

Mediation of Proposition 187: Creative Solution to an Old Problem? Or Quiet Death for Initiatives?

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I. INTRODUCTION

The initiative Proposition 187 has been a catalyst for change. Supporters heralded it as the solution to "Save Our State"¹ from the ills of illegal immigration. Those who opposed it, used Proposition 187 as a battle cry to mobilize a disenfranchised minority.² Irrespective of ideology, Proposition 187 ended as no one could have predicted in November 1994 when it passed, 59% to 41%.³ When Governor Gray Davis inherited the Proposition 187 appeal from former Governor Pete Wilson, Governor Davis took the unprecedented step of seeking to resolve the conflict through mediation rather than actively defending Proposition 187 on appeal to the Ninth Circuit Court of Appeals.⁴ The Governor's decision is unique because no initiative has been settled by mediation.⁵ Many criticize Governor Davis' decision arguing that it smacks of a political ploy.⁶ Governor Davis stated that he would uphold his duty to de-

1. Patrick J. McDonnell, *Prop. 187 Turns Up Heat in U.S. Immigration Debate Election: Backers Seek Revolution in National Policy. Foes Predict Ill Educated, Disease Prone Underclass*, L.A. TIMES, Aug. 10, 1994, at A1. An Orange County-based organization adopted the slogan Save Our State (S.O.S.) in support of Proposition 187. *Id.* The organization headed by Ron Prince, a Tustin, California accountant, estimated that illegal aliens cost California \$1.5 billion each year for social services. *Id.* Supporters argued that California has suffered too long from illegal immigration specifically crime, costs of health care, education, and welfare. CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, at 91 (Nov. 8, 1994).

2. Proposition 187 became a touchstone for Latinos in California. They mobilized in opposition to Proposition 187 and gained political strength. Terry McDermott, *Some Are Embittered by Fate of Prop. 187*, L.A. TIMES, Aug. 2, 1999, at A1. The Proposition inspired widespread protests in opposition to the proposed legislation. Marc Lacey & Henry Chu, *LAPD Calls Alert for Student Rallies*, L.A. TIMES, Oct. 29, 1994, at B1. Latino activism continues. In the 1998 election, Latino voters were 13% of the electorate. George Skelton, *West King of the Center Says Lungren Ran Too Far to the Right*, L.A. TIMES, Nov. 9, 1998, at A3. In 1982, Latinos were only 6% of the electorate. *Id.*

3. Proposition 187 was approved by the voters on November 8, 1994. Keith Bradsher et al., *The 1994 Elections: State by State*, N.Y. TIMES, Nov. 10, 1994, at B11.

4. Governor Gray Davis did not support Proposition 187 in 1994 and has declared that if Proposition 187 was a piece of legislation, he would veto it. Terri Hardy, *Davis Seeks Mediation on Prop. 187*, L.A. DAILY NEWS, Apr. 16, 1999, at N1. Governor Davis had to defend Proposition 187 on appeal since the lawsuit challenging Proposition 187 was filed against then Governor Pete Wilson. Ed Mendel, *Davis Takes Middle Road on Prop. 187 Suit*, SAN DIEGO UNION & TRIB., Apr. 16, 1999, at A11. Former Governor Pete Wilson called Governor Davis' decision to mediate a "breach of his constitutional duty." Dave Leshner & Dan Morain, *Davis Asks Court to Mediate on Prop. 187*, L.A. TIMES, Apr. 16, 1999, at A1 (quoting former Gov. Pete Wilson). The former Governor urged Governor Davis to appeal to the United States Supreme Court, if necessary. *Id.*

5. When the mediation settlement was announced in August 1999, after months of talks, Proposition 187 became the first California initiative to be settled by mediation. Patrick J. McDonnell, *Prop. 187 Talks Offered Davis Few Choices*, L.A. TIMES, July 30, 1999, at A3.

6. Many believe that the Governor's decision is a way to seemingly support the appeal of Proposition 187, but kill it softly through a mediated settlement. Phil Busse, *Killing It Softly*,

fend the will of the people even though he was against Proposition 187 before he became Governor. The Governor's statement that he would defend the will of the people seemed contradictory to his announcement that he would not defend one of the most controversial sections of Proposition 187: denying illegal children access to public education.⁷ The people of California, however, will never know if he zealously defended Proposition 187.

One of the primary tenets of mediation is confidentiality. Its purpose is to make participants more willing to openly communicate because the process will be held in confidence among the participants. The Governor's decision to mediate is paramount because it could cause an effect never foreseen in the resolution of initiatives due to this unique nature of mediation: confidentiality.⁸

CAL. LAW., Aug. 1999, at 17. The Governor's decision to mediate Proposition 187 came just a month before former President Ernest Zedillo's historic three-day visit to California. Rick Orlov, *Binding Relationship; Zedillo Hails New Era in L.A. Visit*, L.A. DAILY NEWS, May 20, 1999, at N1. During President Zedillo's visit the Governor announced that he would never be a "party to an effort to kick kids out of school." Dave Leshner, *Davis Won't Follow Prop. 187 on Schools*, L.A. TIMES, May 21, 1999, at A1. Many Latino supporters were enraged by the Governor's decision and termed it a betrayal, especially Lieutenant Governor Cruz Bustamante, who called Proposition 187 neither "morally or legally defensible." Terri Hardy, *Davis Seeks Mediation on Prop. 187*, L.A. DAILY NEWS, Apr. 16, 1999, at N1. The Governor was in a political quagmire: dropping the appeal appeases Latino voters, but appealing conflicts with his statements to support the will of the people. Ed Mendel, *supra* note 4, at A1.

7. Some believe that the Governor is showing disrespect for the voters because he decided not to defend the portions of Proposition 187 that he did not politically support. *Davis Won't Stick to Prop. 187 Clause*, PRESS-ENTERPRISE (Riverside, Cal.), May 22, 1999, available in 1999 WL 18891195; see also Dan Morain, *Debate Rises on Mediation of Proposition 187*, L.A. TIMES, Apr. 20, 1999, at A1. One of the groups supporting Proposition 187, Pacific Legal Foundation (PLF) wanted to challenge the 1984 Supreme Court decision *Plyler v. Doe*, 457 U.S. 202 (1975), granting illegal alien children the right to public school education. M. David Stirling, *The Governor Disrespects State's Voters*, S. F. CHRON., May 24, 1999, at 23. The Howard Jarvis Taxpayer's Association filed suit with the California Supreme Court on June 1, 1999, to oppose mediation in the settlement of Proposition 187, but the court unanimously denied the Association's request. A.P., *High Court Refuses to Block Prop. 187 Mediation Effort*, L.A. TIMES, July 2, 1999, at A26. The Association claimed that it was neutral on the Proposition 187 issue, but opposed mediation as a tool to resolve initiative conflicts. *Id.*

8. Many of those who support or oppose Proposition 187 are concerned that the mediation of Proposition 187 will establish a precedent for settling disputes over initiatives. Dan Morain, *Debate Rises on Mediation of Proposition 187*, L.A. TIMES, Apr. 20, 1999, at A1. Terry Francke, an attorney for the nonprofit First Amendment Coalition is concerned because of the lack of public access in the resolution of Proposition 187. *Id.* Co-author of Proposition 187, Ron Prince is concerned that precedent has been established for settling initiative battles that dilutes the will of

The courts usually resolve conflicts arising from initiatives.⁹ Many argue that mediation of initiatives will set a poor example because there will not be an appellate decision to establish legal precedent for important constitutional issues.¹⁰

This Article will examine the possible impact mediation will have on the resolution of conflicts arising from initiatives. Part II discusses the initiative process and briefly discusses Proposition 187 and its appeal.¹¹ Until recently, initiatives have been the cornerstone of grassroots organizations.¹² Moneyed, anti-minority groups frequently sponsor present day initiatives.¹³ Part III explains mediation and its creative and beneficial attributes,¹⁴ and the impact

the people. McDonnell, *supra*, note 1, at A3. Joel Fox, President Emeritus of the Howard Jarvis Taxpayers' Association, likens the mediation of Proposition 187 to horse-trading. Joel Fox, *Commentary: Who Represents Voters at the Mediation Table?*, L.A. TIMES, June 1, 1999, at B5.

9. Governor Davis argued that he could not drop the appeal of Proposition 187 as his advisors and supporters claimed because California law prohibits him from refusing to enforce a statute unless an appellate court has ruled the statute is unconstitutional. However, the constitutional amendment the Governor refers to does not prohibit him from refusing to enforce a statute because the statute concerns administrative agencies and not a governor's duties. CAL. CONST. art. III, § 3.5. Many constitutional scholars say the law is not clear and is "laden with technicalities, but no clear obligation." Dave Leshner, *Davis Faces Deep Dilemma over Appeal of Prop. 187*, L.A. TIMES, Apr. 14, 1999, at A1. The amendment reads:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

- (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
- (b) To declare a statute unconstitutional;
- (c) To declare a statute unenforceable, or to refuse to enforce a statute . . . unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

CAL. CONST. art. III, § 3.5.

However, this constitutional amendment has been enforced against school officials, the state controller, and other school employers. *See Valdes v. Cory*, 189 Cal. Rptr. 212 (1983); *see also, Leek v. Washington Unified Sch. Dist.*, 177 Cal. Rptr. 196 (1981).

10. Former Governor Wilson urged the Governor to appeal Proposition 187 to the United States Supreme Court. *See Leshner, supra*, note 9. David Stirling, the Vice President of the Pacific Legal Foundation called Governor Davis' decision to mediate 'Machiavellian'. David Stirling, *Davis' Prop. 187 Con Job*, ORANGE COUNTY REG., May 19, 1999, at B8. Stirling urged the Governor to appeal to the United States Supreme Court to challenge the validity of *Plyler* given the harsh financial burden California bears by educating more than 300,000 illegal aliens. *Id.* Others argue that since lower courts have largely eviscerated the law, the only way to resolve the legality is to appeal to the United States Supreme Court. *Behind the Gray Door*, L.A. DAILY NEWS, July 7, 1999, at N12.

11. *See infra* notes 20-140 and accompanying text.

12. *See infra* notes 72-75 and accompanying text.

13. *See infra* notes 76-104 and accompanying text.

14. *See infra* notes 141-264 and accompanying text.

mediation will have on the initiative process.¹⁵ Since the beginning of the Alternative Dispute Resolution ("ADR") movement, mediation has been a unique, party-empowering alternative to litigation.¹⁶ Appellate mediation draws upon private mediation and trial court successes;¹⁷ however, a dangerous standard has begun with the mediation of Proposition 187 because of the numerous constitutional issues involved.¹⁸ Our society and courts need precedent to maintain stability of stare decisis and society's trust in the government, especially the judiciary.¹⁹

II. INITIATIVES — CALIFORNIA'S ELECTORATE LEGISLATE

Since its inception in 1911,²⁰ initiatives and referendums have been controversial.²¹ Primarily tools of the western states,²² initiatives and referendums have had a stormy past.²³ At the turn of the twentieth century, Populists and

15. See *infra* notes 314-355 and accompanying text.

16. See *infra* notes 168, 192-96 and accompanying text.

17. See *infra* notes 148, 212-64 and accompanying text.

18. See *infra* notes 122-131 and accompanying text.

19. See *infra* notes 314-55 and accompanying text.

20. California's initiative and referendum constitutional amendments were passed on October 10, 1911. CAL. CONST. art. II, §§ 8, 9.

21. James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491, 502-03 (1986). Numerous referendums that passed so soon after direct democracy was adopted led to a California Constitutional crisis because of the lack of orderly, cohesive adoption of amendments. See Karl Mannheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1188 (1998). Conservatives responded to the Progressives' championing of direct democracy by decrying that the process violated the Constitution's guarantee of a "republican form of government." Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 791 (1997).

22. Twenty-three states and the District of Columbia allow for some sort of direct democracy. Of these twenty-three, eleven are western states and eight are mid-western states. K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1186-87 (1995).

23. The process of direct democracy has been the subject of numerous lawsuits and law reviews. Almost every initiative is subject to some sort of challenge before or after passage. See generally Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11 (1997). The conflict over direct democracy versus representative democracy has been raging since the formation of the United States with the Federalist and Anti-Federalist debates. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 19-20 (1995). However, in 1912 the United States Supreme Court held that di-

Progressives in California heralded direct democracy as a salve to the wounds inflicted by the Southern Pacific Railroad controlled government.²⁴ Initiatives and referendums were to be the means to oust corporate control of state government.²⁵

Initiatives, which give a voice to citizens tired of not being heard in government, flourished in California and other states²⁶ at the end of the nineteenth century and the beginning of the twentieth century.²⁷ A Populist organization from Los Angeles garnered citizen support and learned from the success of other states' direct democracy elections.²⁸ As a result of the statewide increased Populist following, they were able to elect Hiram Johnson as Governor²⁹ who pushed through the constitutional amendments enacting California's direct democracy.³⁰ Through the initiative process, Southern Pacific Railroad's influence on California's government decreased.³¹

rect democracy does not violate the Guarantee Clause of the Constitution. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

24. The Southern Pacific Railroad controlled so much of California and its politics that one author has likened California at the turn of the century as a third-world "Banana Republic." See Manheim, *supra* note 21, at 1185. Republicans gathered across California in opposition to the Southern Pacific Railroad control of the legislature. *Id.* at 1185-87.

25. *Id.* at 1185-87.

26. Twelve other states enacted some sort of direct democracy before California. Persily, *supra* note 23, at 15. Those states were South Dakota, Utah, Oregon, Nevada, Montana, Oklahoma, Maine, Michigan, Missouri, Arkansas, Arizona, and Colorado. *Id.*

27. The Progressive politics advocated decision making by the people to oust railroads, banks, lumber, and mining companies from controlling the legislature. Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 411-12 (1999).

28. The Los Angeles group was led by middle class Republican lawyers, reporters, professionals, and merchants influenced by Roosevelt and Taft who called themselves the Morning Republicans. GEORGE E. MOWRY, *THE CALIFORNIA PROGRESSIVES* 21-22 (1961). The Morning Republicans were successful in enacting direct democracy through an initiative in Los Angeles four years before the state as a whole. *Id.* at 39.

29. The Morning Republicans from Los Angeles banded with other like-minded Republicans to form the League of Lincoln-Roosevelt Republican Clubs whose diligent efforts finally elected their own Republican candidate for governor, Hiram Johnson. *Id.* at 69-70.

30. To fulfill a campaign promise, Governor Johnson called a special election to enact California's direct democracy devices - the initiative and the referendum. MOWRY, *supra* note 28, at 135-40. California voters approved the Constitutional amendment on October 10, 1911. *Id.*; see also C.A. CONST. art. II, §§ 8, 9. The amendments were approved by a vote of 168,744 to 52,093. *Reports of the California Constitutional Revision Commission, the Initiative Process* (visited February 27, 2001) <http://library.ca.gov/california/CCRC/reports/html/hs_initiative_process.html>.

31. Persily, *supra* note 23, at 31. In the 1911 special election, voters approved twenty-two of the twenty-three amendments, which included women's suffrage. *Id.* After winning the election in 1911, Governor Johnson toured the state by car instead of train, announcing that the Southern Pacific should keep its dirty hands out of government. CALIFORNIA COMMISSION ON CAMPAIGN FI-

Since their inception, initiatives and referendums have proposed various legislation and constitutional amendments with topics ranging from taxation, the environment, and the reorganization of government.³² Use of the initiative waned during the middle of the century, but gained momentum in the 1970s and is currently a powerful tool in the political process.³³

The initiative³⁴ process today is less a grass roots solution to big government than the Populists had hoped. The process is fraught with influence from the politically powerful and wealthy.³⁵ The initiative process has become more politicized by candidates who champion various propositions during their campaign.³⁶ Currently, it costs over one million dollars to finance an initiative from its inception to its passage.³⁷ The money is spent on media blitzes, which are supposed to educate the voters, yet they often appeal to the voters' raw emotions.³⁸ Some of the money pays for ballot-qualifying, mini-

NANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 37 (1992).

32. From 1970 to 1986, 51 initiatives qualified for the ballot. Of those, fifteen were regulatory provisions, twelve dealt with taxation, nine advocated reform of the structure of government, six dealt with the environment, and three related to public works. MARCH FONG EU, A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS 30 (1992).

33. The period from 1940 to 1970 was a particularly low period for initiatives - only 302 appeared on the ballot in all direct democracy states from 1950 to 1960. Persily, *supra* note 23, at 38. During the same period in California, there was a resurgence of professionalism in the Legislature that was considered a national model. WILLIAM K. MUIR, CALIFORNIA'S SCHOOL FOR POLITICS 13 (1982). In 1990 alone, eighteen initiatives were passed. See JOHN M. ALLSWANG, CALIFORNIA INITIATIVES AND REFERENDUMS 1912-1990 12. By the end of the 1990's, it is projected that over 350 initiatives will have been placed on various state ballots. Magleby, *supra* note 23, at 27.

34. This Article will use the term initiative to include both referendum and initiative.

35. The common use of initiatives is for the "well-heeled special interests" that wish to make their wishes into state law. *Initiatives: Use and Abuse*, L.A. TIMES, Apr. 19, 1998, at M4.

36. Gubernatorial candidates regularly sponsor their own initiatives. Candidate John K. Van de Kamp sponsored three initiatives in 1990. COMMISSION ON CAMPAIGN FINANCING, *supra* note 31, at 63. Governor Pete Wilson's sponsorship of Proposition 187 is an example of candidates using initiatives as part of their election platform. *Infra* note 38 and accompanying text.

37. The average cost of an initiative to qualify was one million dollars in 1990. John Garamendi, *Insurers Lost the Battle, but Won the War*, L.A. DAILY J., May 16, 1990, at 6. In 1990, five measures had over \$10 million in contributions. CALIFORNIA COMMISSION ON CAMPAIGN FINANCE, *supra* note 31, at 266. It may be more cost effective for a special interest group to spend one million advocating on behalf of an initiative than \$10 million or more for advertising designed to defeat a measure. *Id.*

38. In one notorious media campaign in 1988, a group opposed to campaign finance reform targeted voters by suggesting in an advertisement that Nazi storm troopers might receive

num signature collection,³⁹ which can cost as much as \$1.20 a signature.⁴⁰ However, even with this massive outlay of cash, most of the initiatives do not survive after qualifying for the ballot because they either do not garner enough votes⁴¹ or are struck down as unconstitutional before implementation.⁴² The tool that was to give a voice to the people has undergone a metamorphosis into a political machine that can be driven by one person who has enough money and savvy to know how to manipulate the people via expensive advertisement into voting for his initiative.⁴³

Proposition 187 is a shining reflection of how the initiative process has changed from a tool to cut the strings of a government controlled by a puppet-master corporation, powerfully giving the people a voice, to a tool to oppress and shun those who are culturally different from the white majority.⁴⁴

public financing should the proposition pass. See CALIFORNIA COMMISSION ON CAMPAIGN FINANCE, *supra* note 31, at 200. In contested proposition elections, voters rank television and other media outlets above the state produced ballot pamphlet as the means of determining how to vote. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE REFERENDUM AND RECALL* 82 (1989). The more complex the ballot initiative, the more likely the electorate will respond and vote with their emotions rather than devoting time and effort into deciphering a measure. See DuVivier, *supra* note 22, at 1195-96.

