THE INITIATIVE AND REFERENDUM: A STUDY AND EVALUATION OF DIRECT LEGISLATION

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Dr. Alfred Balitzer

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INTRODUCTION

The initiative and the referendum are two distinct means of direct legislation. An initiative is the process whereby the voters propose a law; a referendum is the process whereby the voters ratify a law. This study discusses the historical development of the initiative and referendum, and California's own historical experience with direct legislation. The study also provides an analysis of the California practice of the initiative and referendum, and presents alternate approaches to the procedure and function of these two types of direct democracy. We will give special attention to the impact of the initiative and referendum on questions of economic and social policy. Finally, we will examine critically the thesis that broader utilization of the mechanisms of direct legislation would lead to the formulation and expression of an American consensus.

Forms of direct legislation date to ancient Greece. In America, the New England town meeting represents an early form of direct popular lawmaking. Several state constitutions in the wake of the American Revolution were submitted directly to the people for their approval.

Although countless historical examples could be produced of direct popular involvement in the legislative process, the initiative and referendum in their present form are relatively recent phenomena, dating in the United States only to the late nineteenth century. They appeared at this time as outgrowths of a specific historical movement, known to historians as Progressivism, which began in the last decade of the nineteenth century and ended during the First World War. Progressivism sought to correct the problems of democracy by further democratizing the nation. The Progressive movement, like so many other political movements in American, possessed the dimensions of a moral crusade, as Progressives sought political reform as a solution to perceived economic and social problems. Out of the

Progressive Era came such reforms as direct election of United States Senators, the seniority system in Congress, the Clayton Act, the Tillman Act, women's suffrage, and the initiative and referendum, to name just a few. Progressives believed emphatically that the solutions to the problems of civic life were essentially mechanical--that laws providing for greater popular participation in government would lead to the solving of economic and social problems.

After fifty years of experience with initiatives and referenda, some observers are taking a second look at these processes. Have these forms of direct legislation, they ask, fulfilled the purposes intended by those who advocated them? Have they led to greater popular participation, or have they tended to bring about the rule of minorities, often with idiosyncratic or selfish motives? Do our contemporary forms of direct legislation provide for the general welfare and for a popular consensus, or has their major effect been to damage the interests of ethnic communities, organized labor, and business, both "big" and "small"? Do the mechanisms of direct legislation curb the influence of money and organized elites on the legislative process, or have they in fact broadened the roles of money and elites? Have the forms of direct legislation made government in America more or less democratic, more or less enlightened, more or less just? Finally, have the initiative and referendum made for better government in America, or worse government?

While no serious observer (including the author of this study) has suggested that forms of direct legislation should be scrapped, there are good reasons for reevaluating the process, function, and use of the initiative and referendum in American politics. It is time to look for ways of improving the two procedures, and correcting the problems that impede "government of the people, by the people, for the people." It is in the hope of refurbishing and invigorating our mechanisms of direct democracy that the following study is written and presented to the California Roundtable.

EXECUTIVE SUMMARY: INITIATIVE REFORM

1. California's direct legislative process--particularly the "citizen-sponsored" initiative--is widely conceded to need reform. All too often recently, the California voter has been asked to make important "legislative" decisions on poorly understood, complex and controversial issues.

2. A brief summary of the most frequently cited criticisms includes:

   A. Citizen-sponsored initiatives have become just one more political weapon for well-organized, well-funded interest groups, on both the Right and the Left.

   B. In bypassing the legislative process, these initiatives also bypass the compromises that are essential to responsible legislation. Voters are left with an "all-or-nothing" choice.

   C. Legislation passed by initiative can only be repealed or amended by initiative. Citizen-sponsored initiatives with unexpected or unwanted consequences must be re-submitted to the public through costly and additionally confusing initiatives.

   D. Frequently drafted without responsible or expert input, many citizen-sponsored initiatives are not carefully thought-out. Language ambiguities often result in voter confusion and costly litigation.

   E. Initiatives on complex social and economic questions increase the voters' already heavy dependence on the electronic media. Direct legislation campaigns are rarely more than media blitzes appealing to mass emotions and prejudices.

3. Direct legislation used to be seen as an incidental or extraordinary part of the political system. It is so no longer. The time has come to treat the initiative for what it is, and to make appropriate provisions for its continuing presence in the state's political culture.

4. Direct legislation should not and cannot be "reformed away." The responsible approach is to integrate the process into the fabric of government, thereby

tempering and limiting its worst features. In short, reforms should be advanced that return the process to its "good government" origins.

5. Options for reform include:

A. Provide for direct legislative involvement in the critical early stages of an initiative proposal by mandating the legislature to hold preliminary fact-finding hearings on all initiative proposals--before the petitions are circulated for signatures. The legislature might also be empowered to take preemptive action prior to an initiative's being qualified for the ballot by adopting a law substantially similar to the initiative proposal.

B. Create an Initiative Review Commission or expand the responsibilities of the Attorney General to improve the quality and clarity of initiative proposals by holding pre-qualifying hearings to solicit the testimony of proponents, opponents and qualified experts. Proponents of the proposed initiative would be required to circulate arguments favoring and opposing the initiative and an economic impact statement prepared by the Commission or Attorney General with the qualifying petitions. Signatures would be required to sign both the petition and a statement that they had read the arguments for and against the proposed initiative.

C. Prohibit citizen-sponsored initiatives from proposing "Bill of Rights," appropriation and taxation measures.

D. Increase the difficulty of qualifying and initiative by changing the manner in which the signatures may be gathered. Direct mail appeals for signatures, for example, could not be combined with appeals for financial support. Initiative proponents might also be required to gather signatures from a number of geographic regions in the state in order to qualify for the ballot.

6. Reform of the initiative process should be approached with great care. A first step might be to convene a major conference to canvass opinions on these and other options for change.

CHAPTER I

HISTORY OF THE INITIATIVE AND REFERENDUM

The initiative and referendum have ancient roots. Some European tribes, prior to the Roman epoch, voted by "noising" their sentiments (that is, rattling their spears) as a way to choose their leaders. The assembly of Athens governed by direct popular consent; and the Romans used a precursor of the initiative, the plebiscite, as early as the eighth century B.C. Under the Roman practice, a law was never promulgated in the name of the people, yet the plebiscite at least gave the appearance that the ruler's actions were taken with the consent of the citizenry. In later times, including our own, plebiscites have been used to decide such questions as whether or not a people wanted national independence.

Especially in modern times, the idea of "the sovereignty of the people" has encouraged the view that participatory democracy should be the true foundation of any law or regime. Indeed, the initiative and referendum are outgrowths of efforts to establish popular sovereignty--as opposed to representative institutions--as the basis of government in large societies. Although many historical phenomena contributed to the development of mechanisms for direct legislation, the present structure of the initiative and referendum can be traced directly to Switzerland, the "home of the initiative and referendum."

The use of the referendum in Switzerland was infrequent, but persistent, during the late Middle Ages. With the advent of oligarchical rule in the seventeenth and eighteenth centuries, the use of the referendum was severely curtailed. The popular referendum reappeared, however, in 1802 when the Swiss people were asked to ratify the text of the Second Helvetic Constitution.

With the democratization of Switzerland and the concurrent development of corporate enterprise, a conflict developed pitting private interests against popular

opinion. In 1858, for example, the legislature of Canton Neuchatel granted a subsidy to a railroad. This action apparently prompted the establishment of the referendum locally. In Zurich, Carl Burki, "Father of the Referendum," wrote:

> The masses of the citizens of Switzerland found it necessary to revolt against their plutocracy and the corrupt politicians who were exploiting the country through the representative system . . . the plutocratic government of the Grand Council of Zurich, which had connived with the private banks and railroads, was pulled down in one great voting swoop. The people had grown tired of being beheaded by officeholders after each election and politicians and privileged classes have ever since been going down before these instruments (initiative and referendum) in the hands of the people.

This passage is often cited as an indication of the great benefits which may result from direct legislation. There is no doubt that the widespread use of the referendum in Switzerland profoundly altered the legislative process in that country. It would be misleading, however, to give all credit to the referendum while ignoring other constitutional limitations on government that were enacted at about this same time. Among other things, the Swiss created a unicameral legislature that was to meet for short sessions two or three times each year; they prohibited the legislature from granting special privileges to corporations; they denied government the right to enter into contracts or to create such agencies as regulatory commissions; and they required that any appropriations above a certain statutory limit must first be submitted to the voters for approval. A combination of several legal limitations on government, rather than the referendum alone, helped to make possible Switzerland's unique blend of prosperity and popular democracy.

