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## SYMPOSIUM

### THE FOURTH BRANCH OF GOVERNMENT? YOU BET.

Peter Schrag\*

By now, it is generally recognized that direct democracy, and particularly the initiative process, has become increasingly important as a policy-making instrument in the United States. Some twenty-four states have an initiative process in one form or another, and there have been efforts to write it into the constitutions of several others. More important, in the past decade, record numbers of initiatives have been circulated and have qualified for the ballot, particularly in Colorado, Arizona, and the high-initiative states of the West Coast. Those initiatives have dealt with virtually every fundamental public issue one can think of: from ending affirmative action, curtailing bilingual education, toughening criminal sentences, establishing legislative term limits, limiting spending, and capping taxes, to permitting casino gambling on Indian reservations, increasing the minimum wage, imposing new environmental regulations, creating new parks, and increasing support for public education. It also includes some, like legalizing physician-assisted suicide, which one would not think of.

As this list indicates, while the contemporary wave of ballot measures, and particularly those following, and often prompted by, passage of California's Proposition 13 in 1978, came disproportionately from the right, the left has become

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increasingly adept in the process and, in many instances, as well financed. The big news last fall was that while voters rejected vouchers, in both California and Michigan, they generally supported higher pay for teachers and more liberal funding formulas for schools, and continued the remarkable success that Bill Zimmerman and his colleagues have had in liberalizing state drug laws. But Zimmerman's measures, like nearly all others, were also financed by deep pocket funders—in his case by financier George Soros and two other multi-millionaires.

Nationally, 396 initiatives appeared on statewide ballots in the 1990s, and 289 in the 1980s. The only similar period was in the Progressive Era between 1911 and 1920, shortly after many states wrote the initiative and referendum into their constitutions, when 291 were proposed.<sup>1</sup> In California, to cite just one big state, nine measures made it to the ballot in the 1960s, twenty-two in the 1970s, forty-five in the 1980s, and sixty-two in the 1990s. In light of the small number that made it to the ballot last November, and the surprisingly few now in circulation, it is possible, maybe as a result of our general prosperity, that this sharply ascending curve may have dipped, at least for the moment.

But do not count on it. After 1990, when California voters rejected a large percentage of the great glut of stuff they were then confronted with, there were predictions that the electorate was having no more of it. And then, of course, the numbers started rising again. In Oregon last November, voters were confronted with nineteen initiatives and hundreds of pages of ballot materials.

In states like California, the impact of those ballot measures on public policy generally, and particularly on public services and infrastructure, has been enormous. Homeowners are now assured that they will not get any unpleasant surprises in their property tax bills. But after five boom years, we are just now beginning to recover from two decades of spending restrictions and tax limitations. For example, within the next couple of years, California's per-pupil school spending, which was fifth or sixth in the nation in the mid 1960s, and which dropped to forty-first in the mid 1990s, may get back up to the national average, itself not an

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1. Information compiled by the Initiative and Referendum Institute, Washington, D.C.

adequate level when compared to the other large industrial states. It is particularly inadequate in a diverse, high-cost state like California. And the counties have not yet recovered.

Of course, these ballot measures broadly impacted legislative policy, which has been increasingly sensitive to what voters have done, or may do in the future, on initiatives in other states, and on national policy, which, on things like the restrictions on services to immigrants in the original welfare reform bill and tax limitations, has often reflected voter-enacted state measures. More important, perhaps, has been the effect on the political process itself. In states like California, the basic fiscal and governmental structure has changed, shifting far greater authority to the state government. This more or less eviscerates the local power to tax and plan, and thus, confounds accountability not only for voters, but often even for those who are professionally engaged with the process, such as government officials, journalists, and academics. Who is responsible for mitigating school overcrowding or for the red ink that forces a district to cut programs and services? Is it the district that overspent its budget or is it the governor and legislature who failed to come through with the promised money? How does the state's school finance system work? Why, with all that property tax, can't city hall keep the streets paved?<sup>2</sup>

More important, virtually all initiatives circumscribe the power of state and local elected officials, and often their willingness, to deal with new problems. This in turn has exacerbated voter frustration—already high anyway—with elected politicians and officials, which increases the propensity to resort ever more to institutions such as the initiative and referendum that bypass those politicians. Initiatives tend to beget initiatives.

In addition, tax limitation measures like Proposition 13 have skewed the local planning process. Because the property tax is now so limited, planners and city councils go after sales tax payers like big box retailers, shopping malls, and auto malls. As a result, other things being equal, they pay less attention to an attractive balance between housing and high-end employers in electronics or other high-tech

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2. Of course, city hall no longer controls the property tax.

industries, which tend to require more in services than they return to the local treasury in higher property taxes. Conversely, because assessments only change when property is transferred—and sometimes not even then—measures like Proposition 13 and its progeny have tended to reduce turnover and stabilize neighborhoods.

