

# Whose Constitution Is It Anyway? The Executives' Discretion to Defend Initiatives Amending the California Constitution

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## Introduction

On September 8, 2010, the California Supreme Court declared that Governor Arnold Schwarzenegger and Attorney General Jerry Brown need not defend their state's freshly amended constitution.<sup>1</sup> The court's decision was brief.<sup>2</sup> This ruling, however, may end the decade long political and legal struggle over same-sex marriage in California.<sup>3</sup>

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1. *Beckley v. Schwarzenegger*, Case No. S186072, Sept. 8, 2011, appeal dismissed, [http://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=0&doc\\_id=1954641&doc\\_no=S186072](http://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=0&doc_id=1954641&doc_no=S186072) (California Supreme Court denying petition for review). See also Letter Brief of Respondent-Appellee Attorney General Jerry Brown at 1, *Beckley v. Schwarzenegger*, No. S186072 (Cal. Sept. 8, 2010) 2010 WL 3874716.

2. Letter Brief of Respondent-Appellee Attorney General Jerry Brown at 1, *Beckley*, No. S186072. Joshua Beckley, a proponent of Proposition 8 petitioned for a writ of mandamus to compel Governor Arnold Schwarzenegger and Attorney General Jerry Brown to file a notice of appeal to the District Court's decision striking down of Proposition 8. The decision was economical, only stating: "The petition for review denied." *Id.*

3. In 2004, San Francisco began issuing marriage licenses to same-sex couples. These actions were promptly halted because existing state law forbid same-sex marriage. *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1105-06 (2004). In 2008, the existing prohibitions on same-sex marriage were ruled invalid under the California Constitution. *In Re Marriage Cases*, 43 Cal. 4th 757, 829 (2008). This ruling energized opponents of same-sex marriage who led the movement to pass Proposition 8. CAL. CONST. art. I, § 7.5. Initial efforts to invalidate Proposition 8 as an impermissible revision of the California Constitution failed. *Strauss v. Horton*, 46 Cal. 4th 364, 411 (2009). A

Almost two years earlier the people of California, acting through the state's system of direct democracy, adopted Proposition 8: The Marriage Protection Act.<sup>4</sup> This proposition added section 7.5 to article I of the California Constitution and so enshrined marriage as a right solely reserved for opposite-sex couples.<sup>5</sup> This alteration to the California Constitution would not endure without legal challenge.<sup>6</sup> On August 4, 2010, the United States District Court ruled, in *Perry v. Schwarzenegger*, that Proposition 8 violated the United States Constitution.<sup>7</sup> One week later, Attorney General Jerry Brown, a named defendant in the case and the government official charged with supervising all legal matters in which California is interested, announced that he would not appeal the decision to strike down Proposition 8.<sup>8</sup> Governor and fellow defendant Arnold Schwarzenegger would come to the same conclusion.<sup>9</sup> These refusals from the pinnacle of government to defend the new amendment were, according to the California Supreme Court, appropriate expressions of executive discretion.<sup>10</sup>

Not all shared this view of executive discretion. Pacific Justice Institute lawyer Kevin Snider, whose organization filed the unsuccessful suit to compel Governor Schwarzenegger to appeal, characterized the California Supreme Court's decision as a bald

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challenge in federal court fared better, as the District Court found that the ban on same-sex marriage violated constitutional guarantees of Equal Protection and Due Process. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010). During the trial court stage of *Perry v. Schwarzenegger*, the citizen groups that promoted Proposition 8 were allowed to intervene and argue for the constitutionality of the initiative. *Id.* at 928. Currently the issue of these proponents' standing in appellate proceedings is under review by the California Supreme Court. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1196–1197 (9th Cir. 2011) (certifying question to the California Supreme Court).

4. CAL. CONST. art. I, § 7.5. The language of Proposition 8 is not ambiguous: "Only marriage between a man and a woman is valid or recognized in California." *Id.*

5. *Id.*

6. *See supra* note 3.

7. *Perry*, 704 F. Supp. 2d at 1003.

8. Attorney General's Opp'n Emergency Mot. for Stay Pending Appeal at 3, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. August 6, 2010), 2010 WL 3065298; CAL. GOV'T CODE § 12511 (West 2011) (the attorney general is in charge of all legal matters in which the state is interested).

9. Letter Brief of Respondent-Appellee Arnold Schwarzenegger at 1, *Beckley v. Schwarzenegger*, No. S186072, 2010 WL 3874716, at \*1 (Cal. Sept. 8, 2010), available at <http://www.lgbtpov.com/2010/09/developing-california-supreme-court-wants-governor-and-attorney-general-to-explain-themselves-on-prop-8/>.

10. *Beckley*, No. S186072, 2010 WL 3874716, at \*1.

affront to the democratic process.<sup>11</sup> “When the people peacefully enact a constitutional provision and the attorney general refuses to give them meaningful review in the federal judiciary, then you have a veto by the executive branch. That is a constitutional crisis, usurping the power of the people.”<sup>12</sup>

This complaint did not stem from a desire to witness the Attorney General’s elocution in court. Instead in *Beckley v. Schwarzenegger*, the proponents of Proposition 8 prayed only for a writ requiring the Attorney General to issue a notice of appeal which would allow them to intervene and continue to advocate for the initiative’s validity in appellate proceedings.<sup>13</sup> Currently the California Supreme Court is reviewing the question of the proponents’ standing to appeal on behalf of Proposition 8.<sup>14</sup> With no government official defending the initiative, there today exists a distinct possibility that the District Court’s findings of unconstitutionality in *Perry v. Schwarzenegger* will remain. While this issue is not settled, the proponents will have a difficult case to make as a previous United States Supreme Court decision suggests that private citizens do not have standing to defend an initiative in court.<sup>15</sup> The potential for the legal controversy over Proposition 8 to suddenly end without further appellate proceedings did not only perturb the initiative’s proponents. Even the Los Angeles Times’

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11. Bob Egelko, *Court Won’t Force State to Defend Proposition 8*, S.F. CHRON, September 3, 2010, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/09/02/BAPN1F7SPG.DTL&tsp=1>.

12. *Id.*

13. Letter Brief of Attorney General Jerry Brown at 4, *Beckley v. Schwarzenegger*, 2010 WL 3874716 (Cal. September 8, 2010) (No. S186072).

14. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1196–1197 (9th Cir. 2011) (No. 10-16696) (order certifying question to the California Supreme Court). The question of proponent standing is fascinating, but not the subject of this brief note. For a more thorough discussion of the topic see Heather Elliot *Congress’s Inability to Solve Standing Problems*, 91 B.U.L. REV. 159, 178–80 (2011).

15. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997); *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (“[S]tatus as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive.”). If the California Supreme Court finds that the proponents have standing this decision will most likely be highly dependent on the particular fact that the proponents supported Proposition 8 throughout the state court proceedings and this decision will not set a precedent substantially weakening the impact of an executive decision to not defend. Furthermore, the California Supreme Court’s decision only serves as an advisory opinion for the federal courts which will ultimately decide the issue of Article III standing in Proposition 8 litigation. Last, if the proponents are ultimately given standing to pursue their appeal they will have to do at their own cost as California’s executives have utilized their discretionary abilities to abandon the defense of Proposition 8.

Editorial Board, which opposed Proposition 8, saw the refusal to defend the amendment as an inappropriate denial of “the voters’ right to expect the state to defend its laws.”<sup>16</sup>

These criticisms, while superficially appealing, ignore an essential component of California’s constitutional arrangement. Although the initiative may reflect a “theory that all power of government ultimately resides in the people,”<sup>17</sup> California’s governors and attorneys general do not always treat winning initiatives as sacrosanct.<sup>18</sup> As one perceptive account of California’s system of direct democracy points out, “every winning initiative gives government actors an opportunity to make implementation and enforcement decisions.”<sup>19</sup> It is true that neither attorneys general nor governors may repeal an initiative or entirely refuse to enforce an initiative until an appellate court deems the law invalid.<sup>20</sup> Still, the executives’ discretion to refuse to defend an initiative in court, power to interpret provisions, and ability to appoint those who will carry out the law confers on governors and attorneys general a substantial ability to alter the voice of direct democracy.<sup>21</sup>

Be it through a bold refusal to stand behind an initiative in court or the subtle machinations of interpretation, these executive actions raise valid concerns about public officials’ accountability to the electorate.<sup>22</sup> There is, however, another side to this story. While the California Constitution grants the people an expansive ability to democratically initiate laws and elect officials, the fundamental constitutional theory of separation of powers permits executive officers wide latitude to practice their discretionary duties in the

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16. Editorial, *Defending Prop. 8*, L.A. TIMES, Sept. 8, 2010, <http://articles.latimes.com/2010/sep/08/opinion/la-ed-prop8-20100908>.