In 1874, a majority of the Swiss cantons adopted mechanisms of direct legislation. In 1891, the referendum as a national process was included in the new federal constitution. An initiative provision was also included in the 1891 constitution. The initial constitutional article provided basic signature requirements and allowed either the people or the cantonal governments to propose legislation.

In the past century or so, the referendum has become so much a part of Swiss

political life that it is considered a primary tool of government. Between 1848 and 1966, 217 referenda were voted upon. The conclusion one might draw from such frequent use of direct legislation is that the Swiss are dissatisfied with their legislative process. This is not the case, however; rather, the repeated use of the referendum has made it a recognized and respected part of the legislative process.

Although invention of the referendum may be attributed to the Swiss, the American experience with direct legislation also began fairly early--in the early years of the Republic, in fact. The early uses of direct legislation in the United States, however, had a different scope and purpose than in Switzerland. Whereas the Swiss used direct legislation in the nineteenth century to abate the privileges of wealth, the Americans used the referendum in the late eighteenth century to establish state constitutions. Massachusetts, Connecticut, New Hampshire, and Rhode Island used referenda to replace colonial charters with state constitutions following America's separation from Great Britain. The American tradition of direct legislation, then, was founded in the effort to establish and perfect institutions of self-government. Direct legislation here was inspired by the New England religious experience, which rested on the theological belief that every Church stood on the freely given consent of its members; by the impulse to direct democracy supplied by the New England town meeting; and by the Declaration of Independence, which announced that all legitimate government was founded on the consent of the governed. Intellectual, moral, and political forces combined to give the referendum its initial character and function in American history.

The contemporary forms of the initiative and referendum did not become part of the American political scene until the 1890's. Largely on the winds of Populist rhetoric and political activity, direct legislation was installed first in South Dakota in 1898. By 1912--the height of the Progressive Era--twenty-two states had enacted similar provisions. Most of these were designed to clean up state politics and return

control of the legislature to "the people." Although the initiative and referendum carried on the tradition of trying to perfect self-government in America, direct legislation was now also an outgrowth of social and economic unrest, as people sought to deal with America's urgent domestic problems through political reform. From their inception, the initiative and referendum in the United States were seen as supplementing rather than replacing representative democracy; they were tools which would allow the people to recapture control of their government.

Direct legislation received its friendliest reception--and secured its greatest successes--in the states west of the Mississippi River. With the growth of the West, new settlements and towns sprang into being almost overnight, focusing territorial life on local communities and on local government. Procedures of direct legislation, introduced first in townships and city governments, gradually became a part of "Western." When a territory was chartered as a state, it was only natural for direct legislation to become, either initially or by later amendment, part of the state's constitution.

Another factor that promoted Western acceptance of direct legislation was the growth of Populism. Late in the nineteenth century, the Populist movement reached its zenith. Prompted by allegations that corporations--especially the railroads--had "bought" state legislatures, the Populists adopted direct legislation as the panacea for political corruption. The Populist movement was especially strong in the Midwest and Far West--in agricultural areas where the influence of railroads and banks was most obvious.

The popularity of the initiative and referendum in the West is suggested by the following figures: Of the twenty-one Eastern and Southern states, sixteen have no constitutional provisions for either the initiative or the referendum, and only two have provisions for both. By contrast, almost every Western state (the exceptions being Hawaii and New Mexico, which provide only for the referendum) has provisions

for both the initiative and the referendum.

The history of the initiative and referendum in the United States has raised questions--even among their advocates--about the efficacy of the two processes. In 1917, Governor Peter Norbeck of South Dakota commented that in the nineteen years following adoption of the state's initiative provisions, only one ballot measure had been passed--and it was later repealed. Regarding the referendum, Norbeck stated: "In actual practice it has proved a disappointment to its most enthusiastic champions, of which I was one, for not only has it failed of its purpose, but it has actually become an instrument used by selfish and unscrupulous interests to bring about the defeat of good laws." In the years following their adoptions, the initiative and referendum in South Dakota fell into general disuse, and it was not until fairly recently that they came to play a truly active part in the state's politics.

It is a curious fact of American political history that all the fury involved in getting direct legislation adopted should have been followed by so little noise afterwards. "Despite the frenzied enactment of constitutional amendments to authorize initiatives, early experimentation with the device was surprisingly sparse. It occurred principally in Oregon where the test cases sustaining the constitutionality of initiatives and referenda were also generated."

During the early years of the initiative and referendum, states experimented with their laws on direct legislation in an effort to perfect them. For instance, the initiative and referendum in North Dakota date to 1914, when, at the height of the Progressive reform movement, the state constitution was changed to provide for constitutional amendment by the direct action of the voters. Requirements were established that petitions proposing amendments be submitted to the Secretary of State at least six months prior to the next statewide election. Such petitions had to bear the signatures of at least 25% of the registered voters in at least one-half of the counties in the state. If a proposed amendment passed at the polls, it then went

to the legislature for approval. If passed there, it became law. If the legislature failed to act favorably on the measure, however, it was returned to the people for a second, binding vote. Seeing this process as too cumbersome, the voters of North Dakota later changed the procedure so that only 20,000 signatures were required on the petitions for an amendment, the petitions could be submitted within just 120 days of the election, and the legislature had no part in the process at all.

The earliest procedure for initiatives in North Dakota was also complex: 10% of the registered voters in a majority of the counties had to sign petitions in order to place measures before the legislature for consideration. In 1918, the voters opted for a less complicated method here, too, eliminating the legislature from the initiative process and requiring that petitions be signed by only 10,000 qualified voters. If a measure passed on election day, it became law.

Because the later requirements for bringing proposed legislation before a vote of the people were so easily met, direct legislation was used fairly frequently in North Dakota. Moreover, the voters of the state seemed keenly aware of their special interest in the process. Six times since 1918, the North Dakota legislature, through referenda, has attempted to tighten the requirements for direct legislation. The voters of the state have rejected the measures every time.

CHAPTER II

THE THEORY OF DIRECT LEGISLATION REVIEWED AND CRITIQUED

With the increasing use of direct legislation in both statutory and constitutional matters, it is well to examine the theory behind such legislation--the underlying assumptions of the advocates of the initiative and referendum.

A short review of the philosophy of governmental "reform" will assist in comprehending of the impulse behind direct legislation. Our system of government, it is said, is unresponsive to the needs of the people. The distance between elected representatives and electors is too great. Moreover, between the voters and the representatives are many intervening structures--including corporations, political parties, and political machines--that act as "special interests" and unduly influence the governors to the detriment of the governed. Too often, special interests constitute well-organized and well-financed elites whose agents are able to corrupt legislators. The laws made by corrupt public officials lack legitimacy in the eyes of the people, so that the people become alienated from their government.

The initiative and referendum, on the other hand, close the gap between the people and their government, circumvent the power of special interests, encourage representatives to be honest and attentive (because the threat of the initiative process is always present), and provide the ultimate degree of democratic legitimacy for laws and political decisions. Governor Hiram Johnson of California, in the midst of the battle over adoption of the initiative and referendum in his state, expressed the Progressive position, saying: "There are two kinds of government, government in secret, the spring of which no man knows, and government in the open--government that takes into confidence all the people of all the state all the time."

It would be grossly inaccurate to assume that the Progressive champions of

direct legislation were only reacting to the power of money in politics. It is true that their ire was raised in part by their perception of special-interest money and its ill effects on the political system; underlying this perception, however, was their peculiar view of the relationship between democracy and egalitarianism. They drew their political philsophy of participatory and egalitarian democracy from many sources, including elements of the American religious tradition, experiments with utopian communities, the popular utopian literature, the works of the French philosopher Jean Jacques Rosseau and the German Karl Marx, the budding industrial labor movements, and the ideas of America's small but articulate Socialist Party. Indeed, the Progressives believed that their political philosophy represented a furthering of the American political tradition which was, from its inception, devoted to the equal rights of all men.

