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Janet A. Flammang

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DEMOCRACY: DIRECT, REPRESENTATIVE, AND DELIBERATIVE

Janet A. Flammang*

Kenneth P. Miller's well-researched and thought-provoking article maintains that a useful way to understand California's initiative process is by comparing Populist and Progressive conceptions of direct democracy.¹ While the Populist impulse mistrusts and undermines the power of representative government, the Progressive stance trusts and reforms governmental institutions. Miller makes a convincing case that the Populist view of direct democracy has prevailed in California's initiative's structure (no legislative input, hearings, or amendments), process (no checks and balances, accountability, deliberation, or opponents' input), and substance (less legislative flexibility, majoritarian values at the expense of minority rights, and pressure on the courts). Miller supports Populist-constraining reforms that enhance the role of the legislature (legislative review, amendments, and counsel), and that generally make the process harder (supermajority votes for constitutional amendments, tightening the single subject rule, word limits, signature-gathering hurdles, regulations of paid petition gatherers, and, with reservations, pre-election review by the courts or attorney general).

I submit that the Populist-Progressive schema is more useful for helping us to understand how we got to this point than it is in mapping where we should go from here. While

* Ph.D., University of California, Los Angeles; M.A., University of California, Los Angeles; B.A., University of California, Los Angeles. The author is an Associate Dean, College of Arts and Sciences and Professor, Department of Political Science, Santa Clara University.

1. Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037 (2001).

these two strands of thought have strongly influenced California's initiative politics, a Progressive call to constrain Populism will not work in California's political climate, and a new framework is needed.

To begin with the schema's historical relevance, conditions in California that gave rise to the governmental reform measures at the outset of the twentieth century in many respects resemble those in its last three decades, the period of heavy use of initiatives: recessions (in the 1890s and the early 1970s), a marked increase in immigration (in the 1890s and the 1980s), violence in the streets (against striking workers earlier, and in Watts and Berkeley later), and a non-responsive government (whether beholden to the Southern Pacific Railroad or sitting on a surplus budget as property taxes skyrocketed). Additionally, both Populist and Progressive strains are still heard in California's political discourse: Populists' individualism, suspicion of concentrated power, anti-elitism, and faith in the common person; Progressives' reformist optimism, middle-class moralism, and faith in experts and the educated person. Populists have a dualistic analysis of power and politics: big/little, rich/poor, common/elite; while Progressives have a tripartite analysis: lower/middle/upper. So in the case of immigration, as we saw in the debate about Proposition 187, the Populist impulse is to see newcomers as needy, non-productive, foreign "them," while the Progressive impulse is to see newcomers as potential taxpaying citizens and members of the middle class through hard work and education. In debates around many initiatives, Progressives object to what they describe as Populist xenophobia, demagoguery, and simplistic attacks on government as the problem, while Populists take issue with Progressives' obscure jargon, endless tinkering with governmental structures, and simplistic view of government as the solution.

The dominance of these two worldviews has been reflected in California's choice of governors. Governor Pat Brown presided over the Progressive late-1950s and early 1960s. With the state's postwar industrial growth and public infrastructure expansion, government was the solution and could be trusted. In the mid-1960s, in the wake of the Berkeley free speech movement and the Watts riot, Governor Ronald Reagan voiced Populist sentiments in describing

government's irresponsible spending as the problem, and promising to crack down on ungrateful students and other disruptive people. In the mid-1970s, Governor Jerry Brown's administration was a mix of Progressivism's clean government and Populism's small government and anti-elitist critique of the University of California. It was during his administration that Proposition 13 began to change the landscape in Sacramento in the Populist direction described so eloquently in Peter Schrag's *Paradise Lost*.²

Given the historical importance of these two impulses in California politics, and agreeing with both Peter Schrag and Kenneth Miller about the hamstrung condition of the California legislature, what is the problem with using the Populist-Progressive framework for recommending reforms at this point in time? Why not curb Populism in the name of Progressivism? Two conditions markedly different from Hiram Johnson's time—weakened political parties and the power of screen culture—have created a new climate that necessitates a new definition of democracy in which to frame a call for reforms.

