

**California's 2014 Ballot Initiative Transparency Act (BITA)
and its Impact on Public Involvement in the Ballot Initiative Process**

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Abstract

About half the states in the U.S. now provide a ballot initiative process to voters as a form of direct democracy. Citizens are provided the opportunity to vote on proposed laws or constitutional amendments, which are written and proposed by members of the public. Most studies examining the impact of ballot initiatives have focused on the changes in public policy that occur as a result of this form of direct voter engagement. In recent years, however, scholars have begun to examine these questions from a different angle, measuring the scope and depth of civic engagement generated by ballot initiatives. Our study examines the kind of public engagement that takes place early in the ballot initiative process, before propositions actually make it to the ballot, utilizing California's recent reforms to the ballot initiative process as an empirical case. Employing a multi-method approach, we analyze how California's Ballot Initiative Transparency Act of 2014 impacted public involvement in the ballot initiative process. This law was designed to make this process more transparent while encouraging greater public participation in ballot initiatives before they are approved for the ballot. We seek to understand whether this reform has led to greater public engagement in the ballot initiative process, and greater public input into California state policy.

Introduction

The Ballot Initiative Transparency Act of 2014 (SB 1253, or BITA) has introduced important revisions to California's citizens' ballot initiative process. Authored by State Senator Darrell Steinberg, Senate President Pro Tempore from 2008–2014, a key goal of BITA is to bolster the exercise of direct democracy by facilitating public engagement in the ballot initiative process.

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The bill aims to expand the opportunity for legislative compromises on citizens' ballot initiatives, while also creating greater opportunities for public involvement in the ballot initiative process.

Specifically, BITA provides the public with two opportunities to learn about and provide input on proposed ballot measures. The first is a new 30-day online public comment period. The second is an opportunity for the state legislature to hold a joint legislative public hearing prior to an initiative qualifying for the ballot. Joint hearings on ballot initiatives existed pre-BITA, but were not held until after a measure had qualified for the ballot. Under BITA, the proponents of an initiative must report when they have collected 25 percent of the signatures required to qualify their measure for the ballot. At this time, a hearing may take place before a measure has actually qualified for the ballot, no later than 131 days prior to the election. BITA also allows initiative proponents an opportunity to withdraw an initiative: if compromise legislation is agreed upon or if they are otherwise convinced that the initiative is no longer necessary. Previously, initiatives could not be removed from ballot consideration once they had received a title and summary from the attorney general's office.

This article examines how BITA has impacted the extent and type of public involvement in the ballot initiative process, and how and whether this involvement has influenced state policy.² Our findings are based on a multimethod research study of the ballot initiative process during the 2016 election cycle carried out by the California Civic Engagement Project (CCEP) at UC Davis. As part of this study, we conducted in-depth confidential interviews with key players in California's ballot initiative process, including legislative members and their staff, initiative authors, and political consultants. Additionally, we conducted an analysis of the online public comments received by the State of California Department of Justice, and an analysis of joint legislative public hearings on proposed initiatives.

It should be noted, that the 2016 election cycle was the first time BITA was applied to the ballot initiative process in California. As one long-serving legislator put it:

This time it was a new bicycle and people still had training wheels on. The political industrial complex will also start to approach things differently and figure out how to strategically approach this new system. We have lowered the threshold, but increased the opportunity for real discussion.

The conclusions of our study are thus limited to the 2016 election cycle. Indeed, we are likely to see shifts in how BITA impacts public engagement in the future as Californians adjust to this relatively new reform. We should also note that we did not examine public involvement in the ballot initiative process before BITA's passage, making it difficult to draw "before" and "after" comparisons about the level of public involvement and its effects on public policy.

How Citizens' Ballot Initiatives Can Impact Citizen Engagement

The idea that direct democracy in the U.S. is somehow positively associated with high levels of civic participation has been empirically examined by researchers for decades.³ However, there is an ongoing debate, and a lack of scholarly agreement, as to exactly how, and to what extent, direct democracy actually enhances civic engagement. There is some published evidence to sug-

² Other impacts of BITA, including the type and extent of legislative compromises facilitated by this new law, will be explored in forthcoming publications from the California Civic Engagement Project.

³ J. J. Dyck, "New Directions for Empirical Studies of Direct Democracy," *Chap. L. Rev.* 19 (2016): 109.

WHAT DOES BITA DO?

- Extends the petition circulation time from 150 to 180 days.
- Requires proponents to report when they have collected 25 percent of the signatures needed to qualify their measure.
- Requires appropriate committees of the Senate and Assembly to hold a joint legislative public hearing on any measure that has collected 25 percent of the signatures needed to qualify, to be held no later than 131 days prior to the election at which the measure will be voted on.*
- Gives voters a 30-day online period to comment on a proposed initiative before it is circulated for signatures, requiring the attorney general to post the text of the proposed measure on his/her website and invite comments. These comments are sent to the initiative proponents, who have an additional five days after the 30-day public comment period to make amendments. Amendments must be reasonably germane to the theme, purpose, or subject of the initiative as originally proposed. The submitted comments are not visible on the attorney general's website, but they are available to those who submit a request through the Freedom of Information Act.
- Requires the California Secretary of State to make available an alternative digital format version of the state ballot pamphlet (guide) and to create a clearly worded online, one-stop, source of information about each qualified ballot measure, and the sources of funding for campaigns for and against them.
- Allows proponents to withdraw a measure at any time before it qualifies for the ballot. Previously, a measure could not be withdrawn once it was submitted to the attorney general for a title and summary. Ballot initiative petitions must now give notice that proponents have the right to withdraw.
- Makes it a crime to seek, solicit, bargain for, or obtain anything of value in return for withdrawing an initiative that has been filed, punishable by a fine of up to \$5,000 and up to three years' imprisonment.
- Requires that informational ballot materials be drafted in clear and impartial language.
- Requires the legislative analyst's office to prepare an estimate of the net impact of the proposed initiative within 50 days of receipt by the attorney general, unless the Department of Finance and the legislative analyst agree that this can't be accomplished in the 50-day period.