In fact, the Progressive belief in the equality of all men led to their insistence on direct democracy and to their implicit distrust of representative government. Their views, expressed early in the twentieth century, represented the continuation of a debate that was first heard in the eighteenth, between the advocates of the new Constitution and those who had opposed it. During the debates between the Federalists and the anti-Federalists, the latter offered the opinion that popular government is only secure in a small country where the people can meet to administer government directly. Many anti-Federalists believed that a scheme of representative government, necessary in a large country, was subversive of the principle of popular government, and held the seed of despotism. Although the advocates of the Constitution won the day, the arguments of the anti-Federalists faintly persisted down through the decades, from time to time growing more influential when taken up by able leaders battling for a good cause.

Underlying the reformist philsophy of the Progressives was a sentimental and romantic vision of the democratic citizen. According to the historian Richard

Hofstadter:

> At the core of their conception of politics was a figure quite as old-fashioned as the figure of the little competitive entrepreneur who represented the most commonly accepted economic ideal. This old-fashioned character was the Man of Good Will, the same innocent, bewildered, bespectacled, and mustached figure we see in the cartoons today labeled John Q. Public. . . . In a great deal of Progressive thinking the Man of Good Will was abstracted from association with positive interests; his chief interests were negative. He needed to be protected from unjust taxation, spared the high cost of living, relieved of the exactions of the monopolies and the grafting of the bosses. . . . The problem was to devise such governmental machinery which would empower him to rule. Since he was dissociated from all special interests and biases and had nothing but the common weal at heart, he would rule well. He would act and think as a public-spirited individual, unlike all the groups of vested interests that were ready to prey on him.

According to this view, such democratic citizens, when left to their own devices, would freely meet, deliberate, and arrive at decisions that furthered the best interests of society as a whole. However, when confronted by well-organized and well-financed elites, the noble citizen would withdraw from public participation, leaving the government to the oligarchs; alienated himself, he would deny to the democracy its most valuable assets--his public spiritedness and innate good sense. At the heart of the Progressive reform philosophy, then, was a desire to elevate this mythical model citizen to power.

Of course, public spiritedness and innate good sense may not be sufficient to guide society in an age of technological progress and industrial expansion. According to Progressive thought, the social and economic problems that arise as a result of these forces are too complex for sensible but simple men. Thus, communities of democratic citizens need the expertise of professional and technical advisers--specialists who are devoted to sharing their special knowledge of social structure, economics, government, management, and physical science. It is no wonder that so many leaders of the Progressive movement were middle-class technocrats, managers, lawyers, journalists, and other professionals whose educational attainments and general background prepared them to lead the movement.

Indeed, they elected themselves a President of the United States--Woodrow Wilson, formerly the president of Princeton University.

The Progressives in general believed strongly in the virtues of enlightened public discussion. They advocated the creation of public forums for the discussion of topics of the day. These forums, they thought, would create a climate conducive to honesty in government. The Progressives also tried to establish civic and fraternal clubs of bankers, businessmen, lawyers, and others who would devote their energies to informing the public about corruption and about proposed reforms in government and elsewhere. These self-appointed elites, once organized, encouraged government officials to address the people both directly and through the press--all in the hope that a better-informed people would be better able to affect their government in a positive fashion.

The union of sentimental, democratic idealism with a faith in professionalism and technical expertise generally suggests the intellectual character of the Progressives. This union also suggests the ultimate aspirations for society of those who advocated the initiative and the referendum. In its prime, Progressivism represented a great movement for the creation of "apolitical politics."

Although the initiative and referendum are supposedly intended to defend the rights of the people, they represent a significant departure from the American political tradition as it relates to representative government. While they were first designed as corrections to misuses of power in the representative system, it is now claimed by some that the initiative and referendum threaten the procedural safeguards of the legislative process under the representative system. "Without these safeguards the rights of minorities, and civil liberties generally, are acutely vulnerable to oppression by an anonymous majority of voters." In today's political environment, marked by extensive media influence and by a substantial degree of political polarization, the danger increases.

The danger posed to minority rights and civil liberties by direct popular rule was a subject on which the American Founders spoke and wrote at length. The Founding Fathers recognized that direct democracy posed a profound threat to individual rights and liberty. Not only the Federalist Papers, but the records of the Federal Constitutional Convention, show that the Constitution was designed to provide a system of government that would prevent either a tyranny of the majority or a tyranny of the few. James Madison described the danger as one of "faction," as he warned against the power of a majority or a minority of the population "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community."

History had taught Madison that factionalism was the undoing of all previous experiments in popular government.

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed: Let me add that it is the great desideratum, by which alone this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

The history of popular rule, from ancient Greece to Rome to the city-states of Renaissance Italy, offered numerous examples of turmoil, anarchy, and finally tyranny. In sum, the history of free government until the American experiment was a sordid and unhappy one. Direct democracy, Madison believed, only exacerbated the problem of faction. On the other hand, he thought a representative government promised a remedy for the illness. Madison was keenly aware that the attempt to create a union of the states under a republican constitution was an action

unprecedented in modern history. Boldly, Madison urged Americans to undertake the Herculean effort to rescue the reputation of popular government by creating political structures that would secure and preserve both majority rule and minority rights.

Although the danger of factionalism was manifest, Madison did not seek to extirpate factions from society. Faction, he held, was "sown in the nature of man"; any effort to extirpate it would require a tyranny sufficient to destroy all liberty. Madison and his fellow Federalists did not pretend to possess a "final solution" for the chief problem of democracy. Rather, as Alexander Hamilton said: "We are now forming a republican government. Real liberty is neither found in despotism or the extremes of democracy, but in moderate governments."

The effort to create moderate government culminated in the establishment of representative government--a republic. Direct democracy was avoided partly because it exacerbated the tensions between factions by pitting one group of citizens against another in an open, public forum. This inevitably led to "confrontational" politics. If one group of citizens proved to be a majority, it would act for its own sake, disregarding the rights of the minority. Minorities, by contrast, would seek to compel the whole of society to support their special interests. The New England town meeting was no model of popular government, as far as Madison was concerned. Rather, popular government was best when the sphere of territory subject to popular government was enlarged. This necessitated a scheme of representation, and also enlarged the number of interests competing for the public's support.

> The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of Republican, than of Democratic Government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals

> composing a majority; and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

Madison expected that a "multiplicity of interests" would provide for political freedom in America, just as the multiplicity of sects provided for religious freedom. A multiplicity of interests would force each interest to moderate its views as it sought, through compromise, to satisfy its desires in the legislative process. Representative government, in short, allowed for consideration of a great many interests in the lawmaking process, whereas direct or "pure" democracy allowed a bare majority to set the rules for society.

What Madison was saying, in effect, was that direct democracy, including the rule of the people as lawmakers, hold no answer to the problem of special interest. Rather, he believed that the solution to the problem of special interest lay in creating those circumstances--geographic, cultural, economic, and political--that would allow for the development of a multiplicity of interests, and for their subsequent competition through the vehicle of representative government. Madisonian theory, applied to the realities of today's politics, raises troubling questions about the initiative and referendum.

The issue is clearly joined by Justice Hugo Black's often-quoted statement regarding referenda: "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination or prejudice." Setting aside the fact that a successful referendum or initiative campaign represents an unadulterated victory for the larger part of the electorate over the lesser part, it should be pointed out that, in California at least, referenda and initiatives have been used most frequently by special interest groups seeking to influence "life styles" and to legislate morality. Throughout the 1960's, when racial tension was especially high, local and statewide

direct legislation was used, according to many commentators, to maintain segregated neighborhoods. These same commentators point to the use of direct legislation to continue patterns of racial segregation in public schools. Likewise, initiatives have been used to try to limit the employment opportunities of homosexuals in education. Popular measures aimed at homosexuals possess the same "moral tone" as initiatives of an earlier period that sought to restrict drinking and gambling.

Madison feared the direct injection of religious and moral issues into the political process. These are the most inflammatory kinds of issues, sharply dividing society, and sometimes creating a "civil war"-like atmosphere. They are the kinds of issues that dominated European politics throughout the Middle Ages, producing zealots for political leaders and subjecting whole societies to the rule of organized elites. Although Madison strongly believed in the need for moral and religious principles among democratic peoples, he felt that the development and inculcation of these principles was best left to men in their private capacities as educators, religious leaders, and molders of public opinion. The American Founders consciously rejected the medieval approach to politics, seeing in the distinction between state and moral order, and in the processes of representative government, the guarantee of the civil liberties of all men.

