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Drowning Democracy

Our century of voter initiatives

On October 10, 1911, a year after Californians elected Hiram Johnson as their new governor, they approved all but one of the twenty-three constitutional reform amendments that Johnson and the new legislature of Progressives had put on the ballot. Among them: women's suffrage (which passed narrowly), wages and hours laws, strengthened utility and railroad regulation, pensions for teachers and free books for schoolchildren, and perhaps most significantly in our own day, the initiative, referendum, and recall. Those reforms were to end forever the era of bribery, corruption, and corporate domination of the two previous decades, particularly by the Southern Pacific Railroad. "Big business, the Interests, the Southern Pacific . . . the unclean and vile in politics and in social and commercial life," wrote C.K. McClatchy, the editor of the *Sacramento Bee*, Hiram Johnson's friend and like him a classic California Progressive, "these no longer dominate in the halls of legislation. The money changers—the legions of Mammon and of Satan—these have been lashed out of the temple of the people." There could hardly be a better short summary of the spirit of the moment.

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Governor Hiram Johnson campaigning in 1914

And there could never have been a hope more vain. In the century since 1911, and particularly in the past three decades, the initiative process, driven by a radically changed political culture and reinforced by a spectrum of new technologies, has come close to overwhelming representative democracy. What was designed to be an exceptional remedy has become the rule of government.

Even in 1911 some weren't so optimistic. A week after the election, the *New York Times* published an editorial, "Anti-Democracy in California," that a century later seems almost prophetic:

> . . . . The new method is proposed as a check on the machines. But the strength of the machines lies in the inattention and indifferences of the voters, and the voters are sure in the long run to be more inattentive and indifferent in proportion to the number of the questions forced upon them at one time. When the machine managers get familiar with the working of the new method they will work it for their own ends far more readily than they work the present method. The average voter, muddled and puzzled and tired by the impossible task of really understanding and deciding on a mass of matters will give it up, and then the politicians will get in their fine work.[1]

To assess the *Times*' prescience, there may be nothing more timely than the nine initiatives that Californians faced on November 2, 2010, an even century minus a few days after the election that brought Johnson and his Progressives to office. In 2010 voters rejected Proposition 23, a ballot measure funded largely by out-of-state oil companies to overturn the state's model greenhouse gas emission control law; voted to lower the margin to pass a state budget from two-thirds to a simple majority; passed an initiative (heavily funded by business interests, some of them still unidentified) raising the required legislative margin to impose fees to mitigate the medical and environmental damage done by polluting industries from a simple majority to two-thirds; and, despite the state's rising $25 billion budget deficit, rejected a measure to eliminate the costly corporate tax breaks that the legislature had granted the prior year.

Part of the answer, of course, is money. Long before the 2010 election, the same kind of corporate interests—and in a few cases the very same ones—that Johnson and the Progressives promised to check with the initiative process, had become "familiar with the working of the new method [and have worked] it for their own ends." In 1990 Gerald Meral, then head of the California Planning and Conservation League, qualified a $2 billion rail bond initiative with the help of $500,000 from the very same Southern Pacific. Among the many projects it helped fund to relieve traffic congestion and reduce pollution was a rail spur south of Los Angeles to the port of San Pedro that directly benefited the SP.[2] That doesn't mean the big money always wins. In 2010, after those Texas oil companies and a group of other energy interests raised some $11 million for Proposition 23, environmentalists, conservationists, and a few venture capitalists raised $30 million in opposition, outspending the oil company sponsors by a margin of roughly three to one, and handily beat the measure. The defeat of Proposition 23 seemed to reinforce the conclusion of Daniel Lowenstein, who'd been the first chairman of the California Fair Political Practices Commission and later a professor of law at UCLA, that a disproportionate amount of money spent against a ballot measure was more likely to succeed than disproportionate spending in favor.[3]

But what's been true for most of the thirty-plus years after the passage in 1978 of Proposition 13, California's iconic property tax reduction measure and mother of all modern tax revolts, is that without big money for signature

Campaign mailers for 2010 election

collectors, direct mail firms, consultants, and pollsters—now approaching $3 million for each initiative—it's nearly impossible to get any measure to the ballot. The initiative was once supposed to be the citizen's remedy for both non-responsive government and corporate domination of elected officials. In the case of Proposition 13, when spiking local property taxes, driven by escalating real estate assessments, seemed to verge on the unaffordable for many Californians; when Howard Jarvis, the initiative's chief author, did indeed circulate many of the signature petitions himself; and when a divided state legislature and an inattentive governor dithered, it more or less worked that way.

But in the years since, it rarely has. In a large state like California, given the 150 days allowed, volunteers alone can't collect the required number of valid signatures to qualify an initiative or a referendum—currently about 434,000, a number equal to 5 percent of the votes cast in the last gubernatorial election, for a statutory initiative, or 8 percent (nearly 700,000) for a constitutional amendment. Tom Hiltachk, a Sacramento-based lawyer for Republican candidates and conservative causes, famously used to ask would-be initiative sponsors to answer the "million-dollar question." When the client asked what question, the predictable answer was "have you got a million dollars?" And that was in a cheaper era. Robert Stern, the president of the Center for Governmental Studies in Los Angeles and probably California's most knowledgeable expert on the process, suggests, only half facetiously, that it would be far easier, and better for the state treasury, if instead of requiring signatures to qualify an initiative, sponsors merely had to pay the $3 million directly to the state and save everyone a lot of trouble.