17. *Associated Home Builders of the East Bay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (1976).

18. ELISABETH R. GERBER ET AL., *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* 4 (2001).

19. *Id.*

20. See CAL. CONST. art. II, § 10(c) (government officials may not repeal initiatives); *Lockyer*, 33 Cal. 4th at 1100–01 (government official may not refuse to enforce a law in the absence of an appellate decision that a law is invalid).

21. GERBER, *supra* note 18, at 4.

22. Michael T. Brady, Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 974–75 (1983) (arguing that an executive’s choice not to defend a statute “could allow the Executive to invalidate specific provisions of statutes and thereby exercise indirectly that which the Constitution denies him directly: a post-enactment item veto”).

manner they see fit.<sup>23</sup> Defense in court is one such manifestation of these duties. While not an everyday occurrence, there is indeed a well-established tradition of governors, attorneys general and even presidents who have refused to defend new laws because of their own doubts about the enactment's constitutionality.<sup>24</sup>

Executive officers do not, however, wield this discretion to defend in a political vacuum. While the propriety of an executive's discretionary decisions are not a matter for judicial review, these actions can still be checked by "an informed civically militant electorate" which is able to express "an aroused popular conscience that sears the conscience of the people's representatives."<sup>25</sup> If an attorney general or governor decides to buck the will of the electorate and refuse to defend the people's initiative in court, he or she is forced to make this decision publicly and then reckon with whatever political ramifications result from such idealistic stance. This political check is, on the other hand, obscured when California's executives take the alternative path and combat winning initiatives through surreptitious means of interpretation or appointment, safe from the glare of democratic accountability.

The executives' discretionary ability to alter and perhaps even abrogate winning initiatives is wide. It is not apparent whether California's electorate or executive officers hold the reigns to constitutional change in the state. This brief note hopes to shine a little clarity onto this question. Part I will first explore direct democracy's historical origins as a movement to provide the people an opportunity to legislate without the interference of government officials. Next, this section will demonstrate that the initiative gives the people an effective method of implementing their desired policies into state law. Parts II and III will examine the constitutional propriety and extent of the attorney general and governor's discretion to refuse to defend in court a popularly enacted initiative. Part IV will show how California's attorneys general and governors also limit winning initiatives through subtle, yet effective, means of interpretation and appointment. Ultimately, Part V will conclude

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23. CAL. CONST. art. II, § 10(a) (providing that an initiative that gains majority approval becomes law); CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by [California's] Constitution.").

24. See *e.g.*, *United States v. Seminole County Sch. Dist.*, 553 F.2d 992 (5th Cir. 1977); *Diamond v. Charles*, 476 U.S. 54 (1986); *Bob Jones University v. United States*, 461 U.S. 574 (1983).

25. *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

that an attorney general or governor's open refusal to defend an initiative in court provides the electorate with a prime opportunity to hold their executives accountable for neglecting the will of the people.

## I. Power to the People: The Origins and Scope of Direct Democracy in California

### A. The Progressive Movement and the Roots of the Initiative

California's adoption of direct democracy came as a result of the political victories of the Progressive Movement.<sup>26</sup> The origins of the Progressive Movement in California reveal a long-held fascination with empowering the electorate to legislate through direct democracy.<sup>27</sup> In the words of an early Progressive leader, public opinion was "a jury that could not be fixed."<sup>28</sup> Historically, the Progressives emerged as a group of middle-class reformers protesting new concentrations of power in the rapidly industrializing United States of the early twentieth century.<sup>29</sup> The Progressives were ecumenical in their scorn for these emerging monoliths, opposing both organized labor and monopolistic corporations.<sup>30</sup>

In California, the Progressives reserved the bulk of their ire for one particular target.<sup>31</sup> The Southern Pacific-Central Pacific Railroad had, since the last quarter of the nineteenth century, dominated California.<sup>32</sup> The ever-looming hand of Southern Pacific extended far into politics so that "[s]carcely a vote was cast in either house that did not show some aspect of Southern Pacific ownership, petty

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26. JOHN M. ALLSWANG, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 1898-1998*, at 8 (2000).

27. *Id.*

28. JOE MATTHEWS & MARK PAUL, *CALIFORNIA CRACK UP: HOW REFORM BROKE THE GOLDEN STATE AND HOW WE CAN FIX IT* 25 (2010).

29. GEORGE E. MOWRY, *THE CALIFORNIA PROGRESSIVES 89-91* (Quadrangle Books, 1963) (Most of the movement's leaders were either professionals or businessmen who were, in the parlance of the time, "well fixed.").

30. *Id.* at 91.

31. *Id.*

32. JOSEPH R. GRODIN, CALVIN R. MASSEY AND RICHARD B. CUNNINGHAM, *THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE*, 10 (1993). By the 1870s, Southern Pacific owned eighty-five percent of the state's railroad lines and was both the largest landowner and employer in California. *Id.* This power did not breed good stewardship. Southern Pacific charged arbitrary freight rates, favored certain merchants and threatened new towns with bypass if they did not pay tribute. *Id.* at 16.

vengeance, or legislative blackmail.”<sup>33</sup> Early attempts at hedging the power of this monopoly failed as even the Railroad Commission, established by constitutional amendment in 1879, quickly came under the grasp of Southern Pacific.<sup>34</sup>

Facing the omnipotent Southern Pacific on one flank and organized labor on the other, the Progressives turned to the power of the individual citizen in the hopes of dethroning vested interests from California’s government.<sup>35</sup> Progressive leader Marshall Stimson expressed these sentiments well when he urged voters that they could either have “a government controlled by corporate interests, Socialism, or if we have the courage, unselfishness and determination, a government of individuals.”<sup>36</sup> Another leader saw Progressivism as the very means to escape the political affiliations, which flowed from class identifications.<sup>37</sup> Indeed the Progressive would be a Californian who “believes in nationalism, in individual citizenship, and in the whole people, not in any class as a unit of government.”<sup>38</sup> This movement would be “in other words, the twentieth century evolution of democracy.”<sup>39</sup>

This evolution reached its apex in 1911 when newly elected California Governor Hiram Johnson proposed twenty-three amendments, including provisions allowing for direct democracy, to the California Constitution.<sup>40</sup> The initiative, referendum, and recall of elected officials sparked debate throughout California.<sup>41</sup> Grove Johnson, Governor Hiram Johnson’s own father and himself a politician, was no fan of direct democracy.<sup>42</sup> With an air of foreboding, the elder Johnson warned that legislating through the popular vote would only lead to political mischief. “The voice of the people is not the voice of God . . . for the voice of the people sent Jesus to the cross.”<sup>43</sup>

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33. MOWRY, *supra* note 29, at 63.

34. GRODIN, *supra* note 32, at 17.

35. MOWRY, *supra* note 29, at 91.

36. *Id.*

37. *Id.* at 104.

38. *Id.*

39. *Id.*

40. ALLSWANG, *supra* note 26, at 17 (The proposed amendments allowing for the initiative and referendum passed by a vote of 71-0 in the Assembly and 35-1 in the Senate.).