While initiatives and referenda have often had a negative impact on racial and ethnic minorities, it is also true that these devices have often adversely affected the business community. The initiative has been particularly popular among a coalition of special-interest groups, including consumer advocates, environmentalists, educators, and some lawyers, who see business--especially "corporate America"--as the single greatest impediment to a better "life style" for the American people. This coalition, which one critic has termed the coalition of the "utopian coercives," has, in the name of a moral vision, sought to curtial "business as

usual." Their antagonism is most often aimed at the "private sector" and at the "profit motive," which they see as corrupting forces that threaten to destroy basic human values. When the "utopian coercives" speak politically, it is usually against the influence of corporations. Opposing private profits with moral values, they seek to involve the people directly. They tend to reject the representative system, because too often they see their designs frustrated by the compromises that are a necessary part of representative government.

This special-interest coalition also possesses a class bias and seeks to promote a class interest. For example, environmentalists tend to consider environmental quality more important than the production of energy; many also appear more sensitive to the quality of animal life than to the quality of human life (understood in terms of jobs and economic well-being). The environmentalist can usually afford the luxury of his position, but what then becomes of the economic rights of the poor, of disadvantaged racial minorities, and of the business community? By their very nature, initiatives and referenda can seldom balance moral principles and class interests in the same way as a legislative act may balance such principles and interests. Not only is direct legislation absolute, but as with direct or pure democracy itself, it is insensitive to the issues and differences separating economic classes and moral perspectives. Rather than producing reconciliation and consensus, an initiative often hardens class differences. The sophisticated politics that bridges class interests for the sake of the commonweal is sometimes totally absent in the politics of the initiative and referendum.

The foregoing argument is not intended to suggest that initiatives and referenda do not often carry with them a subtle "hidden agenda." For example, Blacks are often disliked by lower-class whites who feel their economic security threatened by the prospect of Black advancement. It has been noted, also, that many of those who seek to prevent the further development of natural resources and

productive capacity, in order to protect a particular "life style," do so out of base motives. As one observer has stated: "It is clear . . . that direct legislation is used effectively by residents of homogenous middle-class communities to prevent unwanted development--especially development that portends increased size or heterogeneity of population." The argument was stated differently by another observer: "Comparison of the voters and nonvoters confirms that direct democracy also has a distinct social bias. Because of low turnouts, local referenda are likely to have more class bias than major elections."

The popularity of the initiative and referendum among those who seek to legislate "life styles" and morality is no accident. Not only is an initiative or a referendum an absolute measure--requiring in California only a simple majority of the votes for passage--but once it becomes law, it is very difficult to repeal. Opposition by the legislature to a successful measure, for example, is tantamount to opposing majority rule and "the will of the people." Generally, the legislative process, filtering legislation through committees and other mechanisms that encourage deliberation and compromise, tends to produce laws that are less stringent and less likely than direct legislation to impede individual choice. The legislative process usually requires more than a mere numerical majority of the representatives in order to produce legislation as restrictive and severe as that which can come from the initiative and referendum.

James Madison believed that irresponsible majorities would be controlled by the legislative process as established under a representative form of government. In a legislature, numerical support for a proposal can be roughly determined in advance of a formal vote, as can the comparative strength of various competing interests. A representative must determine what a given measure means to his constituency in terms of the votes he might win or lose in the next election. The voter in the initiative process does not have to make such a judgment.

One may argue that the media and public debate are the only checks on the initiative process, and, indeed, are the only real checks left against unjust measures. This may be true enough--but it is also true that public debate is especially effective in a representative system. Representative government enlarges and refines public discussion through such devices as committee hearings and other public hearings, the testimony of expert witnesses and interested parties, the production of studies by government and private agencies, and the "give and take" of legislators in debate as they express differing views and partisan opinions. Such processes and devices regularly attract the attention of the media, giving any particular measure greater exposure than it might receive as a statewide ballot proposition (except in the case of an occasional "Proposition 13"). In fact, the ambiguity of many initiatives, the "hidden agendas" that underlay them, the technical nature and wording of some propositions, the extraordinary length of many ballots, and the widespread lack of interest in off-year elections, often discourage public debate, not to mention media coverage of the issues and personalities involved in an initiative campaign.

The problem, then, persists: How does the American body politic protect itself against irresponsible initiatives and referenda? The use of the initiative and referendum to legislate "life styles" and morality promises to grow more widespread in the decade of the 1980's. Supporters of the "Moral Majority," of the "Right to Life" and of environmental causes--including opponents of nuclear power and of economic growth and development--will continue to create a circus-like atmosphere in the political arena. The initiative and referendum are not now, and will not become, the exclusive tools of the "right" or the "left," of conservatives, liberals, radicals, or reactionaries. From Jerry Falwell to Tom Hayden, initiatives and referenda are contemplated as instruments for purifying private and public life. Given the expanded use of the initiative and referendum that is almost certain to

take place in the future, how are the interests of majorities and minorities to be protected against unwise, selfish, irresponsible, or unjust pieces of direct legislation?

The Madisonian concern with the problems of direct democracy reminds us that any effort to improve the processes of direct legislation must focus attention on the questions of majority rule and minority rights. Because there are no standing or permanent majorities in American politics, initiatives and referenda can become the instruments of special interests on both the "right" and the "left." On the other hand, there are permanent rights in this country, promised to all Americans by the Declaration of Independence, the Constitution, the Bill of Rights, and by subsequent Constitutional Amendments. Thus, in considering the present standing of the initiative and referendum, and their possible future improvement, it is necessary to set aside partisan and class interests in favor of attention to those structures that, in providing for majority rule, also protect the rights of individuals and minorities.

If improvements are to be contemplated in the process of direct legislation, they should begin by making possible a clearer expression of the will of the majority. For example, efforts should be made to distinguish more clearly between measures promoted by special interests and elite organizations and measures that are genuinely popular. This can be accomplished by changing in the way that direct legislation reaches the ballot. Such change may also give greater protection to minority rights. Specific suggestions for change, and possible alternate approaches to direct legislation, will be discussed in a later chapter. These discussions will focus on what may be the most important question in American politics: how to truly determine and implement the will of the majority while protecting the rights of the individual and the minority.

CHAPTER III

THE CALIFORNIA EXPERIENCE: HISTORY AND PRACTICE EXAMINED

The introduction of the intiative and referendum in California occurred as part of the historical trend that led to the adoption of direct legislation in most Western states. The initiative and referendum were adopted in California during the Progressive era, Progressivism being a powerful force in the Golden State. The California Progressives, most of whom were Republicans, were an articulate, well-organized elite, drawn mainly from California's middle and upper-middle classes. Most were white, Protestant, well-educated, and civic-minded; their ranks included doctors, lawyers, civil servants, teachers, social workers, clergymen, journalists, and businessmen.

The California Progressives also had a platform and a leader. Hiram Johnson was elected governor in 1910 on a platform drawn up by the Lincoln-Roosevelt League, an organization which was battling the alleged political hegemony of the Southern Pacific Railroad in the state. In a special election in 1911, Johnson campaigned statewide for the introduction of the initiative, referendum, and recall in California. The initiative and referendum measures were adopted by an extraordinarily large margin of about three to one, out of nearly a quarter of a million votes cast in the election. As measures of reform, the initiative and referendum were specifically aimed at overcoming special interests in order to assure better and more "democratic" government in California.

There was another motive force to the introduction of direct legislation in California besides the ambitions of the Progressives. Before South Dakota's adoption of the statewide initiative and referendum, there was a widespread movement in the United States to establish these mechanisms at the municipal level. In 1897, Nebraska enacted a statute permitting municipal electors to use the

initiative and referendum to address specific municipal problems. In 1898, the same year that South Dakota adopted the initiative and referendum, San Francisco and Vallejo adopted direct legislation measures through their freeholder charters. This action was followed in 1902 by a constitutional amendment in California allowing voters to amend city charters by initiative petition. In California, then, direct legislation was first introduced in the municipalities.

The Progressive impulse and the drive for municipal direct legislation came together in the person of Dr. John R. Haynes. In a sense, Dr. Haynes might be termed a "typical" Progressive. He was a highly respected physician, well-educated and well-traveled, and was also successful in business (mostly real estate). He had visited Switzerland and was deeply interested in the example of direct legislation there. In 1900, Dr. Haynes founded the Direct Legislation League of California,* and aimed his reformer's zeal at the city government of Los Angeles. Among his friends were several millionaires and many of the most respected and influential men in California. Dr. Haynes worked tirelessly for local direct legislation, and involved in his campaign "practical men of affairs and leaders of the business community," including doctors, lawyers, and bank officials. Largely as a result of his work, the city of Los Angeles incorporated into its charter in 1903 measures for direct legislation.