39. Qualification is not an easy process. First, the sponsors must collect the signatures of voters equal to 5% for initiatives and 8% for referendum of "votes for all candidates for Governor at the last gubernatorial election." CAL. CONST. art. 2 §§ 8, 9. Then, the sponsors must present the text of the initiative or referendum with the certified signatures to the Secretary of State. *Id.*

40. See CALIFORNIA COMMISSION ON CAMPAIGN FINANCE, *supra* note 31, at 267. The United States Supreme Court declared the limitation on paid signature collection unconstitutional in violation of the First Amendment. See *Meyer v. Grant*, 486 U.S. 414 (1988).

41. From 1912 to 1992, California voters approved 42 out of 121 statutory initiatives giving a passage rate of 34.7%. See Magleby, *supra* note 23, at 26 tbl. 1. During the same period, California voters approved 36 of 115 constitutional referendums, giving a passage rate of 31.3%. *Id.* Only three of the seventeen California statewide initiatives passed in 1990. A.G. Block & Richard Zeiger, *Constitutional Offices and Ballot Propositions-Election 1990*, CAL. J., Dec. 1, 1990.

42. From 1960 to 1980 only two initiatives were not declared unconstitutional in whole or part. DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 203 (1984). Since 1974, the courts have completely invalidated only three of the twenty-nine passed initiatives. See *Chemical Specialties Mfrs. Ass'n v. Deukmejian*, 278 Cal. Rptr. 128, 132-33 (Ct. App. 1991); *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220 (Cal. 1990); *Estate of Gibson*, 189 Cal. Rptr. 201 (Ct. App. 1983).

43. Sixty percent of the total spent on Proposition 227's qualification and campaign was donated by Robert Unz, a software entrepreneur. Frank Bruni, *The California Entrepreneur Who Beat Bilingual Teaching*, N.Y. TIMES, June 14, 1998, at A1. Mr. Unz is contemplating fixing other political problem areas including campaign finance. Todd S. Purdum, *California Republican Tries Altering Campaign Finances*, N.Y. TIMES, Mar. 25, 1999, at A20. Mr. Unz proclaims that he "fixed bilingual education . . . but good." *Id.*

44. Proposition 187 appeals to the fears of the majority by perpetuating false stereotypes.

Proposition 187 was a bastion of bias and prejudice born of fear and uncertainty in an economic recession.⁴⁵ Former Governor Wilson in his reelection campaign reinforced racial stereotypes to appeal to the fear of the white, conservative Californians felt by allegedly being "taken over" by illegal aliens.⁴⁶

Just as many propositions before and after, Proposition 187 was challenged in court,⁴⁷ which delayed it from taking effect.⁴⁸ Proposition 187 is a prime example of how the initiative process has changed over the twentieth century. With the continual rise of the use of the initiative process, those initiatives which oppress, malign, and degrade will become more common, as a result of fear, not of some conscious decision to reform the political machine as the Populists had hoped.⁴⁹

A. A Hard Won Battle for California's Direct Democracy

The controversy over direct democracy⁵⁰ began well before California even became a state. The Federalists and Anti-Federalists debated the best

Minty Siu Chung, *Proposition 187: A Beginner's Tour Through A Recurring Nightmare*, 1 U.C. DAVIS J. INT'L L. & POL'Y 267, 279-80 (1995). The founders of Proposition 187 seemed to be motivated by nativism, prejudice, and racial resentment. See Vargas, *supra* note 27, at 464. Racial anxiety and tension can be seen throughout the campaign rhetoric, advertising and media images. *Id.* at 468.

45. Proposition 187 was passed in 1994 when California was still in the throws of a harsh recession. See Chung, *supra* note 44, at 267 (noting the recurrence of anti-immigrant sentiment when in an economic recession or depression).

46. Governor Wilson was accused of flaming the fires of fear between whites and illegal immigrants. See Vargas, *supra* note 27, at 453. Governor Wilson "showered the airwaves" with television advertisements depicting Latino-looking individuals "overrunning and swarming" around the United States-Mexican border. *Id.*

47. Public interest groups and individual citizens brought suit for declaratory and injunctive relief to bar the California Governor, Attorney General and other state agencies from enforcing provisions of Proposition 187. See *League of United Latin American Citizens v. Wilson*, 903 F. Supp. 755 (1995). These actions were consolidated and the district court struck down most of the provisions as either being unconstitutional or preempted by federal law. *Id.*

48. Paul Feldman & James Rainey, *Parts of Prop. 187 Blocked by Judge*, L.A. TIMES, Nov. 17, 1994, at A1.

49. The rise in popularity of initiatives has seen the rise of anti-minority initiatives, especially against those most reviled - gays and illegal aliens. Vargas *supra* note 27, at 421-37.

50. Direct democracy includes initiatives, referendum, and recall. See generally Patrick L. Baude, *A Comment on the Evolution of Direct Democracy in Western State Constitutions*, 28 N.M. L. REV. 343 (1998).

form of government before the second Constitutional Convention.⁵¹ Federalists Alexander Hamilton and James Madison advocated the republican form of government over direct democracy because of concerns about mob rule.⁵² Madison warned in *Federalist* 47 that “[t]he accumulation of all powers legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”⁵³ The Anti-Federalists, led by Thomas Jefferson, proposed a government with more citizen participation.⁵⁴

Direct democracy traces its roots to the writings of Jean J. Rousseau⁵⁵ and Thomas Paine.⁵⁶ While the Founding Fathers were well aware of these writings, they nevertheless enacted a republican form of government while expressly rejecting direct democracy.⁵⁷ The Federalists won a clear victory because in rewriting the Constitution, the people did not have a direct voice in their government. The passage of the Seventeenth Amendment in 1913, allowing for direct election of Senators, gave the people of the United States

51. Concerned over the failure of the Articles of Confederation, the Framers chose to increase the power of the federal branches of government by distributing its power among the three branches to decentralize any overreaching power by the states or one branch. Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 85-90 (1994).

52. The people, just as the other branches of government, can act oppressively and overstep their authority. Madison warned that the “majority, having such co-existent passion or interest” must be prohibited from acting in concert to “carry into the effect schemes of oppression.” THE FEDERALIST No. 10 (James Madison). By not following the writings of Rousseau, the Framers saved the United States from the horrors of the first French Republic, which was marred by violence and frequent use of the guillotine. ELLIS P. OBERHOLTZER, THE REFERENDUM IN AMERICA 66-67 (1971).

53. THE FEDERALIST No. 47 (James Madison).

54. Thomas Jefferson noted that the citizens themselves are the “safest depository of their own rights” and the evils of citizen rule are less than those from the “egoism of their agents.” Letter from Thomas Jefferson to John Taylor, May 28, 1816, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 668, 672-73 (Adrienne Kock & William Peden eds. 1944).

55. The basis of Rousseau’s *Social Contract* was that the people act as government. Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; see also The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 SEATTLE U. L. REV. 47, 49 (1995).

56. Thomas Paine influenced Benjamin Franklin, who himself became acquainted with Rousseau from Paine’s *Common Sense*. THOMAS PAINE, COMMON SENSE, AND OTHER POLITICAL WRITINGS (Nelson F. Adkins ed., Liberal Arts Press 1953)(1776). Franklin was so taken with Paine, whom he met during the Revolutionary War, and his theories, that Franklin successfully advocated strong reverence to the will of the people in the formation of Pennsylvania’s constitution. Oberholtzer, *supra* note 52, at 57.

57. The message of the Constitution is clear. Individuals who vote for their own interests are less desirable than a representative government where the representatives will vote for the collective greater good. Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1 (1997). See also Hamilton, *supra* note 51, at 87. See also Warner, *supra* note 55, at 51.

their first taste of direct democracy under the Constitution.⁵⁸ However, direct democracy fared better in the western United States.⁵⁹ Many theories explain this unusual development of direct democracy.⁶⁰ Irrespective of theory, the people of the west were accustomed to making decisions regarding government.⁶¹ In most western states, citizens voted directly to decide the location of the capital and to adopt state constitutions.⁶² Some commentators trace the rise of direct democracy to the appeal of the individualistic, moralistic aspects of direct democracy that also typifies the western citizen.⁶³

The Progressive movement in American history coincides with the rise in direct democracy's popularity.⁶⁴ The western states were bastions for the Progressive movement, and consequently, direct democracy as well.⁶⁵ In the

58. The western states had a tradition of direct democracy on a state wide level making both citizens and politicians more familiar with the process, than their counterparts in the South and East. Perilsy, *supra* note 23, at 19.

59. Ratification of most of the western state constitutions and selection of the state capitals were by referendum. *Id.* at 20. These referendums sometimes occurred even before election of candidates. *Id.* James Madison's concern over mob rule seemed less important almost a century later. *Id.* at 21.

60. One author explains that the western states were more susceptible to direct democracy because they were newly established and the rise of Progressivism easily led to structural reform. Charles M. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 248 (1975). See generally Patrick L. Baude, *A Comment on the Evolution of Direct Democracy in Western State Constitutions*, 28 N.M. L. REV. 343 (1998).

61. See generally Perilsy, *supra* note 23, at 19-20.

62. *Id.*

63. Daniel Elazar, a political scientist, theorizes that the citizens of the West were individualistic, traditionalistic, and moralistic, which influenced their view of government. DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 5 (1972). Progressivism embraces these views of government. *Id.* Accordingly, the western states were more susceptible to the Progressive movement and its final influence on the structure of government. *Id.* at 114-18.

64. Magleby, *supra* note 23, at 15.

65. *Id.* Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming are the western states which have some form of direct democracy. ALASKA STAT. §§ 15.45.010-45.245(1999); See ARIZ. CONST. ART. IV, Pt. 1, § 1; See ARIZ. CONST. ART. XXII, §14; See ARIZ. REV. STAT. ANN. §§ 19-101 to -144 (1999); See CAL. CONST. ART. II, §§ 8-10; See COLO. CONST. art. V, § 1; See COLO. REV. STAT. §§ 1-40-101 to -133 (1995); See IDAHO CODE §§ 34-1802, -1804 to -1806, -1809, -1813 (1999); See MONT. CONST. art. III, § 4; See MONT. CODE ANN. §§ 13-27-101 (1996); See NEV. CONST., art. IXX, §§ 2(1); See NEV. REV. STAT. §§ 295.015, 255.035 (1999); See OR. CONST. art. IV, § 1(2)(a); See OR. REV. STAT. § 254.030 (1999); See UTAH CODE ANN. §§ 20A-7-102 (1999); See WASH. CONST art II §1(a-b); See WASH. REV. CODE ANN. §§ 29.79.010 (1999); See WYO. CONST art. I §1, art. III, § 52; See WYO. STAT. §§ 22-24-101 (1999).

late nineteenth and early twentieth centuries, the middle class became increasingly frustrated with corporate controlled government and the Progressive movement reflected such frustration.⁶⁶ The Progressive movement was a result of dramatic increases in industrialization, urbanization, and immigration.⁶⁷ Direct democracy was a response to shifts in the economic and political arenas, which was spurred by industrialization and urban growth.⁶⁸ Citizens distrusted a legislature controlled by powerful, narrow interest corporations that did not reflect their interest or concerns.⁶⁹ As a result, the Progressive movement, advocating direct democracy to eradicate such domination, gained a groundswell of support in the western states.⁷⁰ Progressives believed that direct democracy could not only oust big business from controlling the government, but it would also increase interest and understanding of important political issues.⁷¹

Direct democracy was seen as a battering ram wielded by the citizen to curb the excesses of corporate controlled government.⁷² California used its club to oust the Southern Pacific Railroad from controlling state and municipal governments.⁷³ The Progressives' success in California and elsewhere typ-

66. Justice Tobriner called the direct democracy amendments to the California Constitution "one of the outstanding achievements of the progressive movement of the early 1900's." *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal.3d 582, 591 (1976).

67. In the 1850s, the western states experienced immense growth. Perisly, *supra* note 23 at 21.

68. Lloyd Spoonholtz, *The Initiative and Referendum: Direct Democracy in Perspective 1898-1920*, 14 AMER. STUDIES 43, 60 (1973).

69. Initiatives inherently reflect a distrust of the legislature and act as a check on the power of the legislature. Manheim & Howard, *supra* note 21, at 1169.

70. Price, *supra* note 60, at 247. Advocates of Progressivism and direct democracy espoused "every normal citizen who is mentally and morally fit not only has the right, but is also under a duty to participate in the solution of political problems." LEAGUE OF WOMEN VOTERS OF CALIFORNIA, INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST? 4 (quoting Benjamin DeWitt). The Progressives were optimistic about the benefits of direct democracy and believed that the "collective will would cause evil to perish and good to triumph." Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 736 (1988).

71. By giving citizens direct control of their government, proponents of direct democracy predicted an increase in voter interest and comprehension of significant civic and political issues. Nick Brestoff, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 922 (1975); Herbert Graham, *The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced its Future?*, 27 UCLA L. REV. 433, 437 (1979).

72. *Amador Valley Joint Union High Sch. Dist. et. al. v. State Bd. of Equalization et. al.*, 22 Cal.3d 208, 228 (1978). See generally Stephen H. Sutro, Comment, *Interpretation of Initiatives by Reference to Similar Statutes: Cannons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 948 (1994) (describing the use of initiatives to ignored interest groups).

73. The Southern Pacific Railroad blackmailed Los Angeles into giving it \$600,000 and 60

ifies the ability of multiple minority groups to bind together for a common goal: ousting corporate control of the government.⁷⁴ The Progressives saw direct democracy as a governmental ideal, not just the means to achieve their goal.⁷⁵

B. Modern Direct Democracy Ruled by Moneyed Organizations

Direct democracy was a popular tool of the citizens during the early twentieth century,⁷⁶ but lost its popularity in the middle decades⁷⁷ only to have a resurgence at the end of the twentieth century.⁷⁸ Modernly, small groups use direct democracy to enact legislation favoring their limited interests.⁷⁹ These small organizations are largely financed by a select group of

acres of land by threatening to build railroad lines around rather than through Los Angeles. GEORGE E. MOWRY, *THE CALIFORNIA PROGRESSIVES* 9 (1951). The railroad controlled the Oakland waterfront and ferry service. *Id.* at 10. The Southern Pacific would force other businesses to open its books to the railroad and if the business was doing well, then the Southern Pacific would charge more for transportation of that business' goods. *Id.* at 9, 11. Theodore Roosevelt praised California's passage of direct democracy measures by proclaiming California had set in motion "a new era in popular government" and had made "the greatest advances ever . . . by a state for the benefit of its people." WALTON BEAN, *CALIFORNIA: AN INTERPRETIVE HISTORY* 326 (1973).

74. The growth of direct democracy is attributable to the creation of new interest groups along multiple issues to advocate change in economic and social problems during a period of great change. Perisly, *supra* note 23, at 21-22.

75. Feeling straightjacketed by the political system, Progressives sought reform via direct democracy. Some saw the direct democracy process as a means to change cultural ills. Spoonholtz, *supra* note 68, at 60. While others portrayed direct democracy as "the final steps in the perfection of democratic utopia." Perisly, *supra* note 23, at 28.

76. During the first few years of direct democracy, voters approved over 100 out of 150 initiatives. James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 *HASTINGS CONST. L.Q.* 43 (1983). See *supra* text and accompanying notes 32-34.

77. The use of direct democracy dropped off significantly from the 1940s to the 1960s. Magleby, *supra* note 23, at 27-28, fig. 1 & 2. There were no initiatives on the June 1992 ballot, marking the first time since 1964 that an election did not have an initiative on the ballot. Paul Feldman, *Snapshots of Life in the Golden State: Voters No Longer Feel Like Propositioning*, *L.A. TIMES*, Dec. 30, 1991, at A3.

78. From 1990 to 1996, the Attorney General for signature collection has approved 199 initiatives. Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 *LOY. L.A. L. REV.* 1239, 1254 tbl. 2 (1998). Of those 199, only 44 qualified for placement on the ballot. *Id.* The voters passed only 15 of the 44 qualified initiatives. *Id.* Nine of the 15 initiatives were challenged with only four being upheld. *Id.*

79. The initiative process rewards those groups that capitalize on minority manipulation. DuVivier, *supra* note 22, at 1206. Such groups have realized that they have a tool to circumvent

supporters.⁸⁰ The current landscape of direct democracy requires that the sponsors be financially well heeled and politically savvy.⁸¹ All too frequently, these groups and their initiatives are racist⁸² and have similar racist beginnings.⁸³ While many of these groups may not be successful in passing their initiative or surviving court challenges,⁸⁴ they nevertheless have a prodigious impact on the political landscape.⁸⁵

No longer are the goals of direct democracy to bring the power to the people, but to bring power to the groups with the most money and media

the legislature so long as they are well financed and organized. Liberal and conservative groups alike enact various initiatives to reflect their political ideology. *Perisly, supra* note 23, at 38. While one group or monopoly has not controlled California since Southern Pacific Railroad, organizations reflecting concerns of minority of citizens have risen. Such groups include various Political Action Committees, the National Rifle Association, and the American Association of Retired Persons. *Id.* at 40. *See generally* Scheiber, *supra* note 21, at 813 (detailing the varied ideological bases for many of California's initiatives).

80. In 1990, 67% of the donations were in amounts of \$100,000 or more. CALIFORNIA COMMISSION ON CAMPAIGN FINANCING REFORM, *supra* note 31, at 279.

81. In the 1990 gubernatorial election, every major candidate, including Diane Feinstein, John Van De Kamp, and Pete Wilson sponsored initiatives. DAVID B. MAGLEBY, *DIRECT LEGISLATION IN THE AMERICAN STATES, IN REFERENDUMS AROUND THE WORLD* 234 (1994). The only thing more powerful than money is public discontent which is directed and reflected in initiatives. JIM SHULTZ, *THE INITIATIVE COOKBOOK: RECIPES & STORIES FROM CALIFORNIA'S BALLOT WARS* 5 (1996) (quoting Harvey Rosenfield, author of Proposition 103).

82. Starting as early as 1920 with the passage of the Alien Land Law, which prohibited aliens who were ineligible for citizenship to purchase real property, the initiative became a tool to oppress the disenfranchised minority in California. LEAGUE OF WOMEN VOTERS, *supra* note 70, at 24. In the more recent past, however, initiatives have become the tool of majorities to promote their interest while squashing minority interests. Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L.REV. 1, 20-23 (1978). *But cf.* JOSEPH F. ZIMMERMAN, *PARTICIPATORY DEMOCRACY: POPULISM REVISITED* 89-98 (1986) (arguing that it is a myth that direct democracy targets minorities). CRONIN, *supra* note 38, at 98 (reporting that the overall record of direct democracy supports minority rights).

83. Anti-minority initiatives have similar histories that appeal to the fears of the white majority. In Miami, after the city had enacted an anti-discrimination ordinance for housing and employment, Anita Bryant spearheaded a campaign to "Save Our Children." ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 27-29 (1977). She stated that God tapped her on the shoulder and gave her marching orders. *Id.* She also said that she might as well feed her children garbage if they were exposed to homosexuality. *Id.* Also in Miami, two women came together to start an English-only initiative after both called in to a radio talk show to complain that the non-English speaking were taking over the state. Vargas, *supra* note 27, at 467.