41. MOWRY, *supra* note 29, at 140.

42. *Id.*

43. *Id.*

Appeals by Grove Johnson and other foes of direct democracy had little effect. Countering their opponents' sneers, the Progressives wisely presented these reforms as a means to safeguard the will of the people from the corrupting influence of established government.<sup>44</sup> In the subsequent special election the Progressives won the day, as seventy-six percent of Californians voted to implement the initiative into the California Constitution.<sup>45</sup> California's experiment with direct democracy had begun.<sup>46</sup>

### **B. The Initiative Gives California's Voters a Simple and Expansive Means to Implement New Laws**

The initiative has given the people of California great latitude to change California law. This function of direct democracy allows the electorate to inject either a new statute or constitutional amendment into California law.<sup>47</sup> The basic mechanism of creating a new California law through the initiative is relatively simple and has witnessed little alteration since the days of the Progressives.<sup>48</sup>

To start, the proponents of an initiative write the text of the proposed statute or amendment.<sup>49</sup> The Attorney General then receives this proposal and prepares an official title and summary of the provisions in the initiative.<sup>50</sup> To gain a place on an upcoming ballot, the initiative's proponents must record the signatures of at

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44. Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1188 (1998) (citing Constitutional Amendment 22, in California Ballot Pamphlet, Special Election (Oct. 11, 1911) (Comments of Lee C. Gates, Senator, 34th District, and William C. Clark, Assemblyman, 59th District) (This ballot pamphlet urged voters to adopt the amendments allowing for direct democracy so to "safeguard which the people should retain for themselves to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and to veto or negative such measures as it may viciously or negligently enact.")).

45. ALLSWANG, *supra* note 26, at 77.

46. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, 409 (University of North Carolina Press, 1969). This preference for direct democracy in California contrasts deeply with the constitutional model envisioned by the framers of the United States Constitution. Indeed, many of the framers were primarily motivated with constituting a government that avoided the specter of "democratic despotism." *Id.*

47. CAL. CONST. art. II, § 8(b).

48. Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1188-89 (1998).

49. CAL. CONST. art. II, § 8(b). *See also* LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST?* 20-22 (League of Women Voters of California, 1987) (providing a extremely detailed summary of the process a proposed initiative must undergo to become law).

50. CAL. CONST. art. II, § 10(d).



least five percent of the total votes cast in the last gubernatorial election for a new statute, and eight percent if the initiative is to be a constitutional amendment.<sup>51</sup> When the proponents of an initiative meet these requirements, then the California Secretary of State must put the proposal on the ballot.<sup>52</sup> An initiative that can next gain the support of the bare majority of the electorate is enshrined as the law of the state.<sup>53</sup>

Few restrictions limit the subject matter that a popularly implemented initiative may cover. First, an initiative must only pertain to a single subject.<sup>54</sup> Second, an initiative may also only amend, rather than revise, the California Constitution.<sup>55</sup> Last, like any state law, an initiative must not violate the protections guaranteed by the United States Constitution.<sup>56</sup> Since the implementation of direct democracy, California's electorate has taken advantage of the system and used it to force a motley group of propositions into state law. The people of California can indeed thank direct democracy for the allowance of medical marijuana, limitations on property tax increases, the end of public affirmative action, and new standards for confining egg-laying hens.<sup>57</sup>

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51. *Id.*

52. CAL. CONST. art. II, § 8(c).

53. CAL. CONST. art. II, § 10(a).

54. CAL. CONST. art. II, § 8(d).

55. CAL. CONST. art. XVIII, §§ 1–4 (a winning initiative can revise the California Constitution if it is accompanied by the support of two thirds of the Legislature).

56. *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (striking down an initiative for violating the Equal Protection Clause). There have been interesting explorations of the proper deference the judiciary should show initiatives. *See, e.g.*, Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1504, 1507 (1990). (less judicial restraint is required when reviewing initiatives); Patrick L. Baude, *A Comment on the Evolution of Direct Democracy in Western State Constitutions*, 29 N.M.L. REV. 343, 352 (1998) (both initiative and legislative lawmaking concerning divisive social issues derive from equally nondeliberative sources).

57. CAL. HEALTH AND SAFETY CODE § 11362.5 (West 2011) (codifying Proposition 215); CAL. CONST. art. XIII(A), § 1 (codifying Proposition 14); CAL. CONST. art. I, § 31 (codifying Proposition 209); CAL. HEALTH AND SAFETY CODE § 25996 (West 2011) (codifying Proposition 2).

## II. The Executive's Discretion to Defend an Initiative in Court

### A. An Executive's Decision to Defend an Initiative is Discretionary and Protected from Judicial Compulsion by Constitutional Theories of Separation of Powers

Although California's electorate has great power to initiate new law through direct democracy, the State's Governor and Attorney General still have discretion to choose to defend this enactment in court. The California Constitution, like its federal counterpart, separates the legislative, executive, and judicial branches of government.<sup>58</sup> Since the genesis of American constitutional law, courts have been loath to compel coordinate branches of government to perform discretionary duties in a certain manner.<sup>59</sup> Indeed the most venerable of all American opinions, *Marbury v. Madison*, held that a court may only issue a writ of mandamus to compel action by an executive officer if he fails to perform an explicit ministerial duty.<sup>60</sup> "Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation."<sup>61</sup> California has embraced this fundamental principle of constitutional law. Subsequently, its courts only issue writs of mandamus when government officials violate a distinct ministerial duty derived from an identifiable statute.<sup>62</sup>

### B. There Exists No Explicit Statutory or Constitutional Provision Requiring California's Attorney General or Governor to Defend an Initiative

The California Constitution and Government Codes dictate the ministerial duties that the Attorney General and Governor must

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58. CAL. CONST. art. III, § 3. Interestingly enough, the United States Constitution never mentions separation of powers explicitly, but courts have implemented this view of government through its text and structure. Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1126 (2004).

59. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171 (1803).

60. *Marbury* 5 U.S. (1 Cranch) at 171.

61. *Id.*

62. See, e.g., *US Ecology, Inc. v. State of California*, 92 Cal. App. 4th 113, 138 (2001) (Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment.); CAL. CODE CIV. PROC. § 1085 (West 2010); *California Teachers Assn. v. Ingwerson*, 46 Cal. App. 4th 860, 865 (1996) (Mandamus will also lie to correct an abuse of discretion by an official acting in an administrative capacity).

perform. The provisions outlining the Governor's duties do not in any manner dictate a duty to defend an initiative in court.<sup>63</sup> The role of the Attorney General is more controversial, as this executive officer is indeed in charge of all legal matters involving the state.<sup>64</sup> In whole, however, neither the plain language nor any judicial interpretation of a constitutional or statutory provision requires the Attorney General to defend an initiative in court. Instead, these various provisions grant the Attorney General wide discretion to act how he sees fit during litigation.<sup>65</sup>

Article V, section 13 of the California Constitution defines the Attorney General as "the chief law officer of the state" whose "duty it is to see that the laws of the state are uniformly and adequately enforced."<sup>66</sup> Cases interpreting this provision have not identified any ministerial obligation for the Attorney General to take any specific position in litigation.<sup>67</sup>

In *People v. Honig*, for example, a criminal defendant claimed that the Attorney General lacked authority to prosecute his case.<sup>68</sup> The *Honig* court rejected this contention, finding that article V, section 13 "vests the Attorney General with broad discretion in deciding when to prosecute" and "accordingly, if the court may review the Attorney General's decision at all, it certainly may not interfere with that decision in the absence of a showing of a manifest abuse of discretion."<sup>69</sup> Similarly, other California courts have found that the Attorney General "has the power to file any civil action which he deems necessary for the enforcement of the laws of the state and the protection of public rights and interests."<sup>70</sup> Although California courts have yet to directly address the obligation of the Attorney General to defend a state law under article V, section 13, they have clearly maintained that the California Constitution grants

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63. CAL. CONST. art. V, § 1 (This provision states that the governor is the supreme executive in California, whose obligation is to see that the laws are faithfully executed, it plainly does not imply a universal obligation to defend.)

64. CAL. CONST. art. V, § 13.

65. CAL. CONST. art. V, § 13; CAL. GOV'T CODE §§ 12511, 12512 (West 2010).

66. CAL. CONST. art. V, § 13.

67. Indeed most of the cases discussing article V, section 13 have concerned the relationship between local district attorneys and the attorney general. See e.g., *People v. Dehle*, 166 Cal. App. 4th 1480 (2008).

68. *People v. Honig*, 48 Cal. App. 4th 289, 353 (1996).

69. *Id.* at 355.

70. *People v. New Penn Mines, Inc.*, 212 Cal. App. 2d 667, 671 (1963).

the Attorney General wide discretion to decide whether to participate in litigation.