Progressive direct democracy reforms (initiative, referendum, recall, and direct primaries) succeeded in limiting the power of political parties. Progressives wanted city contracts to be awarded on the basis of "what you know" (professional qualifications) not "who you know" (machine cronyism). "Good government" measures benefited not only their sense of the common good (sanitary conditions, efficient agencies, and the like), but also their social class (educated professionals). Political machines were corrupt, but they also helped earlier immigrant groups get an economic foothold and a partisan identity in the United States. Today's immigrants in California have ties to local community groups, which may or may not be politicized. But they do not have access to political parties the way their earlier counterparts did. They have one less way to become informed and active citizens. Today's Progressives have to bear in mind that a middle-class, white, professional bias lurks beneath the surface of their analysis. They have to realize how their arguments sound to the newly arrived. Trust elected officials and experts in Sacramento to represent you (even as they approve

2. PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* (1999).

billions of dollars of tax loopholes for their campaign contributors). Understand their elaborate cost-benefit models (which presuppose a college, if not a graduate school, level of education). Carefully read the voters' pamphlet before deciding how to vote for dozens of people and issues (with limited English language skills and perhaps a high school education). Given the high rates of immigration in the 1980s, it will take time for newcomers to be assimilated to participatory citizenship, given language barriers and, for many, experiences with repressive governments in their countries of origin, for which Populist concepts make sense. Progressive calls to limit the initiative can sound like an elitist attempt to silence the voice of the people.

Another new condition is the ubiquity of the screen culture: information, advertisements, and entertainment courtesy of computers, television, movies, and videos. Today's informed citizens rely less on people and more on screens; they have to tune out the self-serving ads and stimulating entertainment to get at the relevant information; they can acquire phenomenal amounts of information without leaving home; they support national referenda and global democracy movements. Just as the screen culture has extraordinary democratizing potential, it can also be a vehicle for manipulation, distortion, deceit, and infotainment. But there is no denying its role in citizen education in recent years. With at least one television in most California households, citizens form their political views from news programs and talk shows, and proponents of initiatives have to go to the airways to reach the voters. Any attempt to reform the initiative process has to take as its starting point the pervasiveness of the screen culture.

There is growing evidence that the rise of the screen culture has been accompanied by a corresponding decline in personal contacts, interpersonal trust, and trust in government. Robert Putnam has written about Americans' shrinking access to the "social capital" that is the reward for community activity, sharing, and connectedness.³ Over the past twenty-five years, Americans have become increasingly disconnected from family, friends, neighbors, churches and temples, PTA, recreation clubs, and political parties. The

3. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

Washington Post conducted a study regarding citizen trust of government in 1995.⁴ It found a connection between declining trust in government and erosion of personal trust among Americans. Each generation was less trustful than the one before and government officials are equally skeptical of the citizenry. A 1998 study conducted by the Pew Research Center concluded that, "public distrust of government is paralleled by a belief among members of Congress, presidential appointees, and senior civil servants that the American public is too ill-informed to make wise decisions about important issues."⁵

In order to get out of this morass of mistrust and disconnectedness, we need to look at democracy in a new way. The Populist-Progressive schema locks us into two choices: direct democracy and representative democracy. It is time to adopt a third alternative: deliberative democracy.⁶ The products of both direct and indirect democracy can be either well-deliberated or poorly-deliberated. It should not be assumed that California's governor and legislature will automatically produce well-deliberated legislation and that the initiative process will automatically produce poorly-deliberated legislation. Admittedly, governmental institutions are the venue we most often think of as deliberative bodies: providing public accountability, the airing of different points of view, due consideration of outcomes, and weighing of public benefits. But they do not hold a monopoly as venues of deliberation. For years, the print and broadcast media, educational institutions, civic organizations, and more recently the Internet, performed similar functions. Rather than valorizing the legislative process (representative democracy) or constraining the initiative process (direct democracy), we ought to ask what reforms enhance deliberation in both cases (deliberative democracy). There is nothing we can do to prevent California governors from using initiatives to bolster their anticipated Presidential bids, or demagogues from inflaming the worst fears of voters. But trust in public officials will increase to the extent that their

4. See DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 229 (2000).

5. *Id.* at 230.