The 1911 reforms weren't the first attempt to check the power of the Southern Pacific. The "Octopus" of Frank Norris's 1901 novel (he called it the Pacific and Southwestern Railroad), the SP at the turn of the last century dominated much of California, either directly in real estate, through bribery of politicians and judges, or through its control of freight rates. As Joe Mathews and Mark Paul remind us

Protest of Proposition 23 in San Diego

in *California Crackup*, their shrewd analysis of California's early political history, the deeply divided political groups who wrote California's ragged 1879 Constitution created a railroad commission which "was easily captured by the Southern Pacific."[4] That Constitution was the second, and like the first, which dated from the Gold Rush era, it was hardly a model for democratic government. It prohibited Chinese immigration, even then an obvious violation of the Federal constitution and, in a provision similar to some that would become familiar in a number of American jurisdictions during the first years of the twenty-first century, prohibited corporations from employing Chinese workers. In fact, the 1879 constitution was such a shambles that, as Mathews and Paul note, "Much of the next half-century of political reform efforts would be devoted to undoing its worst provisions."

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The Swiss System: Lost in Translation

California wasn't the first state to embrace direct democracy. South Dakota was the earliest, in 1898, followed by Utah, Montana, Oklahoma, Missouri, Michigan, Arkansas and Colorado, then California. There are now twenty-four, all but a few in the West and Midwest, all roughly inspired by the Swiss system, which to this day remains a model for both the defenders and the reformers of the California initiative process. But in the Swiss system, the process is closely integrated with the conventional republican governmental structure, both locally and nationally, not competitive with it. Swiss referendum elections, which take place several times a year and deal with only a few issues, are separate from candidate elections. The Swiss process is also slower and more deliberative than ours, and deep-pocket private campaign money and commercial campaign organizations play little role in it.[5]

Moreover, as it has evolved over the past century, the system in California differs from that in all other states in its lack of flexibility. If it doesn't, as outlined below, allow for its own amendment, a statutory initiative once passed in California is immune to legislative revision or amendment even if serious problems turn up, without another vote of the electorate.

There have been three initiative booms in California, the first in 1914, shortly after the process was written into the constitution, when seventeen measures appeared on the ballot (still a record for a single election),[6] among them abolition of the poll tax, a ban on prize fighting, and prohibition of alcohol (which failed); another wave during the Depression, when thirty-seven were voted on, and the third, beginning in the late 1970s and running through the first ten years of the twenty-first century.[7]

The long-term pattern in the past four decades, however, has been sharply up. In the first half century—through 1960—135 initiatives made it to the ballot. In the half century since, 209 have been voted on, 10 in the 1960s, 26 in the 1970s, and over 55 in each of the last three decades, plus many hundreds more at the local level, most of them dealing with land use and zoning issues.[8] At the state level, they've addressed every conceivable subject: from tax and spending limits, criminal sentencing, school vouchers, legislative and congressional term limits, limits (sponsored by tobacco companies) on local smoking ordinances, mandatory parental notification of abortion for minors (on the ballot several times) to political campaign contribution and spending limits; from limits on union political activities and public services for illegal immigrants, the establishment of English as the state's official language, and banning affirmative action, bilingual education and same-sex marriage to environmental regulation, bonds to acquire park land, and increases in the minimum wage. Californians have also voted on liberalizing Indian gaming, on auto insurance regulation, on legalizing the medical and recreational use of marijuana (yes on the first, no on the other), and on a shift of emphasis in drug control policy from punishment toward treatment. In the 1980s, 48 percent of balloted initiatives passed, a record high; it has declined from that peak in the years since. In addition, in the past century nearly a thousand titles and summaries of other initiative proposals were cleared by the attorney general's office for circulation but failed to qualify.[9] Under current rules, anyone who pays the state's $200 filing fee can try.

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Occasionally, initiatives are spiked with poison pills for others on the same ballot. In November 1988, voters faced five auto insurance reform measures totaling some one hundred pages of fine legal print in the ballot pamphlet, roughly 130,000 words, enough to defeat even the most diligent citizen. Two were sponsored by the insurance industry, one by trial lawyers, each of which had language overruling provisions of others, and one by consumer groups and endorsed by Ralph Nader. By law, if two or more pass covering the same subject, the one with the most votes prevails. In 1988 (fortunately for clarity) only one of the insurance measures, Proposition 103, the consumer-oriented reform, passed. That reinforced the arguments of initiative defenders like Arthur Lupia (in this case at least) that even when faced with long, complicated measures, voters get useful cues from the identity of the sponsors and other "widely available information shortcuts."[10]

When more than one passes, however, even if they overlap only marginally, the sometimes-exasperated courts have

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to sort it out, which is what happened in June of 1988. In that election, Californians approved two campaign reform measures, Propositions 68 and 73, the latter largely funded by politicians to kill the public financing and tougher (and fairer) contribution limits in Proposition 68. But after the state Supreme Court ruled that they were irreconcilable, and that Proposition 73, which got more votes, therefore prevailed, the US Supreme Court held that its campaign contribution limits unfairly disadvantaged nonincumbents and invalidated its major part. Nonetheless, the state Supreme Court, noting that some provisions of Proposition 73 survived, declined to restore Proposition 68, so the key provisions of both measures were dead.[11]

In the years since, voters have passed a string of other campaign reform measures: new limits on campaign contributions; the transfer of control of the decennial reapportionment process from the legislature to an independent commission and, in the hope of reducing partisan polarization, the creation of a "top-two" open primary in which voters can vote for any candidate regardless of party and in which, beginning in 2012, the top two candidates, again regardless of party, will face each other in the general election. The evisceration of political parties that began a century ago is thus almost complete.