* There is some room for legal interpretation as to whether a joint public hearing is automatically triggered when a citizens' initiative collects 25 percent of the required signatures, or whether the legislature need only hold such hearings when it deems it likely that the measure will eventually make it onto the ballot if it is not withdrawn. Prior to BITA, the state legislature held public hearings on initiatives only after they were certified to appear on the ballot.

gest that citizens' initiatives lead to more political learning opportunities, and enhance public interest in elections. A 2005 study by Tolbert suggests that the more numerous the initiatives that appear on the ballot, the more likely it will be that an individual will be interested in the election.⁴ Multiple studies have shown that ballot measures increase voter turnout in midterm elections and even in presidential elections, although the effect is less significant in years with high voter turnout. Over the past quarter century, states with ballot initiative processes have enjoyed higher voter turnout than those without. A 2001 research paper by Tolbert, John Grummel, and Daniel Smith found that states with citizens' initiatives had 7–9 percent higher voter turnout in the 1994 midterm election and 3–4.5 percent higher turnout in the 1996 presidential election than did states lacking the citizens' initiative.⁵

Scholars have reached a range of conclusions regarding who benefits from citizens' initiatives. There are concerns that wealthy special interest groups or individuals may have co-opted citizens' initiative processes. Still, a 2004 study of the economic impact of 20th-century state and local initiatives by John Matsusaka concluded that direct democracy generally served the needs of the many.⁶ Matsusaka subsequently clarified that while the results of citizens' initiatives generally pleased the majority of Americans, this did not appear to take place at the expense of minority groups, or undermine the rights of minorities, any more than legislative actions did. On the other hand, a 1996 paper by Lascher, Hagen, and Rochlin presented evidence suggesting that direct democracy does not lead to policy outcomes that are representative of public desires,⁷ and a 2007 study by Haider-Markel, Querze, and Lindaman concluded that minority interests such as those of LGBT Americans are not likely to be served by ballot measures.⁸

Researchers have also considered how the availability of this form of direct democracy impacts the public's level of political knowledge, sense of political efficacy and overall happiness. As summarized by Dyck and Lascher (2008), all these factors have been reported to be positively impacted by citizens' initiatives. Smith and Tolbert (2004) reported that Americans living in states that frequently used the ballot initiative were more likely to believe that the government was responsive to their needs.⁹ On the other hand, an extensive analysis of survey data published four years later concluded that the prevalence of direct democracy was unrelated to the general public's sense of either its political efficacy or the responsiveness of government agencies. Strikingly, the use of direct democracy was found to increase internal political efficacy among high-resource, well-informed voters, but was found to have had the opposite effect on low-resource

⁴ Caroline Tolbert, "The Ballot Measure/Citizen Interest Link: Information, Engagement and Participation," The Impact of Direct Democracy Conference, 2005. <http://www.nonprofitvote.org/documents/2010/11/ballot-measure-and-citizen-interest-in-2005.pdf>

⁵ Caroline J. Tolbert, John A. Grummel, and D. A. Smith, "The Effects of Ballot Initiatives on Voter Turnout in the American States," *American Politics Research* 29, no. 6 (2001): 625–48.

⁶ J. G. Matsusaka, *For the Many or the Few: The Initiative, Public Policy, and the American Democracy* (Chicago: University of Chicago Press, 2004).

⁷ E. L. Lascher, Jr, M. G. Hagen, and S. A. Rochlin, "Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion," *The Journal of Politics* 58 (1996): 760–75.

⁸ D. P. Haider-Markel, A. Querze, and K. Lindaman, "Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights," *Political Research Quarterly* 60 (2007): 304–14.

⁹ Daniel A. Smith and Caroline J. Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States*, The University of Michigan Press, 2004. <https://www.press.umich.edu/pdf/0472098705-fm.pdf>

nonvoters and underinformed voters.¹⁰ A poll conducted in the late '90s by Lascher and Hagen found that most Californians believed that two-thirds rather than a simple majority should be required to approve a measure, and 41 percent believed the number of initiatives on any one ballot should be limited.¹¹

How Recent Reforms to California's Ballot Measure Process Have Impacted Public Engagement

Supporters of BITA hoped this reform would enhance public knowledge of and participation in the ballot initiative process. To this end, the law introduced several innovations. BITA creates a 30-day period for Californians to read and comment on proposed ballot initiatives online, and allows proponents of the initiative to make changes based on the input received. Public hearings devoted to ballot initiatives that are seen as likely to qualify for the upcoming ballot now occur earlier in the process than they did before. Proponents may withdraw initiatives if a legislative compromise is reached, or if they are otherwise convinced that it is no longer wise to place the proposition on the ballot anytime until certification, which occurs on the 131st day before the next general election. Proponents now have 180 instead of 150 days to collect the required number of signatures (five percent of the number who voted in the last gubernatorial election for most initiatives, and eight percent for those that require a change to the state constitution).

Analysis of Online Public Comments

One purpose of mandating a 30-day public comment period, and allowing proponents of citizens' initiatives to make changes to or even withdraw their proposals, was to improve the legislation resulting from California's initiative process. Nicolas Berggruen, chair of the public policy think tank the Think Long Committee for California, noted that one of BITA's goals was to "enable broader debate and public review so that measures can be modified before they go to the ballot, avoiding unintended consequences." In a public statement, the executive director of California Common Cause, Kathay Feng, explained that BITA was drafted to give "voters the chance to see what initiatives are about early in the process, and address flaws if there are problems with the language." However, it should be noted that because the public comment period takes place very early in the ballot initiative process there is often limited information available to the public other than the language of the proposed initiative.