The California Government Code further identifies the Attorney General's responsibilities. Like the relevant constitutional provision, these codes grant the Attorney General the prerogative to decide to defend a law.<sup>71</sup> California Government Code section 12512 provides that the "Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity."<sup>72</sup> The California Supreme Court has interpreted this duty broadly.<sup>73</sup>

The case of *D'Amico v. Board of Medical Examiners*, demonstrates that Attorney General may decline to represent the state when he believes its enactments violate the federal constitution.<sup>74</sup> In *D'Amico*, Attorney General Evelle Younger came to the independent conclusion that the position of the California Medical Board violated the Equal Protection Clause of the United States Constitution.<sup>75</sup> Subsequently, the Attorney General removed himself from the case.<sup>76</sup> The California Supreme Court endorsed this action.<sup>77</sup> The *D'Amico* court held the Attorney General may, while discharging his duty to defend the state under Government Code section 12512, make a legal determination that the state's position is not acceptable and cease to defend it. Indeed, the California Government Code anticipates that the Attorney General may act on that authority by specifically allowing government agencies to retain private counsel if the Attorney General exercises his discretion to not defend.<sup>78</sup> Like the other statutory and constitutional provisions which define the Attorney General's role, section 12512 does not constrain the Attorney General with any strict ministerial duty to defend.<sup>79</sup>

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71. CAL. GOV'T CODE §§ 12511, 12512 (West 2011).

72. CAL. GOV'T CODE § 12512 (West 2011).

73. *D'Amico v. Bd. of Med. Examiners*, 11 Cal. 3d 1, 21 (1974).

74. *Id.* at 15.

75. *Id.*

76. *Id.* at 13.

77. *Id.* at 15.

78. CAL. GOV'T CODE § 11040 (West 2011). Initiative proponents, unlike the California Medical Board in *D'Amico*, may very well not have standing to promote their favored propositions. *See supra* note 14.

79. Currently, State Senator Tom Harmon is promoting the Ballot Box Defense Act. This bill would alter the California Government Code and force the Attorney General to defend a winning initiative from legal challenges. If the attorney general were to be disqualified from the case, then the Act would allow the proponents of an initiative to

Government Code section 12511 also does not mandate that the Attorney General defend a state law. This section states that the Attorney General “has charge, as attorney, of all legal matters in which the State is interested . . . .”<sup>80</sup> A plain reading of the phrase “has charge” in section 12511 demonstrates that the Attorney General’s discretionary powers during litigation are expansive.<sup>81</sup> The code’s particular use of the phrase “has charge” does not imply supervision over the Attorney General’s decisions in court. Indeed to have charge is to be literally entrusted with the onus to act in the manner one sees fit.<sup>82</sup> Not surprisingly, case law interpreting section 12511 has also demonstrated that the Attorney General is not hemmed in by a strict ministerial duty to defend.<sup>83</sup>

Even when the Attorney General writes an advisory opinion supporting a certain legal position, under California Government Code section 12519, he still may not be compelled to support that position as a defendant in court. In *State of California v. Superior Court of San Diego County*, Attorney General Jack Van de Kamp successfully appealed a trial court’s order to compel his inclusion as a defendant in a lawsuit after he composed an advisory opinion that was contrary to the plaintiff’s position.<sup>84</sup>

For the California Court of Appeal, the trial court’s order to include the Attorney General in the case was no less than “a trespass upon the internal management and policy decisions of the Attorney General’s office” and seemed to be “perilously close to the brink of unwarranted interference in violation of constitutional mandate.”<sup>85</sup> Subsequently, the Court of Appeal liberated the Attorney General as an unwilling defendant because “a court cannot order a public officer to do something unless that officer has a plain duty to do it.”<sup>86</sup> It is

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defend their handiwork in court. While this Act may end a controversy like that which arose over the defense of Proposition 8 it is not yet the law. S.B. 617, 2009 Leg. Reg. Sess. (Cal. 2009).

80. CAL. GOV’T. CODE § 12511 (West 2011).

81. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 377 (Merriam-Webster 1996).

82. *Id.*

83. *See e.g.*, *Pierce v. Superior Court*, 1 Cal. 2d 759, 761–62 (1934) (holding that the attorney general has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests).

84. *Id.* at 396.

85. *Id.* at 397–98.

86. *Id.*

evident, from both statute and case law that the Attorney General does not have a duty to defend.<sup>87</sup>

**C. Modern Notions of Executive Powers Have Expanded the Ability of Governors and Attorneys Generals to Refuse to Defend a Law Without Abusing Their Discretion**

Although not ordinary practice, executive officers at both the state and federal levels regularly exercise the discretion to refuse to defend their jurisdictions' own laws.<sup>88</sup> Traditionally government counsel have been cautious in utilizing their discretion and only refused to support a law in court when there was no reasonable argument that an enactment was constitutional.<sup>89</sup> A prime example of government counsel utilizing the discretion to defend under a narrow interpretation of this power occurred in *Simkins v. Moses H. Cone Memorial Hospital*.<sup>90</sup> In this case, the United States refused to defend a separate-but-equal hospital financing provision owing to the fact the one year earlier the United States Supreme Court had declared that state-sponsored racial discrimination was "foreclosed as an issue."<sup>91</sup>

Modern notions of executive discretion are more expansive and allow executives wider latitude to combat laws without abusing their

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87. The imposition of unwilling government counsel also raises concerns about inadequate advocacy. In *Oregon v. Mitchell*, United States Solicitor General Erwin Griswold defended in court, against his own political view, the constitutional validity of the Voting Rights Act Amendments. Richard S. Greene, *Congressional Power over the Elective Franchise: The Unconstitutional Phase of Oregon v. Mitchell*, 52 B.U.L. REV. 505, 565 (1972) (citing Transcript of Oral Argument at 21–28, *Oregon v. Mitchell*, 400 U.S. 112 (1970)). In a reflection of this apathy, Griswold began his defense of the act by admitting that the Attorney General could not appear because of previous opposition to the challenged law, but that "I am here and I and my associates have endeavored to support the statute as rigorously as we are able." *Id.* This phenomenon would most likely not occur in the Proposition 8 litigation as the proponents would, if given standing, intervene and gladly provide a rigorous defense. Letter Brief of Attorney General Jerry Brown at 4 *Beckley v. Schwarzenegger*, No. S186072, 2010 Cal. WL 3874716 (September 8, 2010).

88. See *supra* note 14. The relationship between the executive and legislative branches within the federal government differs from that in California. In cases where the President uses his discretion to refuse to defend a law, Congress may employ its own counsel in defense of the law. 2 U.S.C.A. § 130f(a) (West 2010). When the Carter administration refused to defend the FCC's position, 2 U.S.C.A. § 130f(a) was not in effect. Later Congress did hire outside counsel to defend a law when President Barack Obama's Justice Department would no longer advocate for the Defense of Marriage Act in court. *Windsor v. United States*, No 1:10-cv-8435 (S.D.N.Y. 2011).

89. Brady, *supra* note 22, at 974–75. The overriding presumption is that all legislation is constitutional. Dalena Marcott, *The Duty to Defend: What is in the Best Interests of the World's Most Powerful Client?*, 92 GEO. L.J. 1309, 1319–21 (2004).

90. *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963).

91. *Id.*

discretion.<sup>92</sup> In the early days of the conflict that would flower into the landmark United States Supreme Court case *FCC v. League of Women Voters*, President Jimmy Carter's Department of Justice sided with the plaintiffs and refused to defend the FCC's position in court. This refusal to defend stemmed from the Department of Justice's own conclusion that the FCC's position, banning local public broadcasters from editorializing, violated the First Amendment.<sup>93</sup> The Carter administration abandoned its traditional role as defender of federal law, despite protests from the Senate, the Justice Department's Office of Legal Counsel, and academia all of which urged that the law was valid.<sup>94</sup> The next president, Ronald Reagan, was more sympathetic to the FCC's position and revived the litigation vigorously defending the law all the way to the United States Supreme Court. Although the Court ultimately struck down the law, not all justices shared President Carter's view that the act was unconstitutional.<sup>95</sup> The four dissenting justices, saw many reasonable arguments why the FCC's law was entirely valid.<sup>96</sup>

#### **D. *Reitman v. Mulkey* Revisited: Executive Discretion and the Defense of Direct Democracy in California**

Governor Schwarzenegger and Attorney General Brown's refusals to defend a winning initiative like Proposition 8 have precedent.<sup>97</sup> In both California and neighboring western states that practice a similar form of direct democracy, executive officers have, on rare occasions, chosen not to defend initiatives because of their overriding constitutional concerns.<sup>98</sup>

Proposition 8 was not the first winning initiative opposed during litigation by the state's Attorney General. Four decades before the

92. Brady, *supra* note 22, at 974–75; *Bailey v. Patterson*, 369 U.S. 31, 32 (1962) (per curiam).

93. *FCC v. League of Women Voters*, 468 U.S. 364, 371 (1984).