In recent years, Californians have also voted for prohibitions on the slaughter of horses and the sale of horsemeat for human consumption, on restrictions on the confinement of chickens and other farm animals, and on prohibition of body-gripping traps for fur-bearing animals. In 1938 and again in 1939, in the Depression, they also voted on (and twice rejected) the "Ham-and-Eggs" initiative, officially the "California Life Payments Act," dreamed up (even then) by a radio talker named Roger Noble. It would have required the state to provide a $30 check every Thursday to each Californian aged 50 years or older. Its first defeat, in 1938, may have been due more to the sleazy reputation of some of its chief backers (who had by then ousted Noble from the campaign) than to the intrinsic economic infeasibility of the measure. When its backers brought it to the ballot again at a special election in 1939, what Carey McWilliams called "this fantastic proposal" lost handily.[12]

But was "Ham and Eggs," for all its kookiness, all that different in its economic flaws from what's now called "ballot box budgeting"? In recent years, ballot box budgeting—attractive-sounding initiatives submitted to, and approved by, voters as free programs, programs sold without providing for additional taxes or other revenues to pay for them—have included billions in high-speed rail bonds, for stem cell research, and for children's hospitals, as well as an annual diversion of $500 million annually to expand California's after-school child care services. In the tough fiscal times of his administration, Governor Arnold Schwarzenegger frequently complained about the state's "autopilot" spending mandates, and occasionally tried (always unsuccessfully) to get the voters to end them, but it was Schwarzenegger himself who cosponsored the expansion of the state's after-school day care program and who endorsed the stem cell bonds. In a blistering attack in 2009 on the "dysfunctional" government that the initiative helped produce, California Chief Justice Ronald George tellingly observed that in the election of 2008, "Chickens gained valuable rights in California on the same day that gay men and lesbians lost them."[13]

The Costs of "Direct Democracy"

But the two things, perhaps three, that have most marked the modern history of the initiative process—more than the

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growing numbers of initiatives on the ballot or the huge range of issues that they deal with—are the vastly increased professionalization and commercialization of the process, and the accompanying voter distrust of conventional representative government, some, of course, fueled by the initiative campaigns themselves. Jarvis and Paul Gann, the authors of Proposition 13, may have been among the last to have qualified a ballot measure with few paid signature collectors.[14] (The most creative innovator in this business was Meral of the Planning and Conservation League, who, in addition to getting that half-million from the SP for one of his measures, bartered financial and/or signature-collecting support from scores of local and state environmental groups for the earmarked projects they wanted: parks, playgrounds, coastal preservation, wildlife preserves, bike trails, and "urban canyons." For $50,000 and 50,000 signatures, for example, the Santa Monica Mountain Conservancy would get $50 million from the bonds.)[15]

But the Jarvis-Gann campaign to pass Proposition 13 also marked a major step in the use of what later became known as the "initiative industrial complex," initially in the use of direct mail specialists with their targeted voter lists[16] and the associated campaign technologies that have since become standard elements of the political landscape. In the years since, it has evolved to the now-familiar panoply of pollsters, consultants, commercial petition circulators, media experts, and lawyers who seem to be essential to almost every successful campaign.

Some initiatives begin as pure commercial projects. In 1984, Kimball Petition Management test-marketed what became the California lottery before it ever had a sponsor, and in the absence of any popular outcry about the legislature's alleged failure to provide one, they sold the idea to Scientific Games, the Atlanta-based manufacturer of lottery tickets and other gaming materials. Scientific Games put up most of the $3.5 million to qualify and get it passed. The lottery backers' biggest sales pitch both in the campaign and in its early years was the promise that "the schools win, too," which created the widespread belief that in getting a piece of lottery sales, California's underfunded schools didn't need any more money from the state, when, in fact, the lottery money they got, roughly a third of total lottery revenues, never amounted to more than three percent of the K-12 budget and in recent years to a great deal less.[17] It was that vote that subsequently opened the door to the proliferation of Indian casinos now scattered up and down the state. In Oregon and Washington, initiative entrepreneurs like Tim Eyman have taken the process even further, sponsoring initiatives and secretly paying themselves to run the campaigns to pass them.[18]

The Speed of Deliberation

More recently the proliferation of new media—the political talkers on radio and television, the Internet and the associated unmediated, unedited electronic systems, Facebook, YouTube, and Twitter among others—have powerfully reinforced distrust of all established institutions. It's not just their propensity to instantly spread rumor, innuendo, and suspicion without check, but the fact that, as *Washington Post* columnist David Broder pointed out in his *Democracy Derailed*, they produce responses with a speed that leaves the slower deliberations and actions of government far behind. Government cannot respond at the click of a mouse.[19]

Ever since the passage of Proposition 13, which seemed to teach voters that they could indeed take government into their own hands, Californians have told pollsters that they have more trust in the initiative process than in elected government. That sentiment in itself has helped accelerate the use of the process, which in turn made the system all the more opaque and confusing. Probably the most fundamental consequence of the passage of Proposition 13 wasn't the sharp cut in revenues for local governments or its elimination of the power of local governments to raise property taxes, or even the imposition on the legislature of supermajority vote requirements for tax increases—although it did all those things—but its almost casual shift of authority from the locals to Sacramento. Because Jarvis and Gann, in rolling back and capping local property taxes—in 1978 by about 57 percent—didn't know how to apportion what was left among the thousands of

June 6, 1978: Howard Jarvis, chief sponsor of Proposition 13, signals victory as he casts his vote in Los Angeles

cities, counties, school districts, and the countless other overlapping jurisdictions that formerly had taxing authority, they simply assigned the job to the legislature (which, of course, the voters trusted less, and were more disconnected from, than their local governments). But even as Proposition 13 inadvertently centralized authority in Sacramento, the initiative process has relentlessly curtailed the ability of Sacramento and, of course, local governments to exercise it.

The reason is obvious. By their very nature, initiatives either require or prohibit specified actions of the ordinary government—supermajority votes to raise taxes, for example, or caps on spending, or restrictions on the jurisdiction of the courts through mandatory sentencing formulas and evidentiary rules. Either way they constrain it, reducing discretion. And as legislatures, governors, county supervisors, city councils, and school boards—and sometimes the courts as well—become more constrained and unable to cope, public frustration increases, producing yet more demands for ballot solutions.