An analysis of the comments received via the California attorney general's website during the first election cycle since BITA took effect offers some insights into how the public utilized this opportunity to weigh in online.¹² In total, there were 1,010 public comments submitted dur-

¹⁰ J. J. Dyck and E.L.L. Lascher, "Direct Democracy and Political Efficacy Reconsidered," *Political Behavior* 31, no. 3 (2008): 401–27.

¹¹ M. G. Hagen and E. L. Lascher Jr, "Public Opinion about Direct Democracy," 1998. Presented at the annual meeting of the American Political Science Association, Boston (as cited in J. J. Dyck and E. L. Lascher Jr, "Direct Democracy and Political Efficacy Reconsidered," *Political Behavior* 31 no. 3 (2008): 401–27).

¹² We engaged in a directed content analysis of the public comment data, creating coding categories both preset and open; we started with a list of preset codes derived from the conceptual framework and the list of research questions, and then we identified themes and categories that emerged from the data.

ing the new 30-day public comment period mandated by BITA on the 125 initiatives submitted prior to the end of 2015. Twenty-six percent of the proposed initiatives received no public comments. Of the 125 initiatives, 33 received no comments, 92 received at least one comment, 42 received 4 or more comments, 12 received 10 or more comments, and only 5 received 25 or more comments.

Fifty-eight percent of the comments received in this period related to three initiatives in particular. The proposal receiving the most comments was the Sodomite Suppression Act, which proposed making it a crime punishable by death to touch someone of the same sex for sexual gratification. Twenty-seven percent of all public comments received by the attorney general during this cycle related to this highly controversial initiative. Of the 273 comments received via the website, 95 percent took a position, with 94 percent opposed, 2.3 percent in favor. The remainder were unclear in their position. This unpopular initiative was eventually deemed unconstitutional by the courts and removed from circulation.

Meanwhile nearly 22 percent of public comments received were in response to the Voter Empowerment Act of 2016, an initiative that would have removed constitutional protections for state and local public employee pension and retirement health benefits. A significant number of active and retired public employees and their family members appeared to weigh in, identifying their affiliations (not all who commented on this initiative chose to identify themselves). Fully 96.8 percent of the people who commented on the pension reform initiative took a position; of these, 72.8 percent opposed it and 16 percent supported it. Ultimately, it failed to gather enough signatures to qualify for the 2016 ballot.

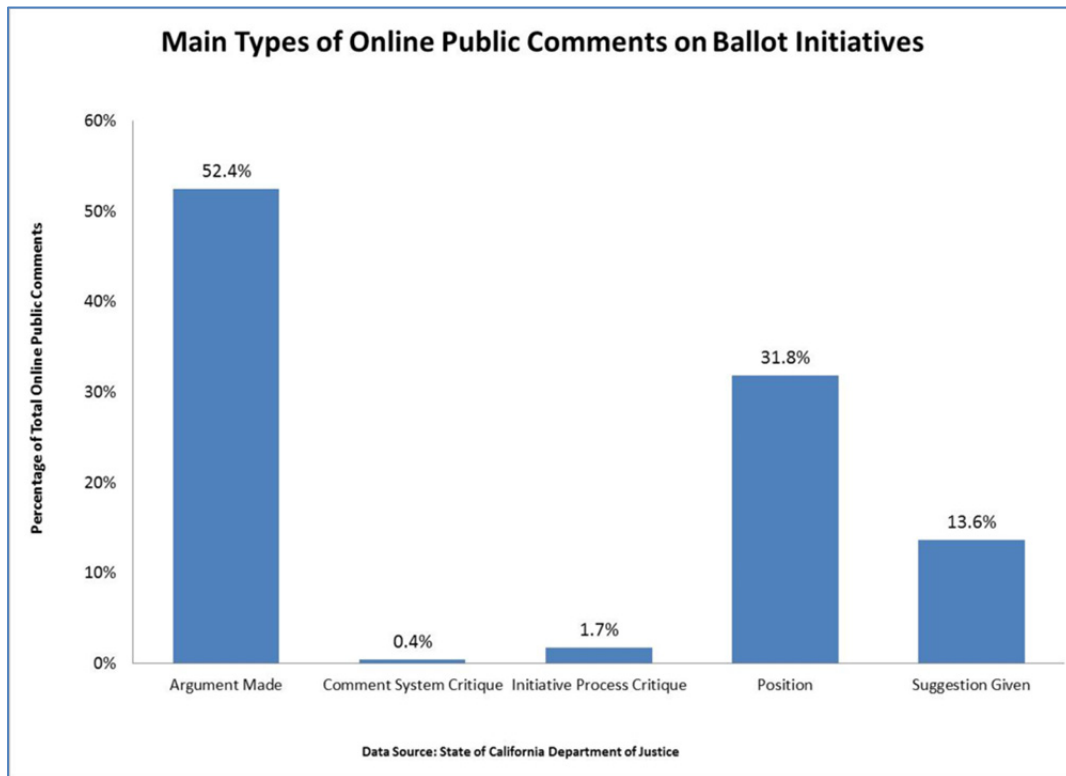
Finally, nine percent of online public comments were written in response to the Safety for All Act, an initiative championed by former San Francisco Mayor Gavin Newsom, aimed at regulating gun and ammunition sales in California. As one might expect on such a divisive topic, the comments on this initiative expressed everything from gratitude to outrage, with some commentators thanking him for this initiative, and others decrying the proposal as an assault on their Second Amendment rights. Of the 91 online comments submitted regarding this initiative, 54.9 percent took a position. Of those, 62 percent were opposed, 16 percent were in support and 22.5 percent were unclear if they supported or opposed the measure. Known as Prop. 63, the initiative appeared on the November 2016 ballot and was approved by voters.