Most fundamentally, the initiative has changed the quality and the institutional character of the legislature itself. The big driver has been term limits: In California three two-year terms in the Assembly, two four-year terms in the Senate. Freshman members now chair crucial policy committees, speakers last no more than two years, and almost everyone begins looking for their next job from the moment he or she arrives. In Sacramento, the capitol is now the state's plushest bus depot, where some people have just arrived, some are just about to leave, and few stay very long. Equally important, in an effort to curb bloated staffs and reduce the number of political hacks, California's Proposition 140 sharply reduced the legislature's own budget.

In fact Proposition 140 did not do much to eliminate hacks. Instead it inadvertently drove out the policy people and eviscerated the staff of the non-partisan and highly respected legislative analyst. The hacks are still there. Although it is impossible to prove, it is at least conceivable that California's electricity deregulation mess would never have happened without term limits.

Let us turn for a moment to some other issues. In the past decade the so-called initiative industrial complex—the network of consultants, direct mail specialists, petition gathering firms, pollsters, and media firms—has become a familiar part of the political landscape. And so, of course, has the growing amount of money involved. While money and paid political operatives played a role almost from the beginning, the process was conceived as an instrument of citizen action. It was to comprise two hurdles: qualifying a measure for the ballot and getting it passed.

But in an era when, on the one hand, it is nearly impossible in most states to qualify anything for the ballot without paid petition circulators and, on the other, easy for deep pockets initiative sponsors to qualify almost anything, the first hurdle becomes meaningless as a test of citizen commitment. Instead it becomes a barrier to it. At the same

time, it becomes an open invitation to almost anyone who, for reasons of ideology, economic self-interest, political advantage, or simple vanity wants to become an instant player. In Oregon last fall, one man, Bill Sizemore, who has become a sort of one-stop-shopping initiative conglomerate as developer, sponsor, and campaign organizer, qualified six measures for the ballot. In the process, he forced the governor to change his own legislative priorities to fight the most draconian of Sizemore's proposals. This process is indeed a fourth branch of government.

Scholars like Daniel Lowenstein, Elizabeth Garrett, and Elisabeth Gerber contend, more or less correctly, that while a large money advantage is often sufficient to defeat an initiative, it has rarely been sufficient by itself to pass one. But without money—the money of self-interested politicians and political parties, insurance companies, Silicon Valley millionaires, or labor unions—initiative proponents cannot get to the table at all. Gerber has found that without other resources, the groups she defines as economic interests can rarely use their financial power alone to prevail at the ballot box. But in 1998, a coalition of well-heeled gambling interests seeking authority to run electronic slots in reservation casinos spent \$65 million in California to prove they were poor Indians, and Nevada gambling interests spent \$25 million in their unsuccessful attempt to beat them. It would be hard to describe this battle as anything but a fight between large economic interests. The bigger spenders won.

Increasingly, moreover, the definitions become blurred and the groups confused. Is the California Republican party, which bankrolled the successful campaign to pass Proposition 209, the measure that banned racial and gender preferences in public education and contracting, a citizens' group? Is U.S. Term Limits, which is funded almost entirely by deep, conservative pockets (and will not disclose how much it gets from whom)? Are the public employee unions? Last November, the Silicon Valley venture capitalists and other proponents of Proposition 39, which lowered the margin required to pass local school bonds from sixty-seven percent to fifty-five percent, outspent their opponents at the Howard Jarvis Taxpayers Association by roughly nine to one—\$27 million to \$3 million. In the process they managed to befuddle enough voters, most of whom thought Proposition 39

had something to do with fiscal accountability, not with making it easier to approve bonds, to narrowly pass it. Is Oregon's Bill Sizemore a citizens' group?

The defenders of the initiative process often contend that the involvement of big money does not make it any different in that respect from representative politics. But one of its original justifications was precisely that difference. As the *Sacramento Bee* editorialized back in 1913 shortly after Hiram Johnson and the Progressives wrote the initiative, referendum, and recall into the California Constitution: "[T]he money changers—the legions of Mammon and Satan—these have been lashed out of the temple of the people."<sup>3</sup> And because the initiative is subject to so many fewer institutional constraints, and because initiatives are, in most instances, far harder to repeal and amend,<sup>4</sup> the initiative structure actually makes the role of money much more dangerous.