Vicious Cycles

As a consequence, the past thirty years have produced vicious cycles of initiatives in which one measure leads to another. The revolt spurred by Proposition 13 with its property tax limits in 1978 led almost naturally to the passage in 1979 of Proposition 4, the Gann "Spirit of 13" spending limit, which capped growth in state and local expenditures to no more than inflation and the growth of the population. In 1987, Governor George Deukmejian, concluding that the state had reached its Gann limit, refunded $1.2 billion to the taxpayers (he sent each a check). Although it didn't amount to much for the individual (an average of $71 each), the refunds took a major chunk out of the K-12 system, which then as now got close to 40 percent of the state's general fund.[20]

In response, state school superintendent Louis "Bill" Honig, joined by the League of Women Voters and a number of public employee groups, ran an initiative, Proposition 71, to loosen the Gann limits. When it was narrowly defeated in June 1988,[21] Honig and the California Teachers Association proceeded with what became a far more important fiscal measure, which they'd qualified soon after Deukmejian's tax refund and which appeared on the November ballot as Proposition 98. While it was written to guarantee the schools and community colleges at least 40 percent of the state's general fund, with annual increases based on enrollment and other factors, its complex formulas, each for

a different fiscal and demographic situation, have not only locked up a major chunk of state revenues but confounded state budget writers ever since. And because Proposition 98 based each year's school appropriations on the prior year and then added the growth factors, governors resisted all additional un-mandated school appropriations, even when there was money, lest they get stuck with a higher base in a tight future year. Thus, Proposition 98 ironically became a ceiling as much as a floor.[22]

Not surprisingly, in tight budget years since, legislatures and governors, seeking to reduce deficits, have therefore looked to budget items not protected either by federal or state law. Not least among them: the University of California and the California State University, long the state's crown jewels, which have gotten an increasingly small share of their operating costs from the state each year; and the local governments, whose revenues the legislature and governor have effectively controlled ever since the passage of Proposition 13 and which the state has long supplemented with its own funds.[23] In response, the cities and counties have run their own initiatives to stop Sacramento's raids on what they regarded as their money. The most recent, Proposition 22, which prohibits the state from taking or borrowing fuel taxes and other funds normally allocated to local government, redevelopment or other local projects, was passed 60–40 by the voters in November 2010. (University of California presidents and regents have long talked about either amending Proposition 98 or running an initiative of their own to protect UC funding.) From Proposition 13 to Proposition 4 to Proposition 98 to Proposition 22 to. . . ?[24]

Similarly, the modern career of the initiative process is marked by fixes or attempted fixes for the unintended consequences and errors that initiative drafters overlooked. Proposition 13 spawned what I've called elsewhere a "march of plebiscites"—the extension of its freeze on increased property assessments from current owners to their children or grandchildren if they inherit their homes; the indexing of the state income tax; the elimination of most of the state inheritance tax; the Gann limits; the requirement that fees and exactions, even those imposed on chemical, liquor, and cigarette companies to mitigate the medical and environmental effects of their activities be approved by two-thirds votes in the legislature (as noted above, the latest also passed, as Proposition 26, in 2010). But Proposition 13 was also followed by ballot measures to soften or correct its consequences. The original measure effectively prohibited all local bond issues; in 1986, voters approved a legislative ballot measure that restored that authority, provided the bonds were approved by a two-thirds majority, which had been the law before Proposition 13; in 2000, after a failed attempt to lower the margin for local school bonds to a simple majority, voters approved Proposition 39, lowering it to 55 percent.

Robert Stern of the Center for Governmental Studies, who was the principal coauthor of Proposition 9, the California Political Reform Act of 1974, and the first general counsel of the Fair Political Practices Commission that it created, argues that Californians have never repealed any initiative they've passed and thus have not been fooled or misled enough to regret their votes. But uniquely among all the twenty-four states that have some form of the initiative, California's constitution provides for no sunset of initiatives and allows no legislative amendment or repeal of an initiative, even as obvious flaws appear after a period of years. Statutory measures, unless they provide for their own amendment, can only be changed with another vote of the electorate, which in most cases requires a wealthy sponsor to pay for the signatures to qualify it.

In fact, the voters, in frequently modifying measures like Proposition 13 or, in so loosening the Gann spending limit in 1990 as to largely vitiate it, have changed their minds. In 2000, the voters approved Proposition 22, a statutory initiative banning gay marriage, by over 61 percent. Eight years later, Proposition 8, the constitutional amendment reinstating the ban after the courts overturned Proposition 22, passed with just over 52 percent. Subsequent polls indicate that if a similar measure were to appear on future ballots it would probably fail. But unless the federal courts overturn the same-sex marriage ban on constitutional grounds, it will take yet another deep pocket funder to give the voters their chance to legalize gay marriage.

The Fourth Branch of Government

Yet if the voters rarely vote for outright repeal of something they've previously passed and if, as the polls show, they distrust their elected representatives more than they do the state's direct democracy, they complain consistently about the length and complexity of the measures they're asked to decide on. In the first decade of the twenty-first century,

Voters in Bernal Heights read election materials

when there were fourteen statewide elections, including two special elections for ballot measures called by the governor, they've also complained loudly about the frequency: Why don't the people in Sacramento do their jobs? Why do they keep coming to us? In 2010, for the first time since PPIC, the nonpartisan Public Policy Institute of California, asked the question, a majority of respondents—55 percent—also said they distrust their fellow voters to make good decisions in ballot box policy making.[25] More crucial (and ironic) is that the voters' distrust stems in considerable part from the jurisdictional complexity and opacity they have themselves imposed on the processes of government. Who's responsible if the streets don't get paved or the school is in disrepair or there are no textbooks in the classroom? Is it the local authorities for mismanagement or the state for failing to provide enough funds?

