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Interpreting the Purposes of Initiatives: Proposition 65

by

KARA CHRISTENSON*

During the pre-election campaign, proponents of the Safe Drinking Water and Toxic Enforcement Act (Proposition 65) promised California citizens great things. They promised safer drinking water, warnings before exposure to dangerous substances, more effective enforcement, and more complete government disclosure regarding hazardous substances. Yet, although the Act originated as an initiative, its future may be out of the hands of the electorate. Currently, the legislature has the power to amend the law, while administrative agencies are charged with its implementation. This authority is limited only by a simple condition that regulations and amendments to the statute be in furtherance of its purposes. This criterion is an especially significant factor in forecasting the extent to which the promises of Proposition 65 will be fulfilled.

Although the future of this initiative depends on the “furtherance-of-purposes standard,” the purposes of Proposition 65 are not set out clearly. As a result, both the state legislature and the courts face an interpretation problem. This interpretation issue is not unique to Proposition 65. Case law reveals other situations when the courts have had to

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1. This Note refers to the statute as the Safe Drinking Water and Toxic Enforcement Act of 1986 and as Proposition 65, as it was called on the November 1986 ballot. The statute is now codified at CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.13 (West Supp. 1989).


3. Initiatives are one type of “direct democracy” whereby the voters, rather than their elected representatives, decide whether a proposed measure should become law. See infra notes 9-10 and accompanying text.


6. Id.
discern the intent behind an initiative in order to interpret the law. De-
spite the number of initiative measures passed by California voters, how-
ever, the courts have not developed clear standards for ascertaining the
intent behind initiative statutes. This Note examines various factors
courts have used to determine the purposes of an initiative, develops a
test that can be used by the legislature or the courts, and applies the test
to Proposition 65.

Part I of the Note describes the background of the initiative process
in general and Proposition 65 in particular. Part II analyzes decisions by
California courts involving the interpretation of initiatives. This section
will focus on four well-known California initiatives and the factors ap-
plied by the courts in interpreting them. Part III of the Note then ap-
plies these factors to Proposition 65, to determine the purposes of the
statute. Finally, Part IV examines two proposed amendments to the stat-
ute and analyzes whether they further the purposes of Proposition 65.

I. Background

As a foundation upon which proposals for initiative construction
and interpretation of Proposition 65 will build, this Note begins with a
broad look at the initiative process and the mechanics and controversies
surrounding the adoption of Proposition 65.

A. Initiatives

To better appreciate the significance of Proposition 65’s initiative
status, it is useful to examine initiatives in general. This form of legisla-
tion is based on a grassroots attitude toward lawmaking that historically
has invoked deference from the courts, but is increasingly subject to
criticism.

(1) History

Most California voters are well acquainted with initiative measures. The state ballot for the November 1988 election, for example, contained
twelve initiative propositions on subjects ranging from AIDS antibody
testing\(^7\) to no-fault automobile insurance\(^8\) to an increased cigarette tax.\(^9\)
Although initiatives are familiar, their history and the legal debates re-
garding their advantages and disadvantages are less known.

The initiative power is one of three types of direct democracy—“a
system of government in which the people possess a direct voice in the
lawmaking process.”\(^{10}\) An initiative is a statute or constitutional amend-

\(^{7}\) CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 70-73, 127 (Nov. 8, 1988).
\(^{8}\) Id. at 98-101, 140-144.
\(^{9}\) Id. at 82-85.
\(^{10}\) Eastman, Squelching Vox Populi: Judicial Review of the Initiative in California, 25
ment proposed by the voting public, instead of the legislature. In California, the initiative power has special status because it is a constitutional right. Moreover, the state constitution specifies that while the legislative power is vested in the California legislature, the people reserve the initiative power to themselves. This reservation of power, as compared to a grant of power, implies that the source of the lawmaking power is the people of the state, rather than the legislature. This demonstrates the fundamental nature of the initiative power in California as a right of the people to make laws independent of elected representatives.

The initiative power in California is the product of an amendment to the state constitution during the Progressive era. In the early part of this century, the Progressive movement was an important political influence advocating broader governing power for the populace. Underlying Progressive doctrine was a cynicism towards the lawmaking process of the time, and particularly a belief that the legislatures were responding to the demands of moneyed interests rather than the needs of the people. The initiative process became part of the Progressive platform as a means for the people to circumvent corrupt legislatures.

The unique nature of the initiative often has been recognized by the California courts, which give special deference to the initiative power. For example, the California Supreme Court has held that “[the] power of initiative must be liberally construed ... to promote the democratic process.” Furthermore, statutes enacted through the initiative process are

SANTA CLARA L. REV. 529, 530 (1985). Direct democracy has two other methods in addition to the initiative. The referendum is a measure proposed by the legislature but depends upon the vote of the electorate for passage. The recall is a means by which the voting population may remove an elected official from office before her term expires. See Note, Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative, 61 S. CAL. L. REV. 735, 735 (1988) (authored by Synthia L. Fontaine).

13. CAL. CONST. art. IV, § 1.
15. Id. at 1049.
16. See Note, supra note 10, at 736. Eighteen out of the twenty-two states that provide for the initiative process adopted it between 1898 and 1914, when the Progressive movement was in full force. States that have adopted the initiative process include: South Dakota (1898), Utah (1900), Oregon (1902), Oklahoma (1907), Michigan (1908), Missouri (1908), Arkansas (1910), Colorado (1910), Arizona (1911), California (1911), Montana (1911), Idaho (1912), Ohio (1912), Nebraska (1912), Nevada (1912), Washington (1912), North Dakota (1914), Alaska (1959), Florida (1968), Wyoming (1968), Illinois (1970). See Note, supra note 14, at 1050 n.27.
17. See Note, supra note 10, at 736. Ironically, a widespread criticism of the initiative process today is that it has succumbed to lobbyists and media campaigns representing wealthy industries. See, e.g., L.A. Times, Nov. 21, 1986, at II 6, col. 1 (editorial commenting on the “No on 65” media campaign).
18. San Diego Bldg. Contractors Ass’n v. City Council, 13 Cal. 3d 205, 210, n.3, 529
protected to some extent from amendment by the legislature. According to the California Constitution, initiatives can be amended by the legislature only if the amendment is approved by the electorate. Amendment without voter approval, however, is possible if specified in the initiative. Thus, both the origin of the initiative process and judicial policy toward the process in California illustrate its significance as a means by which the people can promote their concerns, as well as a determination to protect this power from those who would curtail it.

(2) The Advantages and Disadvantages of Initiatives

The initiative process is not without detractors. Perhaps as a consequence of controversial initiative propositions on recent California ballots, the initiative process itself has become controversial. According to the League of Women Voters, the battle line over the pros and cons of initiatives can be drawn between those who favor "representative, or republican, principles of government and [those who prefer] democratic, direct participatory, principles."
Supporters of direct democracy commonly assert that its greatest benefit is that it reinforces Americans' image of self-government. According to this view, initiatives are the most valid way to make laws, because they are the best reflection of the values of the people. Supporters also point to the initiative process as a useful means to overcome legislative inaction. Elected representatives may fail to enact laws if they are reluctant to take politically unpopular positions. The initiative process allows the people to enact laws that the legislature is unwilling to pass.

Proponents of initiatives also maintain that direct democracy allows voters to become more involved in the political process and more aware of the issues that affect them. This result, in turn, makes legislatures more responsive to the electorate. Representatives feel greater pressure to please voters and are less attracted to the promises of lobbyists and those offering political favors.

Critics of the initiative process argue that direct democracy is decidedly un-American because it violates the United States Constitution's guarantee of a republican form of government. As a consequence, opponents argue, the process allows for majority rule at the expense of minority groups. Opponents also counter the supporters' claim that initiatives provide for a better informed electorate. Critics say the contrary is more likely because advertising for initiative campaigns focuses on emotional and superficial arguments. The result is an uninformed, or at least a misinformed public.

Critics of the initiative process also question the ability of voters to comprehend initiative propositions. Although initiative proposals must be limited to a single subject, their substance and ramifications can be complex. Proposition 65 is an obvious example. A primary concern of

23. Id. at 85; Eastman, supra note 10, at 531.
25. Id. But see Walters, Public Policy Gridlock: The Initiative as Decidedly Bad Lawmaking, L.A. Daily J., July 14, 1986, at 4, col. 6 (“The Legislature invited this flood of simplistic, viscerally appealing initiatives by creating the impression, through its own inactions, of gridlock on major public policy questions. The opportunity has been exploited by those with axes to grind and pockets to fill.”).
26. See Eastman, supra note 10, at 531.
27. See D. MAGLEBY, supra note 24, at 27-28; LEAGUE, supra note 19, at 85.
28. U.S. CONST. art. IV, § 4. The United States Supreme Court, however, ruled in Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118, 151 (1912), that the constitutionality of the initiative process is a nonjusticiable political question. See Note, supra note 10, at 759-76 (arguing that the initiative process violates the Guaranty Clause of the United States Constitution).
29. See D. MAGLEBY, supra note 24, at 30; Note, supra note 10, at 747-51.
31. CAL. CONST. art. II, § 8(d).
that law is determining acceptable levels of risk of harm from toxic substances. Risk assessment\textsuperscript{32} is a highly technical process involving issues that have not been resolved even in the scientific community.

