the general policy statement no longer support the initiative because they view the text presented to them as inconsistent with the original objective, they can vote against it. Most initiatives fail to pass,³⁹ and voters tend to vote “no” when they are uncertain or worried about the effect of an initiative. We expect that one issue in any initiative campaign will be whether the text presented to the voters conforms to the policy statement that was circulated, so voters will have ample opportunity to punish any opportunistic behavior. We note that one positive development from our new framework may be clearer drafting of the legislative or constitutional text so that initiative supporters will be able to credibly claim to voters that they are acting consistently with the policy objectives they identified generally during the first reading stage.

3.1.2. Allowing Flexibility in Drafting

Second, in all states with the popular initiative, virtually no changes are allowed in the text of the statutory or constitutional proposal once it has been submitted to the relevant state official to obtain permission to circulate petitions.⁴⁰ The initiative process is a rigid one, unforgiving of mistakes and not amenable to compromise and revision during the campaign period. A recent case in California demonstrates the rigidity. In the fall 2005 special election, the legislative redistricting initiative supported by Governor Schwarzenegger was nearly removed from the ballot when it was revealed that supporters had submitted one version to the Secretary of State and circulated petitions with another version. Although supporters argued that the differences were minor and technical, the Attorney General went to court to remove the measure from the special election ballot. The California Supreme Court allowed the initiative to remain on the

³⁹ See Waters, *supra* note 15, at 7.

⁴⁰ States with the direct initiative process prohibit changes in the text of the proposal after a very early stage in the process. Although some allow revisions to reflect advice provided by legislative drafters or other officials, see, e.g., Idaho Code § 34-1809, none allow changes once proponents begin to circulate petitions. In some indirect initiative processes, the proposal can be changed after the legislature has considered it and refused to act but before it is presented to the citizens for a vote. See, e.g., Mass. Const. Amend. Art. XLVIII, c. V, § 2 (allowing change that is “perfecting in nature and does not materially change the substance of the measure”).

ballot, ruling tersely that there had been no showing that the people who signed the initiative had been misled.⁴¹ In the final decision after the defeat of the initiative, the Supreme Court held that the proposition was properly submitted to the voters, notwithstanding the discrepancies, because the voters would not have been misled about the initiative had they relied on the version that did not appear on the ballot.⁴² It seems clear that if the proponents had purposefully made changes in the initiative after it was submitted to state officials at the beginning of the circulation process – even if the changes were to correct mistakes – or if the discrepancies had not been relatively minor,⁴³ the petitions would have been invalid, and the measure pulled off the ballot. In contrast, our framework contemplates that such substantial changes could be made after the policy statement qualifies, because a process providing such flexibility is a better process than the rigid status quo. The California Supreme Court’s reaction is noteworthy for our purposes for another reason: the Court’s view of the signature gathering process mirrors ours in that the justices did not believe that the details of the proposal played a significant role in a citizen’s decision to sign the petition.

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

3.2. The Second Reading: Drafting the Text and Negotiating with the Legislature

As is evident in Figure 1, there are two possible pathways during the second reading period for the initiative to influence public policy. Once a proposal has met the signature requirement, a three-month period will begin during which the proponents of the proposal can develop text to

⁴¹ Costa v. Superior Court, Case No. S136296 (Cal. Aug. 12, 2005).

⁴² Costa v. Superior Court, 128 P.3d 675, 700-01 (Cal. 2006).

⁴³ Id. at 700 (calling error “inadvertent”); id. at 694 (referring to similar cases as involving “relatively minor departures” from the constitutional and statutory requirements).

implement the policy objectives that they described.⁴⁴ In addition, the legislature can submit text on the same general topic.⁴⁵ No other group can submit an initiative related to this policy statement for the ballot, although presumably some competing groups may also qualify their own general statements of policy as a response to a petition drive. In many cases, developing competing ballot measures is a strategy to defeat the first one; the competitors may not particularly care if their measure is enacted because their main objective is to defeat the proposal they oppose. In 2005, for example, pharmaceutical companies used this tactic to defeat a measure placed on the California ballot by consumer groups to provide discounts on prescription drugs.⁴⁶ The main goal of qualifying the second measure was to defeat the first; thus, the drug companies were not unduly disappointed when both failed. In other cases, competing groups simply have different ways of achieving the same goal. In this case, either both would have to qualify policy statements to get their versions on the ballot, or they would have to compromise during the second reading period on text that fits the policy statement that has qualified and proceed to the ballot with a consensus proposal.

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

⁴⁴ Another recent scholarly proposal includes a step in the initiative process similar to ours. It would also allow flexibility in drafting after qualification and would provide a pre-election period similar to notice-and-comment rulemaking in federal administrative agencies. This process would allow better drafting and time for compromise; it would also provide a record for subsequent judicial review. See Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 Wisc. L. Rev. 17 (2006).

⁴⁵ Because the legislature has a role in this process, the three months must overlap with a legislative session, a requirement that presents greater logistical challenges in states with part-time legislatures.

⁴⁶ Proposition 78 on the 2005 special election ballot was sponsored by the pharmaceutical companies and would have created a state-run drug discount program in which the pharmaceutical companies could voluntarily participate. It was a reaction to Proposition 79, which was sponsored by consumer groups such as Consumers Union, AARP, and the League of Women Voters. It would have created a mandatory drug discount program. See *The California Special Election; The Nov. 8 Special Election Ballot*, L.A. Times, Oct. 21, 2005, at B-2.

Reviser will draft the legislative language.⁴⁷ In Colorado, there is a mandatory public hearing on measures that will appear on the ballot,⁴⁸ and the advice provided by experts and the public during this deliberation results in revisions in 70 to 80 percent of initiatives before petitions are circulated.⁴⁹ These review periods all occur before the petition circulation stage; our framework would change that timing so that drafting and legislative resources are deployed only after a significant number of voters have indicated a desire to submit the policy to a popular vote.