A system where one institution provides the revenues and another spends it is an open invitation to irresponsibility and buck-passing, and in which even the most diligent citizen is quickly confused and alienated. Political scientists Bruce Cain, director of the Washington Center of the University of California, and Roger Noll of Stanford argue cogently that many of California's chronic budget problems lie in that toxic mix of state and local irresponsibility:

> Total revenues to all governments as a percentage of income [in California] are very near the national average. The state spends less than the average for other states, but local governments spend much more. High local expenditures are financed by revenue transfers from the state that account for about 40 percent of the state's budget. The cause of California's unusual fiscal relationship is decades of initiatives that more severely constrain local revenues than state revenues. The state has responded by creating a system of state-local transfers that allow local governments to face a form of soft budget constraint, leading to excess local spending and lack of clear accountability for the state's recurring fiscal crisis. Because the cause is the cumulative effect of numerous state-wide initiatives, the

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> only plausible cure is initiative reform and revision of numerous initiatives, which most likely can be accomplished only through a state constitutional convention. All other pending reforms are at best palliatives, and many would make the fiscal situation worse.[26]

It's sometimes true, as the defenders of the initiative argue, that the failures, inaction, or malfeasance of government prompts initiatives. But is inaction always bad and for how long is inaction tolerable or even desirable? Who can argue that the twenty-six states that don't have the initiative—including Minnesota, Iowa, Wisconsin, North Carolina, New Hampshire, Vermont—are in worse shape or more poorly governed than those that do? California's modern history suggests something altogether different—that the state is caught in a cycle in which governmental problems and ballot remedies follow one another like chickens and eggs. From Gann, as we've seen, to a tax refund, to a strict school-funding formula, to ballot measures to protect local funds; from an alienated citizenry to legislative term limits, to a legislature of newcomers and inexperienced freshman committee chairs ever more dependent on the interest groups that try to influence them; the cycle keeps turning.

Along the way, the initiative has become both part of electoral politics and a fourth branch of government. In 1994, Governor Pete Wilson, then behind in his run for re-election, embraced two divisive initiatives against his opponent, Kathleen Brown, a traditional liberal Democrat who opposed the death penalty.[27] One of the Wilson-backed initiatives was Proposition 184, a tough-on-crime three-strikes prison sentencing measure; the other was Proposition 187, which sought to deny all state services, including schooling, to illegal immigrants—and made them central elements of his campaign. They automatically put the liberal Brown on the defensive and Wilson easily won.[28]

In 1995, planning to run for president the next year and looking for traction in the primaries, Governor Wilson, again relying on wedge-politics, was instrumental in first pressuring the University of California regents to end race preferences in UC admissions and, the following year, in raising funds to qualify and pass Proposition 209, which prohibited all race-based public affirmative action in hiring, contracting, and education in California. In the same years Silicon Valley millionaire Reed Hastings, a smart and earnest school reform advocate, collected enough signatures to qualify an initiative that would have greatly expanded the number of legally authorized charter schools, but withheld the signatures to successfully pressure the state's heretofore resistant Democrats and the California Teachers Association (CTA) to accept a somewhat more moderate charter school expansion bill. In his battle with the Democratic legislature in 2005, on the other hand, Governor Schwarzenegger tested the limits of the strategy with five initiatives in a special election he called for the purpose—and lost with all five.

The Role of the Courts

Backers of the initiative, Robert Stern among them, have occasionally complained that the courts have meddled too much in the process. As a result, wrote Stern and Craig Holman in 1998 after a federal judge temporarily blocked Proposition 209, the initiative ending affirmative action, "the refrain 'why should I vote for the initiative when the courts will just throw it out' is increasingly heard. At the same time, voters are losing confidence in the judiciary—a branch of government that has historically been held in high esteem."[29] Among other things, Stern and Holman endorsed the idea that any federal court review of an initiative

2005 political poster by Dan Wood

should involve a panel of three judges. Even sharper attacks have come from conservatives like Edwin Meese, President Ronald Reagan's attorney general. "In the past few years," he wrote in the course of a broader attack on federal judges in 1997, "some of the most egregious federal judicial decisions have involved initiatives passed by the people themselves."[30]

In California, these arguments are at least debatable. While courts in states like Florida, where initiatives are routinely subject to judicial review before they go on the ballot, have often strictly scrutinized initiatives, in California that's rarely been the case. On a couple of occasions in the past generation, the California Supreme Court found that a measure violated the constitutional rule that an initiative must be devoted to a single subject and ordered it removed from the ballot (the constitution also prohibits revising, as opposed to amending, the constitution by initiative, likewise a slippery distinction). In 1999, for example, the court struck down an initiative that combined a new legislative redistricting scheme with cuts in legislative pay and per diem expenses, and in 1994 a federal judge ruled that much of Proposition 187 (on illegal immigration) violated the federal Constitution's equal protection clause.[31]

But with a few such exceptions, the courts, despite California Chief Justice Ronald George's vehement ex cathedra attacks on the process, have been remarkably diffident. The California court held that Proposition 13, even in its gutting of home rule and its great shift of authority to Sacramento, was not a revision.[32] And it found that Proposition 8, the constitutional initiative passed in 2008 barring same sex marriage, was just an amendment of the state constitution and not a revision of its fundamental guarantee of equal projection. (It was a federal judge who, in a case still on appeal, subsequently struck it down.)

Nor did the US Supreme Court, notwithstanding Justice John Paul Stevens's vigorous dissent, find any violation of equal protection or other constitutional guarantees in Proposition 13.[33] It acknowledged that the measure, in freezing property assessments at the purchase price, created vast differences in the assessments of similar or identical properties, depending on when they were acquired, meaning that some residents were paying far more for public services than their neighbors in nearly identical homes. But in the court's judgment those inequities didn't overcome, in Justice Harry Blackmun's words, the state's "legitimate interest in neighborhood preservation, continuity and stability." In other cases since, the federal court has also stretched to protect the initiative process, striking down Colorado laws that sought to restrict or prohibit the use of paid signature collectors, even those from out of state, as constitutional violations.[34]

Right-leaning critics like Meese (who in view of the conservative judicial activism of today's Supreme Court justices might now hold a somewhat different position regarding judicial restraint) seem to believe that because initiatives come from "the people" they deserve more deference from the courts. But writers like the late Julian Eule of the UCLA Law School argued quite the opposite. Because initiatives are enacted without the "constitutional filtering system" of conventional legislation, Eule said—no public committee hearings, no two-house agreement, no executive veto, no inherent politician's impulse not to offend anyone—"courts must play a larger role . . . because the judiciary stands *alone* in guarding against the evils incident to transient, impassioned majorities that the Constitution seeks to dissipate."