94. Brady, *supra* note 22, at 975–76 (The Department of Justice claimed that a reasonable defense could not be made and thus the Code of Professional Responsibility prevented them from defending the statute in court).

95. *League of Women Voters*, 468 U.S. at 401 (Brennan, J. wrote for the majority in a 5-4 decision.).

96. *League of Women Voters* at 402–19 (White, J., Burger, J., Stevens J., Rehnquist, J., dissenting).

97. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1977); *California Democratic Party v. Lungren*, 919 F.Supp. 1397 (N.D. Cal. 1996); *League of United Latino Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

98. *Id.*

controversy over same-sex marriage in California, another contentious legal struggle pitting the choices of the electorate and the rights of a minority group against each other.<sup>99</sup>

In 1964, California voters passed Proposition 14 amending their constitution so to impede any attempts by the Legislature to create laws that would promote nondiscriminatory practices in the private housing sector.<sup>100</sup> One year earlier, the California Legislature had passed the Rumford Fair Housing Act.<sup>101</sup> This Act required that private home sellers and landlords create racially open housing in their residences and apartments.<sup>102</sup> The Act emboldened a strong counter-movement in the next year's general election, which pushed through Proposition 14 by a resounding 2–1 during the subsequent election.<sup>103</sup>

In subsequent litigation challenging the validity of Proposition 14 under the United States Constitution, Attorney General Thomas Lynch and Governor Edmund “Pat” Brown did not support Proposition 14's addition to their state's constitution.<sup>104</sup> Instead, Attorney General Lynch filed a brief in opposition to Proposition 14, urging that the people's enactment violated the Equal Protection Clause.<sup>105</sup> Lynch argued that despite its neutral language, Proposition 14 was motivated by and would perpetuate racial discrimination.<sup>106</sup> These arguments succeeded, as the United States Supreme Court struck down Proposition 14 on similar grounds.<sup>107</sup>

Note that in *Reitman*, the litigants were private parties and the validity of Proposition 14 only emerged during summary judgment proceedings.<sup>108</sup> Subsequently, neither the Attorney General nor the

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99. *Reitman*, 387 U.S. at 371.

100. *Id.*

101. ALLSWANG, *supra* note 26, at 74.

102. *Id.*

103. *Id.* at 74–75 (In the 1964 election the California Real Estate Association led the charge to abrogate the Rumford Fair Housing Act through the passage of Proposition 14. Opposing Proposition 14 stood an amalgamation of Democratic party leadership, organized labor, churches and members of the Hollywood scene.).

104. Brief of the State of California as Amicus Curiae at 1, *Reitman*, 387 U.S. 369 (1967) (No. 483).

105. *Id.* at 1–3.

106. *Id.* at 9–12 (“This constitutional barrier to such legislature or enactment of ordinances by local entities in the fair-housing field constitutes an affirmative stand by the state electorate against fair-housing enactments contrary to the Fourteenth Amendment of the United States Constitution.”).

107. *Reitman*, 387 U.S. at 373.

108. *Id.* at 372.



Governor was ever forced to make the fateful choice to refuse to defend the people's enactment. Still, as a matter concerning the legal interests of the state, Attorney General Lynch could have petitioned to be added as a defendant, or submitted an amicus curiae brief and advocated for will of the majority of the state.<sup>109</sup> He did not do this. Rather, when given the opportunity, the Attorney General decided to support his view of Equal Protection to the detriment of the electoral decisions of the majority of Californians.<sup>110</sup>

**E. California Executives did not Abuse their Discretion by Refusing to Defend Proposition 8 in Appellate Proceedings**

Even though the Attorney General and Governor's decision to support an initiative in court is not ministerial, these officials could still be liable to a mandamus action if their decision stemmed from an abuse of their discretionary powers.<sup>111</sup> In this case, however, no such abuse of discretion occurred. Foremost and quite obviously so, Attorney General Brown and Governor Schwarzenegger refused to appeal the decision in *Perry v. Schwarzenegger* after the United States District Court of Northern California had found the initiative unconstitutional.<sup>112</sup> To rely on this decision by the District Court does not satisfactorily assess the propriety of the executives' opposition to Proposition 8, as Attorney General Brown contested the initiative's validity during both the federal and state challenges.<sup>113</sup>

In *Strauss v. Horton*, the California case, Attorney General Brown opposed Proposition 8 in a brief submitted to the state's Supreme Court.<sup>114</sup> Brown argued that Proposition 8's ban on same-sex marriage would impose an *ultra vires* revision to the state's Constitution abrogating fundamental rights of "safety, happiness, and

109. CAL. GOV'T CODE § 12511(West 2011).

110. Brief of the State of California as Amicus Curiae at 4, *Reitman*, 387 U.S. 369 (1967) (No. 483).

111. *See supra* note 62.

112. *See supra* note 9. "[T]he Attorney General has consistently recognized [Proposition 8's] constitutional deficiency. . . . The United States District Court reached the same result applying the lens of the federal Constitution." *Id.* at 1.

113. *Strauss v. Horton*, 46 Cal. 4th 364, 364 (2009); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 921 (N.D. Cal. 2010). During *Strauss v. Horton*, the group that promoted Proposition 8, ProtectMarriage.com, was allowed to intervene and argue the case. Interveners' Answer to Amicus Curiae Briefs and Supplemental Response to Pages 75–90 of the Attorney General's Answer Brief at 1 *Strauss v. Horton*, 46 Cal. 4th 364 (2009) (No. S168047).

114. Attorney General's Response to Amicus Curiae Briefs at 1, *Strauss v. Horton*, 46 Cal. 4th 364 (2009) (No. S168047).

privacy” guaranteed by article I, section 1.<sup>115</sup> When the validity of Proposition 8 under the United States Constitution came before the District Court in *Perry v. Schwarzenegger*, Brown again attacked the initiative.<sup>116</sup> He said that he could not support the initiative because the California Attorney General had a sworn duty to uphold the United States Constitution and the initiative violated the “supreme law of the land.”<sup>117</sup> Specifically, Brown maintained that Proposition 8’s prohibition on same-sex marriage violated Due Process and Equal Protection.<sup>118</sup>

While Proposition 8’s ban on same-sex marriage may not be “clearly unconstitutional” like the “separate but equal” provisions in *Simkins v. Moses H. Cone Memorial Hospital*, there exist valid arguments that this initiative violates the United States Constitution. The United States Supreme Court has held that the freedom to marry is a fundamental right protected by the Due Process Clause.<sup>119</sup> Marriage is also not tied to a couple’s capacity to procreate as “it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>120</sup> It is unclear whether the United States Supreme Court would find that existing law supports the extension of marriage to same-sex couples.<sup>121</sup> The issue of marriage rights remains one of the great constitutional questions of our day. In the short term, however, the existing precedents supporting the extension of marriage to same-sex couples justify the

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115. *Id.* at 4–5. Attorney General Brown’s argument in federal court, and the position ultimately determinative of this official’s proper use of his discretion, is the stronger of the two. In *Strauss v. Horton*, Brown maintained that an initiative could not abrogate fundamental rights within the California Constitution, which after *In Re Marriage Cases*, included same-sex marriage. *Id.* at 45. The California Supreme Court rejected this argument, holding that “no decision suggests that when a constitution has been explicitly amended to modify a constitutional right” that “the amendment may be found unconstitutional on the ground that it conflicts with some *implicit* or *extraconstitutional* limitation that is to be framed and enforced by the judiciary.” *Strauss*, 46 Cal. 4th at 391. Although the impact of Brown’s position in *Strauss v. Horton* was minimal because the proponents intervened, this sort of novel argument edged close to an abuse of discretion.

116. Answer of Attorney General Edmund G. Brown Jr. at 1 *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (2007) (No. 3:09-cv-02292-VRW).

117. *Id.*

118. *Id.* at 6.

119. *Turner v. Safley*, 482 U.S. 78, 95 (1987).

120. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

121. There are precedents which support the constitutionality of a ban on same-sex marriage. *E.g.*, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

discretionary decision by Attorney General Brown and Governor Schwarzenegger not to defend Proposition 8.

### III. Structural Limitations to Executive Discretion

#### A. The Attorney General May Not Assess an Initiative's Constitutional Validity when Performing Ministerial Duties to Prepare the Initiative for the Ballot

In California, the Attorney General must prepare an official summary of an initiative before it appears on the ballot.<sup>122</sup> In the exercise of this duty, the Attorney General's role is entirely ministerial and he may not attempt to use this position as a means to combat proposed initiatives.<sup>123</sup> In *Schmitz v. Younger*, Attorney General Evelle Younger refused to grant a title and prepare a summary for a proposed initiative.<sup>124</sup> Despite this clear statutory direction, Attorney General Younger took a stand against an initiative. Younger believed this initiative would violate the requirement that popular enactments only pertain to a single subject as it would prohibit campaign contributions by teachers' organizations, outlaw teachers' strikes, and prevent tax revenues from supporting transportation for the purpose of racially balancing public schools.<sup>125</sup>

Despite it being apparent that the proposed initiative spanned multiple subjects, this decision was not to be made by the Attorney General under the guise of ministerial obligation.<sup>126</sup> Rather, "[t]he duty of the Attorney General to prepare title and summary for a proposed initiative measure is a ministerial one and mandate will lie to compel him to act when the proposal is in proper form and complies with statutory and constitutional procedural requirements."<sup>127</sup> In fulfilling this ministerial responsibility to prepare prospective initiatives for the ballot, the Attorney General may not

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122. CAL. ELEC. CODE §§ 3502, 3503 (West 2011).

123. *Schmitz v. Younger*, 21 Cal. 3d 90, 92 (1978).

124. *Id.*; CAL. ELEC. CODE §§ 3502, 3503 (West 2011).

125. *Schmitz*, 21 Cal. 3d at 92. CAL. CONST. art. II, § 8(d) provides that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

126. *Schmitz*, 21 Cal. 3d at 92.

127. *Id.* (While finding the duties to prepare summary and title purely ministerial, the *Schmitz* court also noted that "this [ruling] does not mean that the Attorney General may not challenge the validity of the proposed measure by timely and appropriate legal action.).

impute his own opinion about an initiative's constitutional worth and is susceptible to compulsion by a judicial writ of mandamus if he does so.<sup>128</sup>

**B. The Governor Holds the Ultimate Discretion to Determine If an Initiative Will Be Defended by Government Counsel in Court**

In states like California, where executive power is divided among the independently elected Governor and Attorney General, conflicts may emerge regarding discretionary decisions to defend an initiative.<sup>129</sup> Of course, during the Proposition 8 litigation, then Governor Schwarzenegger and Attorney General Brown shared a disinclination to defend the initiative and thus no intra-branch dispute emerged.<sup>130</sup>

Still, in a state where the Governor and Attorney General are both independently elected and quite possibly divided by political, partisan or personal differences, the prospect of conflict within the executive branch ever lurks.<sup>131</sup> Indeed, the California Supreme Court has already reviewed an instance of discord between the Attorney General and the Governor concerning the state's position in litigation.<sup>132</sup> In that case, California's highest court held that it is the Governor who possesses the ultimate discretion to decide whether the state will defend a law.<sup>133</sup>

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128. Even when ministerial obligations burden the California Attorney General with mandatory compliance, California Courts have still allowed state executives to exercise a degree of discretion to prepare summary in any way he sees fit as long as the document would "reasonably inform the voter of the character and real purpose of the proposed measure." *Lungren v. Superior Court of Sacramento County*, 48 Cal. App. 4th 435, 443 (1996).

129. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, And Lessons From the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006) (The division of executive power between an independently elected governors and attorneys general in most states is quite different from the federal model where the attorney general is appointed by the president and serves at his pleasure.).

130. See *supra* notes 8 and 9.

131. Marshall, *supra* note 122, at 2453. In states with a divided executive branch, debilitating conflict has not often materialized. William Marshall attests this cooperation to the moderating influence of politics. Indeed, "[a] governor who rejects the Attorney General's position therefore risks expending political capital by appearing reckless, if not lawless." Conversely, an "Attorney General may also be restrained from overreaching because she is aware that her role is, in large part, defined by public expectations and that her primary obligation is to defend, not contradict, the policies of state officers or agencies, except when those policies violate the law." *Id.*

132. *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 158 (1981).

133. *Id.*

In *People ex rel. Deukmejian v. Brown*, the California Supreme Court decreed that the Attorney General cannot take a position in litigation contrary to that of the Governor.<sup>134</sup> The cast in this case is familiar. In 1977, during Jerry Brown's first term as Governor, the California Legislature adopted the State Employer-Employee Relations Act ("SEERA"), a statute which promulgated new rules for disputes between public employees and their managers.<sup>135</sup> In response, private citizens contended that SEERA was unconstitutional and sought to prevent Governor Brown from enforcing the Act.<sup>136</sup> Soon thereafter, then Attorney General George Deukmejian also came to the conclusion that SEERA was constitutionally invalid and attempted to file his own suit seeking relief similar to that of the original plaintiffs.<sup>137</sup>

In a sweeping ruling, the California Supreme Court prohibited Attorney General Deukmejian's attack on SEERA and held that it was the Governor who has the ultimate discretion to determine California's position in litigation.<sup>138</sup> The court in *ex. rel. Deukmejian* relied on the California Constitution's statement that the Attorney General is "subject to the powers and duties of the Governor"<sup>139</sup> and subsequently found that if a conflict between the Governor and Attorney General develops, the Governor retains the ultimate authority to determine the state's interest.<sup>140</sup> In response, Deukmejian argued that he, as Attorney General, had a common law right to sue public officials through his role as "the People's legal counsel" and thus could litigate on behalf of the public interest even if this view was contrary to the opinions of the Governor. The court rejected this contention.<sup>141</sup> In California, it is the Governor, rather than the Attorney General, who decides which position the state will take in court.<sup>142</sup>

Much of Attorney General Jerry Brown's opposition to Proposition 8 would not have been possible if Governor

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134. *Id.*

135. *Id.* at 154.

136. *Id.*

137. *Id.*

138. *Id.* at 158.

139. *Id.* (referencing CAL. CONST. art. V, § 13).

140. *Id.* The court also relied upon section 12010 of the California Government Code, which provides that the "Governor shall supervise the official conduct of all executive and ministerial officers." CAL. GOV'T CODE § 12010 (West 2011).

141. *Id.* at 157.

142. *Id.*

Schwarzenegger had supported the constitutionality of the initiative.<sup>143</sup> Although Attorney General Brown never attempted to switch sides and act as plaintiff in either *Strauss v. Horton* or *Perry v. Schwarzenegger*, his court filings undisputedly urged that Proposition 8 was unconstitutional.<sup>144</sup> Because *Ex. rel. Deukmejian* mandates that the Attorney General be beholden to the Governor's vision of the constitutionality of state action, Brown would have been unable to promote this opposition to Proposition 8 if this view had contradicted with Governor Schwarzenegger's stance.<sup>145</sup>

When litigation preferences diverge, the Attorney General is still free to withdraw from the case and allow lawyers independently employed by the Governor or a relevant state agency to litigate the case.<sup>146</sup> An Attorney General's ability to retreat into neutrality is, however, an entirely different sort of action than an active attack against a state law. In California, the Attorney General can only achieve the latter if the Governor approves.

#### **IV. Combating Winning Initiatives by Executive Interpretation and Appointment**

##### **A. Limiting Direct Democracy by Interpretation: Proposition 63, the English Only Initiative**

In California, the Attorney General and Governor may impede a winning initiative's impact through their own interpretation of the law's text.<sup>147</sup> The saga surrounding the implementation of Proposition 63, The English Only Initiative, demonstrates the power of governors and attorneys general to thwart the will of direct democracy by this sort of subtle action.<sup>148</sup>

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143. Vikram David Amar, *Lessons From California's Recent Experience With Its Non-Unitary (Divided) Executive: of Mayors, Governors, Controllers, and Attorneys General*, 59 EMORY L.J. 469, 487–89 (noting that during *In Re Marriage Cases*, Attorney General Jerry Brown filed a brief whose view of Equal Protection differed from that of the Governor's filing in the case and thus technically violated the holding of *Ex rel. Deukmejian*).