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

3.2.1. Time to Draft and Revise

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

⁴⁷ See Wash. Rev. Code 29.79.015 (2003). See also *Democracy by Initiative*, supra note 23, at 102.

⁴⁸ See Colo. Const., Art. V, Section 1(5); Colo. Rev. Stat. § 1-40-105 (2003) (requiring hearing be held on each initiative submitted before petitions are circulated).

⁴⁹ *Democracy by Initiative*, supra note 23, at 102. See also Waters, supra note 15, at 15 (listing similar services in other states).

officers and firefighters killed in the line of duty.⁵⁰ Although the Governor contested this interpretation as one adopted by a Democratic official seeking to undermine his agenda,⁵¹ the current structure of direct democracy denied him the easy and uncontroversial response of just changing the language to clarify that death benefits were protected.

Sometimes gaps in the initiatives become apparent during the campaign. Proposition 71, the stem cell bond measure on the California ballot in November 2004, arguably contained inadequate conflict of interest and disclosure provisions. These concerns were raised during the campaign,⁵² providing the opportunity for amendment before the popular vote. This example also demonstrates that a framework providing this kind of flexibility may not solve all the problems of poorly worded or inadequately comprehensive initiatives. In this case, the main force behind Proposition 71, entrepreneur Robert Klein who is now chairman of the California stem cell institute, has denied the need for such provisions.⁵³ Of course, if he had the chance to make changes to respond to the concerns, he might have been willing to do so; the position he has taken in the campaign and after his victory could be a function of the inflexibility of the process and his desire to ensure that the measure takes effect. Nonetheless, as with most framework laws, an initiative framework would provide the opportunity for revision, it would not require proponents to respond to all criticisms. It is important to leave the decisions about changes to a ballot measure in the hands of the proponents even if they may resist beneficial changes. Empowering state officials or legislators to change the language of an initiative undermines the reason for direct democracy in the first place – to circumvent entrenched political players who may be motivated by self interest or influenced by special interests at a cost to the public interest.

As advocates consider the best way to implement the policy objective, qualified during the first reading period, they also have an opportunity to build support for their proposal by

⁵⁰ See Prohibition Against Defined Benefit Public Pensions, Exception for University of California, Initiative Constitutional Amendment and Statute, available at http://ss.ca.gov/elections/elections_j.htm#1134 (providing title and summary analysis from Attorney General).

⁵¹ See Robert Salladay, *Lockyer is Accused of Stacking Deck Against Initiatives*, L.A. Times, Aug. 1, 2005, at A1, A13.

⁵² See, e.g., Jonathan Knight, *Critics Slate Ethical Leeway in California Stem-Cell Proposal*, Nature, Sept. 16, 2004, at 232; Francis Fukuyama, *Big Science, Big Giveaway*, Wall St. J., Oct. 25, 2004, at A18.

⁵³ Klein has said that voters approved the initiative “with their eyes open” and that “the institute needs time to go through the process” and “have thoughtful due diligence.” See Bernadette Tansey, *Stem Cell Program in Limbo*, Hayward Judge Reviewing Lawsuits that Block Research, S.F. Chron. Nov. 18, 2005; Carl T. Hall, *Stem Cells: The \$3 Billion Bet*, S.F. Chron., Apr. 21, 2005.

involving other groups in the drafting. In this way, the initiative process can incorporate some of the aspects of the traditional legislative process where tradeoffs can be made and compromises can be reached. The scope of any logrolling will be limited by both the breadth of the general policy statement and the requirement that the text voted on by the people fairly fit within the objectives it set out. We also envision that states will retain the single-subject requirement⁵⁴ under this new framework, a restriction that further constrains the scope of negotiations and compromise.

The second reading stage promises other systemic benefits. More drafting flexibility before the vote might also reduce litigation after Election Day which often revolves around awkward wording. Moreover, the discussion that would accompany the decision to amend an initiative's language and the record from legislative hearings could provide courts with evidence helpful in interpreting vague or ambiguous language in subsequent lawsuits.⁵⁵ Requiring a second reading in the initiative process may reduce the use of crypto-initiatives for which policy change is at best a secondary consideration.⁵⁶ The need to negotiate with legislators before an initiative is actually placed on the ballot may reduce the purely political use of initiatives by giving the legislature an opportunity to short-circuit crypto-initiatives. Also, the information developed during this period could also better inform those providing fiscal analyses of the initiatives. Importantly, unlike the indirect initiative in many states, the legislature could not unilaterally deny proponents access to the ballot by passing an alternative formulation. In our Dual Path Initiative Framework, the proponents always have the option to put their reform on the ballot, even if the legislature has responded with a statute or a constitutional ballot measure.⁵⁷

3.2.2. A Formal Role for the Legislature

⁵⁴ For a discussion of the single-subject requirement in the context of initiatives, see Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 Election L.J. 35 (2002).

⁵⁵ For a discussion of how court's find "legislative intent" for initiatives, see Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L.J. 107 (1995).

⁵⁶ See Kousser & McCubbins, *supra* note 2, at 969-74 (discussing rise of crypto-initiatives).

⁵⁷ This provides an antidote for the concern that in some circumstances the legislature will respond to an initiative with a legislative bargain satisfying only those with outlying preferences. See John G. Matsusaka & Nolan M. McCarty, *Political Resource Allocation: Benefits and Costs of Voter Initiatives*, 17 J. of Law, Econ. & Org. 413 (2001).