What he called a "harder look" was particularly necessary when the rights of minorities are affected." His article, in the *Yale Law Journal*, was published in 1990—before the passage of Proposition 187, which sought to deny all public services to illegal immigrants, and before Proposition 209, the measure banning race preferences in affirmative action—which makes it all the more telling.[35] But in a state like California, where appellate judges are subject to recall (another of Hiram Johnson's reforms in 1911) and to periodic reconfirmation by the voters, ruling on voter-approved initiatives, can be (as the late California Supreme Court Justice Otto Kaus colorfully put it) like shaving in the morning and discovering an alligator in the bathtub.[36] In 1986, an intense political campaign resulted in the non-confirmation of three high court judges.

Perils of the Demographic Gap

Yet if public distrust of government, reinforced by the new media, has helped drive the growing use of the initiative process in the past thirty years, there may be yet another, less obvious factor in play, and that's California's rapidly changing demographic and political landscape.

By the 2000 census, California no longer had a non-Hispanic white majority; by 2010, the population was just under 43 percent white, 37 percent Latino, and roughly 12 percent Asian, a majority-minority state. But the electorate was still over 62 percent non-Hispanic white, most of it older and more affluent than the general population, leaving a large gap between voters and those particularly dependent on public services—schoolchildren and their parents, low income workers reliant on state-supported child care, Medi-Cal recipients. That gap tends to reduce voter and taxpayer incentives to provide generous public services—particularly when the beneficiaries are thought to be illegal immigrants. "The more a middle-income voter looks at the likely recipient of public aid and says 'that could be me' (or my daughter or my whole family)," wrote economist Peter H. Lindert, "The greater that voter's willingness to vote for taxes to fund such aid."[37] Similarly, in the view of Harvard economist Alberto Alesina and two colleagues, "shares of spending on productive public goods—education, roads, sewers and trash pickup—in US cities . . . are inversely related to the [area's] ethnic fragmentation."[38] As a journalist writing about crowded schools and tight budgets I frequently received mail arguing that those problems wouldn't exist if it weren't for all the illegal aliens. In 1978, shortly after the passage of his Proposition 13, Howard Jarvis wrote an op-ed piece for my paper about "illegal aliens who just come here to get on the taxpayers' gravy train."[39]

Because legislative and congressional districts are apportioned by population, not by the number of voters, and because poor urban districts with large minority, poor or immigrant populations have a much smaller number of voters per resident than the white affluent suburbs, the legislature looks more like the population than the electorate and tends to be more liberal and Democratic. Thus, the initiative becomes an attractive device for the older, whiter, more affluent electorate to trump the legislature, both on economic issues like taxes and spending and on divisive social issues like crime, immigration, and affirmative action. What became Proposition 209, banning affirmative action, first known as the California Civil Rights Initiative, was bottled up for years in the legislature in the early 1990s before it became an initiative and reached the ballot. The same was true of measures tightening the state's criminal sentencing and law enforcement policies during the crime panic years that began in the mid-1980s. In the 1980s, the Assembly Criminal Justice Committee was sometimes known as the graveyard of law enforcement reform.

As the percentage of "minority" voters continues to increase, the gap will shrink. That doesn't necessarily mean a more liberal electorate. Latinos have traditionally been socially conservative, especially on abortion and similar family issues—in 2010, they also voted overwhelmingly against Proposition 19, the initiative that would have legalized recreational marijuana. The great majority of today's Latino voters are Democrats, but assimilation and naturalization—home ownership, for example, or business interests—may lead to a gradual embrace of more centrist, even conservative, politics as well. But for more than a century, the Republicans' ethnic self-isolation and nativism on immigration, more than any social or political issue, has driven immigrants into the arms of the Democrats, and it continues to do so. It happened after Pete Wilson's 1994 reelection campaign with its televised ads warning that "they keep coming," and it's happening now with the Republican Party's resistance to the DREAM Act and its pursuit of tough state and federal law enforcement against illegal aliens. In any case it's likely that as the gap between the

2010 political graffiti stenciled on sidewalk

statewide electorate and the composition of the legislature shrinks, the use of the initiative will shrink with it. But the change is still coming slowly.

The Roadblocks to Reform

In the past couple of decades, as problems have accumulated and dissatisfaction with the initiative process has grown, there have been all sorts of proposals for reform, some from official commissions, among them one established by Assembly Speaker Robert Hertzberg in 2001–2002, another from a constitutional revision commission in the 1990s, others from legislative committees and individual legislators, still others from the Center for Governmental Studies, the California Commission on Campaign Financing with which it was affiliated, and other independent public policy groups.

Among the recommendations: creating a second, indirect initiative process requiring fewer signatures that "would provide for legislative review, amendment and possible enactment prior to consideration by the voters," similar to what California once had but which was abandoned; allowing legislative amendments to initiatives after passage, provided they're consistent with a measure's intent; providing more information in the ballot pamphlet and elsewhere about the sources of funding for a measure; a requirement that any initiative that imposed a supermajority vote for taxes or other policies had also to be passed by a supermajority vote; a 5,000-word limit on all ballot measures; lengthening the time allowed to qualify a measure to allow volunteers to collect the signatures; strengthening the single subject rule for initiatives and requiring the attorney general to verify them for compliance before they were circulated; a requirement that any ballot measure that costs money identify the revenue stream to pay for it.

