Loyola of Los Angeles Law Review

Volume 31
Number 4 *Fritz B. Burns Lecture: Euthanasia, Morality & Law and Symposium on the California Initiative Process*

Article 4

6-1-1998

Symposium on the California Initiative Process: Introduction

Karl Manheim

INTRODUCTION

SYMPOSIUM ON THE CALIFORNIA INITIATIVE PROCESS

*Professor Karl Manheim**

Political reform movements swept the American states in the late nineteenth and early twentieth centuries. One of their crowning achievements was the introduction of initiative lawmaking–legislation proposed and enacted directly by the people. The initiative process was seen as a way to bypass the corruption and corporate control of state legislatures, and restore democratic self-governance in the people themselves. Today, a century later, it is debatable whether this form of "direct democracy" has fulfilled its motivating purpose, or whether initiatives have become just another tool of powerful special interests.

By their design, initiatives bypass state legislative processes entirely. In doing so, they also reject the political theory of "republican," or representative, government. Notably, the initiative and other forms of direct democracy are absent in federal lawmaking. Our constitutional framers believed that only representative government could both implement the people's will and filter out the passions and prejudices of majority factions. Indeed, the United States is one of only five democracies that has never had a national referendum.

The situation is considerably different in California and other states that allow legislation or constitutional amendment by initiative. Many sweeping and controversial laws have been enacted by initiative. These run the gamut from property taxes to capital punishment. Even more than these, racial politics has been a prime target of the initiative, from Proposition 1 in 1964 (banning fair housing laws) to Proposition 209 in 1996 (prohibiting state affirmative action). If nothing else, these acutely focus the dialectic between minority rights and majority rule.

The initiative also profoundly affects California in process terms. It affects the way the Legislature works, the way electoral campaigns

* Karl Manheim is a Professor of Law at Loyola Law School.

are waged, the way contributions are raised, and the way public opinion is formed and implemented. Hot-button focus issues, presented as initiatives, dominate the electoral process.

The importance of initiatives in guiding the political development of California has often been recognized, yet poorly understood. The goal of this Symposium is to fill some of that void. It explores the workings of the California initiative process from various viewpoints: legal, political, historical, and practical. Given that nearly any initiative of substance winds up in protracted litigation, several of the articles focus on judicial review of direct democracy.

The article by Professors Karl Manheim and Edward Howard provides a structural theory of the initiative power. It traces the political development of the initiative process, its constitutional context, and its implementation by the California Supreme Court. The authors conclude that the initiative power has been given a very wide berth, perhaps because it approximates the exercise of ultimate political power by the people in their sovereign capacity. Yet, it lacks the safeguards normally associated with assertions of popular sovereignty. Although apparently sacrosanct in legal terms, the initiative process calls into question basic principles of democratic self-governance.

The article by Craig Holman and Robert Stern explores the judicial role in reviewing initiatives. It is critical of that role in several key cases involving significant ballot measures. The authors offer suggestions on how a more deliberative judicial review process can be created, notably the reinstatement of three-judge federal courts for initiative challenges.

Professor Richard Hasen responds to the Holman/Stern article and offers an alternative solution for perceived problems of initiative review in federal court. He believes that although the existing system of appellate review provides adequate safeguard against biased decisionmaking, a more random process of judge selection might be appropriate.

The article by Michael Vitiello and Andrew Glendon also defends federal judicial review of California initiatives. Indeed, they argue, the federal judiciary better represents majoritarian sentiments than does the process of direct democracy. This is because the initiative process has been captured by the very special interests it was designed to control.

Ernest Graves argues in his article that some uses of the initiative may violate the Guarantee Clause, which requires that each state maintain a "republican form of government." While the clause in Article IV, Section 4 of the United States Constitution has been held to be non-justiciable, because it raises a political question, the guarantee of republican government is also contained in the California

Constitution, where it is justiciable. The guarantee appears both through the state constitution's explicit incorporation of federal supremacy and, more specifically, through the state charter's prohibition of constitutional revisions through the initiative process. Those initiatives that have effected a "revision" are, therefore, void.

Finally, California Assembly Speaker pro Tempore Sheila James Kuehl explores the functional political side of the initiative process. She discusses the inadequacies of law making by popular initiative, especially its rejection of legislative input. Here too the goal is to reform the initiative process to make it more reflective of the people's will, while preserving efficient and responsive government.

While not formally part of this Symposium, a recent address by Reverend Jesse Jackson to the students and faculty of Loyola Law School is also included. Reverend Jackson spoke on the impact of initiatives on civil rights and minority issues.

These articles and essays add to the dialog on the theoretical and practical strengths and weaknesses of the initiative process. While much has already been written, it remains a misunderstood tool of self-governance. At its root, the use of initiative lawmaking challenges foundational principles of democracy and the role of judicial review under majoritarian rule.

Whatever one's view on the merits of the initiative process, there is no turning back the clock to 1911 to reconsider the wisdom of Governor Hiram Johnson and his reforms. Initiatives will remain, for the foreseeable future at least, an inevitable part of the enduring dialectic between popular sovereignty and representative government.