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

It is likely that at least some initiative advocates would be willing to explore legislative alternatives because they are now increasingly using ballot measures as leverage in the legislature. Often initiative proponents would prefer to avoid an election, which is costly and risky. Even if their change is constitutional and thus necessitates a vote, ballot measures backed by the legislature pass at significantly higher rates than do popular initiatives.⁵⁸ Accordingly, they hope that the credible threat of ballot victory encourages legislative leaders to work out a mutually agreeable compromise. Currently, if a compromise can be reached before signatures have to be filed with the California Secretary of State, then there is no difficulty because the supporters can decide not to turn the petitions in. The complication arises when a compromise comes after the signatures have been verified and the question certified for the ballot. In most states, proponents cannot pull a question from the ballot once it is certified.⁵⁹ This inflexibility can cause confusion if the compromise that is reached requires the legislature to submit a different but related question to the people. Then the ballot contains two incompatible measures, and the parties to the deal have to specify to voters which measure they should vote for and which they should ignore or vote against. In some cases, this message can be successfully conveyed. For example, in 2004, Governor Schwarzenegger hammered out a deal with local government officials that allowed him to get a budget through the legislature. In return for the local leaders' support, the legislature put Proposition 1A on the ballot to amend the Constitution to somewhat protect local governments' property tax and sales tax proceeds from state raids in

⁵⁸ While most popular initiatives are defeated, most questions put on the ballot by legislatures pass. In California, 65 percent of legislative initiatives pass, while around a third of popular initiatives succeed at the polls. Bruce E. Cain, Sara Ferejohn, Margarita Najjar & Mary Walther, *Constitutional Change: Is it Too Easy to Amend our State Constitution*, in *Constitutional Reform in California*, supra note 22, at 265, 269. See also David B. Magleby, *Direct Legislation* 107 (1984); Thomas E. Cronin, *Direct Democracy* 197 (1989) (providing similar national figures).

⁵⁹ Although most states limit the ability of proponents to withdraw the ballot measures after signatures have been submitted or verified, see, e.g., Okla. Stat. § 34-8, South Dakota allows proponents to withdraw an initiative if the election is at least 120 days away, and if at least two-thirds of the named sponsors request withdrawal, in writing, with the Secretary of State. S.D. Codified Laws § 2-1-2.2. See also Colo. Rev. Stat. 1-40-134 (allowing proponents to pull a measure from the ballot no later than 33 days before the election).

the future.⁶⁰ To increase the likelihood that the Governor and legislators would deal with them, the local governments had already qualified Proposition 65 for the November ballot, which would have much more severely limited the ability of the state to use these revenues in an emergency.⁶¹ Once a deal was reached, the local governments dropped their support of Proposition 65 and joined the campaign for Proposition 1A, but both measures still appeared on the ballot in November.⁶²

In this case, the compromise passed and the initiative used as a threat in the bargaining did not, but it surely would have been simpler and less confusing had the supporters of Proposition 65 been allowed to remove that measure entirely. If our framework had been in place, these negotiations would have occurred in the second reading stage, and only the compromise constitutional amendment would have appeared on the ballot. Although constitutional compromises will entail a popular vote, when statutory compromises are sufficient to satisfy all the parties, then nothing needs to be taken to the people after a successful bargain. Merely qualifying a general statement of policy does not require the proponents to proceed all the way to an election.

The second reading stage encourages negotiation and compromise with the legislature in other ways. Not only does the legislature necessarily become involved as it conducts mandatory hearings on the proposal, but the legislature also has leverage to encourage initiative supporters to deal with it. Our framework permits both the legislature and the group qualifying the policy to place initiatives on the same topic on the ballot. If no mutually acceptable compromise is reached – and either passed as legislation or put on the ballot as a consensus initiative – then the legislature has the right to place its own measure on the ballot. Our framework would not limit the legislature to achieving the policy goals identified in the statement that had been circulated; rather, the legislature can put any initiative on the ballot, as it can under current rules. Thus, the

⁶⁰ See Tom Chorneau & Doug Haberman, *Local Officials Seek End to State Raids on Funds*, Press Enterprise, Oct. 25, 2004.

⁶¹ See Proposition 65, available at <http://www.voterguide.ss.ca.gov/propositions/prop65-title.htm> (requiring voter approval for any reduction of local governments' vehicle license fee revenues, sales tax revenues, or share of local property taxes).

⁶² See Proposition 65, Excerpts from Voter Information Pamphlet, available at http://www.sa.ca.gov/elections/bp_nov04/supplemental/vig_sup_65_entire/pdf (providing no argument in favor of Proposition 65 and urging voters to pass Proposition 1A, "a new and better measure ... to prevent state raids of local government funding"). Proposition 1A passed with 83% of the vote; Proposition 65 was handily defeated. See California Secretary of State, California General Election, November 2, 2004, State Ballot Measures, Statewide Returns, available at <http://vote2004.ss.ca.gov/Returns/prop/00.htm>.

legislature has the flexibility to achieve the objective identified in the policy statement but in a different way – or to achieve a different and perhaps incompatible objective. The state may use its power to cause enough confusion to result in the defeat of both proposals, or it may actually succeed in passing its ballot measure. The California legislature used this strategy in 2004 to defeat an initiative proposing non-partisan primaries. Instead, voters passed a legislatively-initiated ballot measure amending the constitution to allow political parties control over their own primaries, essentially a codification of the status quo.⁶³

Initiative proponents also have some clout in this bargaining game. As we have noted, they can walk away from any bargain and take their proposal directly to the people for enactment. If they choose that route and succeed, then the Citizens' Initiative Implementation Oversight Commission ("CIIOC") will play a role in the implementation of the initiative.⁶⁴ If the legislature wishes to avoid the possibility of involvement by the CIIOC in the future, then lawmakers will have to reach a deal that proponents support. Thus, both sides have reasons to bargain with the other, and our framework changes the bargaining dynamics in significant ways relative to the status quo. It also provides additional information to voters who can learn of the legislature's response to any initiative proposal. Indeed, even the decision not to bargain or respond, beyond the mandated hearings, to a proposal provides credible information to voters.