How did other initiatives stack up? The 15 proposed initiatives related to legalizing cannabis received only 54 online public comments, or about five percent of the total comments received despite the growing popularity of legalizing marijuana in California. Other proposals receiving 20 or more comments included The California Immigration Reform Act with 48 comments, a proposal to allow online voting with 25, a proposal to restrict bathroom use based on assigned gender with 22, and a proposal to change the state's three strikes felony sentencing laws with 20.

Of the 15 citizens' initiatives that qualified for the November 2016 ballot, three received no public comments: Prop. 52 (protecting state hospital fees that provide Medi-Cal services) and Prop. 67 (a plastic bag ban referendum) entered the circulation stage prior to BITA implementation. Prop 57 (sentencing parole reform) received no online public comments and went on to be approved by voters. Ten initiatives that qualified for the ballot received 1–4 public comments. Only two of the 15 qualifying citizens' initiatives received more than four public comments, the aforementioned Safety for All Act which drew 91, and the Marijuana Legalization Initiative (Prop. 64) garnering 13.

This analysis was conducted by one researcher and then peer reviewed by another to help guard against the potential for lone researcher bias and to help provide additional insights into the analysis.

Figure 1. Main types of Online Public Comments on Ballot Initiatives



As shown in Figure 1, most of the online public comments received through the state attorney general’s website made some argument with regard to that initiative, or clearly stated the author’s position. Only 13.6 percent of the comments included suggestions on how to improve the initiative or change its language.

One such suggestion, on the initiative that became Prop. 64, reads in part:

Several concerns remain and the following suggestions (in bold) are intended to provide constructive improvements to AUMA [Adult Use of Marijuana Act] and provide wording that could still be integrated into the initiative: 1. Penalties for providing marijuana to those under 21, Section 11360 (p. 53) A. Clarification is needed re: “Unlawful transportation, importation, sale, or gift.” It appears that providing marijuana to someone under 21 falls under “unlawful sales or gifts” that

can be punished by up to a \$500 fine and/or 6 months in jail. Providing marijuana to those under 21 should be separated out as more egregious than unlawful sales to an adult or unlawfully transporting marijuana.

Less than two percent of comments offered critiques of the initiative process, while an even smaller number, .4 percent, related to the online platform for offering public comments.

As Figure 2 illustrates, nearly two-thirds of online public comments expressed opposition to a proposed initiative. Californians who participated in this new public comment process more often commented on initiatives they were opposed to than ones they supported. This trend may have been exaggerated in this first round of public comment under BITA due to the controversy

Figure 2. Online Public Comments on Ballot Initiatives: Types of Positions Taken

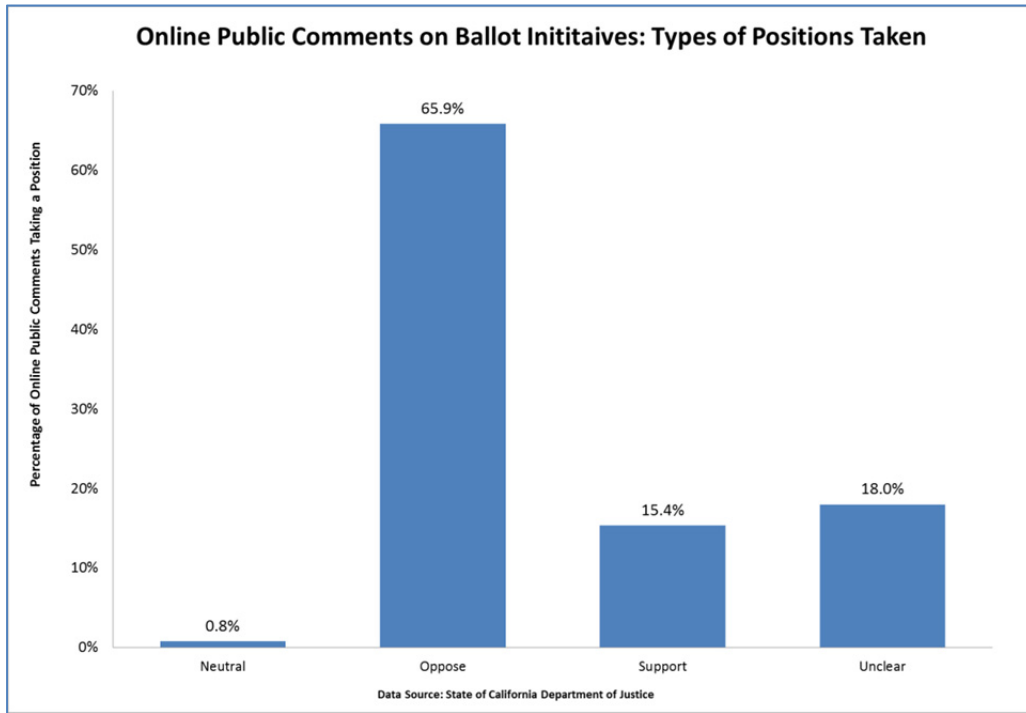
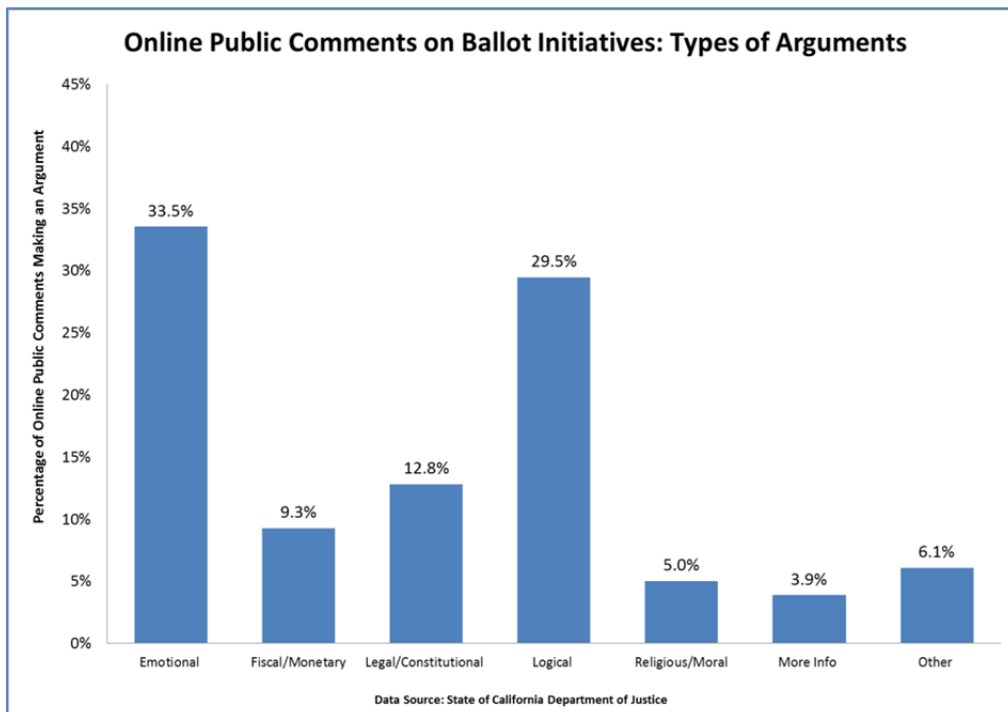


