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CALIFORNIA INITIATIVES: IF THEY AIN'T BROKE, DON'T FIX 'EM

Bill Zimmerman*

As I am neither a lawyer nor a legal scholar, my response to Professor Gerald Uelmen's paper[1] will stray somewhat far afield from his tightly reasoned arguments regarding the single subject and constitutional revision rules. I will comment instead on a few broader issues, not as an election attorney but as an initiative campaign manager and political media consultant.

For twenty-five years I have been part of the initiative industrial complex of which my friend, Professor Uelmen, whom I have called upon for initiative advice on more than one occasion, makes some well-deserved criticisms. Indeed, I now make the better part of my living from initiative campaigns. Nonetheless, I believe I can rise above my self-interest and make a few objective observations, since I have a long history of rising above my self-interest with respect to the clients I choose. They are generally the under-funded side in initiative battles, being either consumers or public interest groups fighting special interests that would endanger society or use a change in the law to feather their own nests.

My first initiative campaign was with Cesar Chavez and the United Farm Workers in 1976. Since then I have worked on twenty more California statewide initiatives and a similar number in other states. They have addressed issues like rent control, excess oil company profits, a nuclear weapons freeze, various environmental issues, auto insurance regulation,

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1. Gerald F. Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives after* Senate v. Jones, 41 SANTA CLARA L. REV. 999 (2001).

homelessness, gay rights, physician assisted suicide, medical marijuana, criminal justice reform, campaign finance reform, and, most recently, treatment instead of incarceration for nonviolent drug offenders.

Let me disagree at the beginning of my remarks with some of what Professor Uelmen states at the conclusion to his article. Certainly, we have no disagreement that voters should be protected from "logrolling," that initiatives ought to be built around a "publicly understood" (in Professor Daniel Lowenstein's sense) single subject, and that constitutional revisions are not a proper subject for ballot initiatives.

However, in the last paragraph of his paper, Professor Uelmen states, "The growing complexity of initiatives and the swelling ambition of their proponents actually threaten continued public support for the initiative process, lower the level of public participation in elections, and inject confusion and deception into our political discourse."[2] The attitude toward initiatives reflected in this sentence is, of course, a common one, but it is an attitude with which I must take issue.

In my view, initiatives enjoy widespread popular support, increase voter participation, and generally have a salutary effect on our democratic process. I will admit that this point of view is considered unorthodox at both ends of the political spectrum. I will defend it nonetheless.

If you doubt the popularity of the initiative process, estimate what the outcome would be if you asked voters to eliminate it. I doubt such an attempt would command more than thirty percent of the vote. Consider the many attempts to amend the process. Professor Uelmen refers to one of the best-known efforts to eliminate the initiative process in recent years, the 1992 report of the California Commission on Campaign Financing. This report sought to spark legislation designed to change the initiative process. Other legislative studies have had similar goals at various times, but the California Legislature, that most sensitive of political weathervanes, never chose to make such changes, even with respect to the most trivial modifications. They knew which way the wind was blowing.

As a result, unlike Professor Uelmen, I do not subscribe to the idea that "continued public support for the initiative

2. *Id.* at 1025.

process" is threatened. That support, as well as other public attitudes toward initiatives, can only be measured against the backdrop of similar attitudes toward the legislative process. Those of us familiar with the arcane and often obtuse rituals practiced so adroitly in Sacramento are not in the best position to understand how the average man-or-woman-in-the-street sees the legislative process and compares it as a law-making tool to the initiative process.

To say that voters are mystified about "how a bill becomes a law" in our state legislature barely scratches the surface of the problem. The average voter has no real understanding of the committee and sub-committee process, no grasp of how leadership controls the machinery of the legislature, no meaningful or detailed information about how the lobbying process works, or who is working it. The average voter is no more able to read a legislative bill than an initiative. He or she has no real information about the actual beneficiaries or victims of proposed legislation, no detailed knowledge about who is lining up on each side of the vast majority of legislative disputes or why, and no reliable or easily accessible way of obtaining the education needed to overcome these deficiencies. Worse, they are fully aware of all of these shortcomings.

In addition, many, perhaps a majority, of eligible voters believe that most legislators are for sale to the highest bidder. They do not understand how a legislator can spend many times his or her salary on a re-election campaign. They do not understand why wealthy individuals and large-scale business interests contribute what appear to them to be fortunes to these same legislators unless there is an agreed upon quid pro quo for the money. Often they are right. In 1988, I managed the successful Proposition 103 campaign that established regulation of auto insurance in California. Prior to our putting that initiative on the ballot, it was common knowledge that auto insurance industry contributions to Republican legislators and trial lawyer contributions to Democratic legislators had resulted in a stalemate that balanced the interests of these two entities but left out meaningful relief for consumers subject to skyrocketing insurance premiums.