84. Magleby, *supra* note 23, at 28. In the 1970s and 1980s, there was an increase in petition circulation, but not a corresponding increase in initiative adoption. *Id.*

85. Scheiber, *supra* note 21, at 799; *see also* Fischer, *supra* note 76, at 44-45. Proposition 187 is credited with the changes in welfare with regards to the denial of social services to illegal aliens. *See generally* *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (holding that denial of welfare benefits to illegal aliens is preempted by federal law).

coverage. Grass roots organizations cannot compete with more financially and politically shrewd organizations.⁸⁶ The organizations that the Progressives sought to oust now either sponsor their own initiatives or contribute heavily in favor of or against a particular initiative.⁸⁷

The greatest difference between historical and modern direct democracy is the impact of money. Presently, sponsors must be well financed to afford the costs of political advisors, lawyers, media advertising, public relations costs, and other qualification costs.⁸⁸ Because California has easy access to the "ballot, money, . . . sophisticated media, and a higher than usual population of self-made millionaires," it has produced some of the most controversial initiative issues.⁸⁹ An "initiative industry" has exploded to oversee signature collection with computerized mailings and media blitzes.⁹⁰

At the beginning of direct democracy in California, initiative supporters were the models of grass roots organizations that wished to oust big business from the government while returning the power to the people.⁹¹ However,

86. Such grass roots organizations face an uphill battle in being heard by the voters. Scheiber, *supra* note 21, at 816. Even if grassroots organizations were able to compete, the direct democracy process is fraught with problems. For example, there has been great abuse in the signature-gathering phase during ballot qualification. CALIFORNIA ASSEMBLY ELECTIONS AND REAPPORTIONMENT COMMITTEE, PUBLIC HEARING ON THE INITIATIVE PROCESS 2, 32, 48 (OCT. 10, 1972). Some of these problems include children being employed as signature gatherers, forgery, and the gatherers' use of short catchy phrases to describe the initiative thus obscuring the Attorney General's official summary. *Id.* Money is needed to support polling, focus groups, and public opinion research in addition to the other costs associated with bringing an initiative to the voters. SHULTZ, *supra* note 81, at 15-22.

87. *Supra* text and accompanying notes 35 and 36.

88. The media serves a key role in the success of initiatives. They can narrowly frame issues around anti-minority sentiment intended to evoke emotional reactions regardless of the potential impact on minorities. RICHARD K. SCHER, *THE MODERN POLITICAL CAMPAIGN: MUDSLINGING, BOMBAST, AND THE VITALITY OF AMERICAN POLITICS* 100-15 (1998). The media's role is particularly heinous because it routinely "artfully contrive[s] atmosphere of alarm, distortion of facts, and a general atmosphere of opinion manipulation . . ." *Id.*

89. Vargas, *supra* note 27, at 420.

90. Scheiber, *supra* note 21, at 815.

91. Grass roots organizations cannot compete with well-financed groups because a massive amount of cash is needed at every stage of the initiative process. Cash is needed to pay for signature solicitors to collect signatures (approximately 700,000) in a short period of time (150 days). CAL. ELEC. CODE §§ 9013, 9040 (West 1996). Using attorneys to ensure that the language of the initiative is constitutional and unambiguous can increase the cost of getting an initiative passed and upheld. Some commentators have foreseen the rise of initiatives being ruled by small groups joined by some common interest, rather than some romantic notion of power to the pro-

modern groups supporting direct democracy wish to oust the people's control of the government, returning it to the control by a minority of citizens or big business.⁹²

Direct democracy has entered into a new era. It is overwhelmingly popular,⁹³ state courts are deferential to initiatives,⁹⁴ and popular politicians such as Ross Perot and Jack Kemp urge a national referendum.⁹⁵ While a popular

ple. V.O. KEY, JR. & WINSTON W. CROUCH, *THE INITIATIVE AND THE REFERENDUM IN CALIFORNIA* 572 (1939).

92. The effect of such a high barrier to getting an initiative on the ballot results in well-financed groups being the only successful groups to be heard and to have the initiative voted upon. Scheiber, *supra* note 21, at 816. Often these groups are the very ones that direct democracy was enacted to limit.

93. Vargas, *supra* note 27, at 420.

94. California state courts are more likely to uphold initiatives when challenged than their federal counterparts. Holman, *supra* note 78, at 1254 tbl. 2. As a result, challengers are more likely to file their lawsuit in federal court where their chances of getting the initiative thrown out are greater. *Id.* at 1253. See generally *id.* at 1263 (calling for a panel of three judges to decide challenges to initiatives which would theoretically be more deliberative and less the result of one judge's bias).

The state courts have been so deferential that they have removed many of the checks instituted to protect against abuses in the direct democracy process. The single subject rule of California's Constitution Article II, Section 8(d) has been so broadly interpreted that it is no longer a protection against packaging numerous pieces of legislation into one mega-initiative. *Brosnahan v. Brown*, 651 P.2d 274, 279 (1982). Moreover, the distinction between a referendum and an initiative has practically been judicially eliminated. CAL. CONST. art. II, § 9; see also *Rossi v. Brown*, 889 P.2d 557, 559 (1995). California state courts are very willing to enforce an initiative's severability clause even if it is counterproductive and confounds voter intent. Such problems with severability were highlighted in the court challenges of Propositions 68 and 73 in the 1988 election whereby the California Supreme Court ended up cutting and pasting parts of initiatives together. *Taxpayers to Limit Campaign Spending v. Fair Pol. Prac. Comm.*, 51 Cal.3d 744, 799 P.2d 1220, 274 Cal. Rptr. 787 (1990); *Service Employees Int'l v. Fair Political Practices Commission*, 955 F.2d 1312 (1992); see also *Gerken v. Fair Political Practices Comm.*, 863 P.2d 694 (1993). Moreover, the courts do not generally observe the constitutional limitation on initiative topics limited to legislation, not administrative regulations. *McKevitt v. Sacramento*, 203 P. 132 (1921) (proposing two-part test to determine the character of an initiative as either legislative or administrative); see also *Simpson v. Hite*, 36 Cal. 2d 125, 222 P.2d 225 (1950); see also *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988) (rejecting the two-part test for a more comprehensive statewide test).

California courts do not usually decide the constitutionality of a proposition before the election and rarely remove such proposition from the ballot. JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* 107-09 (1989). Moreover, California state courts are more decisive and quick in their decision. In *Calfarm Ins. Co. v. Deuknejian*, 771 P.2d 1247, 1249-50 (1989), it took the Supreme Court of California two days to stay Proposition 103. However, in *Bates v. Jones*, 958 F. Supp. 1446, 1453-55 (N.D. Cal. 1997), the federal district court took six years to decide the merits of Proposition 140.

95. There have been many supporters of using direct democracy as a check on Congress. Ross Perot's use of the "electronic Town Hall" in his 1992 presidential campaign would have enabled voters across the country to debate and vote on legislation. ROSS PEROT, *UNITED WE*

tool of the voters and politicians, direct democracy is not without its critics. Many argue that direct democracy violates the Guarantee Clause of the United States Constitution.⁹⁶ Others advocate a stricter standard of scrutiny on appeal because of the lack of voter understanding of the nature of the initiative due to apathy, misleading media campaigns, and complexity of voter pamphlets.⁹⁷ Still others understand the popularity of direct democracy, but would like to see a more cohesive constitutional test when minority rights are at issue.⁹⁸

Coinciding with the advent of new moneyed direct democracy, the majority of citizens have become less politically involved and less aware of the true meaning or impact of the initiatives upon which they vote.⁹⁹ Most citizens who do vote do not spend the time to educate themselves about the initiatives.¹⁰⁰ Even if citizens do take the time to educate themselves, deceptive

STAND 32 (1992); see also David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'ren and the Oregon System*, 67 TEMP. L. REV. 947 (1994). Some are fearful of what mass technology would mean to the process of direct democracy. Hamilton, *supra* note 57, at 1. In the late 1970s, Jack Kemp advocated a national referendum in his book *An American Renaissance*. JACK KEMP, *AN AMERICAN RENAISSANCE: A STRATEGY FOR THE 1980s* 187-89 (1979).

96. See generally Fountaine, *supra* note 70, at 762-63; see also John C. Brittain, *Direct Democracy by the Majority Can Jeopardize the Civil Rights of Minority or Other Powerless Groups*, 1996 ANN. SURV. AM. L. 441, 446-47 (1996); see also Sutro, *supra* note 72, at 973-76.

97. See generally, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522-30 (1990); see also Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); see also Symposium on the California Initiative process, 31 LOY. L.A. L. REV. 1161 (1998); Symposium, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Competent of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227 (1998); see also Bell, *supra* note 82, at 23.

98. Vargas, *supra* note 27, at 505-13 (proposing a four part test in balancing minority and majority rights under the direct democracy system).

99. The ballot pamphlet sent to voters before the election simply contains arguments for and against the initiative. LEAGUE OF WOMEN VOTERS, *supra* note 70, at 54. There is little real analysis because the supporters of the initiatives and those organized against the initiative draft the arguments in the ballot pamphlet. Moreover, the voters have to make numerous decisions per election. This lack of real analysis and numerous decisions lessen the chances the voters are making informed choices. *Id.* Furthermore, direct democracy is an inefficient form of government. Brestoff, *supra* note 71, at 939-42; Fountaine, *supra* note 70, at 751. There are campaign costs, state election costs, voter costs, and costs associated with court challenges. Fountaine, *supra* note 70, at 751-54. See generally Sutro, *supra* note 72, at 966-76 (proposing only allowing courts to use the ballot pamphlet as a means to deciphering voter intent after the pamphlet and its use is reformed).

100. Those with high income, high education, and an interest in politics are more likely to

advertising misleads them¹⁰¹ and official ballot pamphlets that are written on a reading level higher than most citizens attain.¹⁰² Mass deceptive advertising and the advent of counter initiative,¹⁰³ has led to the passage of inconsistent, destructive, and in some cases oppressive laws.¹⁰⁴

vote on initiatives. See Vargas, *supra* note 27, at 414. If the initiative is on the ballot during an off year or during a primary election, the voter is more likely to be older, educated, financially independent and more ideological. See Magleby, *supra* note 23, at 32 (citing LARRY M. BARTELS, PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE 140-48 (1988); JAMES I. LENGLE, REPRESENTATION AND PRESIDENTIAL PRIMARIES: THE DEMOCRATIC PARTY IN THE POST-REFORM ERA 15-26 (1981)). Voting on initiatives increases this disparity because poor, undereducated, and younger voters usually skip ballot questions at much higher rates. See MAGLEBY, *supra* note 81, at 105. In the 1990 general election more than 10% of voters bypassed the initiatives. William Edicott, *June Ballot Will Give Voters Only a Temporary Respite*, L.A. DAILY J., Jan. 14, 1992.

101. Supporters and those groups who oppose initiatives use advertising to appeal to voters' emotions by oversimplifying the issues and proposing simplistic solutions to complex issues. See LEAGUE OF WOMEN VOTERS, *supra* note 70, at 54. These groups use mass media, especially radio and television; some even use celebrities to promote an affirmative or negative vote on the initiative. Peter King, *Commercial Litmus Test: Will TV Viewers Buy It?*, L.A. TIMES, Nov. 14, 1986, at A28. Some voters unabashedly admit their propensity for using the advertisement to decide how to vote, rather than being truly educated on the initiative. *Id.*

102. The pamphlets between 1974 and 1980 were written at a reading level ranging from the fourteenth to the eighteenth grade level. See MAGLEBY, *supra* note 81, at 120; LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *supra* note 70, at 54. On the other hand, the average voter reads only at the thirteenth grade level. *Id.* Voter pamphlet length is also an issue discouraging voter participation. The lengthier a pamphlet, the more likely the voter will not read it. In 1988, the voter pamphlet was 159 pages long and in 1990 the pamphlet was 224 pages long. Charles Price & Robert Wast, *Initiative: Too Much of a Good Thing?*, CAL. J., Mar. 1991, at 117. The length of pamphlets seems to grow each year; the 1993 pamphlet was 236 pages long. See DuVivier, *supra* note 22, at 1195. Criticism of the length of the pamphlet is nothing new. The pamphlet was criticized in 1914 as being too complex and lengthy for the average voter who must work to make a living. *Id.* Even the California Supreme Court recognizes the "sound-bite" nature of the ballot language is "designed to win votes, not to present a thoughtful or precise explication of legal tests or standards." *Hill v. National Collegiate Athletic Ass'n.*, 865 P.2d 633, 646 n.5 (1994).

103. The counter-initiative and other obfuscating devices confuse the voters. Such devices include misleading initiative titles, dense and verbose initiatives, and of course the counter-initiative. See Scheiber, *supra* note 21, at 815 (citing Bruce E. Cain et al., *Constitutional Change: Is It Too Easy to Amend Our State Constitution?*, in CONSTITUTIONAL REFORM IN CALIFORNIA 280-82 (1995)). David Magleby characterizes counter-initiatives as the latest step in professionalization of the initiative process where groups pay large sums of money to get their counter-initiative passed, but also spend huge sums to get the voters to cast their votes for their initiative, not the competing initiative. See Magleby, *supra* note 23, at 24. The counter-initiative, just as misleading of a title, can confuse voters into voting for an initiative not knowing that their yes vote really means a no vote. This very thing occurred in California's 1980 rent control initiative. Roger Smith & Dorothy Townsend, *Proposition 10: Its Defeat Hailed and Lamented*, L.A. TIMES, June 5, 1980, at 1. *But cf.*, DuVivier, *supra* note 22, at 1194 (arguing that counter-initiatives can actually aid the education of voters by giving them more than just a yes or no vote on one initiative).

104. Voters, unlike the legislature, are given one choice: either to vote for or against an in-

C. Proposition 187: A Thoroughly Modern Initiative

On November 8, 1994, the people of California passed Proposition 187 by a margin of 59% to 41%.¹⁰⁵ The next day five lawsuits were filed challenging the constitutionality of various provisions of the newly enacted law.¹⁰⁶ November 8 was the day of reckoning for a state with one of the nation's most diverse populations.¹⁰⁷ It seemed that a new chapter in history had been

initiated. There is no planning commission or committee meetings to deliberate the value and necessity of the initiative. *Tachner v. City Council*, 31 Cal. App.3d 48, 64 (1973). Nor is there an opportunity to change or redraft the initiative once it enters the approval, signature-gathering phase of qualification for the ballot. Legislators, on the other hand, are more likely to make informed decisions because they have the tools that initiatives lack. They can debate a piece of legislation and redraft it to properly reflect the needs and the best way to solve a problem. See Fountaine, *supra* note 70, at 743. Moreover, if the electorate is disappointed with the decisions of the legislator, he can be voted out in the next election. *Id.* at 742. Direct democracy lacks such a check. Many commentators criticize the lack of real options and uninformed voting inherent in direct democracy. See Eule, *supra* note 97, at 1523-30; MAGLEBY, *supra* note 81, at 128.

Another issue with direct democracy is that it is superior and inferior to the power exercised by the legislature. It is superior because the legislature cannot repeal or amend an initiative, unless the initiative so allows. CAL. CONST. art II, § 10(c). It is inferior because the legislature can do more than legislate because it can pass resolutions, redistrict the state political boundaries, and call for a federal constitutional convention. *AFL-CIO v. Eu*, 36 Cal.3d 687, 714, 686 P.2d 609, 627 (Cal. 1984).

105. See Bradsher, *supra* note 3, at B11. California passed numerous anti-immigrant laws against the Chinese in the 1800s. These laws required extra fees for licenses, prohibited Chinese from being witnesses at trials, and limited how and where they could work. See Chung, *supra* note 44, at 269-75. California is not the only state shouldering the burden of immigrants. Other states such as Florida, Arizona, Texas, and New Jersey sued the federal government for reimbursement of services they provided to illegal immigrants. *Prodding Washington on Immigration*, PITTS. POST-GAZETTE, Jan. 6, 1995, at C3.

106. See *League of United Latino American Citizens v. Wilson*, 908 F. Supp. 755, 763 n3. Those included *League of United Latin American Citizens v. Wilson* (CV 94-7569 MRP), *Children Who Want an Education v. Wilson* (CV 94-7570 MRP), *Ayala v. Pete B. Wilson* (CV 94-7571 MRP), *Gregorio T. v. Wilson* (CV 94-7652 MRP), and *Carlos P. v. Wilson*, (CV 95-0187). *Id.* The District Court allowed several plaintiffs to intervene. *Id.* at 763, at n.2. Those parties include the City of Los Angeles, California Association of Catholic Hospitals and the Catholic Health Association of the United States, California Teachers Association, American Federation of State, County, and Municipal Employees AFL-CIO, Islamic Center of Southern California, Muslim Public Affairs Council and California Council of Churches. *Id.* See also Paul Feldman & Amy Pyle, *Wilson Acts to Enforce Parts of Prop. 187; 8 Lawsuits Filed*, L.A. TIMES, Nov. 10, 1994, at A1. Soon after, an injunction was granted halting enforcement of Proposition 187. See Feldman, *supra* note 48, at A1; *League*, 908 F. Supp. at 764.

107. California has seen significant immigration from Vietnam, Philippines, China, Taiwan, India, Iran, Korea, Armenia, United Kingdom, Ukraine, Mexico, Japan, Canada, Nicaragua, and

written.¹⁰⁸ However, the issues Proposition 187 addressed were not new to California.¹⁰⁹ California has a history of passing anti-alien laws especially when economic times are poor.¹¹⁰

Thailand. Richard Sybert, *Population, Immigration and Growth in California*, 31 SAN DIEGO L.REV. 945, 968 (1994). As of 1994, California had the largest foreign born population of any state. *Id.* at 957. Population growth and the increase of unskilled laborers is seen as one of the most important social issues facing California. *Id.* at 945-46.

108. The United States as well as the United Kingdom has long histories of exclusion of aliens and discrimination based on immigration status. Kevin C. Wilson, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons From Great Britain's Past*, 24 GA. J. INT'L L. & COMP. L. 567 (1995). All great nations including the United States, Great Britain, and France have a history of oppressing minority groups. See Barbara Nesbet & Sherilyn K. Sellgren, *California's Proposition 187: A Painful History Repeats Itself*, 1 U.C. DAVIS J. INT'L & POL'Y 153, 175 (1995). California has a history of passing anti-alien laws. Voters approved the Alien Land Law, which limited land ownership to those legally in the state, in 1920. See LEAGUE OF WOMEN VOTERS, *supra* note 70, at 24. Moreover, in 1986, California voters passed the English only initiative. CAL. CONST. art. III, § 6.

To date thousands of newspaper articles and law reviews have been written about Proposition 187. When first passed and the injunction issued, it was seen as a certainty that the constitutionality of Proposition 187 would result in an appeal to the Supreme Court of the United States. See Stacey Hardin, *State Forays Into Immigration Law, "SOS": Can California 'Save Our State,'* 34 U. LOUISVILLE J. FAM.L. 195, 196 (1995).

109. See discussion of Chinese immigration in the 1800s *supra* note 44. California has been struggling with immigration problems for most of its history. *Id.* The following legislative finding was made on March 11, 1938:

WHEREAS, The presence of the alien in this county and his activities constitute a grave problem that demands immediate attention of Congress; and WHEREAS, This alien question directly affects every American Wage earner, employer and taxpayer, and forms the basis for much of the current distress, expense and danger resulting from unemployment, relief, crime and the activities of subversive minority group; and

* * * * WHEREAS, California, with a heavy relief burden on its hand, confronted by a serious unemployment problem, already a victim of the alien criminal, gangster, dope peddler is weary of the trials and distractions of the alien agitator; now, therefore, be it . . . That the Legislature of the State of California most respectfully urges and petitions the President and the Congress of the United States to enact legislation [to] deal with the alien problem . . .