As a consequence of this complexity, many citizens may be interested less in ballot propositions than in candidate elections. Thus, as one critic has asserted, fewer people vote on propositions than on candidates and "the result is nonparticipation on the propositions and greater alienation in the electorate."\textsuperscript{33} Therefore, "the outcomes of ballot propositions are a reflection more of luck or voter whim than of reasoned judgment. . . ."\textsuperscript{34}

In addition, critics of direct democracy assert that excluding initiatives from the fine-tuning process of legislative debate, compromise and review produces inferior results.\textsuperscript{35} Without the feedback provided by the legislative process, initiatives allow ambiguous and unworkable laws to be passed.\textsuperscript{36}

In the face of these criticisms, calls for reform of the initiative process have been made.\textsuperscript{37} Yet, few would seek to abolish the initiative power. Given the democratic nature of the initiative, such a move would be politically unpopular. Moreover, as the proponents of Proposition 65 would no doubt agree, good laws have resulted from the process. These people would support direct democracy, since that process allowed the voters of California to speak out against toxic pollution and its attendant threat to human health.

The criticisms of the initiative process, however, indicate the difficulties inherent in the interpretation of an initiative statute. Not only are initiative statutes excluded from the legislative process, but as a result, no legislative history is available to a court. Courts instead must attempt to determine the intent of the electorate using various factors. This intent may be difficult to determine, however, given the problems of voter comprehension of, and participation in, the initiative process.

B. Proposition 65

The above factors undoubtedly will contribute to a divisive process when determining the intent of Proposition 65. Prior to its passage, the law stirred substantial controversy.\textsuperscript{38} Passage of the initiative did little to


\textsuperscript{33} D. MAGLEBY, \textit{supra} note 24, at 29.

\textsuperscript{34} \textit{Id.} at 123.

\textsuperscript{35} \textit{Id.} at 29-30; Note, \textit{supra} note 10, at 743-46.

\textsuperscript{36} \textit{See} D. MAGLEBY, \textit{supra} note 24, at 29-30; Note, \textit{supra} note 10, at 743-46.

\textsuperscript{37} \textit{See, e.g.}, N.Y. Times, June 14, 1988, at A24, col. 2.

\textsuperscript{38} \textit{See, e.g.}, L.A. Times, Oct. 13, 1986, at I 12, col. 1; L.A. Times, Oct. 24, 1986, at I 3,
resolve the controversy—litigation has burgeoned since the passage and implementation of Proposition 65. The debate can be stated simply: whether Proposition 65 is a "[c]alamity or a [l]egal [c]atalyst." The law poses the threat of significant liability to businesses, even those that are not normally associated with toxic substances, such as supermarkets and newspaper publishers. On the other hand, Proposition 65 is designed to "accelerate the transition from science to law," by motivating industry to help determine whether the thousands of new chemicals created every week are hazardous to human health. Examining the features of the law and the arguments of both its supporters and critics provides a background helpful in discerning the purposes of the initiative.


Proposition 65 is similar in many respects to other federal and state environmental laws. Typically, this type of statute grants a department of the executive branch authority to identify which substances are covered by the statute and to compile a list of those substances. The statute covers only listed substances; thus, the listing provision serves as a trigger for other provisions of the law. Proposition 65 also includes sections regarding discharges of listed substances and warnings of exposure to those chemicals. Upon closer examination, however, Proposition 65 diverges significantly from other laws. It shifts the burden of proof, allows for substantial recovery by private citizens, and exempts all governmental agencies from its provisions. These distinguishing provisions are discussed in section III.

a. The Listing Procedure

The listing procedure is an appropriate starting point for an examination of Proposition 65 since the other provisions of the statute are not triggered unless a substance has been listed by the statute. Proposition 65 directs the Governor to compile a list that includes, at a minimum, substances classified in the Labor Code as probable carcinogens. In col. 5 (Newspaper accounts describing the central debates and issues during the pre-election campaign of Proposition 65).

39. See infra note 73.
41. See generally, San Francisco Chron., Oct. 20, 1988, at A1, col. 2. Supermarkets that sell products containing carcinogens or reproductive toxins could be liable for selling those products if they are not labelled according to the statute. Newspapers may be printed with inks that could contain substances listed under the law.
42. Lipkin, supra note 32, at 9.
44. CAL. HEALTH & SAFETY CODE § 25249.8(a) (West Supp. 1989). Sections 6382(h)(1)
addition, a substance is to be included on the Proposition 65 list if any one of several conditions apply. First, if experts appointed by the Governor determine that a substance "has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity" it must be placed on the list. Second, the list will include a substance if a scientific body that the Governor's experts consider to be authoritative "formally identified [the substance] as causing cancer or reproductive toxicity."

Finally, a substance will be placed on the Proposition 65 list if "an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity." Currently, over two hundred substances are listed under Proposition 65 as causing either cancer or reproductive toxicity.

b. The Discharge Prohibition

Once a substance has been listed, the statute prohibits businesses from knowingly discharging it anywhere "where such chemical passes or probably will pass into any source of drinking water." Such a discharge, however, is exempt from the statute's sanctions if the chemical has not been listed for more than twenty months; or the discharge did not result in the release of a "significant amount" of the substance and

and 6382(d) of the California Labor Code refer to probable carcinogens identified by the National Toxicology Program (by reference to the federal Hazard Communication Standard, 29 C.F.R. § 1910.1200 (1988), and the International Agency for Research on Cancer. One criticism of Proposition 65 is that the lists developed by these agencies were not intended to be used for comprehensive regulation of carcinogens. James R. Fouts of the National Toxicology Program (NTP) stated that NTP's list of probable carcinogens was intended to be "an information vehicle to stimulate inquiries as to whether these chemicals should be regulated, not . . . the list of chemicals to be regulated." Beardsley, As California Goes . . ., 1988, SCI. AM. 20.

45. CAL. HEALTH & SAFETY CODE § 25249.8(b) (West Supp. 1989).
46. Id.
47. Id.
48. CAL. ADMIN. CODE tit. 22, § 12000 (1988). The list includes substances such as asbestos, benzene, chewing tobacco, and tobacco smoke.
49. The term "knowingly" can signify various degrees of intent. According to the proponents of Proposition 65, the law would apply "only to businesses that know they are putting one of the chemicals out into the environment, and that know the chemical is actually on the Governor's list." in BALLOT PAMPHLET, supra note 2, at 54. The current regulations require knowledge of the discharge or exposure, but not knowledge that it is unlawful. CAL. ADMIN. CODE tit. 22, § 12201(d) (1988).
51. The statute defines a "significant amount" as "any detectable amount," Id. § 24249.11(c), unless it poses "no significant risk." Id. § 25249.10(c). The determination of "no significant risk" varies according to whether the substance is a carcinogen or reproductive toxin. No significant risk as applied to carcinogens, assumes lifetime exposure to the substance. As applied to reproductive toxins, the term means that the substance has "no observable effect" on experimental subjects exposed to the chemical at 1000 times the level listed under the statute as safe.
the discharge complies with "all other laws and . . . every applicable regulation, permit, requirement, and order."52

c. The Warning Requirement

The statute also prohibits businesses from "knowingly and intentionally"53 exposing the public to any listed substance "without first giving clear and reasonable warning to such individual."54 Like the discharge prohibition, this section is subject to certain exemptions. The warning requirement does not apply when state law is preempted by federal laws regarding exposure to the substance.55 The requirement is also excused if the substance has not been on the Proposition 65 list for at least twelve months.56 In addition, the warning requirement is not triggered if exposure to a carcinogenic substance "poses no significant risk assuming lifetime exposure at the level in question," or if exposure to a reproductive toxin "will have no observable effect assuming exposure at one thousand (1000) times the level in question."57

d. Enforcement

The statute provides for injunctive relief58 and civil59 and criminal penalties.60 The state attorney general, a district attorney, or a city attorney of a city with a population over 750,000, may enforce the statute.61 In addition, the law provides for enforcement by private citizens.62 Those successfully prosecuting an action under Proposition 65, whether government or private plaintiffs, receive twenty-five percent of the damages awarded.63 In addition, fifty percent of the award is distributed to an account designated for problems resulting from hazardous sub-

52. Id. § 24249.9 (West Supp. 1989).
53. Id. For a definition of the term "knowingly," see supra note 49.
54. Id. § 25249.6 (West Supp. 1989).
55. Id. § 25249.10(a).
56. Id. § 25249.10(b).
57. Id. § 25249.10(c).
58. Id. § 25249.7(a).
59. Id. § 25249.7(b). Civil penalties can amount to $2500 per day for each violation. According to one commentator, "[t]his penalty provision is stiff. Each such 'violation' is likely to mean each discharge or release, or each exposure without warning, to each individual so affected." Nossaman, Guthner, Knox & Elliott, Surviving Proposition 65 120 (1987) [hereinafter Nossaman].
60. Cal. Health & Safety Code § 25189.5 (West Supp. 1989). Criminal penalties range from $5000 to $100,000 for each day of the violation. Stricter penalties apply, however, if the violation caused "great bodily injury or caused a substantial probability that death could result." In those situations, convicted violators face up to 36 months in prison and fines up to $250,000 for each day of violation. Id.
61. Id. § 25249.7(c).
62. Id. § 25249.7(d).
63. Id. § 25192(a).
stances. The remaining twenty-five percent is allocated to the health officer in the jurisdiction in which the violation occurred to be used for enforcement of the statute. Finally, the statute imposes a duty on government employees to disclose information regarding illegal discharges of listed substances to the local government. Government employees who knowingly and intentionally fail to meet this obligation may face imprisonment or fines.