The list runs on. In the past century, the legislature on several occasions adopted reforms, twice lowering the time allowed to collect signatures, first from the original unlimited period to two years, then again to the current 150 days. But not one of the more recent ideas has been adopted, in part because of interest group pressure, in part because of ideological differences, and, where reforms require constitutional amendments, because they need two-thirds majorities in the legislature to get to the ballot. Nonetheless, in 2010–2011, a number of legislators were trying again.[40]

In the past century, California has grown a convoluted governing nonsystem that combines the hyper-democracy of the initiative process with the increasingly constricted representative democracy of the formal elective governmental system, most of it imposed by direct democracy. Given that complex structure, none of those reforms, or even all together, may be sufficient. If an extraterrestrial came to California, Mathews and Paul shrewdly contend, he would find not one governmental scheme but three: a system of single-member districts elected by plurality designed to create a majority and let it rule. Superimposed on that: a second (initiative-created) system of supermajority requirements to raise revenues (and until 2010 to approve spending), the very things "over which the parties and the electorate are most polarized. The driving principle of this second system? Do nothing important without broad consensus. In practice let the minority rule." And then on top of that, "in response to gridlock, voters have repeatedly used the initiative process, another majoritarian institution, to override the consensus principle, which was itself put in place to check the majority-rule principle."[41]

The ultimate effect of that dynamic, ever more clear after California's experience in the past three decades of direct hyper-democracy, is not just to cloud government accountability but, in the end, the accountability of the

It's the voters who, as much as anyone in our time, have created the dysfunctional nonsystem that we all complain about.

voters themselves. The idea sounds almost oxymoronic—how can the voters, who are the source of all legitimate authority, ever not be accountable? They can't be recalled, or impeached, or otherwise run out of office. But it's the voters who, as much as anyone in our time, have created the dysfunctional nonsystem that we all complain about. And since (mea culpa) the media are so dependent on the patronage and good will of their readers and viewers, they'll indict almost any culprit on the list of usual suspects—campaign consultants, corporations, unions, "special interests," the economy, politicians—before they'll pin the blame on the avarice, narrowness, biases, or lack of civic wisdom of the voters themselves.

Because they didn't trust the mass of ordinary citizens, the framers of the US Constitution created a system of checks and balances that was supposed to work as slowly and with as much difficulty as possible. But there have been moments in our history when shrinking democratic majorities have used or created similar instruments to retain power against the immigrant or ethnic minorities growing around them. In Massachusetts at the turn of the last century, the old Yankees created state-controlled finance committees to check the power of the upstart Irish then beginning to take over Boston. A similar impulse contributed to the adoption of civil service and other reforms against Tammany Hall and other urban political machines. And in the South after emancipation, the list of devices instituted by whites to check the power and rights of blacks is notoriously long. Many were, of course, only temporary expedients: the Irish in Boston soon learned to turn the civil service system to their own advantage. Currently, in state after state, conservatives are trying to impose new means—requiring photo IDs for example—to keep immigrants and minorities from the polls.

During the past four decades, as its social and demographic complexion has changed, something similar has taken place in California. The initiative process is a wholly majoritarian system; by definition, minorities, even large minorities, can't use it unless they command overwhelming financial resources. That doesn't necessarily mean that even voters who support measures like California's Proposition 209, which ended affirmative action, or Proposition 187, which sought to deny all public services to illegal immigrants, are racists. But when the majorities on the voter rolls are made increasingly uncomfortable by the new unfamiliar world growing around them, and when that world threatens to become ever more influential in the conventional political process, the initiative lends itself naturally to the political impulse to keep it at bay. Link those impulses to the great array of new campaign technologies, to the new media, and to the vast economic and political power of corporations and other interest groups, and it's apparent even to a growing number of voters that the cheering a century ago about the onset of direct democracy was more than a bit premature. **B**

Notes

1 "Anti-Democracy in California," *The New York Times*, 18 October 1911.

2 Kenneth Reich, "California Elections: Ballot Measures Propositions 108, 116 Would Fund State Rail Systems," *Los Angeles Times*, 28 May 1990. Peter Schrag, *Paradise Lost: California's Experience, America's Future* (Berkeley: University of California Press, 1998, 1999, 2004), 219.

3 Daniel Lowenstein, "Campaign Spending and Ballot Proposition: Recent Experience, Public Choice Theory and the First Amendment," *UCLA Law Review* 29, February 1982, 29.

4 Joe Mathews and Park Paul, *California Crackup: How Reform Broke the Golden State and How We Can Fix It* (Berkeley: University of California Press, 2010), 24. The first, written in 1849 at the time of the Gold Rush, was no model either. "Its greatest virtue," said Mathews and Paul, "is that it existed at all" (p. 20).

5 For a comprehensive recent description of the Swiss system, see Bruno Kaufmann, Rolf Büchi and Nadja Braun, *Guidebook to Direct democracy in Switzerland and Beyond* (Marburg, Germany, the Initiative and Referendum Institute, Germany, 2008).

6 A record that requires an asterisk, since in later years initiatives could be voted on both in primaries and in general elections, which was not the case in the early years. The record was

broken in 1988 and 1990. In both years, a total of eighteen measures appeared in a single (primary and general) election cycle. I must also remind readers that not all propositions on the ballot are initiatives; many, particularly state bond issues, are put there by the legislature, as required by the constitution.

7 Most of the historical initiative data is from the archives of the California Secretary of State (http://www.sos.ca.gov/elections/init_history.pdf), from the Hastings College of Law Database (http://www.sos.ca.gov/elections/ballot-measures/hastings-college-of-the-law-databases.htm), and from my own reporting and records during the past 35 years.

8 Local initiatives, which this piece does not deal with, are themselves a fascinating subject that's gotten far too little attention either from journalists or scholars.

9 Data from "History of California Initiatives," Office of the Secretary of State, http://www.sos.ca.gov/elections/init_history.pdf (accessed December 2010).

10 Arthur Lupia, "Shortcuts vs. Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections," *American Political Science Review*, vol. 88, no. 1, March 1994, 63–76.

11 "U.S. Judge Voids California Limit On Political Campaign Donations," *New York Times,* 26 September 1990. Bob Egelko, "A Low Profile Court," *California Journal*, June 1994, 38. Peter Schrag, *California: America's High-Stakes Experiment* (Berkeley: University of California Press, 2006, 2008), 291–292. n.101. Because the federal court upheld parts of Proposition 73, the state court reasoned, those parts were still valid, thus avoiding the unpleasant (and un-judicial) task of trying to fuse Proposition 68 with what was left of Proposition 73. .