A.J. Res. 15, Leg. Sess., 1938 Cal. Laws. These findings could have easily been made this decade on the floor of the capital in Sacramento. Because California is not the only state grappling with the influx of aliens, Chairman of the House Judiciary Committee, Henry Hyde, is in favor of a national version of Proposition 187. Hugh Dellios, *Immigration Issue Complicated by Many Immigrant Categories*, CHI. TRIB., Feb. 19, 1995, at C4.

110. In 1920, California voters approved the Alien Land Law restricting the rights of aliens who were ineligible for citizenship to acquire real property. See LEAGUE OF WOMEN VOTERS, *supra* note 70, at 24; see also Chung, *supra* note 44, at 269-75. People's attitude about aliens coincides with economic cycles. In economic good times, aliens are sought for their cheap labor, but when the economy enters a recession, then aliens are shunned and bear the frustration of citizens. See generally James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of the United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 235

Regardless of history, Proposition 187 is a modern initiative because it was well financed, played upon citizen's emotions, and pitted neighbor against neighbor.¹¹¹ Even the origins of Proposition 187 are similar to the origins of so many other initiatives that pit majority against minority.¹¹² Proposition 187 was based on fear, uncertainty and a desire to lash out against an unresponsive federal government which was doing little to curb illegal immigration.¹¹³ At the time Proposition 187 was passed, California was going

(1995).

111. See Morain, *supra* note 8. One of the most controversial portions of Proposition 187 would require school officials and others to report those whom they had a reasonable suspicion to believe were in the United States illegally. See SEC. STATE, *supra* note 1, at 91-92 (specifically sections 5(c), 6(c), 7(e), and 8(c)). Some argue that the reasonable suspicion portions of Proposition 187 violate the United States Constitution's right to privacy. See Hardin, *supra* note 103, at 200-09. Fearful of being reported to INS, two deaths occurred because those individuals did not seek medical care when they should have. Pamela Burdman, *Parents Blame Proposition 187 Fear in Son's Death*, S.F. CHRON., Nov. 24, 1994, at A1; Pamela Burdman, *Woman Who Feared Proposition 187 Deportation Dies at S.F. General*, S.F. CHRON., Nov. 26, 1994, at A14.

112. Co-sponsor of Proposition 187, Barbara Coe's experiences are similar to those seen in Florida's anti-gay movement. Ms. Coe went to help a disabled friend straighten out her medical benefits. Stephen Kanter, et al., *Proposition 187: A Debate on California's Immigration Initiative*, 7 INT'L LEGAL PERSP. 85, 86 (1995). Upon arriving at the benefits office, the English-speaking window was closed. *Id.* She was upset because she saw what she perceived as "illegal immigrants" waiting in lines. *Id.* She started the campaign for Proposition 187 because her friend's medical benefits were being discontinued, while all the "illegal aliens" were taking her friend's benefits. *Id.*

113. Antonio Olivo, *Some Foes of Prop. 187 Now Preach Compromise Politics, The New Stance by Those Lawmakers Reflects Latinos' Differing Attitudes Toward Immigration*, L.A. TIMES, May 11, 1999, at A1. Even supporters of Proposition 187 recognize that Governor Wilson made Proposition 187 a race issue. *Out of Purgatory, Let 187's Appeals Begin Illegal Immigration*, L.A. TIMES, Mar. 24, 1999, at B7.

The findings and declaration of section one of Proposition 187 declared that the citizens of California had suffered long enough. Section one reads:

The People of California find and declare as follows:

That they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state. That they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state. That they have a right to the protection of their government from any person or persons entering this country unlawfully. Therefore, the People of California declare their intention to provide for cooperation between their agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.

See SEC. STATE, *supra* note 1, at 92; see also *Prodding Washington*, *supra* note 105. These findings should be questioned because there were no hearings or any check on the validity of the

through a difficult economic recession with more than eight percent unemployment.¹¹⁴ Out of this economic recession, the people lashed out at those unlike themselves: illegal aliens.¹¹⁵ Playing on racial stereotypes, Proposition 187 and its media campaign blamed the economic strain on those illegally in California.¹¹⁶

As a result of this belief that illegal aliens were to blame for hard economic times, a group of Californians drafted Proposition 187 to curb the alleged fiscal pressure illegal aliens placed on the state.¹¹⁷ Believing that pro-

claims made. See Kanter, *supra* note 112, at 97.

114. In July of 1995, the unemployment rate in California was 7.9%, compared with the national average of 5.7%. Tom Murphy Bloomberg, *Lost Jobs Reflect Bumpy Economy*, FRESNO BEE, Aug. 5, 1995, at E1. Between 1990 and 1993, 830,000 jobs were lost in California. Ronald Brownstein & Richard Simon, *Hospitality Turns Into Hostility for Immigrants*, L.A. TIMES, Nov. 14, 1993, at A1. Such a decrease in jobs caused fear that illegal aliens were competing with citizens for jobs. *Id.* This belief is generally erroneous because most illegal aliens are blue collar workers who work for less than minimum wage. See generally Sybert, *supra* note 107, at 945. Illegal aliens actually improve the economy by taking the lowest quality jobs and provide cheap labor for big businesses, which helps to keep inflation rates low. Eric Bailey & Dan Morain, *Anti-Immigration Bills Flood Legislature*, L.A. TIMES, May 3, 1993, at A3. Some hoped the mediation of Proposition 187 would put the racial discord to rest and avoid "racial scapegoating the next time California faces economic hardship." Olivo, *supra* note 113, at A1.

115. See Vargas, *supra* note 27, at 450. One alternative to Proposition 187, would be to force the Federal government to compensate California for shouldering such a large portion of immigrant population and to reform immigration law. See Sybert, *supra* note 107, at 949.

116. The advertisement campaigns were criticized as incorrect and unscientific because they claimed aliens took more in government services than they paid in taxes. Michelle A. Heller, *Stemming the Tide: Illegal Immigration into the U.S.*, HISPANIC, Apr. 1994, at 20, available in LEXIS, News Library, Curnws file. Racial stereotyping in the advertisement campaign is just one problem because the origins of Proposition 187 come from anti-Latino hatred. Proposition 187 could have affected the various immigrant groups that immigrate to California, but would have been enforced more against Latinos. The incident with Eddie Cortez, Mayor of Pomona, is a perfect example of the racial stereotyping that could have occurred if Proposition 187 had been enforced. *Id.* at 3. The Mayor was driving an old truck and was wearing overalls when he was pulled over and asked to produce immigration documents even though he is a third generation American. *Id.* If Proposition 187 had been enforced, Eddie Cortez's experience could have become commonplace.

117. The cost of social services used by immigrants is estimated to be \$4.787 billion. See Sybert, *supra* note 107, at 948 (citing California Department of Finance figures). One expert argues that while immigrants do not use social services more, the cost is more because of the lower level of taxes paid. *Id.* But cf., Mailman, *infra* note 122.

If the state argues that it's goal in Proposition 187 is to save money or to provide more services for its citizens, then the Supreme Court could closely scrutinize the proposition. While the Court defers to the state on social and economic regulation, it will not allow a law to pass the rational basis test when it wholly excludes a class of persons from social services by arguing the need to secure benefits for its own citizens. *Doe v. Pylar*, 458 F. Supp. 569, 586 n.25 (E.D. Tex. 1978) (citing *Dandridge v. Williams*, 397 U.S. 471 (1970)); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

viding education and social services were the primary reasons individuals immigrated to California, Proposition 187 sought to curb immigration by cutting off those services to those who could not prove they were in the United States legally.¹¹⁸ By denying these services and education, the drafters believed that immigration would lessen and save the state millions, when in fact these provisions put billions of federal funding at stake.¹¹⁹ The drafters next sought to deter those who aid aliens by criminalizing the practice of providing illegal aliens with forged immigration documents and punishing those who possess them.¹²⁰ The drafters also required state law enforcement agen-

118. The District Court found that the provisions of Proposition 187 had the purpose of deterring "illegal aliens from entering or remaining in the United States . . ." *League*, 903 F. Supp. at 765. Since California controls 10% of the votes in the House of Representatives, California voters could have required their representatives to enforce the immigration laws. See Kanter, *supra* note 112, at 106. A particularly harsh section of Proposition 187 would require the parents of children attending school to prove their citizen status as a prerequisite for the child attending, even if the child is a citizen of the United States. See SEC. STATE, *supra* note 1, at 92, and specifically section 7(d). The Supreme Court has held that since a child's eligibility as a citizen is not dependent upon their parent's status, states could not deny rights to its citizens on the basis of a member of the family being an illegal alien because to allow such would violate the Equal Protection Clause. *Pylar v. Doe*, 457 U.S. 202, 210 (1982). Even if Proposition 187's section 7 was constitutional on its face, it is doubtful it would be constitutional in practice. If the parent is deported because of their status, then the child would have little choice but to go with the parents. Such a result would violate the Equal Protection Clause because it would force a class of citizens out of the country. See *Doe v. Miller*, 573 F. Supp. 461, 466 (N.D. Ill. 1983).

119. Proposition 187 would have saved \$200 million to state and local governments, but could have cost the state tens of millions to implement and risked losing \$15 billion in federal financing for public services that conflict with federal law. See SEC. STATE, *supra* note 1, at 50. Proposition 187 is poorly drafted and is an oversimplification of the immigration crisis. Paul Feldman, *Figures Behind Prop. 187 Look at its Creation*, L.A. TIMES, Dec. 14, 1994, at A3. A district court judge called Proposition 187 poorly written because it looked as if different people drafted the various sections. Paul Feldman, *Forgers Get 6 Months in Prop. 187 Plea Bargain*, L.A. TIMES, Jan. 5, 1995, at B1.

120. Proposition 187 Sections 2 and 3 dealt with the manufacture, distribution and use of false citizen documents. Section 2 provided:

Any person who manufactures, distributes, or sells false documents to conceal the true citizenship or resident alien status of another person is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of seventy-five thousand dollars (\$75,000).

See SEC. STATE, *supra* note 1, at 91. Section 3 read:

Any person who uses false documents to conceal his or her true citizenship or resident alien status is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine or twenty-five thousand dollars (\$25,000).

Id.

cies to cooperate with officers of the Immigration and Naturalization Service.¹²¹

The supporters and drafters of Proposition 187 were fed up with the economic recession and believed illegal aliens were at the root of the economic downturn.¹²² Some Californians were tired of the federal non-funded mandates to provide for education and social services to all individuals present in the state and the strain the mandates put on the economy. The supporters wanted to send a message to the federal government that the voters of California would no longer stand for the federal government's ignoring the illegal alien problem and expecting Californians to shoulder the bill for social services for illegal aliens.¹²³ Unconcerned that many portions of the initiative violated federal immigration laws and the Constitution, supporters believed the time was right to challenge such laws because of changed circumstances and demographics of the United States Supreme Court.¹²⁴

Those who opposed Proposition 187 were adamant that it violated the Fourteenth Amendment and that many portions were preempted by federal immigration law.¹²⁵ When the district court handed down its decision over a

121. Section four of Proposition 187 required law enforcement officers to cooperate with the INS. *Id.* Section four required officers to report arrested persons to the INS if they suspected them of "being present in the United States in violation of federal immigration laws." *Id.* If the officer reasonably suspected the individual was in the United States illegally he was to ascertain the citizenship status of the individual, notify the individual that he must obtain legal status to be legally present in the United States, notify the Attorney General of California and the INS of the individual's apparent illegal status. *Id.*

122. In 1993, California had more than 40% of the total illegal alien population in the United States. See Brownstein, *supra* note 114. Most illegal immigrants come to the United States to work and are a great contribution to the economy. Stanley Mailman, *California's Proposition 187 and Its Lessons*, N.Y.L.J., Jan. 3, 1995, at 3. These aliens also pay more in taxes than they receive in government service. *Id.* But cf. Sybert, *supra* note 107, at 948.

123. A New York Times investigation revealed that the Immigration and Naturalization Service is one of the most poorly managed federal agencies. Daniel W. Sutherland, *Immigration's Hard Problems and Easy Answers*, WASH. TIMES, Jan. 12, 1995, at A17.

124. See Leshner, *supra* note 9. Proposition 187 authors wrote it with the intent to challenge *Plyler v. Doe*. *Id.* Supporters argued that the court's demographics and the impact on the schools warranted the challenge. *Id.* See Dan Stein, *Entitlements for Undocumented Aliens: Is California's Proposition 187 Constitutional? Yes: The Supreme Court Must Re-evaluate Existing Law*, 81 A.B.A. J. 42 (Feb. 1995)(arguing that the 30 years since *Plyler* has changed the court and the circumstances of illegal immigration). But cf. Herman Schwartz, *Entitlements for Undocumented Aliens: Is California's Proposition 187 Constitutional? No: The Law is Clear, Only the Court Has Changed*, 81 A.B.A. J. 43 (Feb. 1995)(arguing that while the court's dynamics have changed, *Plyler* would still carry the day).

125. See League, 908 F. Supp. at 764; see also SEC. STATE, *supra* note 1, at 55. Those against Proposition 187 were concerned about turning 400,000 children onto the streets if Proposition 187 was enforced. SEC. STATE, *supra* note 1, at 55. They were also concerned about the health risks associated with illegal aliens who would have been without health care, handling

year after its passage, those who opposed Proposition 187 were mostly correct.¹²⁶ District Court Judge Pfaelzer found Proposition 187 to be poorly drafted,¹²⁷ violative of the Fourteenth Amendment via United States Supreme Court case *Plyler v. Doe*,¹²⁸ and predominately preempted by federal immigration laws.¹²⁹ The few provisions that remained intact were the criminal documentation possession and distribution provisions¹³⁰ and the higher education provision.¹³¹

food in restaurants and in the fields. *Id.* Those who opposed Proposition 187 hoped a "no" vote would send a message to the politicians to enforce the law. *Id.* Proposition 187 was opposed by the Sheriff of Los Angeles County, California Teachers Association, and the California Medical Association. *Id.*

126. The five lawsuits were consolidated into one action. *League*, 908 F. Supp. at 763.

127. One serious problem with Proposition 187 was its three vague categories of legal aliens. See SEC. STATE, *supra* note 1, at 91-92 (specifically §§ 5(b)(1-3), 6(b)(1-3), 7(d)(1-3)). Federal immigration law lists more than eight classes of legal aliens. 8 U.S.C. §§ 1101(15)(A)-(N) and 27(A)-(H) (1996). Judge Pfaelzer recognized this discrepancy and interpreted portions of Proposition 187 as if it had adopted federal definitions of aliens in the hopes of validating part of the newly passed law. See *League*, 908 F. Supp. at 770. Yet, she still held that federal immigration law preempted Proposition 187. *Id.* at 771.

128. *League*, 908 F. Supp. at 774. The district court found that not only were the immigration provisions of Proposition 187 section seven preempted by federal immigration law, the denial of education to illegal aliens or children of illegal aliens, was also unconstitutional under *Plyler v. Doe*. *Id.* Consequently, the district court held that section seven conflicted entirely with the Fourteenth Amendment and federal immigration law and therefore, was preempted in its entirety. *Id.*

129. Federal immigration laws preempted all of the sections of Proposition 187 concerning the classification of legal aliens. *League*, 908 F. Supp. at 768; see also note 127. In determining whether federal law preempted Proposition 187, the district court applied the three-prong test delineated in *DeCanas v. Bica*, 424 U.S. 351 (1976). *League*, 908 F. Supp. at 768. The district court held that the classifications of aliens under Proposition 187 contained in sections four through nine, violated the first-prong of the *DeCanas* test because the classifications regulated immigration. *Id.* at 771, 775. The court found the classifications also violated the second-prong of *DeCanas* because the classifications intruded into an area where Congress intended to occupy. *Id.* at 775. The overriding reason the classifications were preempted was because the Immigration and Naturalization Act mandated that the Act "shall be the sole and exclusive procedure for determining the deportability of an alien." *League*, 908 F. Supp. at 777 (quoting 8 U.S.C. § 1252(b)). Proposition 187's classifications would have "create[d] a new, wholly independent procedure, pursuant to which state law enforcement, welfare, health care and education officials-rather than federal officials and immigration judges-are required to determine the deportability of aliens and effect their deportation." *Id.*

130. Because sections two and three did not violate or impede federal law, those sections were not preempted. *League*, 908 F. Supp. at 786.

131. The district court held that the higher education section did not violate or conflict with federal law, and except for the classification provisions, it was not preempted. *Id.* The

Supporters of Proposition 187, including Governor Wilson, were ready to appeal and challenge the district court's holdings.¹³² Supporters wanted to challenge the ruling of a single district court judge, believing that the provisions were salvageable because the time was right to appeal to the United State Supreme Court.¹³³ The appeal was put on hold when the election in 1998 put Democratic candidate Gray Davis, who campaigned against wedge and divisive politics, into the Governor's office.¹³⁴ Governor Davis faced an unusual quandary because he was clearly anti-187 in 1994, but he was faced with defending it on appeal.¹³⁵ Claiming he had a constitutional mandate to appeal,¹³⁶ Governor Davis decided to seek the aid of the Settlement Program of the Ninth Circuit Court of Appeals rather than seeking a full appeal in front of the Ninth Circuit justices.¹³⁷ Both supporters and opponents of Proposition 187 heavily criticized Governor Davis for his decision.¹³⁸ When the

higher education section seemed to be less at issue because many colleges and universities already have requirements for proof of alien status and charge more for tuition if the student cannot establish legal residency. *Id.*

132. Steven J. Gorman, *Analysts: Prop. 187 Ruling Legally Sound*, L.A. DAILY NEWS, Nov. 22, 1995, at N1. Wilson called the District Court's decision "fundamentally flawed." Dennis Anderson, *Judge Throws Out Rest of Prop. 187, Wilson Vows to Appeal Ruling on Immigrant Aid Measure*, L.A. DAILY NEWS, Mar. 19, 1998, N3. Wilson also stated that the District Court's decision would allow for appeal to the Circuit Court of Appeals to enforce the will of the people. *Id.*; see also Ron Prince, *Commentary, Out of Purgatory, Let 187's Appeals Begin, Illegal Immigration*, L.A. TIMES, Mar. 24, 1998, at B7.

133. Wilson vowed to appeal the case to the United States Supreme Court if necessary. See Gorman, *supra* note 132. Governor Wilson recognized that the appellate process is lengthy and the quickest chance of reform would come from Congress. *Id.* Governor Wilson's prediction was correct because the Welfare Reform Act of 1996 denied federally funded social services to illegal aliens. See Leshner, *supra* note 9; see *supra* note 4.

134. Gubernatorial candidate Davis campaigned against wedge politics at every stop during his campaign tour. See Leshner *supra* note 9.

135. See *supra* note 4. Governor Davis says he thinks the law is unconstitutional, but also believes he must defend the measure on appeal to uphold his constitutional duty. See Leshner *supra* note 9 and accompanying text.

136. See *supra* note 9.

137. Robert B. Gunnison, *U.S. Court Asked to Mediate Prop. 187*, SAN FRAN. CHRON., Apr. 16, 1999, at A21; see also *supra* note 4. The Governor announced mediation of Proposition 187 on April 15, 1999. See Hardy, *supra* note 4. After dropping the education issue, an optimistic Governor Davis stated that federal law and court decisions on the educational issue gave him grounds to resolve the educational issue before mediation. See Dave Leshner, *Davis Won't Follow Prop. 187 on Schools Politics: Governor Vows Not to Implement Provision That Would Deny Illegal Immigrant Children Access to Public Education*, L.A. TIMES, May 21, 1999, at A1.