Scholars like Arthur Lupia contend that while voters rarely have time to read the texts of initiatives and while initiative fights are dominated by thirty-second television advertisements and over-simplified mailers, voters get clear enough signals when they know who backs and opposes a measure.<sup>5</sup> And Robert Stern has often argued that voters rarely regret the votes they have cast. But the conventional legislative process, for all the logrolling that sometimes accompanies it, is usually subject to a whole range of institutional checks that the initiative is not—committee hearings, two house agreement, executive veto, as well as the intrinsic legislative impulse to compromise and accommodate as many sides and interests as possible.

None of these checks occur in direct legislation, which is a winner-take-all process that, by its very nature, is rarely respectful of political minorities. In making their decisions, the voters have no technical experts at their disposal; they do not have the time to read the fine print, sometimes running to many thousands of words of legal language, behind the advertising slogans for and against particular measures; they do not have to record their votes, much less confront those

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3. SACRAMENTO BEE, Apr. 5, 1913, at 32.

4. In California, repealing an initiative is impossible unless the measure itself allows for it.

5. See ARTHUR LUPIA, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998).

who believe they have been damaged by those votes; they cannot be run out of office if they make serious errors; they are not accountable for the consequences to their fellow citizens or the public weal. These differences have led some scholars, the late Julian Eule of U.C.L.A. most prominent among them, to argue that in the absence of other checks, the courts, in reviewing the constitutionality of initiatives, should apply *stricter* scrutiny than they do to conventional legislation.<sup>6</sup>

In addressing the question of whether the initiative has become the fourth branch of government, perhaps the most telling element is the extent to which the process, once regarded as something of an exceptional safety valve, something outside the conventional political process, has become part of it. As suggested above, the same political and economic groups that direct democracy is supposed to check—insurance companies, gambling interests, trial lawyers, labor unions, tobacco companies, even the Southern Pacific Railroad before its demise—have become major players. So, of course, have the elected politicians and those seeking public office. The best known is probably former California Governor Pete Wilson, who successfully used Proposition 187, the immigration initiative, and Proposition 194, the three strikes measure, as a wedge in his 1994 campaign for reelection, and tried to use Proposition 209 in his abortive run for the presidency in 1995-1996. There have been others as well, including then-Secretary of State Jerry Brown with political reform in the early 1970s, and former Attorney General John Van DeKamp with campaign reform and moderate term limits in his unsuccessful pursuit of higher office in the 1980s.

In addition, the threat of initiatives can drive the conventional political process. By gathering enough signatures to qualify a measure expanding the number of charter schools and liberalizing the rules under which they could be set up, in 1998 Silicon Valley millionaire Reed Hastings put enough pressure on the California Teachers Association to bring the union to the table and agree to a somewhat more moderate version of the same plan. This is not necessarily bad—indeed, it comes close to the kind of

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6. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503 (1990).

indirect initiative process that some states have and that is now being proposed by reform groups in California. But if you think of the panic over utility prices, driven in part by fear of an initiative from the tempestuous consumer activist Harvey Rosenthal that is besetting the Governor and legislature this spring, and the extent to which Harvey-phobia is already driving state policy, you have to re-examine even this proposition. If you add to this the very evident consideration that elected politicians like Bill Clinton and Gray Davis now rely increasingly on overnight polls, focus groups, and other instant voter surveys (the politician's daily plebiscite) it indicates the extent to which the two seem increasingly to become part of the same continuum. To paraphrase Clausewitz, the initiative has become the extension of politics by other means. All of this seems to reinforce the near-certainty that, regardless of what courts and legislatures may otherwise do, the initiative, which was nearly dormant forty years ago, has become an important part not only of policy making but also of the public consciousness.

Given this fact and the corresponding impact of ballot measures in limiting the powers, prerogatives, and careers of elected government officials, it is hardly surprising that there would be increasing legislative attempts to restrict the process as well. Legislative term limits have been the most pervasive of those career-restricting measures, which have been written into the constitutions of eighteen states, in all but one case through voter initiatives. But there are many other examples as well, particularly in the area of campaign finance reform. Some of those reforms have been struck down by the courts, as have all initiative-based attempts to impose congressional term limits. But in state after state, legislators, sometimes backed by special interest groups, have been seeking ways, both on good policy grounds and on grounds of self-interest, to impose greater checks on the process.