(2) Controversy and Proposition 65

Conflict has surrounded Proposition 65 from its inception. Proposition 65 garnered substantial media coverage and publicity, despite the competition it faced from other controversial initiative measures competing for voter attention in 1986, including propositions to make English the official language of California, to quarantine AIDS victims, and to limit joint and several liability for non-economic injuries. The money spent on the issue indicates the intense interest in the measure. According to one account, opponents of Proposition 65 raised $4.5 million in their unsuccessful attempt to defeat it, while proponents of the measure spent $1.65 million.

In addition, the 1986 gubernatorial campaign was drawn into the debate. Los Angeles Mayor Tom Bradley, a Democrat, supported the initiative; incumbent Governor George Deukmejian opposed it. Both

64. Id.
65. Id.
66. Id. § 25180.7 (b), (c). Employees may be subject to prison terms of up to three years, fines of $5000 to $25,000 and forfeiture of government employment for violations of this provision.
67. BALLOT PAMPHLET, supra note 2, at 44-47.
68. Id. at 48-51.

Some political analysts believed that Proposition 65 was a Democratic tool to help Los Angeles Mayor Bradley woo voters away from incumbent Governor George Deukmejian. See L.A. Times, Sept. 19, 1986, at I 27, col. 1 ("Proposition 65 was created and financed largely by supporters of Bradley, who hope that it is drawing attention to a favorite Bradley issue and helping him in his race against Republican Gov. George Deukmejian."). The anti-65 campaign endorsed this view, "suggesting that the measure was little more than political mischief-making." King, Political TV: Marketing of a Proposition, L.A. Times, Nov. 11, 1986, at I 21, col. 4. According to the initiative's victorious proponents, however, this tactic was pure error on the part of the opposition: "Their false assumption was that it was a Bradley initiative. That was their fatal mistake from the beginning . . . We thought it was confusing partisan instincts with voter instincts . . . They underestimated the sheer potency of the toxics issue itself." King, Political TV: Marketing of a Proposition, L.A. Times, Nov. 15, 1986, at I 39, col. 2 (quoting State Assemblyman Tom Hayden).
Governor Deukmejian and Proposition 65 won the approval of the voters that year, a fact that may explain part of the continuing controversy regarding implementation of the initiative. Deukmejian's administration is now responsible for implementing and overseeing a law that the Governor campaigned against. One of the members of the Scientific Advisory panel appointed by the Governor actually co-wrote the "Argument Against Proposition 65" contained in the ballot pamphlet. The numerous lawsuits challenging regulations issued by the Deukmejian administrations pursuant to Proposition 65 attest to the political difficulties involved in the implementation of the statute. As further evidence of the fractiousness surrounding the statute, State Attorney General, John Van de Kamp, who supported the initiative during the campaign, has refused to represent the Governor in some of the litigation.

In addition to administrative implementation of the law, the State legislature has power to shape the statute's future through its authority to amend laws passed as initiatives. Within a few months of the Act's passage, bills proposing to amend the law were introduced in the State Assembly and Senate. For example, an amendment was proposed to make the Act apply to government agencies. Another proposed change to the statute would have reduced the amount citizens could recover through successful prosecution of violators of the Act. Neither proposal survived the legislative process, but it is likely that Proposition 65 will undergo revision by the legislature. The legislature, however, does not have free reign to amend the Act since amendments to the statute must

72. See Arres, Voss & Ottoboni, Argument Against Proposition 65 in BALLOT PAMPHLET, supra note 2, at 55. Dr. Bruce Ames, Chairman of the Department of Biochemistry at the University of California, Berkeley, urged voters to vote against Proposition 65. He is currently a member of the Scientific Advisory Panel that is responsible for listing the chemicals subject to regulation under the statute. Marshall, California's Debate on Carcinogens, 237 SCIENCE 1459 (March 20, 1987).

73. In AFL-CIO v. Deukmejian, No. 348195 (Sacramento Super. Ct. filed Feb. 27, 1987), the plaintiffs challenged the Governor's initial list of substances covered by the statute because it included only known human carcinogens, rather than chemicals known to cause cancer in laboratory animals as well. The court ordered Governor Deukmejian to expand the list from twenty-nine chemicals to cover well over two hundred. 17 Env't Rep. (BNA) 9 (May 1, 1987). A second lawsuit, AFL-CIO v. Warriner, No. 359223 (Sacramento Super. Ct. filed May 31, 1988), challenged an exemption in the regulations for food, drugs, and cosmetics. A third lawsuit, AFL-CIO v. Deukmejian, No. 359223 (Sacramento Super. Ct. filed June 22, 1988), is directed against the Scientific Advisory Panel, the members of which are appointed by the Governor. The Panel maintains the position that they are the only scientifically authoritative group under the statute, and thus, only they may designate chemicals to be covered by the law.


75. See Marshall, supra note 72, at 1459.


"further its purposes."79 Thus, issues arise regarding the power of the legislature to amend Proposition 65: what are the purposes of Proposition 65 and what criteria should be used to evaluate whether a proposed amendment is in furtherance of these purposes? To answer these questions one must determine first how the law has allowed other initiatives to be interpreted.

II. Developing a Test to Interpret Initiatives

Unlike the usual lawmaking process, laws originating as initiatives leave no legislative trail. No debate in the Assembly or Senate has taken place, no prior versions of the law—with deletions in strikeout type and additions in italicized type—are available. Thus, construing these laws and determining the intent of the electorate that approved them makes the often speculative job of statutory construction even more difficult.

In analyzing an initiative it is useful to consider basic guidelines regarding statutory construction that apply to laws passed as initiatives as well as those passed through the legislative process. Section 1858 of the California Code of Civil Procedure governs the role of the court in construing a statute. It provides:

In the construction of a statute . . . the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.80

In addition, section 1859 of the Code of Civil Procedure states that "[i]n the construction of a statute the intention of the Legislature . . . is to be pursued, if possible."81 Furthermore, case law relates construction of conventional legislative statutes to that of laws passed as initiatives: "It is a fundamental rule of statutory construction that a court should ascertain the intent of the lawmakers in order to effectuate the purpose of the law. This rule applies with equal force to initiative measures adopted by the electorate."82

In the context of initiative construction, ascertaining the intent of the lawmakers requires determining the intent of the voters. To accomplish this task, courts have used various factors, but have not developed a clear or standardized test. In examining judicial initiative construction it is useful to consider four cases that involve statutes that, like Proposition

80. CAL. CIV. PROC. CODE § 1858 (West 1983).
81. Id. § 1859.
65, originated as controversial initiative measures. These initiatives include: Proposition 9, also known as the Fair Political Practices Act; Proposition 13, the Jarvis-Gann tax limitation initiative; Proposition 8, the Victims' Bill of Rights; and Proposition 51, the "deep pocket" initiative. Factors applied by courts to analyze the intent underlying these initiatives include the language of the statute, the events leading to its passage, the arguments and summaries found in the ballot pamphlet, and the construction by the legislature and agencies responsible for implementing the statute. Similarly, the legislature and the courts are likely to employ these factors when considering whether an amendment to Proposition 65 furthers the law's purposes.

A. Statutory Language

Although many factors are used to interpret an initiative statute, the obvious starting point is the language of the law itself. As Justice Traynor once stated:

The court turns first to the words themselves for the answer. It may also properly rely on extrinsic aids, the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures. Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded.

Thus, courts have examined the words of initiative statutes at the beginning of the construction process. For example, in a recent decision involving the intent of Proposition 8, the California Supreme Court stated, "We are directed first to the 'words themselves' and cautioned to give them their ordinary and generally accepted meaning."

In some cases, the wording of an initiative reveals its purposes with an explicit statement of its goals. For example, Proposition 9 contains three provisions that would come to the aid of future courts faced with

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84. Proposition 13, the Jarvis-Gann Initiative (current version at CAL. CONST. art. XIXA).
86. Proposition 51, the Deep-Pocket Initiative (codified at CAL. CIV. CODE §§ 1431-1431.5 (West Supp. 1989)).
construing the measure. The section subtitled "Findings and declaration" clearly states the problems intended to be remedied by the statute.\textsuperscript{89} Another section sets forth the goals of the statute by plainly stating, "The people enact this title to accomplish the following purposes. . . ."\textsuperscript{90} A third section specifically instructs that "this title should be liberally construed to accomplish its purposes."\textsuperscript{91} Although not all initiative statutes declare their purposes so straightforwardly, inclusion of provisions such as those in Proposition 9 seems good policy. Then an individual's vote for the initiative is an affirmative vote for defined goals. These sections of the statute provide courts with a clear indication of what voters thought they were voting for, thus assisting courts in interpreting the statute. Furthermore, the danger of inflexibility that would limit the law's desired effect can be reduced by including a clause like that in Proposition 9 calling for a liberal construction of the statute. Without the relatively clear indication of intent provided by these types of clauses, courts must turn to more subjective—and therefore less accurate—means of interpreting initiative statutes.