144. *See supra* notes 112–123.

145. *Ex rel. Deukmejian*, 29 Cal. 3d at 157–58.

146. *D'Amico v. Bd. of Med. Examiners*, 11 Cal. 3d 1, 15 (1974); CAL.GOV'T CODE § 11040 (West 2011).

147. GERBER, *supra* note 18, at 21.

148. *Id.* at 35.

In 1986, the California electorate overwhelmingly passed Proposition 63.<sup>149</sup> This initiative amended the state Constitution by enshrining English as the official language of California.<sup>150</sup> Although the proponents of Proposition 63 were enthusiastic and competent campaigners, their drafting skills were lacking.<sup>151</sup> The text of Proposition 63 is vague, only specifying that the Legislature should take all necessary steps to ensure the role of English as the common language.<sup>152</sup> Despite these deficiencies, the proponents of Proposition 63 believed the English Only Initiative would have a robust effect on California. Former United States Senator S. I. Hayakawa, the driving force behind Proposition 63, had grand plans for laws like the English Only Initiative, as he believed promoting English as the official language would combat a “policy of so called ‘bilingualism.’”<sup>153</sup>

Despite Proposition 63’s victory at the polls, the hopes of the initiative’s proponents would be thwarted by California’s executive officers. Upon the passage of Proposition 63, Governor George Deukmejian refused to say if or how he would enforce this constitutional amendment, predicting that “many many lawsuits” would occur.<sup>154</sup>

Attorney General John Van de Kamp was more aggressive in his defiance of the people’s initiative. When a dispute concerning the use of bilingual ballots arose, Van de Kamp issued a research memo in which he stated that Proposition 63 merely requires voting material be available in English—rather than in English alone.<sup>155</sup> This was not the dream of Hayakawa and his fellow proponents of The English Only Initiative.<sup>156</sup> Two years after its passing, the United States Court of Appeals for the Ninth Circuit would admit that Proposition 63 was now merely “a symbolic statement concerning the importance

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149. Abbreviated California Ballot Listing, Proposition 63, available at <http://library.uchastings.edu/cgi-bin/starfinder/15245/calprop.txt> (Seventy-three percent of the electorate supported Proposition 63.).

150. CAL. CONST. art III, § 6.

151. GERBER, *supra* note 18, at 35.

152. *Id.* The drafting of Proposition 63 was so poor that one government official remarked that its text was “a masterpiece of vagueness.” *Id.*

153. Valerie Lexion, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 HASTINGS CONST. L.Q. 657, 661–62 (1986) (quoting an undated letter from Senator S. I. Hayakawa to potential U.S. English supporters during the Congressional English Language Amendment Hearings in 1983).

154. GERBER, *supra* note 18, at 35.

155. Barnaby Zall, *Official Use of English: Do We Need a Constitutional Amendment? (Yes)*, 74 A.B.A. J. 34, 35 (1988).

156. *See supra* note 155.

of preserving, protecting, and strengthening the English language.”<sup>157</sup> Since then, Proposition 63 has remained on the books serving solely as a hollow artifact to the powers of hostile executive interpretation.<sup>158</sup>

**B. Limiting Direct Democracy Through Political Appointment:  
Proposition 97, The California Occupational Safety and Health Act**

In 1988, the people of California passed Proposition 97, The California Occupation Safety and Health Act (“Cal-OSHA”).<sup>159</sup> The motivation for the people of California to implement this initiative stemmed from a desire to counter the policies of then Governor George Deukmejian. One year earlier, Governor Deukmejian had eliminated funding for an earlier iteration of Cal-OSHA.<sup>160</sup> These actions by the Governor enraged many Californians and these citizens would subsequently band together to promote “the superior protections of Cal-OSHA.”<sup>161</sup> Their efforts through direct democracy led to the passing of Proposition 97, an initiative which required the Governor to fully fund the Cal-OSHA program.<sup>162</sup>

Upon Proposition 97’s ascension into California law, Governor Deukmejian immediately stated that he would abide by the voter’s decision and revive Cal-OSHA to its previous splendor.<sup>163</sup> These public affirmations of support for Proposition 97 did not, however, reflect the actions Deukmejian took behind the scenes.<sup>164</sup> Throughout the Deukmejian governorship the reconstituted agency operated with a reduced number of employees and completed twenty-four percent fewer inspections than it had before Deukmejian first reduced the agency’s funds.<sup>165</sup>

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157. *Gutierrez v. Mun. Court of Se. Jud. Dist., L.A. Cnty*, 838 F.2d 1031, 1044 (9th Cir. 1988) cert. granted, judgment vacated sub nom. *Mun. Court of Se. Judicial Dist., County of Los Angeles v. Gutierrez*, 490 U.S. 1016 (1989).

158. Frank M. Lowrey, IV, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223, 293–94 (1992).

159. *Cabrera v. Martin*, 973 F.2d 735, 737–40 (9th Cir. 1992) (providing a factual summary of the political events surrounding Proposition 97).

160. *Cabrera*, 973 F.2d at 737–40.

161. Text of Proposition 97, California Ballot Pamphlet, General Election (Nov. 8, 1988), available at [http://traynor.uchastings.edu/ballot\\_pdf/1988g.pdf](http://traynor.uchastings.edu/ballot_pdf/1988g.pdf).

162. Abbreviated California Ballot Listing, Proposition 97, available at <http://holmes.uchastings.edu/cgi-bin/starfinder/24830/calprop.txt> (Proposition 97 claimed the support of approximately fifty-four percent of the electorate).

163. ELISABETH R. GERBER ET AL., *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* 40 (2001).

164. *Id.*

165. *Id.*



Most notably, Governor Deukmejian appointed two members to the Cal-OSHA' board who had previously opposed funding the agency.<sup>166</sup> With his ability to appoint officials to positions of power within Cal-OSHA, Governor Deukmejian publicly complied with the letter of Proposition 97 while still directing policy in a manner that more closely mirrored his intent than that of Proposition 97's supporters.<sup>167</sup> Through the state's system of direct democracy, the people of California had attempted to bolster Cal-OSHA by passing Proposition 97. And as a reward for their efforts, they received neither their desired policy nor even the consolation of being able to hold an elected executive directly responsible for this lack of compliance.

### **V. The Exercise of an Executive's Discretion to Defend Provides an Opportunity for Democratic Accountability**

No doubts remain as to which side of the Rubicon Attorney General Jerry Brown and Governor Arnold Schwarzenegger stood when they decided to counter the will of the electorate and not defend Proposition 8 in court.<sup>168</sup> Because of their shared belief that Proposition 8 violates the Equal Protection Clause and guarantees of Due Process within the United States Constitution, the Governor and Attorney General refused to support a law promulgated by the voice of direct democracy.<sup>169</sup> Such action was not ignored by the political realm. In the days leading up to the decision in *Beckley v. Schwarzenegger*, fellow Republicans voiced their displeasure towards Governor Schwarzenegger and urged that only he could allow the question of Proposition 8's constitutionality to ascend to the appellate level.<sup>170</sup> Schwarzenegger was not swayed and continued to withhold his support from the defense of Proposition 8 on constitutional grounds.<sup>171</sup>

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166. *Id.*

167. *Id.*

168. *See supra* notes 8–9.

169. *Id.*

170. Associated Press Report, *Lawmakers Urge Governor to Appeal Prop. 8 Ruling*, CBS NEWS ONLINE (Sept. 1, 2010), <http://www.cbsnews.com/stories/2010/09/01/national/main6827966.shtml>. The political ramifications of Governor Schwarzenegger's act were undisputedly mitigated by timing, as the furor over defense of Proposition 8 occurred in the waning months of his governorship.

171. *See supra* note 9.

More notably, the question of the proper scope of the executives' discretion to defend emerged as a key political issue in the statewide electoral campaigns for Attorney General and Governor in late 2010. During the campaign, Attorney General candidate Steve Cooley and gubernatorial hopeful Meg Whitman both announced that they would appeal the ruling in *Perry v. Schwarzenegger* if elected.<sup>172</sup> Conversely their respective opponents, Kamala Harris and Jerry Brown, to no one's surprise, adverted that they would continue to refuse to defend Proposition 8 in court.<sup>173</sup> With each candidate staking a position on the issue of executive discretion to defend Proposition 8, California's voters were able substantively assess those who would claim the mantle of executive power accountable for their views on the rights guaranteed by the United States and California Constitutions.<sup>174</sup> This was a privilege which the voters interested in the outcome of Proposition 97 and Proposition 63 never enjoyed.