3.2.3. Certifying the Text for the Ballot

At the end of the second reading stage, when initiative sponsors propose final text, the actual detailed proposal must go to the Citizens' Initiative Implementation Oversight Commission. The CIIOC (or a subcommittee or staff person to whom this has been delegated) will determine whether the text fits fairly within the scope of the general policy that had appeared on the petition. The CIIOC has the option of certifying the initiative for the ballot, severing provisions that are beyond the scope of the policy statement, or disqualifying the entire initiative as inconsistent with the statement. There should be expedited appeals of a CIIOC decision through the state courts. We advocate this role for the CIIOC, and not the Attorney General or Secretary

⁶³The legislature-sponsored proposal was Proposition 60, which was placed on the ballot to react to Proposition 62, the nonpartisan primary initiative. Proposition 60 passed overwhelmingly with 67% of the vote, while Proposition 62 failed. California Secretary of State, *Votes For and Against Statewide Ballot Measures*, available at http://www.ss.ca.gov/elections/sov/2004_general/sov_pref21_votes_for_and_against.pdf.

⁶⁴ See *infra* Part 4 (discussing the CIIOC).

of State who has similar responsibilities now, because a state official, likely hostile to any initiative that has not been embraced by the established political actors, may not rule fairly on the ballot measures. Current rules allowing the legislature to place initiatives on the ballot would remain in place, allowing the legislature to put its own competing proposal on the ballot in cases where no compromise was reached. In that event, the CHOC would provide a statement about how the legislative proposal fits, if at all, with the goals of the original policy statement.

Our framework injects a new issue into any campaign relating to an initiative. We expect that opponents will argue that the version submitted to the voters diverges from the policy statement that was circulated for signatures. This argument might influence people to vote against the initiative either because it is not what they originally supported or because this sort of strategic behavior casts doubt on the motives and honesty of the proponents. Anticipating this kind of attack, proponents are more likely to draft relatively simple text so that concerned voters can check the language and assess the accuracy of campaign claims. This is a positive development because it makes it more difficult for proponents to slip in special provisions benefiting them or their allies and encourages straightforward and relatively clear statutory or constitutional proposals. Simplicity will not always be a tactic available to proponents; some reforms are necessarily complicated. But, on the whole, we would expect that our framework would improve transparency in the text of initiatives.

Even with these changes in the process of proposing and drafting initiatives, we expect some to contain mistakes or to cause consequences not fully understood when they were enacted. After all, even with many vetogates, expert staff, and time for deliberation in the traditional legislature, some statutes are poorly written, hastily conceived, and prone to unanticipated consequences.⁶⁵ Thus, the third reading stage of our framework focuses on the ability to revise popularly enacted laws and constitutional amendments after they are passed.

3.3. Third Reading: Allowing Revision After Enactment

⁶⁵ Nagle observes that the legislature can sometimes fail to take advantage of vetogates in his interesting piece comparing initiatives with hastily enacted statutes. See John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1 N.Y.U. J. Legis. & Pub. Pol'y 163 (1997). Certainly, we do not want to compare an ideal legislative process with a realistic, or even cynical, view of direct democracy. But our point is that the legislative process provides checks and balances – including the executive's veto power – that the initiative process simply lacks. Our goal is to suggest additional checks for the latter process, in the hope that they will be used to improve policy but with awareness that they will not be foolproof.

The issue of post-enactment change to initiatives must be resolved differently for statutory initiatives and constitutional initiatives. In every state that allows popularly-generated constitutional amendments, a subsequent popular vote is required to amend or repeal such an initiative. Statutory initiatives, on the other hand, are more amenable to subsequent revision. All states except California allow legislatures some latitude to modify statutory initiatives; in California, statutory initiatives are insulated from subsequent legislative involvement unless specifically authorized by the initiative itself.⁶⁶ A few other states prohibit repeal, at least for the first few years the initiative is effective. Other states require supermajority legislative votes to amend or repeal popularly-enacted laws, and Arizona requires that any amendment further the purposes of the initiative and be passed by three-fourths votes of both houses.⁶⁷ We will discuss the framework for statutory initiatives first and then deal with the harder issue of revision of the more durable constitutional initiatives. Our focus is on initiatives that are placed on the ballot by individuals and groups, not by the legislature. Legislatively-backed constitutional initiatives have the advantage of the checks and balances in the legislative process and thus do not require the additional check of the third reading stage described here.

3.3.1. Statutory Initiatives

Under our new framework, some proposals for statutory changes qualified in the first reading stage will never appear on the ballot because a successful compromise with the legislature will be negotiated that culminates in the enactment of legislation through the traditional legislative process. However, some proponents will not be satisfied with the legislature's response and will place their statute on the ballot. Unlike the current regime in California, the initiative framework should allow legislative repeal and amendment of such statutory initiatives with the following limitations. First, repeal by two-thirds vote of the legislature should be possible only after two years of experience with the initiative, and a two-thirds vote of the legislature should be required for amendments, which must further the objectives of the popularly-enacted law. Some protection from the legislature is required, because lawmakers can be hostile to initiatives, which are often used to circumvent the traditional process to enact policy. We allow repeal but limit

⁶⁶ Cal. Const. art. II, § 10(c).

⁶⁷ See Waters, *supra* note 15, at 27; Ariz. Const. Art. 4 Pt. 1 §6(c). Arizona is also a state that prohibits repeal of an initiative by the legislature.

amendments to those consistent with the purpose of the law because this design better ensures accountability for lawmakers who seek to undermine the statute. If they want to negate the law, they must do so directly by repeal, not through amendments that gut the proposal surreptitiously while still leaving it on the books. This latter course of action is much more likely to occur without the public's knowledge; outright repeal is apt to be noticed.