The mystification and lack of understanding of the legislative process, and the growing disgust over the

pervasive and corrupting influence of money in Sacramento, are why there are reduced voter participation, increased cynicism about government, and a gradually corroding political discourse.

In comparison, initiatives look good. Yes, voters often have a hard time understanding them. They are often confused about who is on which side and why. And, of course, they are very suspicious about hidden agendas when they see some initiatives commanding huge campaign budgets. Nonetheless, initiatives have the feel of direct democracy. Rightly or wrongly, most voters have confidence in their own ability to tell a good initiative from a bad one. Of course, this is a subjective evaluation, but it goes to the point of voter confidence in, and affinity for, the initiative process.

In the end, I believe this affinity for initiatives comes from a basic democratic impulse, one we should nurture and support. At its core, it represents a desire to participate in government and to play a more significant role in societal decision-making. If they cannot aspire to Athenian democracy, voters at least prefer the appearance of democracy as reflected in initiatives more than the appearance of plutocracy as reflected in their understanding of the legislature.

Our citizens have been profoundly let down by the two institutions charged with educating them for democracy—our schools and our news media. Absent advanced college level courses in political science, there is no place in our educational system where average voters receive the training necessary to understand what is going on in Sacramento . . . or in Washington. The news media are no better. Now a mere satellite of our private sector entertainment industry, their inability to meet the challenge of informing citizens for democracy is so self-evident it requires no further comment.

In addition, our society has witnessed a significant erosion of other institutions that once supported the democratic impulse and democratic discourse. The village green is gone as are the soapbox orators of old. Town meetings no longer play a role in government. Candidates cannot attract voters to campaign speeches. Political debates are a thing of the past. Even the neighborhood tavern, not an institution any of us should pine for, at least provided citizens with a venue for heated political discussion with their

neighbors until it was overwhelmed by an electronic box with moving pictures one could keep in the living room.

That is why I see voter interest in initiatives, despite their faults and shortcomings, as a rational response to the increasingly distant legislative process. Furthermore, voters understand that they have won significant victories through the initiative process, victories that were not possible through legislation. Yes, I agree that Proposition 13 did more damage to California than any single law ever passed. However, if the legislature had been sufficiently independent of its own contributors to tax commercial property at rates higher than residential property, Proposition 13 would not have been necessary. Its proponents would not have had to deal with the devil to benefit commercial and residential property owners equally in exchange for the campaign contributions of the commercial interests.

Nor was Proposition 13 the only bad law created by initiative. Of course, opinion will vary with ideology, but in my liberal democratic view the "three strikes" law, the anti-affirmative action initiative, and the revisions of criminal law as it applies to juveniles embodied in last year's Proposition 21 were all bad laws passed by initiative. Clearly, a majority of my fellow citizens would disagree. But bad laws are often enacted in Sacramento as well in spite of the superior ability of the legislative committee structure to research details and anticipate unintended consequences and often for the same social, political, and cultural reasons that bad law is enacted by initiative. One need only look to the current energy crisis for an example.

On the other hand, one can point to numerous good laws that were enacted by initiative, and indeed could not have been enacted any other way. Earlier, I mentioned my involvement in Proposition 103, the 1988 initiative that regulated the auto insurance industry. Granted, not everything promised in this initiative has been achieved, but if nothing else, auto insurers now have to justify premium rate increases and seek the permission of a state agency before such increases go into effect. Regulation of this sort could never have been accomplished through legislative action.

In 1996, I managed the campaign that legalized the medicinal use of marijuana, although I had no involvement in

drafting the initiative itself. Bills to achieve the same purpose had passed both houses of the legislature with bipartisan support twice before. Both bills were vetoed by then Governor Wilson whose presidential aspirations left him more concerned about projecting a tough-on-crime image than enacting a good law. With public opinion also strongly in favor of medical marijuana, Proposition 215 was a textbook example of the initiative process functioning as was originally intended.

This past November, I co-authored and managed the campaign for Proposition 36. This initiative, which passed with sixty-one percent of the vote, could not possibly have been approved through legislative action. Concern about projecting a tough-on-crime image, of course, is not limited to California governors although it does seem to find its highest expression in that office. Obviously, I believe that Proposition 36 is good law in that it will improve our ability to rehabilitate drug users, reduce crime, save us vast sums of money, and ease the overcrowding in our jails and prisons. How long might we have waited for these benefits without the initiative process?

Lest I give you the impression that it is only my own initiatives that I think qualify as good law, let me point to three other examples. Voters have passed two initiatives regarding tobacco use that have resulted in California having lower usage of this dangerous drug than any other state. These initiatives have saved countless lives and huge amounts of taxpayer money, and in the case of the most recent one, has resulted in more money being available to educate our children. Yet, neither of these critically important laws could have hoped to overcome the massive legislative lobbying clout of the tobacco industry. As a final example, I would point to Proposition 65, passed in 1986, which forced the labeling of products with dangerous chemicals. This is another important law that would not have survived the lobbying clout of its opponents.