138. See *supra* note 6 and 7 and accompanying text; see also Leshner, *supra* note 9; Gunnison *supra* note 137. Opponents argued that the Governor should drop the appeal. See Gunnison *supra* note 137. While supporters of Proposition 187 blasted the Governor for delaying the appeal and acting with unconstitutional authority because the Governor was not seeking a full appeal, the most vocal opponent to the Governor's decision to mediate was the Lieutenant Gover-

Settlement Program decided to mediate the appeal, Proposition 187 became the first Proposition to go to mediation.¹³⁹ In August 1999, when the mediation ended in a settlement, Proposition 187 became the first Proposition to be resolved by mediation.¹⁴⁰

III. RISE OF MEDIATION AS A COURT SPONSORED TOOL TO RESOLVE DISPUTES AND THE FUTURE OF MEDIATED INITIATIVES

Mediation is one of the many processes in the ADR movement.¹⁴¹ The courts have embraced mediation above all other ADR tools to resolve disputes ranging from custody issues to complex litigation involving government regulation.¹⁴² Mediation can empower the parties to resolve their dispute together without having to go to trial.¹⁴³ The mediator's role is to help the par-

nor Cruz Bustamante. Ed Mendel, *Bustamante Widens Split with Davis on 187*, SAN DIEGO UNION-TRIB., Apr. 21, 1999, at A3. The Lieutenant Governor planned to file a legal brief arguing the Court of Appeals should drop the appeal. *Id.*

139. See *supra* note 5 and accompanying text.

140. *Id.*

141. Mediation is a procedure in which the mediator tries to help disputing parties reach agreement and in which the mediator has little or no authority to impose a decision if the parties do not reach an agreement. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 8, 41-53 (1996).

142. Mediation has been used to resolve conflicts such as landlord-tenant, debtor and creditor, and family matters. James J. Alfini, *Evaluation Versus Facilitation Mediation: A Discussion*, 24 FLA. ST. U.L. REV. 919, 921, 924, 934 (1997). Mediation has been successful in helping parties resolve a broad range of issues from international conflicts to neighborhood disputes. See ELIZABETH PAPLINGER, ET AL., *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS*, 3 (1996); see also PETER LOVENHEIM, *MEDIATE, DON'T LITIGATE* 8-9 (1989). Mediation is also used outside the court system to solve disputes in schools, at work, and in churches. See *id.* at 19. The President of the United States uses mediators to resolve international disputes. Sharon Press, *Institutionalization: Savior or Saboteur of Mediation*, 24 FLA. ST. U.L. REV. 903 (1997). The most well known meditations involve baseball where the players and owners resolve the players' salary disputes. *Id.*

143. Some see empowerment mediation as the key to settlement because it helps the parties to better understand their goals, options, and resources by making informed decisions. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 86-87 (1994). A mediator's evaluation of the party's case, if done right, can be helpful in evaluating particular options. *Id.* at 874; PAPLINGER, *supra* note 142, at 1. This evaluative style is sometimes seen as coercive because the mediator pressures the parties to accept settlement options over others. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U.L. REV. 839, 864 (1997). But cf. Lavinia E. Hall & Eric Green, *Finding Alternatives to Litigation in Business Disputes*, in WHEN

ties communicate and facilitate a dialog ending in a mutually agreeable settlement.¹⁴⁴ Mediators can be facilitative where they merely assist the parties resolve their conflict,¹⁴⁵ or they can be more evaluative by providing the parties a reality check by expressing their opinion about the probability of success at trial.¹⁴⁶ Mediation has been successful in resolving a variety of disputes at the trial level.¹⁴⁷

Recently, following the success of the trial court programs, most appellate courts on the state and federal level have instituted some type of settlement program to combat increased filings.¹⁴⁸ Most of these programs utilize a

TALK WORKS: PROFILES OF MEDIATORS 279, 306 (1994).

144. A facilitative mediator would "encourage [the] parties to examine and articulate underlying interests, recognize common interests and complimentary goals, and engage in creative problem solving to find resolution acceptable and optimal for all parties." Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALT. TO HIGH COST OF LITIGATION, 31, 32 (1996).

145. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U.L. REV. 937, 939 (1997). Facilitative mediators are concerned with the quality, expertise, and soundness of the evaluative mediator's advice. Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies, The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U.L. REV. 949, 958 (1997). While Florida state courts have adopted a purely facilitative model, some critics warn that facilitative mediation has out lived its usefulness. *Id.* at 954-56. The most popular mediators use some type of evaluative technique. *Id.* at 973. Some evaluative mediators are concerned about the increased potential harm if one party is less savvy about the process than the other party. *Id.* at 976-77.

146. See *infra* note 200 and accompanying text. Expert negotiator and mediator, William Ury advocates careful evaluative mediation. WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 130-56 (1993). Some evaluative mediators balk at the argument that evaluative mediation is an "oxymoron." John Bickerman, *Evaluative Mediator Responds*, 14 ALT. HIGH COST LITIGATION 70 (June 1996). On the other hand, some argue that a mediator should only offer his opinion if there is an "insurmountable settlement gap" between parties on the effect of settlement. Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALT. HIGH COST LITIGATION 62 (May 1996).

147. See *supra* note 129 and accompanying text. Florida state trial courts have adopted a true facilitative model of mediation. See Stempel, *supra* note 145, at 960. Facilitative mediators can help the parties in evaluating their case, position, or argument by having the parties question assumptions and positions and reexamine their interests. See Love, *supra* note 145, at 939. But cf. James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals From an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 774-79 (1997).

148. ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 1, 2 n.4 (1997). Most of these programs are a result of the passage of the Federal Rules of Appellate Procedure Rule 33 in 1994. *Id.* Under Rule 33, the court may direct parties and attorneys to participate in a settlement conference run by another judge or other person the court designates. FRAP Rule 33. Many state appellate courts have established settlement programs utilizing ADR. Michael J. Wilkins and Karin S. Hobbs, *Utah's Appellate Mediation Office Opens January 1998: A New Option for Case Resolution at the Utah Court of Appeals*, 10 UTAH B.J. 25 (Dec. 1997); MASSACHUSETTS CONTINUING LEGAL EDUCATION, APPELLATE PRACTICE IN MASSACHUSETTS, ALTERNATIVE DISPUTE RESOLUTION

neutral third party, such as a mediator, to aid the parties in hopes of ending the dispute before oral arguments.¹⁴⁹ There are many types of appellate settlement programs, but they have all been successful in resolving disputes.¹⁵⁰ The true level of success of these programs is hard to determine because many of the programs pre-select cases that seem to have a high likelihood for settlement.¹⁵¹ On the other hand, some programs require mandatory participation or permit mediation if one of the parties requests.¹⁵² Just as trial level mediation has become a popular alternative to resolving disputes, appellate programs are likely to become more popular as more parties and attorneys become familiar with the programs.¹⁵³

The Ninth Circuit Court of Appeals' Settlement Program¹⁵⁴ established in 1984, mediated Proposition 187.¹⁵⁵ The settlement office prescreens and selects cases that seem more amenable to participation in the program based upon the Civil Appeals Docketing Statement.¹⁵⁶ The Settlement Program prescreened and rejected Proposition 187, but when Governor Davis inherited the appeal, he requested that the program be used.¹⁵⁷ While participation is mandatory, all parties must agree upon the final resolution to either settle or proceed to appeal.¹⁵⁸ Through the Settlement Program, the parties found a

AT THE APPELLATE LEVEL 1 (1996).

149. NIEMIC, *supra* note 148, at 12-16 (outlining mediation use among federal circuit courts).

150. *Id.* See generally Irving R. Kaufman, *Must Every Appeal Run the Gamut? The Civil Appeals Management Plan*, 95 YALE L.J. 755 (1985-86)(discussing the success of court-sponsored mediation in the appellate process).

151. NIEMIC, *supra* note 148, at 11.

152. Only the Federal Circuit requires mandatory participation in a prehearing settlement discussion. NIEMIC, *supra* note 148, at 16. The Seventh Circuit selects one in every five appeals to participate in a settlement conference. *Id.* at 14. The remaining circuits prescreen the appeals for participants based on their settlement potential. *Id.* at 12-16.

153. S. Gale Dick, *The Surprising Success of Appellate Mediation*, 13 ALTERNATIVES TO HIGH COST LITIG. 41 (Apr. 1995). Some of the appellate programs pre-date the trial court settlement programs. *Id.*

154. *Appellate Court Agrees to Mediate Prop. 187*, L.A. TIMES, Apr. 27, 1999, at A26.

155. NIEMIC, *supra* note 148, at 72. Nationwide between 1994 and 1995, 40% of all eligible cases were selected to participate in some type of settlement program. *Id.*

156. The clerk's office forwards the Civil Appeals Docketing Statement to the Settlement Program Office. NIEMIC, *supra* note 148, at 73. This statement includes information on a wide variety of topics including nature of action and issues on appeal. *Id.*

157. Five percent of cases processed by the Settlement Office come as requests by the parties to participate. NIEMIC, *supra* note 148, at 74.

158. If settlement is not reached, the mediator will work with the parties and counsel to

mutually satisfying solution to the conflict over Proposition 187.¹⁵⁹ After many months of conference-call discussions, all parties agreed to a resolution of Proposition 187 where the Governor would drop the appeal and only enforce Proposition 187's criminal provisions.¹⁶⁰ Many critics were disappointed in the resolution, while others were encouraged by the success of the program with such a difficult appeal.¹⁶¹

Many scholars question the validity of a settlement program to end a dispute over an initiative,¹⁶² but the Supreme Court of California agreed to allow the settlement program to aid in resolution of Proposition 187.¹⁶³ Supporters of Proposition 187 were concerned that their position would not be adequately represented; they believed that if the Governor was truly against the Proposition, he would not zealously guard the will of the people and defend it.¹⁶⁴ However, the mediation of Proposition 187 was unique in many respects. First, Proposition 187 became the first initiative to settle via mediation.¹⁶⁵ Second, the parties on both sides did not seem to be opposed because Governor Davis has always been anti-Proposition 187.¹⁶⁶ Third, the mediation did not set precedent for future immigration challenges because no judicial opinion was written to establish *stare decisis*. What this uniqueness will mean for future initiatives will be examined in Part D.¹⁶⁷

establish a schedule for the remainder of the case and files an order releasing the case from the Settlement Program. NIEMIC, *supra* note 148, at 77.

159. See *infra* note 297.

160. Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles Litigation: Governor's Deal with Civil Rights Groups Effectively Kills 1994 Anti-Illegal Immigrant Measure, Accord is Likely to Ignite Further Controversy*, L.A. TIMES, July 29, 1999, at A1.

161. Terry McDermott, *Some Are Embittered by Fate of Prop. 187 Politics: Fervent Backers of Anti-immigration Measure Express Rage at its Demise and Want to Recall Gov. Davis*, L.A. TIMES, Aug. 2, 1999, at A1; see also Antonio Olivo, *Some Foes of Prop. 187 Now Preach Compromise Politics: The New Stance by Those Lawmakers Reflects Latinos' Differing Attitudes Toward Immigration*, L.A. TIMES, May 11, 1999, at A1.

162. Dan Morain, *Debate Rises on Mediation of Proposition 187*, L.A. TIMES, Apr. 20, 1999, at A1. One critic stated that the Proposition is either "constitutional or not," leaving no room for negotiation. *Id.*

163. *High Court Refuses to Block Prop. 187 Mediation Effort*, L.A. TIMES, July 2, 1999, at A26.

164. *Deal Struck to End Litigation Over Immigrant Aid*, A.P. NEWSWIRE, July 29, 1999. Sharon Browne of the Pacific Legal Foundation stated that the mediation left "Proposition 187 basically undefended." *Id.*; see also Ed Mendel, *Bustamante Widens Split With Davis on 187*, SAN DIEGO U. TRIB., Apr. 21, 1999, at A3 (stating that supporters fear no one would defend the initiative's integrity).

165. *Deal Struck to End Litigation Over Immigrant Aid*, *supra* note 164.

166. McDermott, *supra* note 161.

167. See *infra* notes 314-54 and accompanying text.

A. Mediation — A Popular Device of Alternative Dispute Resolution

Mediation is a process that helps the parties come to an agreement regarding their dispute with the aid of a neutral third party.¹⁶³ Mediation and other forms of ADR gained popularity in state trial courts in the 1980s due to over worked judges and heavy court dockets.¹⁶⁹ The goal of these programs is successful resolutions of conflicts while avoiding the time and expense of a trial.¹⁷⁰ Mediation and other programs have been successful in resolving disputes before trial.¹⁷¹

Most courts have some type of alternative process to help settle cases. Depending upon the court, many programs can be voluntary or mandatory.¹⁷²

168. One of the primary goals of mediation is to empower the parties to reach a mutually satisfying result. Lande, *supra* note 143, at 858. The use of empowering mediation is an emerging style that is not without its critics, but is viewed as a byproduct to the institutionalization of settlement-oriented mediation. *Id.* Empowerment and evaluative mediation are both more likely to occur in court-sponsored mediation, as its goal is to settle cases. *Id.* These styles involve the mediator as an evaluator which also involves gently pushing parties to settle. *Id.* See also BUSH & FOLGER, *supra* note 143. Bush and Folger are one of the most vocal and prolific advocates of the empowerment style. See generally Joseph P. Folger & Robert A. Baruch Bush, *Ideology, Orientations to Conflict Mediation Discourse*, in NEW DIRECTIONS IN MEDIATION (1994); see also Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996) (articulating common practices among successful mediators).

169. Lande, *supra* note 143, at 841; see also Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343, 365 (1992). California courts are bombarded with more cases and an increasing number of complex cases. *Id.* at 397. Some see the modern ADR movement as a by-product of society's dissatisfaction with litigation. Stempel, *supra* note 145, at 970.

170. Since the passage of the Civil Justice Reform Act of 1990 (CJRA), Federal District Courts have all been required to develop a cost and delay reduction plan for civil cases. 28 U.S.C. §§ 471-82. The CJRA includes ADR as a management tool. *Id.* Many cases are now mediated well before trial, thus avoiding costs of future litigation. PALPINGER, *supra* note 142, at 10-11 (discussing sample mediation fees).

171. Based on a survey of the federal district courts, mediation and other tools handle a large caseload. PALPINGER, *supra* note 142, at 6, 29-57 tbls. 3-7. This survey should be carefully examined because many of the courts do not formalized reporting systems. *Id.* at 6.

172. The district courts have mandatory and voluntary programs. PALPINGER, *supra* note 142, at 36-48, tbl. 4. The California District Courts have both voluntary and mandatory programs. *Id.* Central District of California has established Local Rule 23 that requires parties to meet with a judge, settlement officer, or private mediator forty-five days before the final pre-trial conference. *Id.* at 80. The Eastern District of California has established a voluntary Early Neutral Evaluation (ENE) program via Local Rule 252. *Id.* at 88. Under ENE, the third party helps the parties examine the strengths and weaknesses of their case. *Id.* The Northern District Court of

Most of these programs involve a third party who assists the participants in their resolution of their case.¹⁷³ Depending upon the program, this neutral third party can be: a court volunteer, an attorney or even an expert in the field of the particular dispute.¹⁷⁴ These neutral third parties have many different styles and approaches to settling disputes.¹⁷⁵ Regardless of the background and style of the third party, his or her goal is to help the parties come to a resolution.¹⁷⁶ The third party will have to overcome many obstacles to attain this goal.¹⁷⁷ First, the third party will have to bring parties together for a dialog when the parties are clearly having a dispute.¹⁷⁸ There may be trust, legitimacy, and other issues that must be addressed and overcome for a successful mediation.¹⁷⁹

California has adopted an ADR Multi-Option Program under Local Rule 3 where all civil cases are required to participate in mediation, arbitration, ENE, or see a Magistrate Judge for a settlement conference. *Id.* at 90. The Southern District of California has established an ENE where the parties meet with a magistrate soon after responsive pleadings are filed. *Id.* at 103. The parties in the Southern District may later opt into or be ordered to participate in mediation, arbitration, mini-trial, or summary jury trial under Local Rule 16.1. *Id.* ENE has a staff which handles the daily workings of the program which has formalized procedures for use of ADR. *Id.* at 11.

173. See *supra* note 168; see also PALPINGER, *supra* note 142, at 9, 29-57, tbls. 3-7 (discussing the reliance on third-party neutrals).

174. *Id.* Some state programs such as Florida's have established specific training and experience guidelines for court mediators. Press, *supra* note 142, at 915.

175. Lande, *supra* note 143, at 845, 850. With the increase in popularity of mediation, many critics believe that there should be only one model of mediation, presumably so that when parties request or courts order them to mediation, they know what to expect. *Id.* at 854. With the institutionalization of mediation and its different styles, this uniformity is difficult and unlikely. *Id.* at 855. One alternative is to clearly define the different styles and varieties of mediation in ways that would be clearly and easily understood by the parties. *Id.*

176. While some mediators and attorneys assume that they know their goals and discussion of these issues are unnecessary, they are frequently mistaken and benefit from goal and interest discussions. Lande, *supra* note 143, at 871. There are at least four goal topic areas that should be explored including litigation issues, business interests, personal/professional/relational interests and community interests. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7, 18-23 (1996). In order to reach the parties' goals, the mediator and parties must establish trust at the start of the mediation via their actions and statements, which should continue throughout the mediation. See *id.*

177. Some parties may come into the mediation on attack and do not realize it because they are too close to the situation. URY, *supra* note 146, at 39. The mediator can put an end to the attack and alleviate its impact by recognizing it, informing the parties, taking a break, clarifying the problem, and discouraging rushed decision-making. *Id.* at 41-51.

178. The mediator will have to bridge the gap that exists between the parties. This bridging can occur by encouraging active listening, paraphrasing, acknowledging feelings and positions, projecting confidence, acknowledging competence and authority, and expressing optimism on overcoming differences. URY, *supra* note 146, at 72. The mediator can help the parties get to problem solving by probing the parties by asking them "why," "why not," "what if," "what makes it fair," and asking for advice. *Id.* at 80-87.

179. MOORE, *supra* note 141, at 174-77, 214. See *infra* note 182 for a discussion on legiti-

Since the majority of programs utilize mediation, the remainder of this section will address mediation and the process of mediation. While the nuts and bolts of mediation is beyond the scope of this Article, it is important to understand the role of the mediator to analyze the impact mediation had on the settlement of Proposition 187. In general, the mediator is able to overcome many problems the parties have been experiencing because the mediator is a neutral third party who can bring a fresh perspective.¹⁸⁰ Oftentimes, the parties and attorneys¹⁸¹ have preconceived notions of the positive value of their case and the related negative perception of the opponent's case.¹⁸² A successful mediator will be able to bring the parties together, help them see the value of the other party's perspective, and help guide them to their own resolution, usually a dollar amount. Sometimes a non-monetary resolution can

macy. Lack of trust can be a large roadblock to a successful mediation. MOORE, *supra* note 141, at 129. The parties must be able to "depend on or place confidence in the truthfulness or accuracy of another's statements or behavior." *Id.* The mediation process itself can serve as a key role in increasing trust. *Id.*

180. URY, *supra* note 146, at 130-56. The mediator is usually a neutral third party with no stake in the outcome. *See supra* notes 168 and 177. As such the mediator can use his experience and neutrality to educate. *Id.* at 132-33. The mediator can also educate the parties on the consequences by asking "reality" testing questions learned via mediator experience. *Id.* at 134-36.