Figure 3. Online Public Comments on Ballot Initiatives: Types of Arguments



generated by the Sodomite Suppression Act, as noted above. When the Sodomite Suppression Act comments are removed from the data, the number of comments expressing opposition decreases from 66 percent to 54.5 percent of all comments. Only 15.4 percent of comments collected were in support of proposed initiatives, while 18 percent did not take a clear position, and .8 percent remained neutral. Interviewees with experience in ballot measure campaigns whom we spoke with offered a possible explanation for this, noting that savvy opponents of initiatives would be unlikely to share their views with proponents through the attorney general's website, preferring to unveil their arguments later in the process for strategic reasons.

Figure 3 shows a breakdown of the types of arguments presented in the public's online comments on ballot initiatives during the 2016 election cycle. The most common type of argument made was an emotional appeal; one-third of comments included an emotional component.¹³ Making proponents upset was a slightly less popular strategy than making them laugh: of the emotional appeal arguments submitted online, one fourth included name-calling or threatening language, and just over one quarter (28.6 percent) included humor or sarcasm. Less than two percent of arguments included profanity, an encouraging number for fans of civil discourse.

Such arguments feature many examples of humor and colorful language. In response to the satirical Shellfish Suppression Initiative, which was intended to mock the proposed Sodomite Suppression Act, one commentator quipped: "Shellfish are a monstrous evil that Almighty God, giver of freedom and liberty, commands us in Leviticus to suppress. They also smell bad." Others resorted to name-calling or threatening language. Responding to the Sodomite Suppression Initiative, one commentator fumed: "What kind of sick, disgusting lunatic even proposes this nonsense? The person who submitted this thing should be disbarred, fired, and fined for wasting the time and energy of the employees and legislators of the state of California." Still others combined an emotional appeal with logic-based arguments: "Please address this issue," one person wrote in response to the Three Strikes Rehabilitation Reform initiative, "With the aging inmate population this is the right thing to do. We don't need the financial burden of inmates that are likely no longer a threat to the public."

Slightly less than one-third of comments made a logic-based argument for or against the initiative in question. For instance, one comment from a person who supported the Death Penalty Procedures Initiative (Prop. 66) reads:

Voters support reform of California's death penalty. It has become ineffective because of waste, delays, and inefficiencies. Fixing it will save California taxpayers millions of dollars every year, assure due process protections for those sentenced to death, and promote justice for murder victims and their families. Death row inmates have murdered over 1,000 victims, including 226 children and 43 police officers; 294 victims were raped and/or tortured. It's time California reformed our death penalty process so it works.

Another logic-based argument opposing the Citizens Services Agency Initiative, which did not qualify for the ballot, reads in part,

The DMV is already overworked and understaffed. How can you possibly expect them to do this work? As usual, the people proposing un-debated legislation have failed to indicate how many new hundreds of employees this will require.

¹³ Comments were coded as making an argument with an emotional appeal if the comment had an emotional quality to it or appealed to readers' emotions. Subcategories for this code were; name calling and hate language, profanity, sarcasm or a joke, or other type of emotional appeal.

Nearly 13 percent of the arguments presented by the public cited a legal or constitutional rationale. For instance, one commentator who opposed the proposed Public Assistance Benefits Initiative argued that,

I have several concerns about this act. The first is that it makes no provisions for those who are protected by the Americans with Disabilities Act and equivalent state-level legislation. Second, this may run afoul of the 5th, 13th, and 14th Amendments to the United States Constitution. This would deny people liberty without due process of law. It would force people into involuntary servitude without due process of law as punishment for a crime. It abridges section 1 of the 14th Amendment as it expanded the aforementioned restrictions to state governments.

A total of 9.3 percent of the online comments cited financial concerns. For example: “California is hurting financially and can’t afford to take in more people that will get benefits our own citizens can’t even get. Businesses are leaving, the economy is getting worse and this is not going to help!”

Religious or moral beliefs were cited in five percent of the comments on proposed initiatives. Only 3.9 percent of the online comments requested more information about the initiative or its possible impacts. Finally, of the relatively small number of comments received related to California’s Initiative Process itself, the vast majority were critical of this process, while five were neutral, and one praised it.

Impact of Online Public Comments

To better understand the impact of the public comments submitted online, we conducted in-depth interviews with key players involved in the ballot initiative process, including legislative members and their staff, voter advocates, and those involved in initiative opposition and support.¹⁴

The actual impact of the comments submitted online is difficult to measure. Proponents are not mandated to make any changes to their initiatives following the public comment period. If they do choose to amend their proposal in the five-day window following the public comment period provided, these changes need not reflect the public input they received during this period.