B. Events Leading to Passage—Similar Prior Legislation

A court is not limited in its analysis of an initiative's purposes to the four corners of the statute. Courts also look at events prior to passage for clues to the intent of the electorate. This factor can be divided into two parts: prior legislation on the same topic as the issue in question, and direct messages to the electorate in the form of ballot pamphlets, news reports and advertisements.\textsuperscript{92}

Courts use prior legislation to illuminate the problems the voters intended their initiative to remedy. For example, in \textit{Consumers Union of United States, Inc. v. California Milk Producers Advisory Board},\textsuperscript{93} the California Supreme Court had to decide whether a regulation under Proposition 9 unlawfully permitted industry officials to serve on state regulatory boards and commissions that made decisions affecting their industry. In interpreting the statute, the court looked at laws similar to Proposition 9\textsuperscript{94} and found that the regulation was an attempt to harmonize, not nullify, many existing laws allowing such practices.\textsuperscript{95}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{89} \textsc{Cal. Govt} Code § 81001 (West 1987).
\item \textsuperscript{90} \textit{Id.} § 81002.
\item \textsuperscript{91} \textit{Id.} § 81003.
\item \textsuperscript{92} To some degree, the two parts overlap. The relevance of prior legislation to voter intent depends on the extent to which voters were aware of the laws and their effectiveness. Ballot pamphlets, news reports and advertisements can inform the electorate on this issue. The messages directed at the electorate, however, concern other aspects of the initiative as well.
\item \textsuperscript{93} 82 Cal. App. 3d 433, 435-36, 147 Cal. Rptr. 265-266 (1978).
\item \textsuperscript{94} \textit{Id.} at 439-41, 147 Cal. Rptr. at 269-70.
\item \textsuperscript{95} \textit{Id.} at 444, 147 Cal. Rptr. at 272.
\end{enumerate}
\end{footnotesize}
The challengers of the regulation, however, also used prior legislation to support their case, arguing that a previous law had specifically exempted industry boards from its purview, but Proposition 9 did not. The court was not persuaded that this silence was an intentional effort to apply the law to industry boards, stating that, “[a] reasonable explanation is that the drafters of the Political Reform Act simply overlooked the problem.”

The fact that in this case prior legislation was used by both sides to construe the intent of the voters warrants caution in relying solely on this factor. One cannot deny, however, that this factor places the initiative in a political context that contributes to analysis of the statute.

Another example of the court’s use of prior legislation to interpret an initiative is found in Evangelatos v. Superior Court. The court had to determine whether the electorate intended the limitations on joint and several liability imposed by Proposition 51 to apply retroactively. The court used an approach similar to the one described above, reviewing “the history of the times and of the legislation upon the same subject.” This analysis revealed that legislation similar to Proposition 51 had been found by the courts to apply prospectively only. In light of these holdings, the court reasoned:

Since the drafters declined to insert such a provision [regarding retroactivity] in the proposition—perhaps in order to avoid the adverse political consequences that might have flowed from the inclusion of such a provision—it would appear improper for this court to read a retroactivity clause into the enactment at this juncture.

Arguably, the attention devoted by the Evangelatos court to “the history of the times and of the legislation upon the same subject” could be applied to factors other than prior legislation. In fact, a lower court decision, Creighton v. City of Santa Monica, did use a broader range of factors in interpreting a municipal rent control initiative. The court looked at “the political and social milieu [sic] that existed at the time the ... initiative came before the voters.” The evidence considered by the court included a recent California Supreme Court decision on rent control, the local housing situation, and the ballot pamphlet. Although the court did not elaborate on these factors to any great degree, the decision demonstrates an openness to considering a wide range of factors that
might have influenced voters. Moreover, in contrast to information tailored to reach voters, such as news reports and advertising, these factors can be based on objective information and statistics. The factors are still pertinent to voter intent because they describe the circumstances surrounding the initiative campaign, but do not require the same degree of speculation about voter comprehension as advertisements for and against an initiative.

Even without the possibility of broader use of relatively objective factors, the traditional view of prior legislation remains important because it requires the court to consider the initiative in the framework that it arose. An initiative may be passed because voters believe that existing laws are ineffective or do not address a problem at all. Thus, examining an initiative statute to distinguish it from laws existing before the election can shed light on the intent of the electorate.

C. Events Prior to Passage—Ballot Pamphlets and Messages Directed at the Electorate

In addition to considering prior legislation, courts often examine ballot pamphlets when analyzing the purposes of an initiative. Courts consider the information in ballot pamphlets as an indication of what the electorate believed the initiative would accomplish. As the California Supreme Court declared in interpreting Proposition 13, “[W]hen, as here, the enactment follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language.”

Use of ballot pamphlets is supported by long-standing precedent and is widely accepted. For the purposes of interpreting initiatives, the ballot pamphlet is analogous to the legislative history of a particular measure. In ascertaining the intent of the electorate when construing an initiative, the ballot pamphlet is especially significant: it is an impartial reference available to every voter providing information on the issues concerning the proposition.

104. See infra note 113 and accompanying text.
105. See supra notes 23-25 and accompanying text.
107. People v. Ottey, 5 Cal. 2d 714, 723, 56 P.2d 193, 197 (1936) (Recognizing that the “argument sent to the voters . . . may be resorted to as an aid in determining the intention of the framers and the electorate when . . . necessary.”).
The value of using ballot pamphlets to determine the electorate's perception of the purposes of a statute, however, has been questioned. For example, the Consumers Union court did not use ballot pamphlets, despite clear precedent, to analyze the purposes of an initiative, stating, "it would be folly to attempt an analysis of what the majority of the voters had in mind in adopting the PRA [Political Reform Act], especially since we cannot legitimately assume that voters possessed any uniform intention or thought." According to this court, one reason not to rely heavily on ballot pamphlets is the fact that although millions of people receive them, no two voters' interpretations of the information contained in the pamphlet can be exactly the same. As one writer has stated: "The ballot pamphlets which describe the proposed law are insufficient to describe the diverse purposes and intentions of the voters who enact the law; a vote for the law does not necessarily imply a vote for the purposes and intentions of the law as expressed in the ballot pamphlet."  

Another argument for cautious use of ballot pamphlets questions the number of voters who actually read the pamphlets, comprehend the information contained inside them, and rely on them when casting their votes. According to author David Magleby, only thirteen to thirty-three percent of the electorate use the information in the ballot pamphlet in deciding how to vote. Magleby also found,

[T]he least readable section of the voter's handbook is the official description. . . . While the remainder of the handbook is more readable, citizens still need a reading level equivalent to that of a third-year college student in order to understand the document . . . . [T]his means that more than two-thirds of those who receive the document cannot read it.

It follows from Magleby's conclusion that a court using a ballot pamphlet to discern accurately the intent of the electorate should account in its analysis for confusion and incomprehension on the part of most voters.

Magleby's research also suggests that newspaper and television reports and advertising on propositions are more appropriate factors for consideration. "In proposition elections, voters rely almost entirely upon the mass media for information about propositions. . . . [F]or propositions, over 80 percent of the voters reported that their most important
source of information was television, radio, or newspapers.\textsuperscript{113} Magleby's contention regarding the broader influence of these forms of communication on the electorate suggests that they are more relevant to the construction of an initiative.

Clearly, however, these communications also present significant problems. Copies of television and radio reports and advertisements may not be available. In addition, attempting to discern the intent of the electorate by examining news reports does not eliminate questions of voter comprehension. Perhaps most importantly, although political advertising may hold great sway over voters, it is often misleading and inherently slanted. Thus, using advertising as a basis for determining the voters' conceptions of the objectives of an initiative would be a tricky task for a court. The lack of cases using advertising as a factor for interpretation suggests that courts may consider it too speculative to serve as a reliable guide.

Finally, it should be noted that although the California Supreme Court in the \textit{Amador Valley} decision referred to the use of ballot pamphlets in construing an initiative statute, the court gave less weight to the pamphlet than to other factors: "In the instant matter we have the advantage of both principal interpretive aids, those related to the ballot and the legislative-administrative construction. We focus primarily on the latter."\textsuperscript{114} Thus, although \textit{Amador Valley} affirms the use of ballot pamphlets and has been cited in subsequent cases as authority to do so,\textsuperscript{115} the state supreme court considers that factor to have less significance than others.

D. Legislative-Administrative Construction

As indicated above, the \textit{Amador Valley} decision sets out another factor employed by the courts to interpret the purposes of an initiative: how the legislature and the agencies responsible for its administration have construed it. California courts have followed a general rule of judicial deference to the interpretations of the legislature and administrative agencies. As the \textit{Consumers Union} court stated, "Legislative findings as to public purpose, even after the relevant times, are not binding on the

\begin{itemize}
\item \textsuperscript{113} Id. at 133.
\item \textsuperscript{114} Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d. 208, 246, 583 P.2d 1281, 1300, 149 Cal. Rptr. 239, 258 (1978).
\end{itemize}
courts, but are given great weight and will be upheld unless they are found to be unreasonable and arbitrary.”