Dr. Haynes is remembered by California historians as "the father of the recall in California." He is also remembered for his advocacy of the initiative and referendum, which marks him as an important figure in the political history of the Golden State. A popular speaker, Dr. Haynes nearly always emphasized one point in

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*The National Direct Legislation League was founded shortly after the Populist Party platform of 1892 advocated adoption of direct legislation in the states. The first president of the NDLL was Eltwood Pomeroy of New Jersey, who also edited the League's journal, the Direct Legislation Record. After the founding of the national organization, a number of individual states, including California, created their own Direct Legislation Leagues.

his prepared remarks: "Direct legislation must be adopted in the United States, as has already happened in Switzerland." Dr. Haynes's success as an advocate of good government was matched only by his success as a political tactician. One of his admirers described his strategy: "It was Dr. Haynes's life work to channel the discontent engendered by the excesses of the Southern Pacific into permanent reform." Moreover,

> persistently he sought to interest the most powerful men of the state in direct legislation, principally conservative businessmen, and throughout the campaign he emphasized that honest corporations and reputable businessmen should desire direct legislation. He sought also to secure the cooperation of newspaper editors.

After winning the day in the City of Los Angeles, Dr. Haynes turned his efforts to the adoption of statewide direct legislation.

Not only was Hiram Johnson elected governor in 1910, but for the first time a state legislature was elected which was friendly to the idea of direct legislation. Opinion in the state was now ready to embrace what the Los Angeles Times had earlier denounced as "gimcrack schemes." Of course, it had taken more than a decade to prepare public opinion. For many years, Dr. Haynes had constituted a one-man crusade. His personal efforts to interest state legislators in the initiative and referendum, which include the holding of lavish banquets for them, had at first produced few results. Slowly, however, a coalition of concerned citizens had formed in support of the initiative and referendum. This coalition included organized labor, farmers' groups, the Socialist Party, civic organizations, women's groups, prohibitionists, clergymen, and professional and business organizations. The coalition also secured support eventually from many of the largest corporate and financial institutions in the state. These disparate interests came together initially during the first decade of the new century in order to free various cities from the control of the state political machine. This effort seemed successful: by 1910, twenty home-rule cities had adopted direct legislation. The coalition then focused its

efforts on the statewide initiative and referendum, building its argument around the widespread opposition to the political machine created and sustained by the Southern Pacific Railroad.

According to one account:

> Legislatures, governors, commissioners, were controlled (by the corporation) in much the same fashion as in other states at the time. Few newspapers retained their independence, some being bought with as little as a railway pass and others with substantial sums of cash. Party conventions did the bidding of the railroad attorneys. The state organization rested on a political foundation of local machines in the larger cities and to no small degree in the rural counties of the state. The interests backing the state machine recruited allies from among those who received favors from local organizations and the whole constituted a well-knit alliance for the protection of common interests and the prosecution of common gain. . . . It was this organization, with the backing of virtually all the wealth of the state and with its tentacles of control reaching into every corner of the commonwealth, that a determined band of citizens sought to displace.

The merits of the allegations against the Southern Pacific Railroad are obscured by passionate rhetoric. It is known that many public officials enjoyed the privilege of free transportation. Other abuses of greater significance are also on record. Such abuses often accompany rapid industrial expansion, and, indeed, there is reason to believe that there was substantial public support for continuation of the privileges, and even for some of the alleged "excesses" of the state's corporations. After all, the "Captains of Industry" in the late nineteenth century had become the heroes of an American industrial republic; their accomplishments were often seen as the basis of a better life for millions of people. It is clear, moreover, that the Southern Pacific Railroad at the time did not enjoy the "backing of virtually all the wealth in the state"; nor, judging from the many editorials favorable to the initiative and referendum in California, had it "bought" all the newspapers.

Whatever may be the truth of the various allegations against the Southern Pacific Railroad, the actions of that corporation did lead to agitation favoring direct legislation. The movement against the Southern Pacific's role in California

politics was spearheaded by newspapermen. In 1907 and 1908, two reporters called meetings that led to the establishment of the Lincoln-Roosevelt League. Those attending the 1907 meeting endorsed a platform which was to have significant consequences. The platform called for breaking the political power of the Southern Pacific; working for adoption of the direct primary, the initiative, the referendum, and the recall; and securing women's suffrage. The 1908 meeting, attended by some fifty Republicans, actually established the Lincoln-Roosevelt League, and provided for the creation of League clubs throughout the state. The platform of the League was the platform on which Hiram Johnson ran for Governor and was elected in 1910. Johnson's campaign was focused on a single issue: he promised to "kick the Southern Pacific out of politics in the State of California." Said Johnson: "There is one question I have put everywhere and that has never been answered yet: why is it that every Southern Pacific politician, every political crook, every lawyer for big interests should declare themselves against us?"

The 1911 special election saw almost the entire platform of the Lincoln-Roosevelt League put before the voters. The legislature submitted twenty-three measures to the people, including provisions for the initiative and referendum. The election was hotly contested, conservatives seeing a victory for the Progressives as spelling the end of the Republic. The Southern Pacific Railroad, it is said, "pulled out all stops," and the campaign on both sides generated more public debate and speeches than had been seen in almost any prior election in California. The automobile was used for the first time in a California political campaign when Dr. Haynes organized a tour of the southern part of the state to reach those towns that had not yet received the Progressives' message.

Of the twenty-three propositions on the ballot in 1911, all but one passed, and most by wide margins. The initiative and referendum had come to California.

Just what had the voters adopted in 1911? The 1911 ballot called for the

creation of the constitutional amendment initiative, the direct statutory initiative, the indirect statutory initiative, and the referendum. Californians, in short, adopted all the Progressives' proposals for direct legislation. As one observer has noted: "In the late 1970s California stands alone among the large urban industrial states of the American union in employing both the constitutional amendment initiative and direct statutory initiative." The constitutional amendment initiative and the direct statutory initiative begin and end with the people directly; proposals reach the statewide ballot after having been initiated by popular petition. The indirect statutory initiative, provisions for which were repealed in 1966 after the process had been used only four times, involved the legislature in the initiative process. Proposals originating with a popular petition were forwarded to the legislature. If the legislature failed to pass the measure, it was submitted to the statewide electorate for a decision. The California referendum, for its part, suspends the enforcement of a law until the voters can act upon it.

In order to qualify for the ballot, the constitutional amendment initiative and the statutory initiative, as adopted in 1911, required petitions signed by registered voters equaling eight percent of those voting for governor in the last general election. The indirect statutory initiative required signatures equaling only five percent of those voting for governor in the last general election. At the time the indirect statutory initiative was discarded by the electorate in 1966, the same electorate reduced the number of signatures necessary to qualify a statutory initiative for the ballot to five percent of the gubernatorial vote. The referendum, for its part, requires a petition with signatures equaling five percent of the voters in the last gubernatorial election. In all cases, petitions must be submitted within ninety days of the adjournment of the legislature.

There are, of course, other measures besides the four adopted in 1911 that may be acted on by the people directly. Among these are constitutional amend-

ments proposed by the legislature, bond issues, and amendments to statutes first adopted by the initiative process and requiring the consent of the voters. In order for the legislature to propose a constitutional amendment, a proposal must receive the approval of two-thirds of the entire membership of both the Assembly and the Senate. Constitutional amendments proposed by the legislature tend to be more common in California elections than initiatives, less controversial because of the broad consensus that leads to their being placed on the ballot, and generally more successful than initiatives. (See Table 1.)

TABLE 1

Propositions Submitted to the Voters of California, 1912-1976*

Type of Proposal	Number Proposed	Number Approved	Percent Approved
Measures proposed by petition			
Constitutional amendments	90	24	27
Statutes, bypassing legislature	65	18	28
Statutes, submitted first to legislature, then to voters	4	1	25
Referenda	35	21	60
Subtotal	194	64	33
Measures proposed by legislature			
Constitutional amendments	476	294	62
Bond referenda	52	41	79
Amendments to law originally adopted by initiative	15	13	87
Subtotal	543	348	64
Total	737	412	56

*This table is adapted from Eugene C. Lee, "California," in Referendums: A Comparative Study of Practice and Theory, ed. David Butler and Austin Ranney (Washington, D.C.: American Enterprise Institute, 1978), p. 90.