The most common have been attempts to shorten the time allowed to collect signatures or to require that some signatures be collected in every county. In a number of western states, voters have approved legislatively initiated ballot measures, pushed hard by hunting and gun groups, that either prohibit or severely curtail voter initiatives

protecting wildlife. In Utah, the so-called "Cowboy Caucus" managed to get voter approval for Proposition 5, a constitutional amendment requiring that all future ballot measures protecting wildlife be passed with a two-thirds vote. The amendment was sold as a conservation measure; in the words of Wayne Pacelle of the Humane Society, "[T]he advertisements [for Proposition 5] said not a word about the supermajority requirement." For defenders of the initiative who argue that the electorate always knows what it is voting on, the irony here ought to be obvious.<sup>7</sup>

More important, there are increasing indications that the courts are becoming more active in checking the excesses of initiative making, and particularly in enforcing the requirement, common to most initiative states, that ballot measures be confined to a single subject.<sup>8</sup> Although the standards and interpretations have varied widely, from the Florida Supreme Court's very restrictive readings to California's heretofore generally tolerant ones, even the California Court seems now to be sending signals that it will give measures stricter review. In December 1999, it knocked a measure off the 2000 primary ballot that, in an effort to get voter support for something they weren't particularly interested in, combined changes in the state's redistricting system with caps on legislative salaries. This was a clear violation of the single subject rule, but one that might have passed muster a decade before.

In his majority opinion, Chief Justice Ron George seemed to suggest precisely such a change of course. Alluding to law review criticisms of the court's alleged failure to enforce the single subject rule, he declared, "[T]he rule is neither devoid of content nor as 'toothless' as some legal commentaries have suggested."<sup>9</sup> (I add this speculation advisedly in the hope of

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7. See Wayne Pacelle, *The Animal Protection Movement: A Modern-Day Model Use of the Initiative Process*, in M. Dane Waters, *The Battle over Citizen Lawmaking*, 109-19 (2001).

8. See, e.g., Kenneth P. Miller, *Courts as Watchdogs of the Washington State Initiative Process*, U. SEATTLE L. REV. (forthcoming 2001).

9. *Senate v. Jones*, 21 Cal. 4th 1142 (1999). See also Gerald F. Uelmen, *Taming the Initiative*, CAL. LAW., Aug. 2000, at 46. How far that goes, of course, is anyone's guess, since state judges generally are subject to periodic reconfirmation votes. Thus, striking down a hot button issue, particularly one approved by a substantial majority, leaves the judge feeling, as former California Supreme Court Justice Joseph Grodin said, as if he's sitting with an alligator in his bathtub.

provoking further enlightenment from Chief Justice George on this point). In the meantime, the federal courts have struck down initiative-based attempts to write congressional term limits into the U.S. Constitution. They have overturned ballot measures in Oregon and Colorado that sought to restrict homosexual rights. They have struck down most of California's Proposition 187, which sought to deny schooling and other services to illegal aliens and their children, as well as measures on campaign finance reform and, more recently, the California voter initiative establishing a "blanket" primary.<sup>10</sup>

However, most high-profile initiatives—on taxation, legislative term limits, affirmative action, criminal sentencing, environmental regulation, bilingual education—have survived pretty much intact. But because some were temporarily blocked in trial courts and, in one case, by a three judge appellate court panel, there has been considerable backlash, including in some cases calls for impeachment of judges or for requiring review by three judge district court panels in cases involving the constitutionality of voter-enacted laws. This has led scholars like Kenneth P. Miller to warn that "as courts enforce constitutional norms and invalidate initiatives at a high rate, the public may become increasingly frustrated and may look for ways to undermine the courts' independence."<sup>11</sup> As former Justice Otto Kaus said in a now famous aphorism, for a state appellate justice subject to periodic reconfirmation by the electorate, weighing the constitutionality of an initiative is like having a crocodile in the bathtub.

On the other side of this coin is the simple fact—the one that stares all would-be initiative-process reformers in the face—that the same courts, notwithstanding the complaints about judicial activism coming from initiative defenders, have given the process great deference, and often on similar grounds. That deference goes back to 1912 when the U.S. Supreme Court ducked the most fundamental question: Is

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10. However, when it comes to campaign reform efforts, the courts have given equally strict scrutiny to legislative acts as to those imposed by initiative.

11. See Kenneth P. Miller, *Judging Ballot Initiatives: A Unique Role for the Courts* (Mar. 24, 2000) (unpublished manuscript prepared for presentation at the 2000 Annual Meeting of the Western Political Science Association, on file with author).

direct democracy a violation of the guarantee clause? It ruled that this is a political issue, not a legal one, and thus, beyond its jurisdiction.<sup>12</sup> Since then the Supreme Court has ruled that the First Amendment prohibits states from banning paid signature gatherers,<sup>13</sup> and prohibits them from requiring that they identify themselves by name, or even from the requirement that they be voters in the states in which they operate.<sup>14</sup> Given the fact that the electorate loves the initiative process—according to polls, the voters have far more confidence in policy making at the ballot box than through representative state government—that leaves reformers few choices other than sneaking fiddles past the voters, or trying to restore some form of indirect initiative, and/or requiring fuller and faster disclosure of who backs, funds, and, where possible, opposes any given measure.