Three reasons underlie this deference. First, both the legislature and government agencies, which are departments within the executive branch, are responsible to the people. In theory, their interpretations of an initiative reflect the views of the constituencies they represent. Second, an agency may have expertise in the particular area that the courts lack. Third, the statute may have authorized implementation by an agency and this delegation of responsibility might include an interpretative role for the agency as well.

A recent United States Supreme Court decision also involved deference to legislative-administrative construction. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* involved a challenge to the Environmental Protection Agency’s interpretation of provisions of the Clean Air Act. The Court held that absent a clear statutory directive from Congress, a court must defer to a reasonable agency interpretation of a statute:

If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute . . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Other parts of the *Chevron* holding also are relevant to the issue of initiative interpretation. For example, a passage in the opinion may foreclose possible policy arguments regarding an initiative whose purposes are not expressly set forth. As the Court stated, “[p]olicy arguments are more properly addressed to legislators or administrators, not to judges.” The Court also declared that deference to the administrative view is proper when “the decision involves reconciling conflicting policies.” This language may mean that if an initiative does not express its purposes clearly, challenges to an agency regulation or a legislative amendment will be difficult. Given the high degree of deference adopted by the Court, challenges based on policy arguments are unlikely to succeed.

118. *Id.* at 843-44.
119. *Id.* at 864.
120. *Id.* at 865.
It is possible that any particular statute can yield more than one "reasonable" construction, depending on one's view of the policies underlying the law. The Court's decision, however, presents the possibility that an argument that an agency interpretation is not the one closest to the intent of the electorate might fail as long as the administrative determination is reasonable. As the Court stated, "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."121

By precluding such arguments, the *Chevron* decision goes beyond the standard of deference expressed by the California courts. As articulated by the California Supreme Court in *Consumers Union*, legislative interpretations are accorded great weight and are upheld unless they are found to be unreasonable.122 There is still room under this California rule for one to argue that the administrative construction of the statute was arbitrary because it runs counter to the purposes the electorate. Under *Chevron* such an argument would not succeed.

The applicability of the *Chevron* decision to initiatives is debatable, however, because the law involved in that case was a federal statute, not a state initiative. The holding might not apply to states. Moreover, the focus of inquiry when interpreting initiatives is the intent of the electorate at the time the proposition is passed,123 but interpretation of legislative statutes focuses on the intent of the legislature. The two involve distinct categories of inquiry deserving separate analyses on the deference standard.

Furthermore, contrary to the holdings of *Consumers Union* and *Amador Valley*, in *People v. Castro*124 the California Supreme Court recently cast doubt on the appropriateness of employing any post-election factors, including legislative-administrative construction. This case involved the construction of an amendment to the California Constitution as implemented by Proposition 8. The provision states that "[a]ny prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding."125 The court held that despite the mandatory language, courts retain discretion to prohibit

121. *Id.* at 866.

122. *See supra* note 116 and accompanying text.


such evidence if it would result in undue prejudice to the defendant.\textsuperscript{126} The \textit{Castro} court rejected as evidence regarding interpretation of the initiative an opinion by the Attorney General and reports prepared by the state assembly because the court could "only speculate on the extent to which the voters were cognizant of them."\textsuperscript{127} Significantly, the California Supreme Court did not defer to or even consider the views of these governmental entities, emphasizing the critical nature of voter intent when interpreting an initiative.

The \textit{Castro} decision leaves the status of this factor uncertain. The court did not overrule prior cases explicitly like \textit{Consumers Union} and \textit{Amador Valley}, and in fact acknowledged the traditional "great weight" accorded to legislative-administrative construction of statutes.\textsuperscript{128} The court stated simply, "[t]he pronouncements relied on here do not fall into this category,"\textsuperscript{129} explaining only that there was no indication that the voters were aware of the evidence. The \textit{Amador Valley} court, however, considered post-election legislative implementation of Proposition 13 in its analysis without questioning its relevance to an inquiry focusing on voter intent.\textsuperscript{130} The \textit{Castro} decision did not explain its reasons for rejecting the same type of evidence it considered previously. The fact that the \textit{Castro} decision does not overrule the traditional rule of deference to legislative-administrative construction explicitly, however, suggests that the rule is still applicable.

E. Assessing the Factors of Initiative Interpretation

As the disagreement over the use or non-use of post-election evidence such as legislative-administrative construction demonstrates, the courts have not developed a standard test to interpret initiative statutes. It is reasonable to assume, however, that any thorough investigation into the intent of an initiative should consider each factor. The language of the statute is the traditional starting point for statutory interpretation. In many situations, however, the words of the initiative alone will not resolve all ambiguities. Despite inconsistency among decisions using the remaining factors, each factor is significant and should be considered when interpreting an initiative.

The factors, however, may not be equally relevant in determining the intent of a statute that originated as an initiative. Thus, one might question the \textit{Castro} court's outright rejection of post-election evidence—

\begin{itemize}
  \item \textsuperscript{126} \textit{Castro}, 38 Cal. 3d at 312, 696 P.2d at 117, 211 Cal. Rptr. at 725. The court also held that the provision applied only to felonies involving "moral turpitude." \textit{Id.} at 314, 696 P.2d at 119, 211 Cal. Rptr. at 727.
  \item \textsuperscript{127} \textit{Id.} at 312, 696 P.2d at 117, 211 Cal. Rptr. at 725.
  \item \textsuperscript{128} \textit{Id.} at 311, 696 P.2d at 117, 211 Cal. Rptr. at 724.
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Amador Valley Joint Union High School Dist. v. State Bd. of Equalization}, 22 Cal. 3d 208, 246-47, 583 P.2d 1281, 1300-01, 149 Cal. Rptr. 239, 258-59 (1978).
\end{itemize}
a less extreme approach is more appropriate. The legislature is composed of the people’s representatives. Similarly, the agencies administering a statute are departments within the executive branch and, as such, are related to representative government. Legislative and administrative construction should be considered as evidence of the people’s intent.

If one accepts the premise that the intent of an initiative is to be found in the beliefs of the electorate at the time of passage, the ballot pamphlet and the events leading to the passage of the initiative are more relevant to determining its meaning than post-election constructions. The ballot pamphlet is an appealing document for this purpose since, as noted above, it is made available to every voter, and is designed to be an objective assessment of the proposition. Its usefulness, however, is limited by the degree to which voters read and comprehend it. The events leading to the passage of the initiative, including prior legislation and messages directed at the electorate, also provide pertinent information because they put the initiative in a political and social context, addressing why the voters believed the measure was necessary and what problems they hoped to remedy. This factor has obvious appeal as an appropriate means to determine the intent behind a proposition. Its drawback is its subjectivity and the danger that the intent found to underlie the initiative is not that of the electorate, but that of the judge.

Each of the four factors is capable of contributing to a thorough analysis of an initiative’s intent. In developing a test, however, it is difficult to determine how much weight to accord each factor. A general matter to consider when assigning weight to each factor is that factors that seem to reflect best the intent of the average voter, such as newspaper and television reports, are likely to require the most judicial speculation. One commentator has suggested a solution to this problem, proposing that courts should use inherently subjective materials only when more reliable evidence has not led to a clear interpretation of the statute. Ultimately, though, one must acknowledge the inescapably discretionary nature of statutory construction. Once the factors of interpretation are identified, the responsibility of defining their relative importance rests with the principled discretion of those charged with construing an initiative. The importance of this task is intensified when the subject of an initiative concerns matters of great concern to the public, such as Proposition 65’s relationship to the regulation of substances hazardous to human health.

III. Determining the Purposes of Proposition 65

Careful consideration of Proposition 65 reveals that its fundamental purpose is to provide protection and information to the public regarding carcinogens and reproductive toxins. This examination, however, also shows that provisions in the statute affect this goal by limiting and defining it. While the provisions are not purposes in and of themselves, one can logically assume that they were included in the initiative for a reason. Although not every factor of initiative interpretation reveals a bright line between the primary purposes and the other features of Proposition 65, a distinction can be made. Proposed amendments to Proposition 65 might fail to further its purposes either by directly limiting the scope of the protection and information provisions, or by impairing the ability of the secondary mechanisms of the statute to achieve its fundamental purposes.

A. The Fundamental Goals of Proposition 65

Applying the four-factor test to Proposition 65 reveals that the basic goal of the statute is to protect human health and to inform the public. Its mechanisms serve to implement and define the basic aim of the statute. To comply with the "furtherance-of-purposes" standard, judicial scrutiny of amendments to the statute must determine whether the proposal is consistent with the primary goal of protecting human health. Amendments that compromise the primary goal of Proposition 65 should be subject to greater scrutiny than those that change the statute but do not affect its power to protect and inform the public.