181. The role of the attorney in a mediation can be confusing for the attorney and the parties. An attorney is an advocate and as such may affect the outcome of the mediation. Lande, *supra* note 143, at 883. At a mediation the attorney may do most of the talking, make statements, and comment on the viability of settlement options - all in lieu of client participation. *Id.* Another problem facing the attorney and mediation is the attorney's lack of time due to the fact that the attorney often has other hearings and meetings that encroach upon or cut a mediation short. *Id.* at 887. Attorneys can have a major impact on the relationship between mediation and litigation in the emerging liti-mediation culture, where many attorneys now save their settlement efforts until mediation when the case could have been settled earlier. *Id.* at 891. It is advisable for a mediator to set the parameters of the attorney's role in the mediation at the onset of the mediation. *Id.* at 884. One solution to several of these problems is for the attorney to become more educated about mediation and different mediation styles and options, and allow the client to participate more in mediation. *Id.* at 896-97.

182. This overconfidence may present a legitimacy issue. MOORE, *supra* note 141, at 174. The party may accept his own position and interest as legitimate, but deny opponent's opinion, interests, or emotions are legitimate. *Id.* Some of the legitimacy issues can be resolved by the mediator's redefining the issues, having another person mediate in lieu of a particular party, being more specific or general when warranted, or focusing on an issue that could be recognized as legitimate. *Id.* at 176. The parties and attorneys may also bring stereotypes and misperceptions to the bargaining table. *Id.* at 169. The mediator will need to address these issues and overcome them if the mediation is to be successful. *Id.*

be just as satisfying.¹⁸³ The success of mediation is a reflection on its ability to recognize there are many reasons behind a lawsuit. The parties are obviously disagreeing on some legal right, but the reason the disagreement resulted in a lawsuit, and what the parties hope to gain, is a facet that litigation and judicial resolution often misses.¹⁸⁴

In order for a mediator to be successful, he must bring the parties together. Unification is not an easy task. The mediator must use all of his experience to help him achieve this goal.¹⁸⁵ To help identify the underlying issues and to help the parties achieve their goal; the mediator frequently must progress through many stages.¹⁸⁶ The mediator will move through these stages until the mediation attains ultimate resolution.¹⁸⁷

The mediator's task of bringing the parties together begins as soon as the party's select or the court orders the parties to mediation.¹⁸⁸ The mediator ed-

183. Every dispute has several issues and sub issues that take time and a commitment to reveal. Lande, *supra* note 143, at 872-73, 876. The mediator must be willing to spend such time as necessary in assisting the parties to unearth these issues so that all options may be considered in settlement. *Id.*

184. A judge does not focus on the how or the why of a dispute between the parties, while ADR processes are usually focused on such issues. EDWARD J. BERGMAN & JOHN G. BICKERMAN, COURT ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS viii (1998). A mediator is able to change with the parties as they progress through the resolution of their dispute. As parties participate in dispute resolution their attitudes, values, and interests change and the mediator is flexible enough to change as the parties change. Stempel, *supra* note 145, at 980-81. Mediation gives parties a new avenue to solve disputes in a creative way while still providing a reference to the viability of options and outcome should the case end in litigation after all. *Id.* at 982-83. Moreover, mediation gives parties access to information they would not have received otherwise. *Id.* All these reasons make mediation more flexible and responsive to parties' needs than judicial resolution of cases.

185. See *supra* note 174; MOORE, *supra* note 141, at 55, tbls. 1,2. Depending upon the style of the mediator and how the mediator is selected, the mediator may know the parties personally or professionally or may be impartial and neutral. *Id.*

186. MOORE, *supra* note 141, at 63. Mediators can blend together many of the stages or emphasize them depending upon the mediator's style or approach. *Id.* There can be many obstacles to getting the parties to agree to a settlement. URY, *supra* note 146, at 107. The mediator can help the parties build a bridge. *Id.* at 109. This bridge can be built by helping the parties to see the other side's perspective. *Id.* at 110-11. The mediator can do this by asking for constructive criticism, giving the parties a choice, and trying to establish a plan that addresses unmet interests. *Id.* at 110-16. An important aspect of this is to not simply dismiss the parties and their position as irrational. *Id.* at 116. Mediators should encourage the parties to put themselves in the opposing party's shoes. *Id.* The bridge can also be built by not overlooking basic human needs and intangible goals. *Id.* These intangible goals can be unearthed during a caucus. See *infra* notes 195 and 196.

187. LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 22 (1990).

188. PAUL MICHAEL LISNEK, A LAWYER'S GUIDE TO EFFECTIVE NEGOTIATION & MEDIATION 117 (1993); MOORE *supra* note 141, at 66, 81-98; SINGER, *supra* note 187, at 22-23.

ucates the parties and attorneys about the mediation process.¹⁸⁹ In return the parties educate the mediator about the dispute.¹⁹⁰ The mediator starts to build trust and cooperation by expressing a readiness to handle strong emotions, check perceptions, and clarify communications.¹⁹¹ Many of these initial stages are done before the bargaining stage of the mediation.

Once the mediation begins, the mediator starts on a positive and open note by establishing the ground rules for behavior.¹⁹² During the mediation, the mediator may help the parties vent emotions, limit or expand topic areas as needed, and then establish a plan for issues for the remainder of the mediation.¹⁹³ By exploring issues and settling on an agenda, the mediator will hopefully be able to unearth hidden interests of the parties and help the parties bring those interests to the attention of the other side.¹⁹⁴ Discovering hidden interests is difficult and the mediator may use individual meetings with each side called caucuses to enable the party to express himself freely without the presence of the opposing side.¹⁹⁵ In the interests of fairness, if the mediator has a caucus with one party, he will caucus with the other party as well.¹⁹⁶

At this point in the mediation, settlement options may begin to be pro-

189. MOORE *supra* note 141, at 66; SINGER, *supra* note 187, at 23; LISNEK, *supra* note 188, at 117-18.

190. MOORE *supra* note 141, at 66, 114; LISNEK, *supra* note 188, at 120.

191. MOORE *supra* note 141, at 66.

192. MOORE *supra* note 141, at 66, 193; Leonard L. Riskin, *Mediation Training Guide*, in DISPUTE RESOLUTION AND LAWYERS 342-44 (1997); LISNEK, *supra* note 188, at 117-20; LOVENHEIM, *supra* note 142, at 81-86.

193. MOORE *supra* note 141, at 66, 231; LISNEK, *supra* note 188, at 23-28; RISKIN, *supra* note 177, at 348.

194. See *supra* note 186; SINGER, *supra* note 187, at 23; LISNEK, *supra* note 188, at 129; LOVENHEIM, *supra* note 142, at 91-96; RISKIN, *supra* note 177, at 348.

195. A caucus is when a mediator meets separately with one side. Lande, *supra* note 143, at 863 n.116. The caucus can be an effective tool by allowing the parties separate time with mediator to explore options and underlying issues. *Id.* The mediator can use a caucus to meet just with the parties, attorneys, or both. *Id.*; see also, SINGER, *supra* note 187, at 23; LOVENHEIM, *supra* note 142, at 95-97; RISKIN, *supra* note 177, at 345.

196. Aaron, *supra* note 146, at 62. By having a caucus, the mediator is able to decide the best method to deliver a message to a party. *Id.* The caucus can be especially helpful when one party is culturally or ethnically different from the opposing party. *Id.* If the mediator is going to evaluate the party's case, a caucus would give the mediator the opportunity to do so without causing the party to lose face. *Id.*

posed.¹⁹⁷ At this stage, the mediator's role is to help the parties realize the viability of the options.¹⁹⁸ There is a great deal of disagreement in the mediation community about the role of the mediator either to be a true facilitator — as a tool to help the parties realize the value of their options,¹⁹⁹ or to be an evaluator — as a tool to evaluate the viability of success of an option advocated by one side.²⁰⁰ While such a dichotomy is interesting, it is beyond the scope of this article. However, most appellate programs focus on settlement. As such, most mediators use some sort of evaluative feedback to educate the parties on the success of settlement options.²⁰¹

After settlement options are enumerated, the parties will assess the options by analyzing how the various options meet their interests and the costs or benefits to the various options.²⁰² At this point, the mediation either moves

197. MOORE, *supra* note 141, at 244; RISKIN, *supra* note 177, at 350-51.

198. See *supra* note 176, 186-87; MOORE, *supra* note 141, at 269. If the mediator is going to evaluate the various options, it is advisable that the mediator conduct such evaluation in a caucus, while providing positive and negative feedback to both sides, remaining objective, and presenting the evaluation in a logical fashion. Aaron, *supra* note 146, at 63. The mediator should help the parties to realize that the mediator's evaluation is not the final determination of the value of their case, but merely sets a range for settlement. *Id.* at 64; RISKIN, *supra* note 177, at 350-51.

199. Facilitative mediators focus on getting the parties to voice their own opinion and usually refrain from making comments about viable settlement options. Riskin, *supra* note 161, at 24. For an excellent discussion on the merits and drawbacks of each style see Alfini, *supra* note 142.

200. An evaluative mediator walks a fine line in not pressuring the parties to settle for settlement's sake. Lande, *supra* note 143, at 877. Ultimately, the parties must take responsibility for the decision whether to settle or not. *Id.* To that end, the mediator should double check the willingness of the parties to settle on a particular option and not allow shortness of time to dictate a sloppy or haphazard settlement. *Id.* at 877-78. Evaluative mediators help the parties formulate settlement options and encourage or influence the parties to accept them. Riskin, *supra* note 161, at 23-24. Michigan mediation has been successful in combining both styles of mediation. Laurence P. Connor, *How to Combine Facilitation with Evaluation*, 14 ALT. HIGH COST OF LITIGATION, 15 (1996). Michigan mediation begins as facilitative and then evolves into an evaluative mediation as the mediation progresses. *Id.* Changing style mid-mediation can sometimes aid in depolarizing stagnated positions. *Id.*

201. MOORE, *supra* note 141, at 263, 269. Scholars attribute the origins of evaluative mediation to the rise of court-sponsored mediation. Civic, *supra* note 132, at 32. Critics are concerned that the judicial "arm-twisting" and advocacy of attorney has pervaded mediation and changed mediation from "true" mediation. *Id.*

202. MOORE, *supra* note 141, at 269. The parties must review their interests and determine how each settlement option meets those interests. *Id.* The party may realize that some interests are less important than others. *Id.* Consequently, the parties may begin to modify, combine, or trade the options until a final agreement is met. *Id.* For a complete discussion of settlement options and the stages of settlement, MOORE, *supra* note 141, at 270-78; RISKIN, *supra* note 177, at 352-53.

to final bargaining²⁰³ or ends unsuccessfully.²⁰⁴ The mediation that moves into final bargaining will either do so via small steps or, sometimes, giant leaps of compromise to settle the dispute.²⁰⁵ Getting the parties to trade these items can go far in building the bridge to agreement.²⁰⁶ Breaking the mediation down into small steps and guiding the parties through these steps slowly, can help the parties reach their goal quickly without losing faith.²⁰⁷ The last step is to memorialize the agreement and establish any mechanisms for evaluation and completion of the agreement.²⁰⁸

Mediation is an exciting, empowering ADR device that helps parties come to their own resolution. The courts have successfully adopted mediation and other tools to help decrease its ever increasing case load.²⁰⁹ While mediation may have some negative aspects,²¹⁰ most participants are satisfied with the overall process and resolution.²¹¹

203. MOORE, *supra* note 141, at 67, 280; LOVENHEIM, *supra* note 142, at 100-02; RISKIN, *supra* note 177, at 353.

204. *See supra* note 158.

205. Sometimes it is necessary to go slow in order to go fast. URY, *supra* note 146, at 124. In building the bridge to settlement, the mediator should not assume a fixed pie. *Id.* at 118. Sometimes what one party views as inconsequential, can be highly valuable to the opposing party. *Id.*

206. *Id.*

207. *Id.* at 124-27.

208. MOORE, *supra* note 141, at 67, 301. Sometimes the small steps do not work. *See supra* notes 202 and 205. Some parties do not want to commit themselves until the very end of the mediation. *See* URY, *supra* note 146, at 128. While most conclusions to mediation occur hurriedly, it is important for the mediator to slow the process down so that the parties agree to a proper settlement that is reflective of their agreement. *Id.* at 128-29. The memorialization is important because implementation of the agreement should be included in any agreement. *Id.* at 152-53. The mediator must help the parties to foresee potential risks and build in a procedure to resolve disputes into the settlement agreement. *Id.* at 153-54. The mediator should help the parties realize their goal is for mutual satisfaction of interests, not victory. *Id.* at 155-56.

209. *See supra* note 148 and accompanying text.

210. *See supra* notes 143, 168, 198-202 and accompanying text discussion on evaluative mediation. Some critics warn that mediation poses particular dangers to women in divorce mediation particularly those involving domestic disputes where there is an imbalance of power. Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 444-46 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-51 (1991).

211. Chris Guthrie & James Levin, A "Party Satisfaction" Perspective On a Comprehensive Mediation Statute, 13 OHIO ST. J. ON DISP. RESOL. 885, 889-91 (1998). *See* LOVENHEIM, *supra* note 142, at 7, tbl.1-1.

B. Appellate Settlement Programs Draw Upon the Success of Trial Court Mediation

After the successful adoption of mediation and other ADR programs by many state trial courts, several appellate courts²¹² instituted their own programs to help with burgeoning dockets.²¹³ All Federal Circuit Courts have established some type of settlement program as required under Federal Rules of Appellate Procedure Rule 33.²¹⁴ Similar to trial court mediation, appellate me-

212. Many state appellate courts have instituted settlement programs. Cal. Sup. Ct. R. 19.5; Conn. Prac. Book § 4103; Ga. Ct. App. R. 52; Ind. Ct. App. R. 2; Ky. R. Civ. P.; Md. R. 8-205; Mo. Sup. Ct. R. 84.02; Ohio Ct. App. R. 15; Tex. Civ. Prac. & Rem Code Ann. §§ 154.001-.073, Wash. Ct. App. R. 5.5. See also, *Mediation is Helping Cut Court Costs*, DESERT NEWS, Dec. 11, 1998, at B12; Hon. Ruth McGregor, *Dispute Resolution Comes to Appellate Court*, 33 AZ. ATT. 28 (Nov. 1996); Melvin P. Antell, *A View From the Bench: The Casp: Settlements at Appellate Level*, 182 N.J. LAW. 17 (Jan/Feb. 1997); Lester H. Berkson, *Supreme Court Mandated Mediation - A Giant Step Forward*, 6 NEV. LAW. 22 (Oct. 1998); Ronald T. Y. Moon, *Letter to the Bar from the Chief Justice*, 1994 HAW. B.J. 18 (Nov. 1994); Michael J. Wilkins, *Utah's Appellate Mediation Office Opens January 1998: A New Option for Case Resolution at the Utah Court of Appeals*, 10 UTAH B.J. 25 (Dec. 1997).

213. This section will focus on federal circuit court of appeals settlement programs because the Ninth Circuit Court mediated Proposition 187. Todd S. Purdum, *Governor Seeks Compromise on Aid to Illegal Immigrants*, N.Y. Times, Apr. 16, 1999, at A14. Many propositions are filed in federal district courts. See Holman, *supra* note 78, at 1253-59. Thus, more proposition challenges might find their way into the appellate settlement programs. Some criticize the internalization of ADR programs based on efficiency rather than improving the process and humanistic goals advocated by the broader ADR movement. ROGERS & MEWEN, *MEDIATION POLICY OBJECTIVE HISTORICALLY* 1-19; see also Carrie Menkel-Meadow, *Pursuing Settlement In An Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 13-17 (1991) (explaining different appellate settlement programs).

Federal civil appeals have dramatically increased in the past thirty years. CAROL KRAFFKA, JOE S. CECIL, AND PATRICIA LOMBARD, *STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS* 3 (1995). Federal civil appeals have out numbered criminal appeals for many years. *Id.* at 1-2. Federal civil appeals numbered fewer than 5,000 in 1958, but by 1993, more than 300,000 appeals were filed. *Id.* at 3, fig. 1. This increase in federal appeals seems to stem from an increased desire to challenge district court rulings. *Id.* Growth in the appellate courts out paced trial court growth by fifty percent. Jerrold J. Ganzfried, *Bringing Judgement to Business Litigation: Mediation and Settlement in the Federal Courts of Appeals*, 65 GEO. WASH. L. REV. 531, 533 (1997).

214. Federal Rules Appellate Procedure Rule 33 states:

The court may direct the attorneys-and, when appropriate, the parties-to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including the simplifying the issues and discussing settlement. A conference may be conducted in person or by a telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of a conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

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diation can be comprised of a variety of programs.²¹⁵ However, the ultimate goal of all the programs is settlement.²¹⁶ The success of these appellate programs equals that of the trial court programs.²¹⁷

These settlement programs offer assistance in settling an appeal at a point when there was no prior assistance.²¹⁸ These programs help parties forge a settlement when settlement might be hardest: after trial where there has been an adjudicated winner and loser.²¹⁹ Many attorneys have been hesitant in the past to propose settlement on appeal because it can be seen as a sign of weakness.²²⁰ These programs can help the parties and attorneys to overcome hesitancy to settle by exploring creative, non-judicial, or non-legal solutions to their conflict.²²¹ In addition to settlement, these programs conserve judicial

215. NIEMIC, *supra* note 148, at 5-11. The term appellate mediation, as used in this article, includes all types of settlement processes that use a third party neutral.

216. One critic warns that emphasis on settlement rates can be misleading. Frank E. A. Sander, *The Obsession With Settlement Rates*, 11 NEGOT. J. 329 (1995). Settlement rates can be misleading and not accurately reflect the success of a program because settlement rates exclude certain factors. *Id.* at 329. For instance, the rate would not include a case where the mediation did not end in a settlement, but it got the parties talking, which caused an eventual settlement. *Id.* at 329-30. Moreover, the rates do not reflect the difficulty of the cases settled. *Id.* at 330. A successful mediation in a complex litigation case would save the court's time and expense more than mediated settlement of a small claims dispute. *Id.* The numerous federal programs have many objectives including settlement, conservation of judicial resources, and case management. NIEMIC, *supra* note 148, at 3-4.

217. See Dick, *supra* note 153, at 48. There has been a call for a uniform national reporting system to accurately record the settlement statistics. Susan A. FitzGibbon, *Appellate Settlement Conference Programs: A Case Study*, 1993 J. DISP. RESOL. 57, 105 (1993); see also Proceedings of the Fifty-First Judicial Conference of the District of Columbia Circuit and Criminal Procedure, and Rules Governing Section 2255, 134 F.R.D. 321, 326 (1990).

218. In the past, parties at the appellate level either did not offer settlement or rejected offers outright. Thomas F. Ball III, *Appellate Mediation in the Fourth Circuit: An Idea That Works*, 9 S.C. LAW. 28 (Dec. 1997); see also Ganzfried, *supra* note 213 at 533. The litigation and appeals process further reinforces the all-or-nothing decisions without opportunity to solve the underlying problem. David Aemmer, *Appellate Mediation in the Tenth Circuit*, 26 COLO. LAW. 25, 26-27 (1997).

219. See Ball, *supra* note 218, at 30. Parties may be resistant to settlement because the winner gloats over the win and the loser clings to the right to appeal to save face. *Id.*

220. NIEMIC, *supra* note 148, at 3-4. Attorneys can help ensure the mediation meets the party's needs and goals by probing the client's goals and options, helping the parties to be open to alternatives, and reassuring them a solution should encompass both parties' needs. Aemmer, *supra* note 218, at 26.