This specter of political accountability is real. California's electorate has before punished a sitting Governor for failing to vigorously defend a popularly enacted initiative in court.<sup>175</sup> In 1994, the people of California passed Proposition 187: The Save Our State Initiative.<sup>176</sup> This initiative required government officials to verify the immigration status of persons with whom they came into contact and deny those living in the country illegally access to nonemergency healthcare, social services and education.<sup>177</sup>

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172. Patrick McDonald, *Attorney General Candidate Steve Cooley Would 'Defend' Proposition 8*, L.A. WEEKLY, Aug. 19, 2010, [http://blogs.laweekly.com/informer/2010/08/proposition\\_8\\_steve\\_cooley.php](http://blogs.laweekly.com/informer/2010/08/proposition_8_steve_cooley.php); Carla Marinucci, *Meg Whitman says state should defend Prop. 8*, S.F. CHRON, Aug. 21, 2010, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/08/20/MNKU1F18TF.DTL&type=gaylesbian>.

173. *Id.*

174. The political victories of Proposition 8's opponents in the 2010 election for California's Attorney General and Governor are of course the result of a variety of factors. Moreover, the California electorate's opportunity to hold the candidates for Attorney General and Governor accountable for their position on the defense of Proposition 8 was also aided by the coincidental event that the election for these offices and the time to appeal the District Court's decision in *Perry v. Schwarzenegger* overlapped. Still, by electing these politicians into office the people sent a clear signal that their view of constitutional rights is acceptable to a large portion of Californians.

175. Ralph W. Kasarda, *Affirmative Action Gone Haywire: Why State Laws Granting College Tuition Preferences to Illegal Aliens Are Preempted by Federal Law*, 2009 B.Y.U. EDUC. & L.J. 197, 204 (2009).

176. See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995) (providing a description of the substantive elements of Proposition 187).

177. *Id.*

Although this initiative passed by a comfortable margin of fifty-nine percent to forty-one percent, the campaign was fierce.<sup>178</sup> Supporters of Proposition 187 characterized as the initiative as the only solution to illegal immigration, while opponents utilized the campaign to mobilize a disenfranchised minority.<sup>179</sup> “White voters supported the initiative by about a two-to-one ratio while Latinos voters opposed the new law by over a three-to-one margin.”<sup>180</sup> Among the opponents of Proposition 187 was then California State Controller and future Governor Gray Davis who would later declare that if Proposition 187 were “a piece of legislation he would have vetoed it.”<sup>181</sup>

The opponents of Proposition 187 did not rest after their defeat at the ballot box. The day after Proposition 187 became California law, opponents of the initiative filed five federal lawsuits alleging that the new law was unconstitutional.<sup>182</sup> Eventually the various lawsuits were consolidated into a single case, *League of United Latin American Citizens v. Wilson*, which pitted opponents of the initiative against then Governor Pete Wilson, as the representative of California’s government. The District Court would find that the majority of Proposition 187 violated the United States Constitution.<sup>183</sup> Among Proposition 187’s many original sections, only the bar to granting illegal immigrants higher education benefits and new criminal punishments for forging immigration documents remained.<sup>184</sup>

Governor Wilson was ready to appeal the District Court’s findings and stated that he would advocate for Proposition 187’s constitutionality all the way to the United States Supreme Court.<sup>185</sup> Wilson, however, never had the opportunity to participate in this fight. Before the appeal could be completed, he lost the Governor’s

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178. Nicole E. Lucy, *Mediation of Proposition 187: Creative Solution to an Old Problem? Or Quiet Death for Initiatives?*, 1 PEPP. DISP. RESOL. L.J. 123, 124–25 (2001) (providing a detailed analysis of the propriety of mediating constitutional challenges to initiatives).

179. *Id.*

180. Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1286 (2008).

181. Lucy, *supra* note 178, at 124 n. 4.

182. *Id.* at 141.

183. *Wilson*, 908 F. Supp. at 774.

184. Lucy, *supra* note 178, at 147.

185. *Id.* at 148 n. 133.

Office to Gray Davis, a politician who had previously opposed Proposition 187.<sup>186</sup>

Upon taking office, Davis became responsible for determining California's appellate response in *League of United Latin American Citizens*. He chose an unfamiliar route. Instead of pursuing a traditional appeal, as former Governor Wilson would surely have done, Davis elected to take advantage of the Ninth Circuit Court of Appeals' Settlement Program to mediate the dispute over Proposition 187.<sup>187</sup> Before the mediation began, Davis made overtures to the proponents of Proposition 187 to include their perspective. The political divergence between Davis and the proponents was, however, too great and the supporters of Proposition 187 refused to participate in the negotiations. Instead, the proponents appealed to the California Supreme Court to halt the mediation of their favored initiative. The California Supreme Court denied their request unanimously, keeping the fate of Proposition 187 out of the hands of the citizens who supported it most.<sup>188</sup>

Over three months, the Governor's representatives and the plaintiffs negotiated with the aid of the Ninth Circuit's Settlement Program. By all accounts, the mediation was fruitful and both sides reported that they had moved from their initial positions.<sup>189</sup> Still, the final result did not please the citizen proponents of Proposition 187. The settlement agreement upheld the District Court's decision in striking down of the majority of Proposition 187's restrictions on granting services to illegal immigrants. In fact, the agreement went even further than the District Court's decision, mandating that illegal immigrants could receive post-secondary education benefits in California. In exchange for abandoning the major of Proposition 187's provisions, the plaintiffs agreed to drop all litigation and allow the remaining sections to become law. This was not much of a compromise. The only sections of Proposition 187 which survived the mediation were the minor criminal provisions outlawing the manufacturing and distribution of false immigration documents.<sup>190</sup> The mediation of Proposition 187, instigated by Governor Davis, was a victory for those who opposed the popularly enacted initiative.

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186. *Id.* at 148.

187. *Id.* at 169. Proposition 187 was the first and so far only dispute concerning a California initiative to be settled under the Ninth Circuit's medication program. *Id.* at 149.

188. *Id.* at 170.

189. *Id.* at 170 n.307.

190. Kasarda, *supra* note 175, at 204.

California voters did not forgive Davis' discretionary decision to abandon a rigorous defense of an initiative in court. In 2003, Davis became the first California Governor to suffer from the other great prong of the state's system of direct democracy and be recalled by the electorate. One third of those who voted to oust Davis admitted that the Governor's lenient stance toward illegal immigration, exemplified by his refusal to defend Proposition 187 in court, motivated them to remove him from office.<sup>191</sup>

### Conclusion

It has been one hundred years since the reforms of the Progressive Movement brought direct democracy to California.<sup>192</sup> Since then, the people have zealously wielded this privilege and implemented a wide variety of initiatives into California law.<sup>193</sup> The Progressive's dream of an electorate empowered to create laws unadulterated by the influence of elected officials has, however, not been entirely realized. Today, California's Governor and Attorney General still possess much constitutional authority to limit the impact of a winning initiative.<sup>194</sup>

Chief among these discretionary abilities is the executives' prerogative to decline to defend against a legal challenge.<sup>195</sup> While this power is great, its use does not come cheap. By refusing to defend an enactment of the people, California's executives are openly subduing democratic choices in favor of their own vision of fundamental protections.<sup>196</sup> Unlike instances of hostile executive interpretation or appointment, a refusal to defend an initiative during litigation does not permit the Governor or Attorney General to appease the electorate with empty statements of support.<sup>197</sup> Instead, this bare assertion of a Governor or Attorney General's true constitutional colors provides the people with a clear message with which to hold these politicians accountable during the next election.<sup>198</sup> After a century of direct democracy, California's electorate, Governor and Attorney General have each claimed a share of the

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191. *Id.*

192. *See ALLSWANG, supra* note 41.

193. *See supra* note 57.

194. *See Brady, supra* note 22 at 970, 974–75.

195. *See supra* note 1.

196. *See supra* notes 172–195.

197. *Id.*

198. *Id.*

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ability to shape the fundamental laws of the state. In the end, the California Constitution belongs to them all.