The rate of success of constitutional amendments initiated by the legislature (62%), in comparison to those initiated by popular petition (27%), may give rise to the question, "What was all the fuss about over direct legislation?" The question is a good one, especially when one takes into account the fact that only four indirect statutory initiatives were submitted to the voters between 1912 and 1966 (with only one passing), and that in the sixty-four-year history of the referendum, the legislature has been overruled by the voters only twenty-one times. Perhaps it is sufficient to answer the question by saying that the people wanted to have direct legislation available whenever they thought they needed it. Seen in this light, the initiative and referendum may appear as the "safety valves" of democracy, allowing the people a "say" now and then, and thus re-establishing their sovereignty before inattentive, uncaring, shortsighted, or even corrupt public officials.

A detailed look at the history of the initiative and referendum in California, however, suggests other possible answers to the question, "What was all the fuss about?"

In 1912, three measures were submitted to the voters, including two constitutional amendment initiatives and one statutory initiative. The statutory initiative would have legalized betting at racetracks. Of the constitutional amendment initiatives, one would have provided for the consolidation of county and city governments, and the other for a "single tax"--an idea supported by conservatives. All three measures were rejected by the electorate. Two of the measures, track betting and the single tax, were put forth by "special interests," and had little to do with the avowed purposes of the initiative--the securing of political and governmental reform.

In 1914, seventeen initiatives appeared on the ballot. One measure sought to create a six-day, forty-hour workweek, and another sought to establish an eight-hour workday. Both of these measures were rejected--suggesting that Progressive

reforms aimed at business and industry were not as popular as some present-day historians seem to believe. Three initiatives in 1914 concerned prohibition--one providing for it, another suspending the implementation of the first initiative if it passed, and the third prohibiting any further votes on the subject for a period of several years. The first and third of these initiatives were rejected, and the second was approved: Californians were not yet ready to go "dry." Still another initiative sought to restrict professional prizefighting, and it was approved. Thus, out of seventeen initiatives on the ballot in 1914, six related to social and moral issues. Of these six, two passed and four were rejected.

On the same 1914 ballot, there were three bond issues. One bond issue provided funds for completing the campus of the University of California at Berkeley. It was approved. Another measure relating to bonds would have restricted the franchise on bond issues to property owners. This initiative was rejected. The third and final bond measure provided funds for a state building in Los Angeles. It also was rejected. Thus, of the three bond measures originating by petition from the people, the only one that passed was the one related to education.

Of the other measures that appeared on the 1914 ballot, one had to do with the investment of public money and another with titling land split; the former was rejected and the latter approved. Another measure was the only one on the ballot that sought to regulate business--in this case, investment companies. It was rejected. Two other measures provided for the annexation of territory by cities and counties, and for the consolidation of city and county government. The first passed, the other was defeated.

Finally, two measures relating to elections appeared on the 1914 ballot. One abolished the poll tax; promoted by the California Federation of Labor, it was approved. The other provided for absentee voting, and it was rejected. These two proposals, especially the one providing for abolition of the poll tax, were the types

of legislation that the Progressives had hoped would eventuate from direct legislation. The 1914 initiatives focusing on city and county government reflected the Progressives' belief that improved organization and management would secure good government. There seems to have been similar reasoning behind the initiatives to regulate the deposit of public money and provide title to land. It probably is true, then, that seven of the initiatives appearing on the ballot in 1914 were in line with the purposes of those who had advocated direct legislation in the 1911 election, although only one of these initiatives--the measure abolishing of the poll tax--was directly related to the question of democratic rule.

Of course, not all who supported the introduction of a statewide initiative in 1911 were concerned principally with "good government." For instance, the prohibitionists supported direct legislation because they saw it to be a means of advancing their moral agenda. Many present-day commentators are surprised that the initiative in California is used so frequently by groups seeking moral and social "reform." This is less surprising if one looks at the groups who supported direct legislation in 1911. Indeed, if moral and social issues are considered as one category, that category easily takes in the greatest number of initiatives appearing on the ballot between 1912 and 1976. By contrast, measures directed at the governmental and political processes constitute just twenty-one percent of the statewide initiatives over this same period of time. (See Table 2.)

After looking at Table 2, one must conclude that the advocates of direct legislation achieved their purposes only in part. The initiative has been used largely to promote moral and social positions; it has also been used widely by special interests to advance their parochial concerns. The number of initiatives placed on the ballot between 1912 and 1976, and aimed at reforming the political system, curbing corruption in government, providing for greater democratic participation, or undercutting the influence of special interests in the legislature, can be counted on

TABLE 2

Number of Initiative Measures on the California Ballot, by Subject and Decade, 1912-1976*

Subject	1912-19	1920-29	1930-39	1940-49	1950-59	1960-69	1970-76	Total	Percent of Total
Governmental and political process[a]	7	7	11	1	1	2	3	32	21
Public morality[b]	9	6	7	3	1	1	2	29	19
Revenue, taxation, bonds	6	10	4	2	3	1	3	29	19
Regulation of business and labor	6	2	6	6	2	2	2	26	17
Health, welfare, public housing[c]	2	7	6	5	2	0	0	22	14
Civil liberties and civil rights	0	1	0	1	0	3	3	8	5
Environmental protection, land use	0	1	0	0	0	0	4	5	3
Education	0	1	1	1	1	0	0	4	2
Total	30	23	23	19	10	9	17	155	100
Percent of total by decade	19	23	23	12	6	6	11	100	---

a Includes measures related to voting, reapportionment, the initiative process, executive organization, local government, the judicial process.
b Includes measures related to liquor, gambling, boxing, racing.
c Includes measures granting veterans' benefits

Adapted from Lee, "California," p. 95

two hands.

The advocates of direct legislation ended up creating a means by which proponents of not-so-progressive thought could advance proposals that the representative system, in the normal course of its operations, would have either moderated or buried. And even if propositions to regulate morality and social behavior fail on election day, the initiative process provides a public forum that focuses attention on such issues to the detriment of more justifiable and often pressing public-policy concerns. Indeed, the initiative process has injected into public debate issues for which there may be no appropriate legislative solution. Many initiatives dealing with morality and social policy--including those such as the one requiring that the Holy Bible be placed in all school libraries and classrooms (1926), and the one repealing the Rumford Fair Housing Act (1964)--can only be divisive. Other initiatives are so technical in nature (e.g., the tax limitation measure proposed in 1973) that the public finds it difficult to make a reasoned choice, and thus acts from instinct, or on the basis of slogans rather than deliberation. Many of these measures are designed, quite simply, by special interests.

A curious fact about direct legislation in California is that the referendum, which itself was the vehicle for the great political triumph of 1911, has been abandoned by the electorate in recent years. It seems that the huge number of signatures that must be obtained in a ninety-day period, in order to qualify a referendum for the ballot, has discouraged even the stoutest hearts. Since 1952, the referendum has not been employed at all in California. Thus we see that while the initiative has often become the tool of special interests, another important type of direct legislation, the referendum, has fallen into disuse.

CHAPTER IV

PROPOSALS FOR REFORM: IMPROVING DIRECT DEMOCRACY

Since it was first adopted in 1911, California's constitutional provision for district legislation (the initiative and referendum) has only once been significantly amended. In 1966, on recommendation of the Constitutional Revision Commission, California voters approved a provision that created a distinction between "constitutional" and "statutory" initiatives, lowering the number of qualifying signatures for statutory initiatives from eight percent to five percent of the number voting in the last general election for Governor. A minor modification was added in 1975 to permit the authors of a proposed initiative (if they so chose) to submit the initiative to the Secretary of State to review its language "for clarity" (any alterations suggested by the Secretary of State would not be binding).

The popularity of the initiative is such that all other attempts to "reform" the direct legislative process have been rejected by the Legislature, or vetoed by the Governor, or--in the case of the relevant sections of the 1974 Political-Reform Initiative (Proposition 9)--declared unconstitutional by the state Supreme Court.

Yet, despite its status as something of a "sacred cow," the initiative has been a frequent target of criticism and calls for reform. Former Assemblyman Gordon H. Winton's statement, in 1964, aptly summarizes the arguments of the critics.