6. For a discussion of the notion of deliberative democracy, see CASS SUNSTEIN, *REPUBLIC.COM* (2001).

behavior is seen as deliberative, and the quality of initiatives will improve the more deliberative the process that produces them.

Reforms on both fronts should stem from the defining conditions for and characteristics of deliberative democracy: an educated and informed citizenry with common civic experiences; a public forum with an open airing of opposing points of view; a discussion anticipating social, economic, and political consequences of legislation; a clear and straightforward presentation of issues in language understandable by citizens; conditions that foster the exchange of reasoning; disclosure of self-interests and arguments about the general good; accountability; and building trust and the willingness to compromise.

On these grounds, for instance, one would not object to an Internet referendum because it involves too many people too directly, but rather because it is insular, cut off from other points of view. One could defend the legislature's involvement in the initiative process on deliberative grounds by providing its considered judgement of a measure, printed in the voter's handbook, aired on the radio, or in newspaper op-ed pieces. One could justify an increase in legislative policy staff on deliberative grounds. As long as we are locked into the Populist language of "bad big government" and "good small government," then anything the legislature tries to do to regain its policy-making flexibility will be criticized as "more big government." We need to shift from thinking of government as good or bad, big or little, problem or solution, to lawmaking as more or less thought through in deliberative manner.

In 1992 the bipartisan California Commission on Campaign Financing published a report on the uses and abuses of the initiative.⁷ Many of its recommendations should be promoted in terms of enhancing a deliberative democracy. First, require the Fair Political Practices Commission to hold public hearings on the merits of any initiative that had gathered a quarter of the signatures needed to qualify. Second, require the legislature to hold a public hearing on each initiative within ten days of its qualifying. Third, allow proponents to amend the initiative after the legislative

7. See BRODER, *supra* note 3, at 210-12.

hearing. Fourth, create a forty-five day “cooling off period” in which the initiative sponsors and the legislature could negotiate compromise legislation. Fifth, allow the legislature to enact the initiative during these forty-five days and the sponsor to remove it from the ballot. Sixth, require the legislature to vote on any initiative reaching the ballot, and the Secretary of State to publicize in the voter’s pamphlet each legislator’s vote. Seventh, limit the length of initiatives. Eighth, improve financial reporting, including disclosure of principal sponsors in the ads. Ninth, make the voter’s pamphlet more reader friendly.

There are many deliberative opportunities that can be provided through a reconceptualized voter pamphlet, a more responsible media, and a reinvigorated educational curriculum. Governments can increase levels of financing for public affairs programming on television. Media can increase their coverage of state politics. Schools can strengthen their programs in civic education. In the face of declining interest in political science as a major, the American Political Science Association recently embarked upon a nationwide effort to promote civic education. Universities can require a basic grounding in American government, especially by tying community-service projects to the curriculum. Public officials have to do their part to educate citizens in order to restore public trust. They should experiment with new Internet technologies to make more information about government available to the public and to provide forums for the deliberation of issues.⁸

Many California voters say they turn out on Election Day because they care about a ballot initiative. This is not the time for Progressives to put the breaks on popular interest in voting. It is the time to work for reforms that make the legislative process, both direct and indirect, more deliberative. When it comes to making policy choices for California, let’s worry less about how we proceed—directly or indirectly—and more about the deliberative quality of those decisions.

8. Many of these reforms are discussed in DEREK C. BOK, *THE TROUBLE WITH GOVERNMENT* (2001).