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

3.3.2. Constitutional Initiatives

Currently, many initiatives are constitutional amendments and thus cannot be changed by the legislature, but only by a subsequent popular vote. If an initiative framework made statutory initiatives more susceptible to legislative tinkering, presumably the number of constitutional initiatives relative to statutory ones would increase. Although constitutional initiatives usually require more signatures for ballot access, few states require higher voting thresholds to pass constitutional initiatives (a simple majority of those voting is the typical requirement for enactment of any type of initiative).⁶⁸ Groups with sufficient resources find obtaining the

⁶⁸ Nevada requires that initiative constitutional amendments pass by a majority vote in two successive general elections. Waters, *supra* note 15, at 26; Nev. Const. art. 19, § 2.

additional signatures relatively unproblematic, albeit more expensive, and thus often choose the more durable constitutional route rather than the statutory form, in states where they have a choice.⁶⁹

We propose that constitutional initiatives proposed entirely through the petition process, rather than being placed on the ballot by legislatures, should require reauthorization by the people after a certain period of time, requiring either that the legislature resubmit them to the people or that proponents again gather signatures to place them on the ballot for extension. Constitutional provisions passed as initiatives should be subject to a one-time re-approval after ten years of experience.⁷⁰ Although this seems a relatively long period of time, we believe at least a decade of experience is necessary for some important initiatives to produce a record necessary to evaluate them fairly. For example, initiatives that affect structures of representation such as redistricting and campaign finance reform, perhaps the most justified use of the initiative process, must be in place for at least a decade so they do not expire before they can have any significant impact on governance. In addition, there is a cost to reauthorizing initiatives. The framework applies to all initiatives; therefore, even those that enhance welfare will expire and require re-enactment. Indeed, the framework is designed to weed out more of the welfare-reducing proposals during the second reading period before they are enacted. Finally, we want to implement a long enough period to encourage people to continue to use the initiative process; it is not our intention to construct a framework that destroys direct democracy by making initiatives so unattractive that no groups will spend time qualifying and passing them. We therefore chose a period of time that we think balances the costs and benefits of reduced durability.

Although one could argue that constitutional initiatives passed by a landslide, say by three-fourths of those voting on the measure, should not face reauthorization, Kousser and McCubbins' analysis suggests that politicians construct some initiatives to face little opposition and thus might be enacted by a substantial margin in an environment that undermines the ability

⁶⁹ In states that allow both constitutional and statutory initiatives, there have been slightly more statutory initiatives placed on the ballot through the petition process than constitutional initiatives. Data from the Initiative and Referendum Almanac, *supra* note 23, reveals that 703 constitutional amendments have appeared on the ballot in the 11 states that allow both types, while 758 statutory amendments have qualified. This data covers the period from the beginning of the initiative process in the United States through 2000.

⁷⁰ For a discussion of the effects of requiring traditional legislation to expire, including some similar to those we discuss here in the context of initiatives, see Jacob E. Gersen, *Temporary Legislation*, __ U. Chi. L. Rev. __ (forthcoming 2006).

of voters to vote competently.⁷¹ Therefore, no special treatment should be afforded to initiatives on the basis of their popularity on Election Day.

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

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

4. A Framework for the Implementation of Initiatives: A Citizens' Oversight Commission

The checks and balances provided by Dual Path Initiative Framework do not explicitly address the concern of scholars and initiative advocates that legislatures often flaunt or simply ignore the mandates of an initiative. This is called the "implementation problem,"⁷² and it occurs because initiative proponents have to delegate to others the responsibility to implement and

⁷¹ See Kousser & McCubbins, *supra* note 2, at 957-60.

⁷² See, e.g., Lupia & Matsusaka, *supra* note 1, at 475.

enforce the initiative once it has been passed. Because the initiative process is a costly way to circumvent the traditional lawmaking process, it tends to result in policies that elected officials – often a large majority of them – do not like or support.⁷³ Otherwise, reformers would have used the route of traditional lawmaking. Gerber, Lupia and McCubbins identify two groups of post-enactment actors vital to the initiative’s success after its enactment: “implementation leaders” who provide instructions for compliance (e.g., state legislators who often must pass implementing legislation), and “implementation agents” who carry out those directions (e.g., bureaucrats who oversee the day-to-day governmental activities required by the initiative and any subsequent instructions).⁷⁴ Not only are both these groups likely to be hostile to the initiative’s objectives, but initiative supporters often disband after their victory or lack the resources to monitor compliance and sanction noncompliance. For greater compliance, we need to create a third group – call them “implementation intervenors”⁷⁵ – whose interests are more closely aligned with the proponents and the voters. We propose to create such a group by establishing a statewide Citizens’ Initiative Implementation Oversight Commission (CIIOC).

4.1. Design of the Citizens’ Initiative Implementation Oversight Commission

To reduce the ability of initiative leaders and agents to disregard popular measures that the voters approve, we advocate establishing a Citizens’ Initiative Implementation Oversight Commission comprising members appointed by the initiatives that are put on the ballot by citizens. The primary role of the CIIOC will be to oversee the actions of the implementation leaders and agents; provide information on compliance with initiatives through hearings, press conferences, and publications; and bring enforcement actions through the courts and administrative procedures as allowed by law. Accordingly, this initiative intervenor is a component of a “fire alarm” network that will provide information to the public about each initiative and its implementation.⁷⁶ The CIIOC will be granted the power to hold hearings and produce reports, to participate in administrative actions such as rulemakings, and to bring

⁷³ See Gerber, Lupia & McCubbins, *supra* note 4, at 55-56.

⁷⁴ *Id.* at 47.

⁷⁵ Cf. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. of L., Econ. & Org. 243, 264-66 (1987) (describing intervenors in the legislative and administrative processes).

⁷⁶ Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 Am. J. Pol. Sci. 165 (1984).