> It is not enough to say, as some do, that, of course, the initiative process can be abused but that, after all, the people, ultimately, can vote on all these measures. The fact is that, as our ballot grows longer and longer and becomes filled with increasingly complex proposals, the average elector is not in a position to inform himself fully about all of the questions upon which he is asked to give an answer. Time and time again I have heard intelligent voters complain that they find it impossible to understand measures on the ballots. Furthermore, as our Legislature and our executive branch have become more enlightened and more responsive to the public needs, there is less need for the sort of protections that were necessary a half century ago when the voices of the people were often drowned by the voices of private interest groups in Sacramento.
>
> The unpleasant truth is that, at the present time, our initiative machinery is only available either to groups with large and well

> organized memberships or to those who represent the sort of economic interest that can afford to pay to have the large number of signatures gathered that are necessary to get an initiative proposal on the ballot. The days when the initiative may have been a realistic safeguard for the ordinary citizens of the State are long past.

The criticisms of California's initiative process are aimed primarily at the "citizen-sponsored" initiatives that have multiplied in recent years. A listing of the most frequently cited criticisms would include the following:

> Citizen-sponsored initiatives have become just one more political weapon in the arsenal of weapons for well-organized, well-funded interest groups, on both the Left and the Right.
>
> In bypassing the legislative process, these initiatives eschew the compromise or amendment that is often so essential to the drafting of responsible legislation. Voters are left with an "all-or-nothing" choice.
>
> Legislation passed by initiative can only be repealed or amended by initiative. Citizen-sponsored initiatives with unexpected consequences therefore must be resubmitted to the public for modification.
>
> Frequently drafted without "outsider" input, citizen-sponsored initiatives are not always carefully thought-out or well-conceived. Language ambiguities have often resulted in voter confusion and costly litigation.
>
> Initiatives on complex social and economic questions may increase the voters' already heavy dependence on the electronic media for information. Direct legislation campaigns on controversial issues are rarely more than media blitzes designed to appeal to the voters' emotions and prejudices.

In the past, most attempted reforms of the initiative process have centered either on efforts to increase the number of signatures required for ballot qualification, or on efforts to restrict the funds available for qualifying an initiative and campaigning for or against it. In 1980, former Assemblyman John Knox followed one of these strategies when he sponsored legislation that would have applied much more stringent criteria for validating voter signatures on qualifying petitions. (Knox's bill was subsequently vetoed by Governor Brown.)

Critics of the initiative process face two serious difficulties in trying to institute reform. First, in the wake of Proposition 13, it is highly unlikely that the Legislature or the Governor would choose to side against what is publicly perceived

as the most "democratic" process in state and local government. And second, the courts will invariably reject any reforms that attempt even marginally to restrict the rights of petition, association, and speech--each of which comes into play with the circulation of petitions and with various campaign activities.

The only viable reform strategy, then, would seem to be an effort to implant the direct legislative process within the bounds of responsible law-making and governance. For decades, direct legislation has been seen as an incidental or extraordinary part of the political system. This view continues, despite the fact that the initiative is by now a vital and fundamental ingredient of the California political culture. It is time to treat direct legislation for what it is, and to make appropriate provisions for its presence in the state's political system. Direct legislation cannot and should not be "reformed away." The only responsible approach is to integrate the process into the fabric of government, thereby tempering and limiting its most pernicious features. In short, reforms should be proffered that return the process to its "good government" origins.

There are four options for reform that would address the basic problems in the initiative process: (1) to provide legislative involvement in the critical early stages of an initiative proposal; (2) to create an Initiative Review Commission, charged with improving the quality and clarity of initiative proposals; (3) to limit substantially the possible subject matter of citizen-sponsored initiatives; and (4) to make technical changes in the manner of collecting signatures.

The following sections discuss the principal features of these reform possibilities. The purpose of this brief survey is to make clear the range of feasible alternatives and to outline the basic features of each. An actual proposal for reform might emphasize just one of the options, or might select various elements from two or more different options to form a comprehensive package to be submitted to the state legislature.

Preview and Legislative Consideration of Ballot Initiatives

The California legal provisions for citizen-sponsored statutory initiatives entirely exclude the Legislature from any involvement in the drafting, review, or qualifying of a measure for the ballot.* A citizen or group merely has to submit a proposed initiative to the Attorney General, obtain sufficient signatures to qualify the measure for the ballot, and then campaign on its behalf.

In a number of states, however, the state constitution provides the legislature with at least a nominal involvement--and, in some instances, with a substantial role--in the initiative process. In Massachusetts, for example, a proposed initiative must receive the support of at least one-fourth of the legislature in two prior legislative sessions before it can qualify for the ballot. Massachusetts also permits the legislature to amend a proposed initiative, if the amendment is supported by three-fourths of the members. Seven other states also require some form of legislative review of statutory initiatives before they are submitted to the electorate.

In the last decade, several measures have been proposed to permit the California legislature to review all initiatives before the Secretary of State certifies them for the ballot. Although a wide variety of ideas have been entertained, there are basically two options for reform of this type: First, the legislature might be required to hold preliminary fact-finding hearings on all initiative proposals before the petitions are circulated for signatures; second, the legislature might be permitted to take preemptive action prior to an initiative's being qualified for the ballot.

Legislative Hearings. The objective of this reform is to provide a legislative forum for a substantive review of the initiative's goals, language, constitutionality, and

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*The California Legislature is required, however, to review all proposed Constitutional amendments before they are submitted to the voters.

practicability. Such a pre-election forum would provide an opportunity for a debate on the merits or demerits of the proposal, and an investigation of its fiscal and overall policy ramifications. Equally important, the hearings would expose the sponsors of the initiative to the constructive criticism and give-and-take of the legislative process. Once the review was complete, the initiative's sponsors would have the opportunity to amend or reword their initiative and resubmit it to the Attorney General for retitling and summary.

In the 1975-76 legislative session, Assemblyman Art Torres proposed revisions of the initiative process which incorporated many of the above ideas. Assemblyman Torres's legislation, which never reached the Assembly floor, provided for the following:

> Proponents of an initiative would present their proposal to the Assembly after collecting signatures equivalent to one percent of the vote at the last gubernatorial election.
>
> The Legislature would then conduct hearings on the plan in San Diego, Santa Ana, Los Angeles, Fresno, Sacramento, and San Francisco.
>
> The proponents could amend the measure at the conclusion of the hearings and, if they wished to continue the process, they would submit the measure to the Attorney General for titling and summarizing.
>
> After sufficient signatures had been obtained to qualify the measure for the ballot, the proposal would be put through the regular legislative process.
>
> If the Legislature approved a proposed statute, the initiative would not be placed on the ballot.
>
> All proposed statutory initiatives rejected by the Legislature or vetoed by the Governor, and all constitutional amendments whether approved by the Legislature or not, would be placed on the ballot.

Preemptive Legislative Action. In Wyoming, although the legislature is not required to review or hold hearings on citizen-sponsored initiatives, it is given the opportunity to preempt the initiative process by adopting a law substantially similar to the initiative proposal. Thus, when an initiative qualifies for the state ballot, the legislature is permitted to adopt the initiative as written, or to adopt it in an

amended form; in this way, the state can avoid the costs of an election and the divisive campaigns that are frequently inspired by initiatives.

There are at least two reasons to recommend the adoption of this reform in California. First, the reform would not necessarily alter the part played by the initiative process in California politics. Citizens and groups would still have the opportunity to influence public policy through an initiative if the legislature failed to act. Second, the adoption of this reform would probably lead to better drafted and more consistent legislation.

Presently, the California legislature can respond to an initiative proposal only by placing its own initiative on the ballot. The legislature's measure competes with the citizen-sponsored proposal, and if both should win a majority of votes, the initiative with the highest number of votes becomes law. The most recent example of this happening was on the property tax initiatives, Proposition 8 and Proposition 13.

Unfortunately, the current law allowing legislative and citizen-sponsored measures to compete against one another only serves to underscore some of the fundamental problems of the state's initiative process: voter confusion, costly campaigns, and--potentially--the adoption of ill-conceived and poorly thought-out legal provisions. The strongest argument on behalf of the initiative, of course, is that it allows the electorate to circumvent an irresponsible or dead-locked legislature. The reform outlined in the preceding paragraph sustains the spirit of the initiative and, yet, may help avoid its more obvious disadvantages.