The problem in this debate, as with so many other controversies surrounding the initiative process, is that there are no normative criteria beyond the Constitution's general protections for due process, free speech, and minority rights. The great latitude that the courts permit in some states on things like the single subject rule would be rejected out of hand in others. Most states permit some sort of post-election legislative amendment or even repeal of statutory initiatives, but California does not. Some, which have the indirect initiative, formally give legislatures a chance to act before a measure goes on the ballot, but some do not.

The list of unresolved questions runs on and on. In regard to all of these questions, the states vary widely: what is a reasonable threshold for signatures—how many should be required in what period of time and what is a reasonable relationship between them? Who should have the authority to write the ballot title and summary, where many voters get their only information about a measure and which are therefore often crucial in close elections, and what checks

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12. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Interestingly enough, in separate decisions, the Oregon courts ruled that since—in that state—the legislature could amend or repeal statutory initiatives after they pass, the initiative process did not violate the guarantee clause. Inferentially, that begs the question in states like California, where the legislature has no such authority.

13. See *Meyer v. Grant*, 486 U.S. 414 (1988).

14. See *Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (1999).

should there be on that authority? In many cases, the first action in a court comes from a dispute over how the appropriate state official has captioned a measure. In some states, no appeal to the courts is allowed. And what is the difference between amending the constitution by initiative (permitted in states like California) and revising it by initiative, which is not permitted? Is the initiative itself a normative element of American democracy or an increasingly worrisome aberration?

If you like the process, not just in theory but as it is now used, if you like the results, you are likely to be much more restive if the legislature attempts to make access to the ballot more difficult. If you don't like it, you may feel that the courts have been far too obeisant to majority power, not just on single subject, but in their failure to protect minorities against majoritarian assaults on things like affirmative action and bilingual education. Conservative critics who attack judges as thwarting the will of the people for modifying mandatory sentencing measures, or overturning voter-approved restrictions on schooling or other public services for illegal aliens, are not quite as certain when it comes, for example, to the wave of successful initiatives legalizing the medical use of marijuana.

Alongside these questions there are still others. As Bruce Cain and Kenneth Miller have pointed out,<sup>15</sup> there is implicit, though arguably sharp, disagreement even among supporters of the process between those who regard it as a progressive safety valve against legislative malfeasance or inertia and those who see it as a populist alternative to all representative government. Miller also argues quite cogently that it is the populist-oriented measures—those that challenge or limit established institutions—that have run into particular difficulties in the courts.<sup>16</sup>

As the power of our new information technologies increases, as on-line voting and (probably) on-line petition signature collection become real possibilities, and as reliance on unmediated media such as talk shows, the Internet, and e-mail grows, they are likely to create still greater public restiveness about the relatively slow and seemingly

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15. Bruce Cain & Kenneth Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government* (forthcoming 2001).

16. See Miller, *supra* note 8.

unresponsive traditional institutions, not only in government but in other public institutions and services as well. This makes the normative questions about the process ever more important. In his recent book, *Democracy Derailed*,<sup>17</sup> Washington Post columnist David Broder, among our most sophisticated and thoughtful political journalists, even predicts that we will soon get some form of direct democracy at the national level. Those of you who remember a maverick U.S. Senator from Alaska named Mike Gravel from the early 1970s may be interested to know that Senator Gravel now has an organization named Philadelphia II that aims to do precisely that, albeit so far with little success.

But whether or not Broder's prediction is correct, he is surely right in his finding that in state after state, voters show widespread disdain for their legislatures. Broder says that when he asked Oregon voters, who twice balloted on physician-assisted-suicide initiatives, whether such a fundamental ethical issue should simply be subject to the decision of a fifty percent-plus-one majority, "they looked at me like I was crazy." How else to decide something of this importance? Here is a whole generation raised on the speed, responsiveness, and inter-activity of the web and weaned on the unmediated and inherently anti-establishment media of the chat room and the talk show, confronting the deliberate nature, the slowness, and often the non-responsiveness of conventional government. That growing dichotomy and the restiveness it produces is something we had better all pay attention to. The initiative process is not going away; if anything, it will become a larger factor.

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17. DAVID BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000).

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