For instance, one legislative insider suggested that proponents of the initiative that became Prop. 57, The Parole for Nonviolent Criminals Initiative, appeared to use the additional time afforded by the public comment period to amend the measure according to the governor’s wishes rather than in response to public comments. The extensive amendments to this initiative that were made following the public comment period triggered a court challenge, but the court ruled that the changes were reasonably germane to the original intent of the measure, and therefore permissible.

Certain factors appear to limit the impact of the public comment period on the citizens’ initiative process. The attorney general’s office is not required to promote public participation in

¹⁴ As we did with the public comment data, we engaged in a directed content analysis of the in-depth interview data, creating coding categories both preset and open; we started with a list of preset codes derived from the conceptual framework and the list of research questions, and then we identified themes and categories that emerged from the data. This analysis was conducted by one researcher and then peer reviewed by another to help guard against the potential for lone researcher bias and to help provide additional insights into the analysis.

the comment process. There is no direct link to the public comment platform through the attorney general's homepage. Furthermore, public comments submitted online are available only to the state attorney general's office and to the proponents of the relevant initiative. This means that other members of the public, including the opposition, do not have ready access to potentially useful comments. An early analysis of BITA published by Chris Chambers Goodman suggested that, while the public comment period may provide an opportunity for media exposure and public sentiment to influence the process, it may not significantly enhance transparency, since the comments are not published and can only be accessed through a Freedom of Information Act request.¹⁵

The wording of ballot initiatives can also be a barrier to accessibility. One legislative insider shared his/her belief that the complex legal language initiatives are written in can be an obstacle to public participation in the online comment process, saying that "if the idea is for the average voter or citizen or even grassroots group to sort of be able to dive into that and offer substantive comments, that would be really challenging given the nature of how these things are written." Some interviewees believe that the comment process is more accessible to organizations with lawyers and lobbyists than it is to ordinary citizens. One speculated that for most Californians with an interest in an issue related to an initiative, it would be a challenge to "wade through that legal language and really know what do I think about this and really offer some substantive comment."

The very existence of the new online public comment process may not be apparent to most California voters. Whether this process ultimately has a measurable effect on policy outcomes is not clear at this stage. Time is needed for people and organizations to learn about this opportunity to weigh in on future proposed initiatives. Indeed, several people we spoke with talked about this learning curve. As one person involved in the work leading up to BITA remarked:

I would say that in some instances where there are lots of people or organizations that know about an issue and can get organized around something, the (comments) site is not bad. I think [that] as a general tool for the public to use, it is obscure. People don't know that it exists, but then again we have had one major election cycle so it may be that you need to have a big initiative come along that everyone is engaged in for that to be more used. . . . People are realizing, oh, there is this early process that we can make a difference in. It hasn't yet registered in a lot of organizations' minds to pay attention.

Several capitol insiders we interviewed were skeptical about the real impact of comments submitted online by the public through this new process. "It all sounds very nice, but I don't think anything is ever going to come of it," said one capitol staffer. "The public comments will probably wind up being 'this measure sucks', and 'you are a commie,'—the kind of stuff you see on Twitter and in comments on an online newspaper story."¹⁶ The same legislative staff person confided:

There really wasn't public input unless some proponent made an effort to invite it. There was no official mechanism for public input, so that is all brand new. Of course there is no law that says

¹⁵ Chris Chambers Goodman, "Augmenting Transparency in the Ballot Initiative Process: Impacts of the 2014 Reforms on the 2016 Election Cycle," *Chapman Law Review* 19 (2016): 129–50.

¹⁶ As noted above, our analysis of online comments submitted for the first round of proposed initiatives under BITA shows that only a quarter of the comments submitted containing an emotional component resorted to name calling or threatening language, and under two percent included profanity.

the proponents have to read any of it let alone take it to heart. . . . I think that the vast majority of proponents know exactly what they are doing. Whether anyone else agrees with them or not, they are very deliberate about how they are drafting their initiatives. They might not be overly interested in what folks have to say about it.

Another legislative insider expressed doubts as to whether most people submitting online comments possessed the knowledge necessary to offer valuable input. “You really need to have educated yourself, know all the background, what are the concerns, what is the point of view of all the other stakeholders,” the commentator noted. “Only then maybe do you have something worthwhile to contribute to the discussion. You open it up to the public and what are you going to get? It’s not going to be high-quality contributions.”

A senior legislative staffer told us that although they did not have direct experience with citizens’ initiatives, their impression was that poll testing was more likely to result in changes to initiatives during the public comment period than were public comments submitted online. They also postulated that comments that resulted in changes to the initiative would likely come from affected special interest groups, as opposed to “some random voter.”

A legislator who supported SB 1253 described the public comment aspects of BITA as “window dressing, not the main point of the initiative” explaining that “the initiative process has become very expensive, so the discussions generally don’t happen in public, they happen in private.”

Despite these barriers and caveats, our research indicates that comments submitted online may already be influencing the content and wording of proposed initiatives, at least in some cases. One initiative proponent told us that the online public comment portal provided an important way for his/her team to hear useful feedback from stakeholders representing smaller organizations. The interviewee stated that while 80 to 90 percent of the comments they received were purely ideological statements, about 10 percent included thoughtful observations and suggestions which the interviewee found useful. Such comments turned out to be especially important, as supporters of this initiative were able to connect with representatives of small organizations that they may not have otherwise approached. With regard to ballot initiatives related to online voting, a large number of negative online comments were received expressing concern that internet security was not adequate for this form of voting to be safely implemented. However, it is unclear whether or not these comments influenced the proponents of these initiatives. Some legislative insiders we interviewed were hopeful that as the public becomes more aware of BITA’s new feedback opportunities, grassroots organizations and others with limited resources will be able to engage more effectively in the initiative process than they have thus far.