Several factors identify Proposition 65's primary purpose as that of protecting and informing the public. The language of the Act demonstrates that Proposition 65 originated from a belief that the existing regulation of toxic substances was inadequate to protect human health. As section one of the Act states:

The people of California find that hazardous chemicals pose a serious potential threat to their health and well-being, that state government agencies have failed to provide them with adequate protection, and that these failures have been serious enough to lead to investigations by federal agencies of the administration of California's toxic protection programs.132

This opening statement is followed by a declaration of rights, which also suggests that the primary goal of the initiative is to provide protection and information to the people regarding toxic chemicals. The people first declare the right, "To protect themselves and the water they drink against chemicals that cause cancer, birth defects, or other repro-

ductive harm [and] to be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm."133

The measure then declares the need for strict regulation of toxics to "deter actions that threaten public health and safety."134 This right also relates to the primary goal of Proposition 65. Finally, the statute declares that the cost of toxic pollution will be shifted from the taxpayers to offenders.135 While this right does not point directly to protection and information, it is consistent with the idea that these two goals are the primary purposes of the statute. It supports these purposes by promising to deter polluters through the imposition of greater costs for their illegal actions. In sum, the opening language of Proposition 65 substantially supports the idea that its primary goal is to protect and inform the public.

Events leading to the passage of the statute also support this view of the purposes of Proposition 65. Evidence concerning laws regulating toxic substances before the passage Proposition 65 suggests that the public justifiably may have felt dissatisfied with their effectiveness. A report by the California Senate Office of Research states that production of man-made substances greatly surpasses scientific research on the effects of these substances.136 Because most substances are not regulated until evidence suggests they are harmful,137 chemicals are being used in the human environment; in homes, in the workplace, and on food, without adequate knowledge of the risks they may pose to health.

The Office of Research report cites a study by the United States General Accounting Office that "projected that the Environmental Protection Agency will not complete its examination of specific health effects studies for currently registered pesticides until sometime in the twenty-first century. [The study] estimated that the National Toxicology Program has examined perhaps 700 out of 70,000 to 240,000 man-made substances."138 Another statistic reveals the same inaction: "no regulatory action has been taken on 23 out of 61 chemicals for which the [National Toxicology Program] found strong evidence of carcinogenicity."139

This situation has serious implications. A 1985 study by the State Economic Development Commission stated that "California is losing

133. Id.
134. Id.
135. Id.
136. See Senate Office of Research, Analysis of Proposition 65, Safe Drinking Water and Toxic Enforcement Act 1 (1986) (prepared by Bruce Jennings, Ph.D.) [hereinafter Analysis of Proposition 65].
137. See infra note 150-51 and accompanying text.
138. See Analysis of Proposition 65, supra note 135, at 2. According to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), it is illegal to sell a pesticide that is not registered with the Environmental Protection Agency. 7 U.S.C. § 136a (1982).
139. Beardsley, supra note 44, at 20.
ground in the fight to prevent massive environmental contamination from toxic chemicals." The study also estimated that "[e]ach year about 2,500 Californians die of cancer resulting from exposure to toxic chemicals. Toxic chemical cancers cost California about 1.3 billion a year." As these statistics indicate, the electorate easily could have concluded that legislation existing prior to Proposition 65 did not provide adequate protection from, or information about, toxic substances.

In addition to the language of the statute and the prevailing standard of regulation prior to the passage of Proposition 65, the ballot pamphlet also suggests that the basic goal of the initiative was to protect human health from toxic substances more aggressively. The supporters' portion of the pamphlet alluded to the ineffectiveness of current laws at the time of the election and the resulting costs of that problem. Furthermore, the official description of the initiative, as prepared by the attorney general, states in bold uppercase letters that the initiative would restrict toxic discharges into drinking water and would require notification of exposure to toxic substances. No other purposes of the initiative are set out as distinctively in the pamphlet. The description of the initiative written by the legislative analyst also treats protection and information as the primary purposes of the statute; discussing them first, in detail, and with attention to their effect on current regulation. The enforcement measures of the statute are also mentioned, but perfunctorily. Thus, the ballot pamphlet indicates two significant facts: that the

141. Id. at 3 (emphasis in original).
143. Official Title and Summary of Proposition 65, in Ballot Pamphlet, supra note 2, at 52.
144. *Analysis by the Legislative Analyst, in Ballot Pamphlet, supra note 2, at 52.
145. The analysis reads:
   This measure proposes two additional requirements for businesses employing 10 or more people. First, it generally would prohibit those businesses from knowingly releasing into any source of drinking water any chemical in an amount that is known to cause cancer or in an amount that exceeds 1/1,000th of the amount necessary for an observable effect on "reproductive toxicity." The term "reproductive toxicity" is not defined. Second, the measure generally would require those businesses to warn people before knowingly and intentionally exposing them to chemicals that cause cancer or reproductive toxicity. The measure would require the state to issue lists of substances that cause cancer or reproductive toxicity.
   Because these new requirements would result in more stringent standards, the practical effect of the requirements would be to impose new conditions for the issuance of permits for discharges into sources of drinking water. In order to implement the new requirements, state agencies that are responsible for issuing permits would be required to alter state regulations and develop new standards for the amount of chemicals that may be discharged into sources of drinking water.
   The measure also would impose civil penalties and increase existing fines for
Secretary of State’s office (which compiles the pamphlets) and the attorney general felt that the goals of protection and information were paramount and that the voters who read the pamphlets might have been influenced by this determination.

Another factor of initiative interpretation, the construction of the statute by the administrative agencies charged with its implementation, also supports the conclusion that the primary purpose of Proposition 65 is to protect and inform the public. Neither the legislature nor the California Health and Welfare Agency, has explicitly defined the purposes of Proposition 65. The Health and Welfare Agency, however, has promulgated regulations that are required by the statute to further its purposes. These regulations illustrate the administrative construction of the law. For example, an interpretive guideline states, “The Act was specifically intended to protect sources of drinking water and to provide information about exposures to certain chemicals.” In addition, administrators from the Department of Health Services, the Health and Welfare Agency and the Scientific Advisory Panel have referred to the voters’ perception of the goals of the statute as involving protection of health and dissemination of information.

In conclusion, the factors of initiative interpretation support the conclusion that two fundamental purposes underlie Proposition 65. The language of the statute, the ballot pamphlet, the regulations, and evidence that regulation prior to Proposition 65 was deficient, all indicate that public protection and information are Proposition 65’s primary purposes. The statute relies, however, on provisions that are not directly related to these primary purposes to achieve its objectives quickly and efficiently.

B. The Secondary Features of Proposition 65

Although Proposition 65 is designed to protect and inform the public, many of its provisions do not directly pertain to these functions. Instead, they supplement the fundamental purposes of the statute. These toxic discharges. In addition, the measure would allow state or local governments, or any person acting in the public interest, to sue a business that violates these rules.

Id.

146. The California Health and Welfare Agency is designated by Governor Deukmejian as the lead agency for implementing Proposition 65. See CAL. HEALTH & SAFETY CODE § 25249.12 (West Supp. 1989); CAL. ADMIN. CODE tit. 22, § 12102(e) (1988).


provisions are designed to implement the primary purposes of the statute, although they are not separate purposes. Their design, then, is to shape and define the statute's underlying goal of protecting and informing the public. This section will examine provisions of the statute that comprise three secondary features of the law: shifting the burden of proof, better enforcement, and limited application. An amendment to the statute might affect these aspects of Proposition 65. In evaluating such a proposal, one must consider the relationship of the mechanisms to the fundamental purposes of the law and the impact of these amendments on the ultimate goals of the statute.

(1) Shifting the Burden of Proof

One of Proposition 65's most distinctive features is its placement of the burden of proof on industry rather than on regulatory agencies. Proposition 65 flatly prohibits discharges of or exposures to toxins unless the responsible party can show that its action results in "no significant risk" or "no observable effect." To escape liability, a polluter must prove that its discharge or exposure causes no significant risk or no observable effect on human health. In contrast, other environmental laws do not impose a blanket restriction on emission or discharge of a toxic substance. Rather, the government has the burden of showing that a substance causes harm before it can exercise its regulatory power.

150. These terms are defined in the statute. For example, one of the exemptions to the warning requirement applies to exposures to carcinogens "for which the person responsible can show pose[] no significant risk assuming lifetime exposure at the level in question," and exposures to reproductive toxins that will have "no observable effect assuming exposure at one thousand (1,000) times the level in question." CAL. HEALTH & SAFETY CODE § 25249.10(c) (West Supp. 1989).

In addition, an exemption to the discharge prohibition applies to discharges that "will not cause any significant amount of the discharged or released chemical to enter any source of drinking water." CAL. HEALTH & SAFETY CODE § 25249.9(b)(1) (West Supp. 1989). The statute defines the phrase "significant amount" as "any detectable amount" unless the quantity fits the standards set for exemptions to the warning requirement of § 25249.10(c). CAL. HEALTH & SAFETY CODE § 25249.11(c) (West Supp. 1989).