The Initiative Review Commission

The proposal for an Initiative Review Commission would represent a major reform of the current direct legislation process. The objective of the commission would be to adopt procedures aimed at enlightening the registered voter to the

merits and shortcomings of a proposal before he placed his signature on a petition. This would help to thwart those measures that are parochial in nature, that are ambiguous or unclear, or that "sound" like they promote good government but that actually involve unsavory motives and/or consequences.

The commission would assume responsibility for those initiative-related functions now performed by the Attorney General, Secretary of State, and legislature (the last of these holds hearings on citizen-proposed constitutional amendments). It would also carry out the responsibilities proposed in the first option for reform--the holding of fact-finding preliminary hearings. The commission would not, however, in any way impinge on the current prerogative of the legislature to propose initiatives.

The commission's actual functioning might be as follows:

All proposals for citizen-sponsored initiatives would be submitted to the commission, along with a brief statement of the arguments supporting the initiative.

The commission would prepare a summary of the proposed initiative and, in consultation with the Attorney General, would assign the initiative a title. If requested to do so, the commission would review the language of the initiative for clarity.

The commission would (1) publicly solicit an opposing statement to be submitted within 30 days; and (2) prepare an economic impact statement for the initiative.

After a brief period of time during which the supporting, opposing, and economic impact statements are made available to the public, the commission would hold hearings in the major geographical areas of the state, soliciting testimony from proponents, opponents, and neutral analysts who are qualified to assess the pros and cons of the initiative. Written transcripts of the hearings would be made available to the general public within one week of each hearing.

Following the hearings, the commission might publicly circulate proposed (but not binding) revisions in an initiative's language. Sponsors would then resubmit the proposal (in its original form, or as amended) to the commission for titling and final summary. The commission would again solicit opposing statements.

Initiative sponsors would be required to circulate petitions to the commission's summary, a full text of the initiative, and the supporting, opposing and economic impact summary statements, with the qualifying petition.

To qualify the initiative for the ballot, its proponents would be required to collect two signatures from each signatory: one on the petition itself, and another indicating that the signatory had ready both an affirmative and a negative statement on the initiative.

The commission would be charged with the oversight responsibility in seeing that the laws affecting direct legislation are carried out fairly and fully.

The members of the commission might include the Secretary of State, the Attorney General, and the Lieutenant Governor (or their designates), as well as appointees nominated by the majority and minority leaders of both houses of the state legislature, and two "citizen" appointees nominated by the state Supreme Court.

Since it would doubtless be unconstitutional to empower the commission to amend an initiative proposal without the consent of its authors, the proposal for reform through the creation of a commission would best be advanced in conjunction with the reform permitting preemptive action by the state legislature.

Finally, it might be pointed out that "commission-style" reform could be accomplished without the actual appointment of a commission, if the commission functions outlined above were carried out by either the Attorney General or the Secretary of State.

Limitations on Subject Matter

Ten of the twenty-two initiative states limit the permissible subject matter of the citizen initiative. As noted in an earlier chapter, almost twenty percent of the initiatives proposed in California over a sixty-four year period dealt with public morality. The heightened public emotions that surround moral issues are often exploited by political figures attempting to gain exposure by associating with or promulgating initiatives that legislate life styles and inhibit personal choice.

Through a reform measure, citizen initiatives could be proscribed when "Bill of Rights" issues are addressed. Moreover, excluded by many states from allowable

subject matter are the areas of appropriations and taxation. This eliminates the opportunity for one faction in a state to seek a constitutionally protected position with respect to the sources and use of tax proceeds. Given the popularity of Proposition 13, it would be very difficult to enact such a measure in California at this time. An effort to limit social and moral issues on the ballot would find broad support, however, especially given the "libertarian" life style that is emphasized by many in the Golden State. Furthermore, a recent study in the state of Texas suggested other areas which are worth examining for exclusion, including: a prohibition against local or special laws; a prohibition against placing the same measure on the ballot more than once; a prohibition against initiatives dealing with public health and safety laws; and a prohibition against initiatives designed to counter the mandates of federal law.

Reforming Methods of Petition Gathering

The methods by which initiative petitions are circulated and signatures gathered have grown expensive and increasingly complex in recent years. Proposition 9, the Political Reform Act, sought to limit spending for the circulation of petitions, but this measure was struck down by the courts.

The infusion of money into the initiative process has given rise to a "direct legislation industry" in California. Initiative proponents now gather signatures by paying agents as much as seventy cents per valid signature. The introduction of signature gathering by direct mail has taken the petitioning process another significant step beyond traditional methods, involving more money and expertise in the "business" of qualifying an initiative for the ballot.

Furthermore, sophisticated techniques are now used to create a favorable climate of opinion for a particular measure, easing the task of signature gathering. (For instance, during the campaign to qualify Proposition 11 for the June 1980

ballot, the measure's proponents retained a public relations firm to run "pig oil" media spots during the petition gathering stage.) Polling data may also be "floated" during the qualifying period to show a favorable public attitude towards a proposed initiative. Additional innovations can be expected during the decade of the 1980s, as special-interest groups continue to employ the latest technology and procedures for securing signatures on initiative petitions.

The introduction of sophisticated technology and practices into this vital stage of the initiative process exacerbates the problems of ambiguity and confusion about the merits or deficiencies of any particular proposal. Propositions yet to be qualified are "sold" in a thirty-second spot on radio or television, or are advanced in a direct-mail piece through the use of appealing graphics, vague phraseology, and emotional rhetoric. Rather than offering voters a reason for signing a petition, such techniques are used to elicit signatures from people who haven't really thought about what they are signing.

Protecting the rights of minorities and the best interest of the majority requires enlightening the registered voter about the merits of a proposal in advance of his placing his signature on a petition. It also requires that there be a genuine consensus on initiative proposals--meaning that they should have truly broad-based support, and not merely reflect the desires of small, parochial groups. Finally, protection of society's best interests means that the petition gathering process should be separated from all other appeals, such as fund raising appeals, so that the attention of the prospective signatory may be concentrated on the merits of any given issue. The following proposals are intended to address these concerns.

1) Direct-mail appeals for signatures should be separated from appeals for money to support the signature drive or to advance the initiative in other ways. Presently, a direct mailing may contain both a petition for signature and a request for a donation. Given the likely increase in direct-mail appeals for signatures in the

decade of the 1980s, those who wish to qualify a measure should be prevented from soliciting funds in the same envelope. Such a restriction would make necessary at least two direct-mail appeals by initiative proponents, one for signature and another for funds. This, in turn, would necessitate a broader base of support for a successful qualifying campaign.

2) Eight states now require certain geographic distribution of petition signatories in order to qualify a measure for the ballot. Geographic distribution helps to insure that no single area of the state, and no one local interest or sect, can qualify a measure that the state as a whole will have to deal with on election day. In California, a requirement for a certain percentage of signatures from a specified number of counties would insure some measure of consensus on an issue before it reached the ballot, and would probably help to protect minority rights in regard to a wide range of subjects.

The Referendum

The referendum, one of the major achievements of the Progressive Era, has fallen into disuse as a result of requirements that are difficult to fulfill. In order to qualify a referendum for the ballot, petitions bearing signatures equaling five percent of the last gubernatorial vote must be submitted within ninety days of the end of a legislative session.

Since the referendum is a check on the legislative process, it is consistent with the American system of checks and balances, and is, in fact, something of a complement to the representative system. It is therefore unfortunate that this form of direct legislation is no longer actively employed. Indeed, to revive the referendum may satisfy the public's desire for involvement in the legislative process, and diminish the number of initiatives now coming before the people of California. Moreover, the use of the direct mail appeal for signatures may make the

referendum a viable tool of government once again.

Suggestions for reform of the referendum process include: 1) lengthening the qualification period for signatures from ninety days after the adjournment of the legislature to 120 days; and 2) reducing the five percent petition to a three or four percent petition.

These measures could be advanced on the good government grounds that the referendum, a valuable check by the people on their representatives, is no longer employed because it is so difficult to qualify a referendum for the ballot.

Conclusion

The California Roundtable, as the leading business assembly in California, has a great opportunity to assist with reform of the initiative process. Four options for reform have been offered. Program development by the Roundtable in these areas would represent not only a deterrent to misuse of the direct legislative process, but would also provide constructive new alternatives to citizen involvement in the governing process.

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