Others disagreed, however, offering less sanguine observations about the impacts of the newly established public comment period. Some initiative proponents told us they were surprised by how little commentary they received through the online portal, adding that the comments they received did not impact their measure.

Ultimately, the impact of BITA’s reforms may vary, depending on the initiative. Indeed, as some interviewees noted, the amount of public engagement may ultimately have less to do with public input reforms, than with the content of individual ballot initiatives themselves. BITA aside, some initiatives simply garner more input than others, especially if they are controversial or polarizing. The impact of public input also depends on how open initiative proponents are to accepting feedback from the public, and thus to considering amendments to their proposals. Measured this way, the value of public input will depend on several other factors that transcend the potential effects of BITA’s specific public input reforms.

Public Engagement at Joint Legislative Public Hearings

The informational legislative hearings prescribed by BITA were generally pro forma in nature and drew little public or media attention. The hearings retained the same format as the informational public hearings held on qualified ballot measures before BITA's passage, though they were held at an earlier stage in the process than they had been under the old system. Hearings occurred at the state capitol building and, in all but two cases, were filmed and made available for public viewing on CalChannel.¹⁷ Information about scheduled hearings was posted on the Senate and Assembly websites.

At the beginning of each joint hearing, a co-chair explained that the hearing was informational, as outlined under SB 1253 for initiatives that have acquired 25 percent of the required signatures, and noted that the legislature would not be able to amend the initiative. The co-chairs then offered welcoming remarks, after which a representative from the legislative analyst's office read a summary of the initiative. This detailed, nonpartisan analysis of the initiative was also made available online and in print at each hearing. This testimony was followed by testimony from proponents and then from opponents of the initiative, or by other experts.¹⁸ Proponents and opponents of the initiative were given equal time to testify, while members of the legislature in attendance were free to ask questions.

A total of 121 public comments were shared at 14 joint legislative public hearings on proposed ballot initiatives in 2016. About two-thirds of these public comments came from people testifying on behalf of an organization. More people came to the capitol to support proposed measures than to oppose them—54.5 percent of the public comments were supportive, 31.4 percent were in opposition, and 14.1 percent did not clearly take a position. Only 7.4 percent of public comments at the hearings included a clear suggestion related to improving the proposed initiative or its wording.

Public comments at these hearings were often very brief. Those who spoke typically professed the name of the organization they represented, and stated their position on the measure. In some cases, commenters described why they took the position they did, pointed out ambiguities in initiative language, or warned about the initiative's possible unintended consequences. Legislative members generally did not respond to these remarks, other than to thank the commenters for speaking. The people offering public comments were generally paid advocates for organizations, or volunteers with advocacy groups. As one senior legislative staffer we interviewed put it:¹⁹

Unless it is something dealing with vaccinations or spaying or neutering pets, and they all come in the building wearing the same T-shirt, you don't get a ton of average citizens taking a day off work to come to the capitol to testify about a bill . . . it's almost always the usual suspects . . . you get the paid folks and the government agencies that have representation and want to say something about the bill. Unless it's something that is just a real emotional issue, you don't get a ton of average citizens testifying, because it's a big pain.

¹⁷ A hearing on the initiative related to the use of condoms by pornographic actors was not recorded for online streaming due to concerns about protecting the privacy and safety of some of the participants. The hearing on the initiative proposed by the plastic bag industry in response to the ban on single use plastic bags was also not found in a search of legislative hearings available on CalChannel.

¹⁸ No proponents testified at a May 25, 2016 joint hearing on the initiative that became Prop. 65.

¹⁹ Coding of the interview data on public hearings followed the same process as the coding of the interview data on the impact of the online public comments. See footnote 12.

For example, in the relatively well-attended joint legislative public hearing on May 24, 2016 on the initiative that became Prop. 64 (legalizing recreational marijuana), the people who offered public comments included a representative of the California Sheriff's Organization (who opposed it), a representative of the California Growers' Association (who asked the legislature to find a better legislative solution), representatives from the California NAACP and the Black Chamber of Commerce (who supported it), a representative of the National Organization for Marijuana Legalization (who asked for ambiguities in initiative language to be cleared up), and a community activist (who opposed the measure and held up photos of people she said were killed by cannabis users).

By comparison, the joint legislative public hearing held the following day for the initiative that came to be known as Prop. 65, the Dedication of Revenue from Disposable Bag Sales to Wildlife Conservation Fund Initiative (which failed with voters) attracted few attendees. Only two people offered public comment. Both represented environmental organizations opposed to the initiative, which was supported by the plastic bag industry.

At another joint legislative public hearing held on June 14, 2016 for the initiative that became Prop. 56 (Tobacco Tax Increase), a fairly large number of people waited to offer public comments. They included representatives for health agencies who were voicing their support for the initiative, and opponents of the initiative who owned or worked at "Vape" shops (the measure, which was approved by voters, raised taxes on e-cigarettes as well as traditional tobacco products).

As a whole, the earlier time-frame for the informational joint legislative public hearings mandated by BITA does not appear to have appreciably impacted the level of public involvement in the citizens' initiative process in the 2016 election cycle. While these hearings did occur earlier in the legislative cycle than they had in previous elections, the format and types of participants appeared to be similar to what is typically seen in legislative hearings before BITA. The timing of the hearings was also still too late for proponents to amend their initiatives based on any input received. Several capitol insiders we interviewed confirmed this conclusion, noting that the timing of the joint legislative hearings on ballot initiatives precluded proponents from incorporating public feedback received at the hearings into their proposals since amendments were no longer allowed at this point in the process. One legislative staff person remarked that "having public input at that point in the process isn't as constructive as it could be if there were either more flexibility in the process or if that public input came at an earlier point in the process."