152. The determination of what degree of harm is required before regulation is appropriate varies. For example, the United States Supreme Court ruled on the regulation of benzene under the Occupational Safety and Health Act, holding that, "before he can promulgate any permanent health or safety standard, the Secretary [of Labor] is required to make a threshold finding that a place of employment is unsafe." Industrial Union Dep't. v. American Petroleum Inst., 448 U.S. 607, 642 (1980). Courts, however, often have held that a finding of adverse health effects by the Environmental Protection Agency deserves deference. See, e.g., Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1184, 1187 (D.C. Cir. 1980) cert. denied, 449 U.S. 1042 (1980) (regarding EPA's standard for lead).
The shift in the burden of proof is manifested in the language of the statute itself, specifically, the provisions concerning the exemptions to the discharge prohibition and the warning requirement. Under certain circumstances, the blanket prohibition of discharges of toxic substances into drinking water sources and the requirement of warning persons who encounter toxic substances do not apply. Both exemption provisions provide that the defendant has the burden of proving its release or exposure falls under an allowed exemption standard. The exemption provision for the discharge prohibition states, "In any action brought to enforce Section 25249.5, the burden of showing that a discharge or release meets the criteria of this subdivision shall be on the defendant." A similar requirement is set forth in connection with actions to enforce the warning requirement.

Prior to the passage of Proposition 65, its supporters argued that the shift in the burden of proof would speed the regulation of toxic substances by giving industry an incentive to help, not hinder, the process. Under typical environmental statutes, research into the toxicity of a substance means potential regulation. Thus, it may often be in the best interest of industry to postpone conclusive findings. Proposition 65, on the other hand, motivates industries to research the toxic substances used in their products and find levels of no significant risk to avoid triggering the statute. As Attorney General John Van De Kamp described the initiative a few days before the election,

The measure thus creates a major incentive for both industry and government to establish scientifically determined 'safe levels' through regulation. There is no such incentive now, and the result has too often been an interminable debate over each chemical's potential for harm at different concentrations without enforceable standards to protect the public. The shift in the burden of proof is related closely to Proposition 65's fundamental goal of protecting and informing the public. In theory, the public will be subjected to fewer carcinogens and reproductive toxins because the statute imposes liability on those who discharge these substances into sources of drinking water or who do not warn the population of exposures. To escape liability, those responsible for discharges and exposures must prove that the level of the chemical does not pose a significant risk to human health. In order to satisfy this burden, research on dangerous substances must have been carried out to establish safe levels for the chemicals in question. Thus, one can conclude that the results of

154. Id. § 25249.9. See also id. § 25249.10 (regarding the burden of proof in enforcement actions for the warning requirement).
155. Id. § 25249.10.
157. See Van De Kamp, supra note 74.
this research benefit industry by providing exemption from the statute, and benefit the public by providing greater knowledge regarding hazardous substances.

The plain language of the statute that shifts the burden of proof and the comments made prior to the election regarding the objective of these provisions reveal the significance of the shift in the burden of proof to the goals of Proposition 65. This shift must be regarded as an integral part of the statute. For this reason, any bills proposed by the legislature affecting the statute's placement of the burden of proof require especially careful consideration. If adopted, such an amendment should receive heightened scrutiny by the courts to ensure that it furthers the purposes of the law.158

(2) The Citizen Enforcement Provision

Another distinctive aspect of Proposition 65 is its provision for citizen enforcement,159 including significant awards to private individuals.160 Citizen enforcement provisions are not unusual in federal environmental statutes,161 however, California laws traditionally have not conferred a private right of action.162 Proposition 65 is also unique in awarding twenty-five percent of the damages assessed by the court to private plaintiffs who successfully sue to enforce the statute.163

The language of the statute clearly allows citizens to file suit against suspected violators of the law. Citizens must notify the proper government prosecutor sixty days before filing suit and the government must have failed to prosecute the alleged violator.164 The statute provides that fifty percent of the damage award goes to the Hazardous Substance Account in the General Fund.165 Twenty-five percent of the award goes to the health officer in the jurisdiction where the violation occurred to assist with enforcement of the statute.166 The remaining twenty-five percent of the award goes to the office of the government attorney who prosecuted

158. In addition, the apparent success of the shifted burden of proof warrants some attention. According to one of the drafters of Proposition 65, the strategy of shifting the burden of proof has begun to achieve the fundamental goals of the initiative: "Under this new incentive, California has managed to draw the line for more chemicals in the last twelve months than the federal government has managed under the Toxic Substances Control Act in the last twelve years." Roe, Drawing the Line on Toxics, The Recorder, Sept. 15, 1988, at 4, col. 2.
159. CAL. HEALTH & SAFETY CODE § 25224.7(d) (West Supp. 1989).
160. Id. § 25192.
162. NOSSAMAN, supra note 59, at 123.
164. Id. § 25249.7(d).
165. Id. § 25192(a).
166. Id.
the case, or to a private individual if the case was brought under the citizen enforcement provision.\footnote{167}

Statements made by both sides of the Proposition 65 debate illustrate the significance of the citizen enforcement provision. According to one writer, this provision was "[e]asily the most misunderstood and controversial provision of Proposition 65."\footnote{168} Another analyst wrote that the citizen suit provision was "the most anxiety-producing provision in the initiative."\footnote{169} Opponents to the initiative dubbed the clause a "bounty-hunter" provision,\footnote{170} because of its distribution of damage awards. The argument against the initiative in the ballot pamphlet declared in large letters, "Fact: Proposition 65's bounty-hunter provision is a bonanza for private lawyers."\footnote{171} The Los Angeles Times did not endorse Proposition 65, in part because of the citizen enforcement provision, which the editors termed "frontier justice."\footnote{172}

Despite these criticisms of the provision, the electorate passed the initiative. Although one cannot claim that a vote for Proposition 65 was also an affirmative vote for the citizen suit provision, the prospect of private individuals suing to enforce the statute and receiving part of the damage award did not offend a majority of the voters. Furthermore, the citizen enforcement provision is closely related to the rights declared by the people of California in section one of the statute, particularly the right "[t]o secure strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public health and safety."\footnote{173} These two factors should be considered by the legislature and the courts when examining bills that would affect citizen enforcement of Proposition 65. Amendments that impair this provision will compromise the fundamental purposes of the statute.

(3) Exemptions

In addition to its distinctive provisions shifting the burden of proof and allowing citizen enforcement, Proposition 65 also contains several exemptions. For example, the discharge prohibition and warning requirements are not triggered for a period of time after a substance is listed as toxic.\footnote{174} In addition, the "Definitions" provision of the statute

\begin{itemize}
  \item \footnote{167} Id. § 25192(a).
  \item \footnote{168} NOSSAMAN, supra note 59, at 121.
  \item \footnote{171} Arres, Voss & Ottoboni, Argument Against Proposition 65 in BALLOT PAMPHLET, supra note 2, at 55.
  \item \footnote{172} L.A. Times, Oct. 29, 1986, at II 4, col. 1.
  \item \footnote{173} Safe Drinking Water and Toxic Enforcement Act of 1986 § 1, CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.13 (West Supp. 1989).
  \item \footnote{174} See CAL. HEALTH & SAFETY CODE §§ 25249.9, 25249.10 (West Supp. 1989) (dis-
exempts businesses with fewer than ten employees and all government agencies.\footnote{175}{Id. § 25249.11(b).} In view of the enormous amounts of toxic substances used in California, the exclusion of small businesses from Proposition 65 is not as surprising as the exemption for government agencies.\footnote{176}{For example, a nuclear power plant operated by the government is exempt from Proposition 65.} As the opponents to Proposition 65 pointed out, the exemption allows operations such as nuclear power plants, county landfills, public water systems and military bases to escape the provisions of the statute.\footnote{177}{Arres, Voss & Ottoboni, Argument Against Proposition 65 in BALLOT PAMPHLET, supra note 2, at 55.} Thus, the government exemption is a significant limitation on the statute and a crucial factor in shaping and defining its scope.

Events prior to the passage of the initiative indicate that the government exemption was highly controversial. One news report identified it as “[t]he central theme of the anti-initiative advertising.”\footnote{178}{L.A. Times, Oct. 24, 1987, at I 3, col.5.} The election campaign revealed that the exemption posed an interesting political irony: proponents of the initiative wanted to limit its impact; those opposed to it argued that it was too weak. Environmentalists supporting Proposition 65 defended the exemption saying that most of the hazardous substances in government-run water systems and dumps result from the activities of private industry.\footnote{179}{L.A. Times, Oct. 24, 1986, at I 3, col.5.} Furthermore, supporters stated that applying Proposition 65 apply to government agencies would mean a far more complex initiative with relatively little impact, since “[i]t would mean moving $2,500 from one pocket to another.”\footnote{180}{L.A. Times, Oct. 11, 1986, at I 12, col. 1 & 20, col. 1.} Opponents pointed out that the reason for the government exemption may have been based less on reasonableness than on expediency: “[i]f they included government, the onus would be on the taxpayer . . . They would have virtually every government jurisdiction down on their necks.”\footnote{181}{L.A. Times, Oct. 24, 1986, at I 3, col. 5 & 34, col. 1.}

Pinning down the opposition’s justification for its position is equally difficult. Arguing against a measure on the ground that it is too lenient is not necessarily inconsistent with wanting to achieve the same goal of the proposed law. Thus, even those who would want stricter protection from carcinogens might object to Proposition 65 because of the government exemption. Such was probably not the case, however. For example, it seems doubtful that Chevron, a major financial contributor to the initiative’s opposition,\footnote{182}{17 Env’t Rep. (BNA) 741 (Sept. 19, 1986).} objected to Proposition 65 because it did not impose strict enough controls on companies like itself. This inconsistency may
have contributed to the opposition's loss. As one of the media consultants for the "No on 65" campaign pointed out, "you can't build our constituency with people who don't belong on our side."\(^{183}\)

The political irony posed by the governmental exemption illustrates two important points about the exemption. First, the exemption was a highly visible aspect of the initiative campaign. The opposition's drive against the measure focused on it,\(^ {184}\) newspaper articles presented the polarized positions held by the two camps,\(^ {185}\) and the ballot pamphlet referred to it.\(^ {186}\) Thus, one can assume comfortably that most voters were aware of the exemption. Second, the exemption could have either gained or lost votes for the initiative. It may be that the exemption was a strategic move by the proponents of Proposition 65, designed to avoid voter alienation by nullifying forecasts of wasted taxpayer dollars as a result of sizable liabilities for local, state, and federal governments. On the other hand, the exemption might have turned some voters against the initiative. Some may have believed that it was unfair to exempt government agencies when private businesses face significant penalties. Others may have felt that they should hold out for a stronger law that would not contain the exemption.