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

We are not aware of any similar initiative oversight commission with jurisdiction over all popularly-initiated ballot measures. Some statewide and local initiatives establish oversight commissions with responsibilities only with regard to the particular initiative creating them. For example, the Political Reform Act enacted by statutory initiative in California in 1974 established the Fair Political Practices Commission (FPPC) with five members, appointed by the Governor, Attorney General, Secretary of State and Controller, to oversee and administer the Act.⁷⁷ The recently-enacted stem cell initiative established a California Institute for Regenerative Medicine to regulate research and to administer the grants. The 29 members of the Independent Citizens' Oversight Committee that runs the Institute are appointed by various elected officials and the Chancellors of some of the University of California universities.⁷⁸ Other states have similar initiative-specific oversight commissions such as the Citizens Clean Elections Commission established in Arizona as part of the public campaign financing system⁷⁹ and the Citizens' Utility Board established by a 1932 initiative in Oregon.⁸⁰ Local initiatives also can create citizens commissions designed to monitor compliance with the particular ballot measure. For example, an initiative on the Marin County, California ballot in June 2006 proposed to establish a Citizens' Oversight Commission to ensure that money from an education bond was spent according to the terms of the ballot measure. The Commission was to be appointed by the Board of Trustees of the school district, undermining the proponents' claims that it would be independent. These provisions of the ballot measure were explicitly designed to respond to the implementation problem: the opponents' arguments against the measure began with a recitation of past promises related to educational infrastructure that politicians had repeatedly broken.⁸¹

⁷⁷ See Cal. Gov. Code §§ 83100 et seq. (Deering 2006).

⁷⁸ Cal Health & Saf. Code §§ 125290.10 et seq. (Deering 2006).

⁷⁹ Ariz. Rev. Stat. § 16-955A (2006).

⁸⁰ Or. Rev. Stat. §§ 774-070 et seq. (2006).

⁸¹ See <http://www.co.marin.ca.us/depts/RV/main/Prime60606/Measures/21-554.pdf> (Marin county ballot pamphlet giving the arguments for and against the measure).

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

The CIIOC eliminates the need for separate oversight commissions at the state level and replaces them with one well-staffed and permanent commission.⁸² Each statewide initiative will be required to name one representative to serve on the CIIOC if the initiative is enacted.⁸³ This representative will serve one ten-year term in the case of constitutional initiatives or one term of ten years or until the initiative is repealed, whichever is shorter, in the case of statutory initiatives. Each initiative will also name a group of potential replacements for the representative in case she does not serve her full ten year term.⁸⁴ The CIIOC will randomly select from that group of replacements when the need to fill a vacancy occurs.⁸⁵ If none of the replacements is willing to serve, or the initiative fails to name replacements, then the vacancy will not be filled.⁸⁶ This method of selection ensures that the interests of the commissioners will be more aligned with the voters and proponents of the reform, allowing their objectives to remain in play for at least a decade. It also avoids the specter of elected officials nominating people to the commission who are likely not to be sufficiently supportive of the popularly-enacted laws and constitutional amendments.

⁸² Initiatives might still set up initiative-specific agencies to implement the new policy; the CIIOC does not eliminate the need for such administrative agencies. However, because many of these are appointed by elected officials, the CIIOC should improve compliance even in these cases because the appointed officials may have preferences more aligned with those who appointed them than with the voters or initiative proponents.

⁸³ Thus, the number of commissioners will fluctuate as the number of initiatives fluctuates. Commissioners will be part-time positions, with compensation for expenses only. As initiatives conflict, so might the commissioners, but this conflict is just a reflection of state politics and the decisions of the voters in passing conflicting initiatives. The commission then provides another forum for these conflicts to be made public and explicit and to be brought to a resolution. We object to a commission run by experts, such as former legislators or judges, who are often part of the problem being addressed by an initiative. The commission may not need to meet very often, but should meet and publish reports on implementation each fall, and will meet to approve the language of new initiatives as needed. The commission should meet as often as needed by circumstances and should have a budget large enough to allow a sufficient number of meetings.

⁸⁴ Like the FPPC, commissioners would be removable by the Governor, with the concurrence of the Senate, for "substantial neglect of duty, gross misconduct in office, inability to discharge the powers and duties of office ..., after written notice and an opportunity for reply." Cal. Gov. Code § 83105.

⁸⁵ For a recent use of random selection as part of a political process, see George A. Papandreou, *Picking Candidates by the Numbers*, International Herald Trib., June 8, 2006, at 8 (Socialist Party candidate for mayor picked in deliberative poll conducted by 160 randomly selected citizens).

⁸⁶ The ability to fill a vacancy on the commission reflects how much people care about the implementation of an initiative.

To establish the CIIOC immediately, members from current initiative-specific commissions will be randomly selected to serve terms staggered to end as the CIIOC begins to be filled by representatives of initiatives passed after its creation. Thus, in California, the CIIOC might first be formed with a representative from the FPPC, the stem cell Independent Citizens' Oversight Committee, the Children and Families First Commission,⁸⁷ and other similar initiative-created commissions that act in whole or in part as implementation intervenors. After five to seven years, all these members will have rotated off the CIIOC, replaced by representatives of newly-enacted initiatives.

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

The CIIOC will employ an executive director, a legal counsel, a director of communications, a director of research, a director of information services and technology, and other appropriate professional staff. The compensation and the budget will be tied to another state administrative agency's budget, such as the Legislative Analysts Office, and increased automatically according to the number of initiatives overseen and by changes in the cost-of-living in order to avoid the possibility that the legislature will hamstring the CIIOC by denying it funding. Thus, in California the funding structure could be similar to the one which governs the California FPPC: the FPPC chair is paid the same salary as the president of the Public Utilities Commission, other commissioners receive a modest honorarium for each day they are engaged in official duties,⁸⁸ and the budget of the FPPC is set by law and increases automatically by the cost of living.⁸⁹

⁸⁷ Cal. Health & Safety Code §§ 130110 et seq. (Deering 2006).