Still, despite what appears to be underwhelming effects on public engagement from the changes introduced by BITA, some observers noted that the earlier timing mandated by the law may help enhance public involvement in at least some cases in future election cycles. As noted above, the value of BITA's reforms will most likely be on display when controversial or popular ballot initiatives come to the fore. In such cases, BITA will likely offer a new set of opportunities for initiative proponents and opponents to organize, recruit, educate, and energize their allies and disseminate their message. When it comes to more mundane initiatives, however, the effects of BITA may continue to appear less dramatic. As one senior legislative staff person pointed out: "there are some issues that naturally draw people out because they care about it. But if people don't care about an issue, it's really hard to make them care or incentivize them to care, because they just don't."

It should be noted that a difference of opinion exists among some about how to properly interpret the language of BITA with regard to the timing of joint legislative public hearings, and whether they are in fact mandated when the 25 percent signature threshold is reached. At least

one legal scholar interpreted SB 1253 as a mandate that a joint hearing would be held whenever an initiative reached the threshold of 25 percent of required signatures, regardless of whether it had a chance of qualifying for the ballot. However, several senior legislative staffers in Sacramento interpreted the law differently. Their interpretation was that BITA could not require the legislature to hold a hearing, since only a constitutional amendment could mandate such action. Furthermore, they interpret the language of the elections code as amended by BITA, which reads, “The appropriate committees shall hold joint public hearings on the subject of the measure not later than 131 days before the date of the election at which the measure is to be voted upon” to mean that the hearing is required *only* if the initiative will appear on the ballot. One legislative staff person told us, “I always suspected that the legislature was unlikely to hold hearings on measures until it was abundantly clear that those measures were going to qualify for the ballot.” In practice, it turned out that the timing of informational joint legislative hearings under BITA during this first initiative cycle was inconsistent. Hearings did not necessarily occur promptly once a proposal gathered 25 percent of the required signatures. In fact, seven citizens’ initiatives that reached this threshold never received a joint legislative public hearing, presumably because they were not expected to qualify for the ballot.

Recommendations

Relatively few members of the public participated in this first opportunity to weigh in on proposed citizens’ initiatives through the California attorney general’s website. The challenge of engaging more Californians in the ballot initiative process, in order to provide proponents with useful input from a number of diverse viewpoints, is one that is not easily addressed. One purpose of collecting online comments is to help improve citizen-initiated constitutional or statutory proposals by providing a feedback system that helps proponents draft more effective proposals with clear, unambiguous language that avoid unforeseen consequences. With this goal in mind, our research suggests several possible ways to increase public engagement in the initiative process.

The current online public comment interface offers a very basic form of content management that does not offer users guidance on what kinds of comments to provide. It might be helpful to prompt commentators to offer concrete suggestions on how to improve the initiative itself or its wording, and/or to provide constructive alternatives.

Many people we interviewed lamented what they perceived as the low public profile of the joint legislative public hearings. Raising public awareness of and interest in these hearings and the proposed ballot initiatives would require trying new approaches that help these hearings reach people outside the capital. For instance, one experienced legislator suggested that informational hearings be held in communities around the state, noting that it is difficult for people to travel to Sacramento for hearings. Other people we spoke with recommended that new technologies could be used to make the process more inclusive. For example, several key players behind BITA suggested that a type of online town hall interface could be a way to involve more California residents in the initiative process without taking the actual hearings outside the capitol dome.

Addressing the ambiguity in how to interpret the wording of SB 1253 with regard to the timing of hearings could result in earlier, more numerous and more meaningful opportunities for the general public and advocates to weigh in through this process. As noted above, there was a lack of clarity and consistency as to how soon or whether a proposed initiative that collected 25 percent of the required signatures would trigger a hearing. While the authors are still unable to

amend their initiative once the signature gathering process is underway, clearing up this ambiguity might help individuals and organizations be able to plan their public outreach and organizing more effectively.

Finally, others recommended changes in the format of the hearing. One senior legislative staffer argued that the current format appears to lend itself somewhat to conflict and criticism, and suggested it be changed to allow for more “give and take,” which the staffer felt would generate more productive dialogue. A well-planned, inclusive dialogue process might generate more thoughtful, insightful, and useful input for policymakers than traditional government hearings.

However, some of those charged with planning and implementing the hearings thought BITA had an impact on the state legislature’s role in the initiative process. One legislative insider told us that he/she thought of the joint legislative hearings “as being more about the legislature weighing whether it wants to consider an alternative and pass legislation” than about providing information to the public. A legislator who contributed to BITA told us that “we got exactly what I intended, which is to create a 5 to 8 to 12-month window, depending on when an initiative is introduced, for proponents to be able to negotiate with the legislature to find a legislative solution.”

Conclusions

What can we take away from this attempt at creating new opportunities for the public to learn about and weigh in on proposed ballot initiatives? BITA has altered the way that Californians can participate in the initiative process. Thus far, the reforms to the initiative process brought about by this bill appear to have resulted in limited public use of the options provided for engaging in the initiative process. However, public engagement may increase over time, as state officials and the general public become more familiar with the new process. Greater public awareness of the new engagement opportunities BITA provides, including the comment system, will be an important component in enhancing the public input aspects of the initiative process.

There may be support among California’s legislative leaders for exploring more robust online and geographically dispersed in-person opportunities that will allow a greater diversity of residents to learn about, discuss, and weigh in on proposed ballot initiatives. The challenge may be finding a funding source to support an effective statewide outreach effort. Whatever changes might be made should be carefully tracked to gauge their effectiveness in terms of public participation.

We believe that our research suggests several possible ways to increase public engagement in the initiative process, in furtherance of SB 1253’s original goals and intentions. Indeed, the heightened levels of public knowledge that would result from increased public engagement could lead to more constructive input into the ballot initiative process, fostering better policy decisions that better serve the population’s needs. Making the best possible decisions in the interest of all Californians is especially critical when it comes to the long-lasting and often highly impactful changes brought about by the state’s cherished avenue for direct democracy, the citizens’ ballot initiative process.