Thus, determining the intent of the electorate with respect to the government exemption is especially difficult. Even those who agreed with the fundamental goals of protecting and informing the public may not have supported the initiative if they thought it would eventually penalize taxpayers. On the other hand, those who voted for the initiative may have done so although they objected to the exemption, preferring some additional protection from toxic substances to none at all. Presumably, this group of voters would support an amendment to Proposition 65 eliminating the government exemption.

In analyzing amendments to the statute that would affect the exemption, the central question must be whether the exemption frustrates the fundamental goals of Proposition 65, or is an affirmative limitation on its scope. As discussed above, voter intent does not present a simple answer, since it is essentially unresolved. The next section argues that an amendment eliminating the exemption could be validly upheld, despite the difficulties presented here.

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183. King, supra note 30, at I 1, col. 1 & 21, col. 6.
185. See supra notes 175-77 and accompanying text.
186. Reiner, Torres & Newman, Argument in Favor of Proposition 65, BALLOT PAMPHLET, supra note 2, at 54-55; Arres, Voss & Ottoboni, Argument Against Proposition 65, BALLOT PAMPHLET, supra note 2, at 54-55.
IV. Examples of Proposed and Possible Amendments to Proposition 65—Are They in Furtherance of Its Purposes?

This section discusses various possible amendments to Proposition 65 and analyzes why they are or are not in furtherance of the initiative’s purposes. Proposals to amend sections of the law such as the government agency exemption and the citizen-enforcement have already been advanced. Although these proposals were unsuccessful, future attempts to amend the law seem certain, particularly in light of the controversial and complex nature of Proposition 65.

A. An Amendment to Make Proposition 65 Apply to Government Agencies

As discussed in the previous section, Proposition 65 specifically exempts all government agencies and public water systems. Although this exemption was the primary target of the “No on 65” campaign, prior to the election proponents of the initiative contemplated amending the initiative after its passage to make it applicable to government agencies. Shortly after its passage, a bill was introduced in the state senate that would have effected this change. Although vetoed by the Governor, the bill provided that the discharge and exposure prohibitions of the statute would apply to government agencies with the following exceptions: releases pre-empted by federal law, specified discharges by public water systems and from certain watersheds, stormwater runoff, and releases relating to public emergencies, such as firefighting. The bill also expanded Proposition 65’s application to certain discharges by privately-owned public water systems.

The proposed bill raises a significant issue: can the legislature amend Proposition 65 to remove entirely one of the sections of the statute? Can such an amendment be successfully challenged as not in furtherance of the purposes of Proposition 65? One argument against an amendment making the statute apply to government agencies is that the electorate voted for the initiative as it stood. The argument continues that although the measure provided for amendment, the electorate did not intend such a substantial revision of the law. Furthermore, it is possible that if the

187. See infra notes 189-197 and accompanying text.
188. See infra notes 198-202 and accompanying text.
189. 17 Env't Rep. (BNA) 742 (Sept. 19, 1986).
192. Id.
193. Id.
proposition had applied to government agencies before the election, it may not have passed.¹⁹⁴

Despite these arguments, the amendment should properly be viewed as furthering the purposes of Proposition 65. The amendment expands the discharge and exposure prohibitions, broadens the scope of the statute, and remains consistent with its purposes of protecting and informing the public. Although the voters approved limiting the application of these provisions, many of them may have voted in favor of Proposition 65 in spite of the limitation, not because of it. As one media consultant working to defeat the initiative recognized, "The people who buy the exemptions argument all want a stronger law."¹⁹⁵ Since the issue before the voters was focused clearly on toxic pollution, not on government exemptions, a vote against toxins does not equal necessarily a vote for the government exemption.¹⁹⁶ Furthermore, although the current law expressly exempts government agencies, changing this provision of the statute does not necessarily violate the purposes of the law. Provisions are not purposes; section seven of the Act allowing for amendment by the legislature suggests that the drafters of the initiative contemplated that parts of the statute would need to be revised.¹⁹⁷

B. An Amendment to the Citizen-Enforcement Provisions of the Statute

Like the exemption for government agencies, the citizen-enforcement provision of Proposition 65 was a controversial aspect of the initiative and a likely target for amendment by the legislature. A few months after the election, an assembly bill was proposed that would have substantially affected the citizen-enforcement portions of the statute.¹⁹⁸ This proposal probably frustrates the intent of the electorate in passing the initiative.

For example, the bill interferes with the purposes of better protection and information regarding toxics by requiring that a person suffer or expect to suffer "an unreasonable and adverse health or environmental effect from the discharge, release, or exposure"¹⁹⁹ in order to sue for violations of the law. This requirement does not further the purposes of Proposition 65 because it shifts the burden of proof to the plaintiff, rather than placing it on the business responsible for violating the statute. The

¹⁹⁴. See supra text accompanying note 181.
¹⁹⁵. King, supra note 30, at I 21, col. 6.
¹⁹⁶. More specifically, the electorate was voting to increase protection and information regarding toxic substances. Thus, the government exemption provision differs from those shifting the burden of proof and allowing citizen enforcement. These two latter provisions are consistent with better protection and information.
¹⁹⁹. Id.
difficulty of establishing injury from exposure to carcinogens is illustrated by the town of McFarland, California, where the cancer rate for children is four hundred times higher than normal.\textsuperscript{200} McFarland has an agricultural economy; pesticides are sprayed on the lands surrounding the town,

\textit{yet the cause of the cancers has never been proven. Though the state Department of Health Services has evaluated hundreds of these chemicals and possible exposures to them, no cause has been found for the high rate of childhood cancers here. And considering the daily complex changes in the chemical environment of McFarland, the answer may never be found. The only certainty is that something happened here.}\textsuperscript{201}

The bill also discourages rather than encourages citizens to bring actions against violators. The bill requires that unsuccessful plaintiffs pay the defendant's reasonable costs and attorney's fees. This provision alone would deter citizens who contemplate suing a large corporation. Coupled with the burden of proof problem, the provision would negate a fundamental purpose of Proposition 65—reducing the public's exposure to harmful chemicals.

Another disincentive of the bill is its attempt to limit the amount a successful plaintiff can recover.\textsuperscript{202} Instead of receiving twenty-five percent of the penalties assessed against the violator, a plaintiff might lose money. The bill limits recovery to reasonable costs and attorney's fees up to twenty-five percent of the collected penalty. If costs and fees exceeded one quarter of the penalty, presumably the plaintiff would be left to pay those amounts from his own pocket.

Because of the bill's likely effect on the citizen-enforcement provision of Proposition 65, it is not in furtherance of the purposes of the statute. It might, however, be useful to dispel cynical attitudes toward this provision by an amendment to the citizen-enforcement provision replacing the flat twenty-five percent of penalties that a plaintiff can recover under the present law with an amount to be determined by a judge or a jury. Consideration of such an amendment should examine whether citizens would be substantially less likely to sue under the changed law. Finally, one should not overlook the fact that a citizen's successful suit over a Proposition 65 violation could often benefit many others exposed to the same toxic substance. Penalties are allocated to enforcement funds as well as the plaintiff, and injunctive relief and warning labels could also have state-wide significance.

\begin{itemize}
\item \textsuperscript{200} Shavelson, 'The Nightmare Stays with Us,' \textit{Dread and Death in McFarland, California}, San Francisco Chron., Nov. 6, 1988, at 10, col. 1.
\item \textsuperscript{201} Id.
\end{itemize}
Conclusion

As these proposed amendments to Proposition 65 illustrate, the future of the initiative depends on its interpretation by those other than the electorate that passed it. Thus, determination of the purposes of the statute is a crucial exercise. Application of the four factors of analysis described in section II provides a basic picture of the purposes of Proposition 65. It is clear, however, that an abstract examination of the intent of the initiative cannot supply every purpose that Proposition 65 might have. It is not possible to anticipate all potential proposals to amend the statute. The future of the initiative rests with responsible legislators, administrators and judges: they must interpret its purposes consistently with the promises of Proposition 65. Any amendment that affects the primary purposes of protection and information should be scrutinized carefully to determine whether the change would advance or frustrate these goals. In that way, Californians can be assured that the promises of Proposition 65 will be kept.