⁸⁸ Cal. Gov. Code § 83106.

⁸⁹ Cal. Gov. Code § 83122.

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

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

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

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

However, the ability to specify fully is limited for a variety of reasons.⁹⁰ Thus, the CIIOC will nearly always face some possibility of losing when it seeks to enforce its view of the initiative, and this will affect its willingness to bring the action in the first place.

We anticipate that the CIIOC will be popular with the voters. Citizens' assemblies are an increasingly attractive solution to political problems caused when entrenched political actors pursue their self-interest at the expense of the public interest – or are perceived to be doing so. For example, a Citizens' Assembly on Electoral Reform in British Columbia, Canada, consisting of 160 citizens selected randomly from the province's electoral districts, conducted fifty hearings on electoral reform in 2004.⁹¹ With the help of an expert staff, these ordinary citizens proposed changing the system of representation from first-past-the-post, single-member districts to a single transferable vote system.⁹² The proposal was submitted to the people in a referendum. To pass, the referendum had to receive both a supermajority of 60% of all those voting and a simple majority in 60% of the 79 electoral districts. The referendum failed, but it only barely missed the threshold when it received over 57% support and achieved a simple majority in all but two districts.⁹³ A similar citizens' assembly has been proposed in California to consider election reform.⁹⁴ Although these citizens' assemblies are law-proposing bodies and thus serve a function different from the CIIOC's, they reflect the current enthusiasm for mechanisms that facilitate increased citizen involvement in policy making. Moreover, they demonstrate the reality that institutional innovation is necessary to deal with inevitable conflicts of interest when laws regulating the political process would otherwise be crafted or implemented by those active in the political process – that is, when the regulators are also the regulated.

4.2. The Effectiveness of CIIOC as Implementation Intervenor

⁹⁰ For a discussion of the reasons initiatives use vague language now, see Gerber, Lupia & McCubbins, *supra* note 4, at 58.

⁹¹ See Keith Archer, *Redefining Electoral Democracy in Canada*, 3 Elect. L.J. 545 (2004). The website of the Citizens' Assembly is <http://www.citizensassembly.bc.ca/public>.

⁹² See British Columbia's Citizens' Assembly on Electoral Reform, *Final Report: Making Every Vote Count* 3-4 (Dec. 2004).

⁹³ See Final Referendum Results: Referendum on Electoral Reform, *available at* <http://www.elections.bc.ca/elections/ge2005/finalrefresults.htm> (2005).

⁹⁴ See Assembly Constitutional Amendment 28, the Citizens Assembly on Electoral Systems Act of 2006 (introduced by Assemblyman Joseph Canciamilla and still in committee). In addition, a citizens' assembly is under consideration in Ontario. See News Release, *Ontarians To Have a Say on Electoral Reform*, Nov. 18, 2004, *available at* <http://www.premier.gov.on.ca/english/news/ElectoralReform111804.asp>. See also Ethan Lieb, *Deliberative Democracy in America: A Proposal For A Popular Branch of Government* (2004) (proposing an institution like a citizens' assembly in a creative proposal to make direct democracy more deliberative).

In the most comprehensive analysis of the implementation problem, Gerber, Lupia, McCubbins and Kiewiet identify four conditions affecting the degree of compliance with popular initiatives.⁹⁵ The CIIOC, particularly as part of the larger Dual Path Initiative Framework that we propose, implicates three of the four conditions and does so in ways that will result in fuller compliance with the wishes of the voters than occurs now.

First, lowering the technical and/or political costs of implementation leads to greater compliance by a legislature.⁹⁶ Technical costs are affected by the clarity of drafting an initiative because they include “the time and monetary costs of having legislative staff determine how to implement aspects of the initiative.”⁹⁷ The previously discussed first and second readings of an initiative should reduce the technical costs of implementation and thereby increase the probability of compliance. The CIIOC can tilt the balance of political costs in favor of implementation, as well as positively affecting technical costs of monitoring mandated programs. Most initiative sponsors do not have the financial resources to oversee the post-election process, and many disband after the measure has passed. Thus, they currently find it difficult to impose significant political costs on legislators for ignoring voter-passed initiatives. However, an oversight commission that provides “sunshine” and has enforcement authority creates a greater chance that there will be political costs for undermining voter-passed initiatives. By creating political costs for failing to implement an initiative’s dictates, oversight helps to equalize the costs politicians face if they implement an initiative that works against their self-interest against the costs of not following the voters’ wishes. To the extent that oversight shifts the balance of costs toward implementation, the oversight committee will have a positive effect on the probability of implementation.

Second, an initiative is more likely to be implemented if those supporting the measure can impose effective sanctions on initiative leaders or agents who do not comply with the initiative.⁹⁸ Currently, initiative proponents have very limited sanctioning ability.⁹⁹ Under our proposal, their power to punish recalcitrant politicians and bureaucrats is greatly augmented. Initiative sponsors select who sits on the commission, and they will choose agents who are likely

⁹⁵ See Gerber, Lupia, McCubbins & Kiewiet, *supra* note 4, at 15-25.

⁹⁶ *Id.* at 20.

⁹⁷ *Id.*

⁹⁸ *Id.* at 21.

⁹⁹ Gerber, Lupia & McCubbins, *supra* note 4, at 51.

to have common interests and push forcefully for fuller implementation. The oversight commission will have the ability to publicize the actions of the implementers through hearings, publications, press conference and enforcement actions. By bringing lawsuits and other proceedings, they can use the coercive power of the state to increase compliance. Politicians are primarily concerned about re-election;¹⁰⁰ if they anticipate that the information and attention created by the oversight commission is likely to affect their reelection prospects, then they will exercise greater energy in policy implementation.