221. NIEMIC, *supra* note 148, at 3-4. The mediator can help the parties identify underlying concerns, generate settlement options, and expand settlement discussions by identifying and addressing concerns outside the legal process. *Id.*; see also Berkson, *supra* note 212, at 22.

resources and offer aid to the parties in managing their case on appeal.²²²

In the appellate programs, case selection and timing of the conferences can vary. Some of the programs require mandatory participation, while others pre-screen cases or randomly select participants.²²³ The conferences are usually held before the briefing stage to save the parties the time and expense of the briefing process if the parties decide to settle their appeal.²²⁴ However, a few programs allow the conference to occur just prior to oral argument.²²⁵

All federal appellate programs limit participation to civil cases.²²⁶ Many programs further limit participation by eliminating appeals that include a public agency as a party or a pro se party.²²⁷ Participation in the settlement conference does not toll briefing deadlines unless the parties request.²²⁸ Participation in the conference is mandatory once ordered to the settlement program.²²⁹ The programs are all non-binding in that all parties must acquiesce to the final agreement in order for the settlement to be binding.²³⁰ Even if the conference is unsuccessful in settling the appeal, it can narrow the issues and aid the parties in managing their appeal.²³¹ The settlement conference can differ from private mediation in many ways.²³² For instance, in private mediation the facts are gathered without formality.²³³ A private mediation is friendly and quick with a distinct party focus because the mediator personally conducts the mediation with the parties present.²³⁴ On the other hand, appellate mediation occurs after filing of the suit, conducting discovery, and a trial where the rules of evidence limit information gathering and disclosure.²³⁵ The appellate programs may be less party centered because the parties are not required to attend unless it would be helpful to the mediation.²³⁶ The appellate confer-

222. FitzGibbon, *supra* note 217, at 67-68; *see also* Judicial Conference, *supra* note 217, at 326; Ganzfried, *supra* note 218, at 532-33; NIEMIC, *supra* note 148, at 4.

223. NIEMIC, *supra* note 148, at 5-7. Once selected for the program, the parties must participate. *Id.* at 9. Some see this as coercion and detracts from the voluntary nature of mediation. FitzGibbon, *supra* note 217, at 75.

224. NIEMIC, *supra* note 148, at 7; *see also* Aemmer, *supra* note 218, at 26.

225. NIEMIC, *supra* note 148, at 7.

226. *Id.* at 5.

227. *Id.* at 5-6.

228. *Id.* at 8.

229. *Id.* at 9; *see also supra* note 205.

230. *Id.* at 9.

231. NIEMIC, *supra* note 148, at 4.

232. FitzGibbon, *supra* note 217, at 57.

233. *Id.*

234. *Id.*

235. *Id.* at 58.

236. Fed. App. Rule of Proc. Rule 33. Some see client attendance at mediation as counter-productive because the needs for legal and procedural explanations are not necessary when medi-

ences can be held either in person or telephonically.²³⁷ The circuits that are geographically large rely on telephonic conferences for cost efficiency and to save time.²³⁸

While appellate programs may not be exactly the same as private mediation, it does not necessarily follow that appellate mediation is not a worthwhile, helpful program. Many of the differences between the mediations actually benefit appellate mediation because by the time the appellate mediation occurs, the parties are well aware of their respective legal positions.²³⁹ At this point, the parties only require third party assistance in resolving their dispute in a unique and creative fashion.²⁴⁰

Appellate mediation is similar to private or trial level mediation in a few ways. While the client must attend private or trial level mediation, the client *may* attend an appellate mediation and *should* attend if it would assist in the resolution of the conflict.²⁴¹ Like private mediation, the mediation is confidential.²⁴² The settlement programs maintain confidentiality by being completely

ation involves attorneys. *Id.* at 91, 93. *But cf.* John H. Martin, 8th Circuit Court of Appeals Pre-Argument Conference Programs, 40 J. MO. BAR 251, 258 (1984). On the other hand, clients have much to gain from attending mediation. Judicial Conference, *supra* note 217, at 364. Because the mediation deals with the client's needs and concerns it is wise for them to attend. *Id.* Some mediators wish the clients to attend at least one session. *Id.* at 364-65.

237. NIEMIC, *supra* note 148, at 8. While telephonic conferences are popular, some criticize their effectiveness. FitzGibbon, *supra* note 217, at 96. One of the benefits to traditional mediation is face to face meetings, which telephonic conferences would lack. *Id.*; NIEMIC, *supra* note 148, at 8.

238. NIEMIC, *supra* note 148, at 8.

239. FitzGibbon, *supra* note 217, at 63, 98. The parties will be more focused on narrower issues and the roles of the parties are clearly defined. *Id.* at 98. In fact, the best solutions from settlement conferences and mediating occur when the parties voluntarily abandon litigation in favor of an agreement that "does not leave one party scared and the other exalted." Kaufman, *supra* note 150, at 64.

240. NIEMIC, *supra* note 148, at 4. The conferences can widen settlement discussions by combining party's non-legal interests. *Id.*

241. Dick, *supra* note 153, at 50. Many who argue to exclude the client or party from mediation cite many reasons why exclusion is good. Some say that it is too much a burden on the client to attend every session. *Id.* While other argue that client presence alters attorney performance because the attorney cannot openly discuss settlement options when the client is present. *Id.* For a detailed analysis of the benefits and drawbacks to client presence at a settlement conference see Leonard L. Riskin, *The Represented Client In A Settlement Conference: The Lessons of G. Heilemann Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L. Q. 1059 (1991).

242. NIEMIC, *supra* note 148, at 9. Confidentiality can help the mediator probe underlying issues and goals of a party in a caucus without the other party knowing. Aemmer, *supra* note

independent of the appellate courts.²⁴³ This confidentiality binds all parties, attorneys and the mediator.²⁴⁴ Only the fact that the parties are participating in the mediation, any result thereof and filings are public record.²⁴⁵ Just as with court mandated trial level mediation, the parties do not have to pay for the mediation, other than the costs of the telephone call and any travel expenses if the mediation takes place in person.²⁴⁶

There are many benefits to appellate mediation. These programs allow the parties to explore settlement at a time when it seems less likely that settlement would occur.²⁴⁷ Moreover, because the mediation is confidential, if one party requests to participate, the other party would be unaware of this, thus allowing the requesting party to save face.²⁴⁸ In addition, the mediator is able to guide the parties to compromise and educate them about other choices for resolution other than litigation.²⁴⁹ This process might be difficult given that the trial court declared one party the legal winner of the conflict.²⁵⁰ One way this problem can be overcome is to encourage free flow of information, unburdened by the rules of evidence.²⁵¹ Therefore, more information, which might be legally irrelevant, but important to the parties, can be disclosed.²⁵² This increase of information can help the parties come to a mutually beneficial solution.²⁵³ Finally, the conference is party oriented because it focuses on what is important to *them* for settlement, rather than focusing on legal

218, at 26. At these caucus, the mediator can probe the party to see if that party can accommodate the other party's objectives or interests. *Id.* Some see the confidentiality as the key to mediation's success. See Kaufman, *supra* note 150, at 760. Should the attorney or party breach this confidentiality, then the court could censure that party or attorney. *Id.* at 60; see also *In Re Lake Utopia Ltd.*, 608 F.2d 928 (2nd Cir. 1979).

243. NIEMIC, *supra* note 148, at 79.

244. NIEMIC, *supra* note 148, at 9.

245. *Id.* at 10.

246. *Id.* at 11. The court of appeals funds the settlement programs, but the settlement programs remain independent of the decision making of the appellate courts.

247. See *supra* notes 218-19. There are many reasons to settle on appeal including keeping costs low, preserving professional relationship, and maintaining business. Ball, *supra* note 200, at 30-31. For a complete discussion of the reasons to settle on appeal, see Ball, *supra* note 218, at 30-31.

248. FitzGibbon, *supra* note 217, at 78-79; see also notes 239-46.

249. See Dick, *supra* note 199, at 49. The Ninth Circuit is firmly rooted in taking an interest-based approach to mediation. *Id.* The Ninth Circuit Settlement Program has settled many cases whose agreement focuses on the party's interests than on the legal reasons for appeal. *Id.*; see also LOVENHEIM, *supra* note 142, at 35.

250. See *supra* notes 219-21.

251. LOVENHEIM, *supra* note 142, at 66.

252. See *supra* notes 189-91.

253. See *supra* note 205-08.

rights.²⁵⁴

The third party facilitators or mediators have many titles and backgrounds.²⁵⁵ Some of the circuits hire retired judges who are able to draw on their experience as attorneys and judges to help the parties resolve their conflict.²⁵⁶ Most circuits offer additional training to the mediators before they can participate in the conferences.²⁵⁷ For most of the circuits, the mediator uses a facilitative style, but it is likely that most mediators will conduct some type of evaluation simply because the conferences are focused on settlement, which naturally increases the chances the mediator will evaluate in order to strongly encourage settlement.²⁵⁸

The mediator can serve an important role in addition to that detailed above. The mediator can be a sounding board for settlement options and party proposals.²⁵⁹ The mediator can try to insure there is fairness in the conference process.²⁶⁰ Furthermore, the mediator can propose different solutions if the parties are at an impasse.²⁶¹ If the conference begins to stagnate, the mediator can help the parties to move forward and craft an agreement that focuses on the parties' needs.²⁶²

254. NIEMIC, *supra* note 148, at 10.

255. *Id.* at 10. Most mediators have prior experience as a mediator or experience negotiating cases. *Id.*

256. If given a choice, most attorneys would choose a former judge to mediate because of the experience the former judge could bring to the mediation especially regarding "current thinking and workings of [the] . . . court." FitzGibbon, *supra* note 217, at 80. Some of the circuits such as the First and Fourth use retired state supreme court justices as mediators. NIEMIC, *supra* note 148, at 10. On the other hand, the Second Circuit's ground breaking CAMP program expressly prohibits using current judges as mediators because of the negative psychological aspects on attorneys and parties when a judge is a mediator. Kaufman, *supra* note 150, at 760. Moreover, there is concern that if a judge mediates, he may have to recuse himself later. *Id.* If the mediator is a non-judge, then there is greater willingness for disclosure. *Id.*

257. NIEMIC, *supra* note 148, at 10.

258. The circuits mainly use facilitation to help the parties find solutions to underlying problems. NIEMIC, *supra* note 148, at 8. Many of the circuits recognize that the mediator may provide the parties with an analysis of the case. Aemmer, *supra* note 218, at 25. However, only the First and Second Circuits expressly recognize their mediators may be evaluating parties' cases. NIEMIC, *supra* note 148, at 8.

259. NIEMIC, *supra* note 148, at 8.

260. While a mediator cannot completely eliminate inequities, he can help keep the mediation fair. Aemmer, *supra* note 218, at 26.

261. FitzGibbon, *supra* note 217, at 64.

262. The mediator can help the parties work through an impasse without forcing the parties to settle or discounting a particular party's proposal. Aemmer, *supra* note 218, at 26.

Appellate mediation has been a useful aid in helping to reduce the appellate caseload and conserving judicial resources.²⁶³ Given the continual rise of appeals, the impact of these programs will be felt for many years to come.²⁶⁴

C. *Mediation of Proposition 187 - Part Typical Appellate Mediation, Part Groundbreaking Procedure*

The mediation of Proposition 187 was a prime example of appellate mediation. At the announcement of the mediation, the parties were firmly entrenched in their respective corners with little room for compromise.²⁶⁵ Governor Davis requested assistance to resolve the dispute, albeit not quietly to save face.²⁶⁶ The mediator met in person and over the phone to bring the parties closer together for settlement.²⁶⁷ The mediator triumphed in brokering a settlement that satisfies all parties to the mediation.²⁶⁸

1. The Ninth Circuit Court of Appeals Settlement Program

In order to understand the mediated result of Proposition 187, it is important to examine the Ninth Circuit's Settlement Program. The Ninth Circuit program is similar to other circuit settlement programs.²⁶⁹ The purpose of the Settlement Program is to facilitate settlement.²⁷⁰ Not every case is eligible for the program.²⁷¹ As such, only 40% of eligible cases are mediated.²⁷² The

263. See *supra* notes 214 and 222.

264. Ganzfried, *supra* note 218, at 531.

265. Julie Chao, *Both Sides Blast Davis Plan For Mediation of Prop. 187, Neither Camp Sees Room To Compromise on Measure That Limits Benefits To Illegal Immigrants*, S.F. EXAM. Apr. 16, 1999, at A2. The Latino and immigrant groups expressed outrage at the Governor's announcement. *Id.* Carlos Holguin, one of the plaintiff attorneys, stated that he would not "barter away" the Proposition's education section. Harriet Chiang, *Davis' Prop. 187 Bid Called Unusual, Experts say Mediation Won't End Controversy*, S.F. CHRON. Apr. 17, 1999, at A13.

266. Ed Mendel, *Davis Takes Middle Road on Prop. 187 Suit, He Urges Mediation on Immigrant Issue, Both Sides Angered*, S.D. UNION-TRIB. Apr. 16, 1999, at A1.

267. Patrick J. McDonnell, *Prop. 187 Talks Offered Davis Few Choices Mediation: Even If He Had Won, Years of Appeals Would Have Ensued*, L.A. TIMES, July 30, 1999, at A3.

268. Dave Leshner & Henry Weinstein, *Prop. 187 Backers Accuse Davis of Ignoring Voters Court: They Vow to Mount New Legal Challenge to Accord That Kills the Anti-Illegal Immigrant Measure*, L.A. TIMES, July 30, 1999, at A1.

269. NIEMIC, *supra* note 148, at 12-16.

270. *Id.* at 72. The Ninth Circuit Settlement Program was established in 1984 and is governed by Federal Rules of Appellate Procedure Rule 33 and local rules. Ninth Cir. R. 3-4, 15-2, 33-1; see also CHRISTOPHER A. GOELZ & MEREDITH J. WATTS, CALIFORNIA PRACTICE GUIDE FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE ¶ 5:4 (1995).

271. See GOELZ, *supra* note 270, at ¶¶ 5:7-8.

272. NIEMIC, *supra* note 148, at 72.

Ninth Circuit is large and thus most mediations are conducted telephonically.²⁷³

The Settlement Program office selects participants based on many factors as gleaned from the Docketing Statement forwarded to the office from the Ninth Circuit clerk's office.²⁷⁴ The settlement office reviews the Docketing Statement and decides which cases would be more appropriate for mediation based on the parties' interests, whether the case would benefit from mediation, and the likelihood of settlement.²⁷⁵ Only 5% of cases are mediated from party request.²⁷⁶

The Ninth Circuit Settlement Program conducts two kinds of conferences.²⁷⁷ The first is an assessment conference where the mediator meets briefly with the parties to determine if their case would be eligible for the Settlement Program because the information contained in the Docketing Statement was insufficient.²⁷⁸ This conference is usually very short.²⁷⁹ The second conference is the settlement conference or mediation.²⁸⁰ The settlement conference is structured to meet the needs of the parties and their circumstances.²⁸¹ The settlement conference usually lasts four to eight hours with one or more follow-up conferences.²⁸²

A representative from each side must attend the conference once selected for participation in mediation.²⁸³ If one or both sides do not attend, they can be sanctioned.²⁸⁴ While the parties do not have to attend, the attorneys must

273. *Id.* Up to 75% of the cases are mediated via the telephone. *Id.*; GOELZ, *supra* note 270, at ¶ 5:90.

274. *Id.* at 73; see also GOELZ, *supra* note 270, at ¶¶ 5:8, :25, :66. Parties must serve the Docketing Statement on all parties. GOELZ, *supra* note 270, at ¶5:31. The statement is not binding on the appeal; however, failure to file one is grounds for dismissal of the appeal. *Id.* at ¶ 5:26; Ninth Cir. Rule 3-4(a). The statement gives the mediator an overview of the case. GOELZ, *supra* note 270, at ¶ 5:44. The statement should not exceed 250 words. *Id.*

275. NIEMIC, *supra* note 148, at 73; GOELZ, *supra* note 270, at ¶ 5:67. While the mediators are able to select any case they typically select cases which would benefit from participation with a focus on settlement. GOELZ, *supra* note 270, at ¶ 5:67.

276. NIEMIC, *supra* note 148, at 74.

277. *Id.* at 75-76.

278. *Id.* at 75.

279. *Id.* at 77.

280. *Id.* at 76.

281. *Id.*

282. *Id.* at 77.

283. *Id.*

284. *Id.* at 79. The court can impose disciplinary or monetary sanctions. GOELZ, *supra* note

consult with the parties before the conference.²⁸⁵ The parties may attend if it would be beneficial or the parties or mediator request party attendance.²⁸⁶

The settlement conference is confidential to help the parties freely discuss their case. The mediator encourages open and frank discussions.²⁸⁷ The conference is confidential and the parties may not disclose the substance of the conference to the public or the judge.²⁸⁸ To insure confidentiality, the settlement office is separate from the Ninth Circuit Court of Appeals and maintains separate files.²⁸⁹

If the settlement conference is unsuccessful, the mediator and the parties can make some case management decisions. The parties can limit the issues, briefing, and define the record on appeal.²⁹⁰ If the conference is successful, the mediator will help the parties to draft an agreement and request a dismissal from the Ninth Circuit Court of Appeals.²⁹¹

The Ninth Circuit mediators who are randomly assigned to mediate cases are experienced attorneys with training and experience in mediation and settlement.²⁹² There are five mediators in San Francisco and one in Seattle.²⁹³ The mediators conduct the conferences in a facilitative style.²⁹⁴ The mediators do not arm-twist the parties into settlement.²⁹⁵ They help the parties conduct their own risk-benefit analysis of their case.²⁹⁶

270, at ¶ 5:36; Ninth Cir. Rule 42-1.

285. *Id.* at 76; *see also* Fed. R. App. Proc. Rule 33; GOELZ, *supra* note 270, at ¶ 5:132. Before the start of the conference, the attorney should consult with the client and create a settlement plan. The attorney and client should discuss client's interest on appeal and what the client hopes to achieve on appeal. GOELZ, *supra* note 270, at ¶ 5:112. It is advisable to be creative and foresighted by anticipating what opposing party would hope to gain on appeal and then decide how the client could meet opposing party's needs. *Id.* at ¶¶ 5:112-14.

286. NIEMIC, *supra* note 148, at 76; GOELZ, *supra* note 270, at ¶ 5:132.

287. NIEMIC, *supra* note 148, at 76. The parties should be prepared to discuss the merits of the appeal including facts, law, and issues on appeal. GOELZ, *supra* note 270, at ¶ 5:108. However, the attorneys should not dwell on the merits, but should focus on what is necessary to settle by keeping an open mind and being flexible. *Id.* at ¶ 5:109.

288. NIEMIC, *supra* note 148, at 78. Statements and any comments are confidential and are not to be disclosed. GOELZ, *supra* note 270, at ¶ 5:135.

289. NIEMIC, *supra* note 148, at 78. The mediator can play no role in the resolution of the case on its merits. GOELZ, *supra* note 270, at ¶ 5:10.

290. NIEMIC, *supra* note 148, at 77; GOELZ, *supra* note 270, at ¶¶ 5:69, 5:71.

291. NIEMIC, *supra* note 148, at 77.

292. *Id.* at 79; GOELZ, *supra* note 270, at ¶¶ 5:5, 5:9.