My conclusion, as you might have anticipated, is that the initiative process is not broken. Therefore, I look with skepticism at any attempts to fix it. Unlike Professor Uelmen in his concluding statement, I believe that initiatives spur democracy and voter participation. The question for me is, how can we make the initiative more accessible to average

citizens, consumer groups, and public interest organizations, so they can compete with the special interests who already have easy access to the process as a consequence of their financial resources?

I believe there is a ready answer to this question: simply extend the period of time permitted for the gathering of initiative signatures. At present, California requires more signatures to qualify initiatives for the ballot than any other state. Not surprisingly, since we are the state with the largest population. However, the period of time California allows for the gathering of those signatures is shorter than any other state, 150 days, approximately five months. Most states allow a year, some even longer. Florida, for example, allows four years. Gathering the three-quarters of a million raw signatures necessary to qualify a California initiative statute, or the million-plus signatures necessary to qualify an initiative constitutional amendment, in a five-month period virtually guarantees that professional signature gatherers must be hired to complete the task. It simply is not possible to gather that many signatures in such a short time using volunteers.

The result is that only those who can afford to hire professional signature gatherers can get their initiatives on the ballot. Last year, I spent over one million dollars just to get the signatures for Proposition 36. Fortunately, I could call on three philanthropists with no ax to grind to contribute the money, a rare opportunity not usually available to those who lack access to special interest money.

The simple act of extending the signature-gathering period would go a long way toward solving this problem. There is no compelling reason for California to limit this period as severely as it does. If citizens had, say, four years to gather signatures, as they do in Florida, it would be much easier for grassroots efforts lacking in financial resources to qualify ballot initiatives. Such a lengthy period would not open the floodgates for a large number of ill-considered initiatives. Even with four years in which to do it, it would still take a very high level of citizen/volunteer organizing to collect the massive number of signatures required.

A four-year collection period would even the playing field with the special interests and lead to a situation where more initiatives appear on the ballot that truly represent the

interests of average voters. Voter participation would increase, as would interest in politics. Even the news media, in their blind pursuit of rating points, might be influenced by this increased interest in politics to give it more coverage. Thus, our political discourse could actually be enlarged and deepened.

You cannot blame the electorate for being uninterested in politics if you take political decision-making away from them and entrust it to a high priesthood of politicians and bureaucrats who mystify law-making and use language to describe it that is so obfuscating it can only be described as speaking in tongues. Instead, you have to give some of the political process back to the electorate and trust that citizens will rise to the added responsibility and inform themselves more effectively than they do now. Giving them greater access to the initiative process, by dramatically extending the period in which signatures can be gathered, is one way to do that. Of course, there are risks. But ultimately there is no way to improve the quality of our political discourse without granting greater responsibility to the citizens whose participation we wish to solicit.

Let me conclude by making a final point in response to the issues of single subject enforcement and pre-election review raised in Professor Uelmen's paper. As someone who has coordinated the drafting of many initiatives, I can tell you, to paraphrase Winston Churchill, that nothing focuses the attention of an initiative writer more on the single subject rule than the prospect of running a lengthy and costly campaign only to have a victory snatched away in the courts after the election. I question giving this rule "additional teeth" because when initiatives are written, the writers are always looking over their shoulders at the revision and single subject standards for fear of just that outcome.

On the other hand, no reasonable person would oppose the court clarifying the circumstances when these rules will be applied. As I agree with the need to prevent "logrolling," the clear and predictable application of single subject and revision requirements is something most initiative practitioners would welcome. However, there is a trend that has emerged among various state supreme courts in the last few years to very narrowly interpret their single subject rules. Arizona and Oregon are clear examples. This is

having a chilling effect on initiatives in those states, and is something that California, with its long history of judicial respect for the initiative process, should carefully avoid.

Neither is pre-election review a panacea for improving the initiative process. In Florida, despite its generous signature-gathering period, single subject enforcement is quite extreme. Florida encourages a pre-election constitutional review by its state supreme court after ten percent of the required signatures are in hand. Few initiative sponsors are willing to go to the ballot without this review because so many past initiatives have been ruled in violation of the single subject rule. That history makes it difficult to predict how the court will rule, and initiative sponsors are loath to risk collecting all the signatures before getting an answer. The result is a truncated process in which a large volunteer or professional organization is started in order to get ten percent of the required signatures, and then summarily shut down for six months awaiting a ruling by the supreme court. If the ruling is positive, the apparatus has to be started up again, often at considerable additional trouble and expense.

Florida's narrow interpretation of the single subject rule, combined with a cumbersome pre-election review process, results in few initiatives ever making it to the ballot in that state. I know that some attending this conference might applaud such an outcome, but I would suggest that such applause is no more appropriate than cheering for fewer legislative bills. It is not the quantity but the quality and purpose of either initiatives or legislative bills that should draw our applause.

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