A third condition that increases compliance is the ability and willingness of the public or others who support the initiative to observe the actions of the legislature.¹⁰¹ For example, although initiatives imposing legislative term limits are enormously unpopular with lawmakers themselves, they are fully complied with because the failure to leave office at the end of the term is easily observable. Even if the voters forget how long a particular representative has served, her challenger and the press can bring the matter to the voters' attention.¹⁰² Term limits are an unusual case; in most circumstances, voters and information intermediaries face substantial difficulties in learning of the actions of initiative leaders and agents. Our framework directly addresses this issue by creating a standing entity with the resources to oversee implementation and with the incentive to ensure fuller compliance. Importantly, the technical staff and budget of the CIIOC will help to level the playing field between the legislators and the public, thereby increasing compliance with the initiative's dictates.

The fourth condition affecting implementation is the number of people required for full compliance: as that number grows the probability of full compliance goes to zero.¹⁰³ The addition of an oversight commission does not address this concern with implementation. However, proponents concerned about this factor can use the time during the first two readings in the framework initiative process to design legislation that minimizes the number of required participants. We suspect, however, that many reforms require many agents to implement them appropriately so the ability of proponents to reduce the threat to their measures by reducing the number of parties involved is limited.

¹⁰⁰ This is the standard assumption in the legislation scholarship. See David R. Mayhew, *Congress: The Electoral Connection* (1974) (canonical statement of assumption).

¹⁰¹ Gerber, Lupia, McCubbins & Kiewiet, *supra* note 4, at 22.

¹⁰² An additional factor in the success of the term limits initiatives is that they were backed by several well-funded national organizations that did not disband after succeeding in passing the measures. For a discussion of term limits and the implementation problem, see *id.* at 57-59.

¹⁰³ *Id.* at 24.

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

5. Conclusion: More Thoughts on the Political Equilibrium after Adoption of the Dual Path Initiative Framework

Our previous discussion has suggested some characteristics of the political equilibrium that would result from adoption of our proposal. It is worth noting briefly several other changes to the political landscape that we expect. First, we do not anticipate that our reforms will significantly change the balance between statutory and constitutional initiatives because we do not alter the qualification requirements for either type of initiative. Currently, initiatives proponents use statutory initiatives more than popularly-generated constitutional amendments, even though in all states except California legislatures have the ability to amend and/or repeal statutory initiatives.¹⁰⁴ Adding new restrictions (mandatory re-authorization after a decade of experience) to constitutional initiatives will make popular constitutional change relatively less attractive than it is now. So if there is any shift, it should favor increased use of the statutory route, with the corresponding benefit of the possibility of legislative involvement after enactment, allowing flexibility to change the policy over time.

Second, the new equilibrium will result in a different number of initiatives appearing on the ballot than do now, although there are several cross-cutting factors at play so the direction of the change is uncertain. First, our proposal is intended to give initiative proponents an opportunity to qualify policy statements more easily than they can now qualify either type of initiative. The policy statements are less complicated than the text of an initiative, probably making them easier to sell to voters in a signature gathering drive and reducing the costs for drafting them. Thus, we predict that more policy statements will be qualified to move to the second reading period than are currently qualified for the ballot now. Furthermore, the lower costs of qualification (because there is no need to draft detailed text) will encourage smaller

¹⁰⁴ See footnote 69.

groups and grassroots efforts to pursue the initiative process then do so now in the more costly system. Although our proposal does not reduce the power of money in the qualification stage, we do level the playing field for those groups whom the inventors of direct democracy hoped to empower: grassroots groups that are more likely to reflect majoritarian preferences somehow blocked in the legislative process.

However, there are countervailing forces that may discourage the expenditure of money and effort on an initiative. The institutionalized possibility of legislative action during the second reading stage makes any policy gains less certain. Although proponents can still place the measure on the ballot no matter what happens in the second reading stage – legislative action does not foreclose this possibility – voters often defeat both proposals when there are competing initiatives, and the legislatively-backed ballot measures tend to succeed more than popularly-generated ones. The combined effect of more legislative involvement and reduced durability (through mandatory reauthorizations for constitutional initiatives and legislative involvement in statutory ones) will decrease the value of initiatives. By lowering the value of an initiative, we should have fewer initiatives appearing on the ballot. In other words, more policy statements may be qualified, but fewer initiatives may appear on the ballot as proponents bargain with legislators more readily under our proposed incentive structure. As we observed earlier, one way to think of the first reading stage is as a new route of bill proposal in the legislature.¹⁰⁵

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

Another factor affecting the number of initiatives on the ballot is the effect of the re-approval requirement for constitutional amendments which requires that supporters place them back on the ballot to remain effective. We expect most of constitutional provisions will be re-

¹⁰⁵ See supra Section 3.2.

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

Third, although the analysis above suggests that initiatives will have lower value to proponents because of their reduced durability, the CIIOC will actually increase another aspect of the value of popular statutory or constitutional initiatives. The CIIOC will ensure that initiatives enacted by the voters at the polls are more fully implemented, at least until they expire, in the case of constitutional initiatives, or are repealed by the legislature, in the case of statutory measures (an action for which there may be electoral consequences). If, in the end, this effect outweighs the former effects, and more initiatives end up on the ballot because of the promise of citizen oversight, at least they will have had three readings and a chance for legislative involvement before they become the law. The role of the CIIOC with respect to popularly-generated initiatives will encourage the legislature to bargain with initiative proponents because a compromise – whether statutory or constitutional – will not bring with it involvement by the independent group of citizen overseers. Proponents may be willing to give up the protection of the CIIOC in return for permanent enactment of a legislatively-supported constitutional amendment or a statutory solution that lawmakers are more likely to enforce since they played a role in its design.

The equilibrium outcome under the new framework for initiatives – with its dual path process of three readings and the creation of the Citizens' Initiative Implementation Oversight

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