293. NIEMIC, *supra* note 148, at 79; GOELZ, *supra* note 270, at ¶ 5:11.5

294. NIEMIC, *supra* note 148, at 72, 14.

295. *See* Dick, *supra* note 153, at 48.

296. *Id.* There are many reasons for parties to settle on appeal. For instance, the parties may wish to avoid risk of defeat, delay, and avoid establishing precedent. GOELZ, *supra* note 270, at ¶¶ 5:153-168. In addition, the parties may wish to reduce costs, facilitate closure, and

2. Mediation of Proposition 187

Governor Gray Davis announced on April 15, 1999, that he was going to request the Ninth Circuit Court of Appeals' Settlement Program to mediate the dispute over Proposition 187.²⁹⁷ The announcement was a shock to all parties and the Settlement Office.²⁹⁸ After the initial shock wore off, the parties began expressing their disbelief that mediation would alter their positions and thought settlement was impossible.²⁹⁹ The announcement placed Governor Davis in a tight political corner because supporters of Proposition 187 wanted an appellate decision, whereas opponents wanted the appeal dropped.³⁰⁰ The Governor's announcement put him at odds with Lieutenant Governor Cruz-Bustamante, who foresaw only one resolution to the mediation: end the appeal and keep the criminal provisions.³⁰¹

Before the mediation began, the Governor made an effort to include the views and opinions of those groups who supported Proposition 187 by calling for a meeting with group representatives.³⁰² However, after the short meeting, the groups expressed disappointment with the Governor's mediation position and implied that Proposition 187 was going to be undefended during the mediation.³⁰³ The groups made an interesting point because the Governor seemed to be as opposed to Proposition 187 at that moment as he was in 1994. For example, during Mexican President Zedillo's visit to California in May 1999,

preserve an ongoing relationship. *Id.*

297. Ed Mendel, *Davis Takes Middle Road on Prop. 187 Suit, He Urges Mediation on Immigrant Issues; Both Sides Angered*, SAN DIEGO UNION-TRIB., Apr. 16, 1999, at A1. Davis argued that he could settle the appeal while remaining faithful to the electorate without enduring a five-year appeal. *Id.*

298. *Id.*

299. Fitzgibbon *supra* note 217, at 49, and accompanying text.

300. *Davis Won't Stick to Prop. 187 Clause, The Governor Opposes Denying Illegal Immigrants Public School Access*, PRES-ENT. RIVERSIDE, May 22, 1999, at A1.

301. See McDonnell, *supra* note 267, at A3. Governor Davis also put himself at odds with other California Democrats. Todd S. Purdum, *Fight on Immigrant Measure Splits California Democrats*, N.Y. TIMES, Apr. 25, 1999, at A8.

302. See Chao, *supra* note 265, at A2.

303. Dave Leshner, *Prop. 187 Backers Call Davis Inclusion Pledge Insincere Court: After Meeting With State Official, Lawyers for Measure's Sponsors Say the Governor Was Engaging in Political Theater When He Referred Matter to Mediation*, L.A. TIMES, May 11, 1999, at A19. The meeting lasted 50 minutes. *Id.* The supporters of Proposition 187 said that they lost hope when the Governor sent a single deputy attorney general who gave the supporters the impression that their views would not be fully represented. *Id.*

the Governor declared that the negative effects of Proposition 187 would never be felt and that he would not be party "to kick[ing] children out of school."³⁰⁴ Those two statements, combined with the Governor's pre-election stance on Proposition 187, gave strong support to the notion that the Governor used the mediation to save his political skin.³⁰⁵ Concerned that Proposition 187 would be undefended, Howard Jarvis Taxpayers Association appealed to the California Supreme Court to prohibit mediation of initiatives.³⁰⁶ The Supreme Court summarily denied the request.³⁰⁷

Regardless of the political machinations, the Ninth Circuit mediator performed beautifully. The Chief Circuit Mediator, David E. Lombardi, moved the talks forward when there was an impasse.³⁰⁸ He told the press that the mediation was active with many different parties and respective positions.³⁰⁹ Over three months, the mediator navigated the parties from being diabolically opposed to mutual agreement by making non-negotiable issues more negotiable.³¹⁰ The parties believed that they were not getting special treatment because of who they were and the topic of their dispute.³¹¹ The mediation was conducted once in person. Thereafter, several meetings were held via telephone with numerous facsimile communications.³¹² In the end, each party claimed that the mediation was fruitful and that the mediator had instilled an atmosphere where parties compromised a little on both sides to come to an agreement.³¹³

304. Dave Leshner, *Davis Won't Follow Prop. 187 on Schools Politics: Governor Vows Not To Implement Provision That Would Deny Illegal Immigrant Children Access to Public Education. Critics Say He's Betraying His Oath*, L.A. TIMES, May 21, 1999, at A1. Opponents of Proposition 187 were pleased that the Governor advocated dropping the education section because it was the most important section at issue on appeal. *Id.*

305. Terri Hardy, *Davis Seeks Mediation on Prop. 187*, L.A. DAILY NEWS, Apr. 16, 1999, at N1.

306. Howard Jarvis Taxpayers Association filed suit on June 1, 1999, to prevent the Ninth Circuit Court of Appeals from mediating Proposition 187. *High Court Refuses to Block Prop. 187 Mediation Effort*, L.A. TIMES, July 2, 1999, at A26. The Association claimed it was neutral on Proposition 187, but objected to the "secret mediation of the legality of ballot measures." *Id.*

307. *Id.* The California Supreme Court unanimously denied the Association's request for a hearing. *Id.*

308. See McDonnell, *supra* note 267, at A3. Lombardi has worked with the Ninth Circuit Settlement Program since 1992. *Id.*

309. *Id.*

310. *Id.*; see also *supra* notes 218-21 and accompanying text.

311. See McDonnell, *supra* note 267, at A3. Chief Mediator Lombardi set a July 30 deadline for the mediation. *Id.* The impression was that he would not extend talks based on the controversial topic. *Id.*

312. *Id.*

313. *Id.* Responding to criticism that the mediation was nothing more than a backroom deal, Shirley Hufstedler, the Governor's personal attorney, stated that it was "better to settle than

D. Future of Appellate Mediation and Initiatives

The mediation of Proposition 187 was successful only in the limited sense that it resolved the dispute between the Governor of California and the eight plaintiffs.³¹⁴ No legal precedent was established.³¹⁵ Hence, the problem with mediation, especially appellate mediation, is that confidentiality prevents public access and public resolution of disputes.³¹⁶ Confidentiality in the appellate mediation programs is particularly worrisome because it is the responsibility of the appellate courts to establish and interpret the law.³¹⁷ Moreover, the mediation of Proposition 187 will never truly be a success because mediated settlements need party participation for effective resolution of conflict, but the parties for initiatives are the citizen voters of a state.³¹⁸ Mediation of initiatives can never educate and meet the individual needs of so many people.³¹⁹ Furthermore, mediation of Proposition 187 did not, and could not, address the underlying reasons why Proposition 187 was so popular.³²⁰

Mediation may be an effective, useful tool to resolve many types of cases, but it can never establish rules of law or precedent.³²¹ The drafters of Proposition 187 wanted to challenge the United States Supreme Court ruling

to take risks" and that all the parties had to come to that conclusion before an agreement could be reached. *Id.* Thomas A. Saenz, attorney for the Mexican American Legal Defense and Educational Fund, stated that the mediation involved much give and take and that both sides gave up something in the end. *Id.*

314. *Id.*

315. Because the Proposition 187 opinion is a district court opinion, it is not binding on other courts under the doctrine of stare decisis. 20 AM. JUR. 2D Courts § 165 (1995).

316. See generally STUART S. NAGEL & MIRIAM K. MILLS, EDS., SYSTEMATIC ANALYSIS IN DISPUTE RESOLUTION 245 (1991).

317. *Marbury v. Madison*, 5 U.S. 137 (1803); see also 20 AM. JUR. 2D Courts § 165 (1995); see also U.S. CONST. art III, § 2, cl. 1.

318. See *supra* notes 236 and 241.

319. One of the purposes of the court system is to explain, guide, and educate the public about the law. See Ganzfried, *supra* note 218, at 532.

320. Proposition 187's popularity is the beguiling reflection of social and economic state in 1994 California. See *supra* notes 114-21. Additionally, there are many reports and polls to indicate that Proposition 187 would pass today.

321. Norman Brand, *The Misuse of Mediation Prop. 187, Leave the Issue to the Courts; Using This Avenue Puts it and Constitution at Risk*, L.A. TIMES, May 6, 1999, at B9. Mediation is effective particularly in resolving disputes over money, property, or contracts. *Id.* ADR offers a new tool to resolve disputes which individuals might be more comfortable with because it is informal, secret and without sanction of law. NAGEL, *supra* note 316, at 245.

in *Plyler v. Doe*.³²² They will never get that opportunity.³²³ The Howard Jarvis Taxpayers Association tried to challenge the validity of mediating initiatives, especially Proposition 187, but the Supreme Court of California rebuffed their request.³²⁴

The Ninth Circuit Court of Appeals Settlement Program did not exceed its power or act in an unprofessional manner.³²⁵ From all indications, the Settlement Program performed admirably.³²⁶ The underlying problem concerns court sponsored private resolution of a public law issue.³²⁷ The mediator does not act as a judge whose opinion explains, guides, and educates the public about the law.³²⁸ Only written judicial opinions guide the public and engage in an analysis of the law.³²⁹ The opinions are the glue that holds our legal system together.³³⁰

Our system of justice needs judicial opinions to establish the precedent necessary for stare decisis.³³¹ Without judicial opinions, the legal system will

322. Sandy Harrison, *Lawyers Ready For Fight Over Prop. 187 If Initiative Passes, Backers Plan to Argue For Overturning Supreme Court Ruling*, L.A. DAILY NEWS, Oct. 31, 1994, at N4; see also Dave Leshner, *Davis Faces Deep Dilemma Over Appeal of Prop. 187 Courts: Governor Must Decide Whether To Keep Defending Anti-immigrant Measure That He Opposes*, L.A. TIMES, Apr. 14, 1999, at A1. Constitutional decisions can be overturned against conventional stare decisis doctrine if the interpretation has produced harm. 5 AM. JUR. 2D *Appellate Review* § 559 (1995).

323. There had been some discussion about challenging the authority of the courts to mediate a constitutional issue, but as of the date of this Article, no lawsuit had been filed. See McDonnell, *supra* note 267, at A3.

324. See *supra* notes 306-07.

325. See McDonnell, *supra* note 267, at A3. The Settlement Program agreed to mediate the Proposition 187 lawsuits when Governor Davis requested assistance. See *supra* note 297; see also FED. R. APP. P. 33 (enumerating powers of Appeals Court program).

326. See McDonnell, *supra* note 267, at A3; see also *supra* notes 308-13.

327. Joel Fox, Commentary, *Who Represents Voters At the Mediation Table? 187: Unless Gov. Davis' Plan Is Challenged, A Precedent Could Be Set That Puts The Initiative Process At Risk*, L.A. TIMES, June 1, 1999, at B5. Another issue is the secrecy of the process makes it difficult to gather data to evaluate the success of the program beyond settlement. NAGEL & MILLS, *supra* note 316, at 245. Moreover, the focus of ADR programs is not to assign responsibility; rather, the focus is satisfaction and settlement. *Id.*

328. See Ganzfried, *supra* note 218, at 532; NAGEL & MILLS, *supra* note 316, at 248. Courts play a key role in complex policy debates. David M. Trubek, *The Construction and Deconstruction of a Disputes-Focused Approach: An Afterward*, 15 LAW & SOC'Y. REV. 726, 741 (1980).

329. See Ganzfried, *supra* note 218, at 532. The court system's purpose is to interpret the law, rights, principles, and rules that protect individuals and groups. See generally Craig A. McEwen, *Differing Visions of Alternative Dispute Resolution and Formal Law*, 12 JUST. SYS. J. 247 (1987)(discussing the differences in cultural effect between litigation and ADR).

330. See Ganzfried, *supra* note 218, at 532.

331. 20 AM. JUR. 2D *Courts* § 147 (1995).

begin to degrade.³³² Stare decisis is particularly important in cases presenting constitutional law issues.³³³ The confidentiality of mediation begins to break stare decisis down because the lack of written, public opinion.³³⁴ Confidentiality does not create a public record for future guidance.³³⁵

Moreover, only the courts should serve as final arbiters of conflicts over rights. In addition, courts alone can make or interpret the law³³⁶ by reinforcing social values and goals.³³⁷ Consequently, only the courts can protect minority groups.³³⁸ Since mediation fails to state or interpret the law, mediation does not guide behavior or define what is legally right or wrong. Critics argue mediation cannot substitute for a court resolution of public issues.³³⁹

In a larger sense, private resolution of public conflict will most likely undermine the public's trust in government and the judicial system.³⁴⁰ The Government will appear as if shirking its duty to protect individual rights.³⁴¹ The lack of a public record, resulting from the confidentiality of mediation and other ADR processes, can decrease the court's role in our society and the accountability of government to the people.³⁴² This decrease in trust in the

332. See NAGEL & MILLS, *supra* note 316, at 245. By using ADR processes, the courts miss the opportunity to shape conduct of citizens, offer opportunities for remedy, and act as public resource for defining rules and rights. See McEwen, *supra* note 329, at 252.

333. 20 AM. JUR. 2D *Courts* § 161 (1995).

334. See NAGEL & MILLS, *supra* note 316, at 244, 248.

335. *Id.* at 259. As a result of confidentiality and lack of judicial opinions, private groups may make public policy decisions. Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 32 (1987).

336. U.S. CONST. art. III, § 2, cl. 1.; see also NAGEL & MILLS, *supra* note 316, at 259.

337. See Chao, *supra* note 265.

338. See NAGEL & MILLS, *supra* note 316, at 248.

339. *Id.* at 249. The judicial system becomes focused on settlement rather than a public resources for defining rules and rights. McEwen, *supra* note 329, at 252. The courts then are resolvers of private disputes rather than discussion makers who enumerate socially sanctioned values. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); see also SUSAN SILBY & AUSTIN SARAT, *DISPUTE PROCESSING IN LAW AND LEGAL SCHOLARSHIP: FROM INSTITUTIONAL CRITIQUE TO RECONSTITUTION OF THE JUDICIAL SUBJECT* 85 (1988).

340. *Id.* at 259. Just as important, over-clogged courts are unable to resolve disputes in a timely fashion, creating public dissatisfaction and disillusionment with government. NAGEL & MILLS, *supra* note 316, at 246. The court system is thus caught in a catch 22—dissatisfaction with the judicial system with ADR and dissatisfaction with the judicial system without ADR.

341. *Id.* The ADR processes can weaken the cultural importance of the courts because it denies citizens their right to tell their story to the public. Judith Resnick, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 413 (1987).

342. NAGEL & MILLS, *supra* note 316, at 259.

government can be seen in the reactions to the mediation of Proposition 187.³⁴³ Many critics believed the Governor violated his constitutional duty by failing to appeal Proposition 187 because the Governor decided to mediate the dispute, leaving it essentially undefended because he was against it in 1994 believing many portions were unconstitutional.³⁴⁴ The public may never know of the Governor's true intent because the mediation was subject to confidentiality and not open to the public.³⁴⁵

The private nature of mediation is an important issue that must be resolved for effective resolution of public conflicts.³⁴⁶ Either the courts must alone resolve public conflicts involving constitutional rights, or mediation and the other ADR processes must become public.³⁴⁷ Some appellate programs have solved this problem by expressly excluding constitutional issues from participation in the appellate settlement programs.³⁴⁸ Moreover, expert mediators argue whether conflicts over individual rights, crimes, and personal liberty should be mediated.³⁴⁹ Perhaps the appellate mediation of Proposition 187 was a fluke.³⁵⁰ After all, how often will the Government, charged with defending the will of the People, change mid-suit?³⁵¹ Clearly, with the ever-increasing popularity of mediation, future initiatives will be mediated. The appellate court programs must be ready to meet the challenges while still maintaining an important role in dispute resolution.³⁵² Mediation is a popular and

343. *Id.*

344. *See supra* notes 299-303.

345. Ed Mendel, *Bustamante Widens Split With Davis On 187, Attorney General To File Brief On Initiative*, SAN DIEGO U-TRIB. Apr. 21, 1999, at A3; *see also* Olivo, *supra* note 152, at A1.

346. *See* McDonnell, *supra* note 267, at A3

347. *See* NAGEL & MILLS, *supra* note 316, at 259, 262-63.

348. Melvin P. Antell, *The CASP: Settlements At The Appellate Level*, 182 N.J. LAW. 17 (Jan.-Feb. 1997).

349. *See* LOVENHEIM, *supra* note 142, at 15; Hon. Ruth McGregor, *Dispute Resolution Comes To Appellate Court*, 33 ARIZ. ATT'Y 28 (Nov. 1996).

350. *See* Dave Leshner & Dan Morain, *Davis Asks Court to Mediate On Prop. 187: Governor Takes Unusual Step To Try To Resolve Constitutionality of Controversial Immigration Measure, Those On Both Sides of The Issue Criticize The Move*, L.A. TIMES, Apr. 16, 1999, at A1; *see also* Richard Estrada, *Commentary, Storm Over Prop. 187 Misses the Nuance Politics: U.S. Neglect of Immigration Policy Led to Approval of the Measure, Which Focuses On Immigrant Policy*, L.A. TIMES, Apr. 27, 1999, at B7; Dan Morain, *Debate Rises on Mediation of Proposition 187*, L.A. TIMES, Apr. 20, 1999, at A1.

351. Since the lawsuits over Proposition 187 were filed, no other initiative, to the date of this paper, has been mediated. Moreover, since Proposition 187's appeal, many controversial propositions have been challenged on appeal including English only (Proposition 229) and Indian Gaming (Proposition 5) and none of these challenges has ended in mediation.

352. *See supra* notes 333-35 (discussing weaknesses in current ADR programs).

effective tool to resolve conflict.³⁵³ However, mediation of public issues will never truly satisfy society's need for stability and awareness of the law, which courts provide.³⁵⁴ Appellate mediation must rise to these challenges if it is to remain an effective device for resolving disputes.

IV. CONCLUSION

Initiatives have made an indelible impression on the political and governmental landscape in the twentieth century. However, certain recent initiatives have been the result of anti-minority sentiment. Such was the case with Proposition 187. Drafters of Proposition 187 blamed the economic crisis of the early 1990's on illegal immigrants. Moreover, the drafters wanted to challenge the United States Supreme Court precedent, though they will never have that opportunity. Proposition 187 became the first initiative to be resolved by mediation. Today many courts use mediation to decrease their caseloads. While a more recent addition to the ADR landscape, appellate mediation has nevertheless been successful in resolving disputes at a point when settlement had proved difficult.

For all its beneficial attributes, mediation's confidentiality creates a difficult problem when constitutional issues are to be resolved. The cornerstone to stare decisis is precedent. Should more initiatives involving constitutional issues be mediated, stare decisis will slowly erode. The impact of mediated resolutions of constitutional appeals will not be readily apparent for many years due to the slow appeals process and relatively low number of initiative appeals. In order to decrease the impact on stare decisis, appellate mediation programs should specifically disallow constitutional issues from participation in such programs.

353. See *supra* note 319.

354. See NAGEL & MILLS, *supra* note 316, at 259. Moreover, impacts may not be immediately observable or known. *Id.* at 245.