12 Carey McWilliams, *Southern California: An Island on the Land* (Layton, UT: Gibbs Smith, 1946), 304–308. R. Michel Alvarez, William Deverell, and Elizabeth Penn, "The 'Ham and Eggs' Movement in Southern California: Public Opinion on Economic Redistribution in Southern California in the 1938 Campaign," Center for the Study of Law and Politics, USC Law School and California Institute of Technology, Working Paper No. 12, 21 February 2003. http://lawweb.usc.edu/centers/cslp/assets/docs/cslp-wp-012.pdf (accessed December 2010)

13 Ronald M. George, "The Perils of Direct Democracy: The California Experience," Remarks Prepared for Delivery at the American Academy of Arts and Sciences, Cambridge, MA, 10 Octpber 2009. http://www.scribd.com/doc/21055122/Ronald-George-s-speech-in-Cambridge-10-10-2009 (accessed December 2009). It's a speech worth reading. Also see Peter Schrag, "The Court, the Initiative Process and the Crocodile in the Bathtub," *California Progress Report*, 14 October 2009. http://www.californiaprogressreport.com/site/?q=node/90.

14 There were a few others who made partial use of volunteers later, about which more below.

15 Not surprisingly, Meral's tactics caused an uproar, with complaints from legislators and others that special interest groups were setting policy priorities—that this was a form of logrolling, bordering on bribery. But in fact it wasn't all that different from normal legislation and appropriations for public projects: a road in your district for a bridge in mine. Schrag, *Paradise Lost*, 218–219.

16 Lists segregated by interest groups and campaign mailers targeted to those interests.

17 *Democracy by Initiative: Shaping California's Fourth Branch of Governmen, 1st edition* (Los Angeles: The Center for Governmental Studies, 1992), 67. Schrag, *Paradise Lost*, 198.

18 On Eyman, see, e.g., Neil Modie, "Eyman Paid Himself $165,000," *The Seattle Post-Intelligencer,* 1 February 2002.

19 Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (New York: Harcourt, Inc. 2000), 242

20 Deukmejian could have finessed the issue, or at least delayed it, but Deukmejian was a principled conservative.

21 The Gann limit was revised, more or less as Proposition 71 had proposed, with yet another ballot measure, Proposition 111, that voters approved in June 1990.

22 Proposition 98 made for all sorts of unwise policy choices. In the late 1990s, a sudden spike in state revenues forced Governor Pete Wilson, under the terms of Proposition 98, to devote a major chunk to schools. Having been consistently attacked by the CTA, the California Teachers Association, for the state's large class sizes and not wishing to simply throw the additional money on the local bargaining table for the union to gobble up, Wilson hastily muscled a rigid "that'll show 'em" class size reduction formula through the legislature. It was passed with hardly any supporting evidence for its educational benefits and has bedeviled local districts ever since. Ironically, of course, in requiring the state to hire some 20,000 new teachers, many of them inexperienced, the plan gave the CTA thousands of new members.

23 That made the state a disproportionate provider of local revenue and the cities and counties the largest spenders, further confounding fiscal accountability.

24 See, e.g. Larry Gordon, "Honig, UC Regents Clash on Funding Changes," *Los Angeles Times*, 17 May 1989.

25 "Californians and their Government," *PPIC State Survey*, December 2010, 18.

26 Bruce E. Cain and Roger Noll, "Institutional Causes of California's Budget Problem," *California Journal of Politics and Policy* (an electronic journal) vol. 2 (2010) issue 3. http://www.bepress.com/cjpp/vol2/iss3/1/.

27 Brown was the daughter of former Governor Pat Brown and sister of Jerry Brown, the once and future governor, then sometimes still remembered as Governor Moonbeam. She referred to herself as "a different shade of Brown."

[28] But as we've since learned, Wilson's strategy, in alienating Latinos and prompting many to become naturalized and register to vote (largely as Democrats), cost his party dearly and still does.

[29] Craig Holman and Robert Stern, "Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts," *Loyola of Los Angeles Law Review*, vol. 31 (June 1998), 1239.

[30] Edwin Meese III, "Putting the Federal Judiciary Back on the Constitutional Track," Special Report to the Senate Judiciary Committee, Brief No. 29, 30 June 1997. http://www.leaderu.com/socialsciences/meese.html (accessed December 2010).

[31] *Senate of the State of California v. Bill Jones*. 21 Cal.4th (1999) 1142. It was widely speculated at the time that the main reason for the decision was the court's aversion to what was obviously the initiative's central purpose—transferring the redistricting power from the legislature to the court itself, a political chore that the judges would much rather avoid. The other provisions were bait for voters, most of whom have never cared much about reapportionment or most other political process issues.

[32] *Amador Valley Joint Union High School District v. State Board of Equalization* 22 Cal.3d 208 (1978). George was not on the court at the time of the *Amador Valley* decision. He retired at the end of 2010.

[33] *Nordlinger v. Hahn*. 505 U.S. 1 (1992).

[34] e.g., *Meyer v. Grant*, 486 U.S. 414 (1988).

[35] Julian N. Eule, "Judicial Review of Direct Democracy," *Yale Law Journal*, vol. 99 (1990), 1503.

[36] Maura Dolan, "Otto Kaus Dies: Former Justice on State High Court," *Los Angeles Times*, 13 January 1996.

[37] Peter H. Lindert, Growing Public: *Social Spending and Economic Growth Since the Eighteenth Century* (Cambridge: Cambridge University Press, 2004), 187. Lindert is a professor of economics emeritus at the University of California, Davis.

[38] Alberto Alesina, Reza Baqir, and William Easterly, "Public Goods and Ethnic Division," *Quarterly Journal of Economics*, vol. 114, no. 4 (November 1999).

[39] Howard Jarvis, "Illegals Take Free Ride on Gravy Train," *Sacramento Bee*, 17 September 1978.

[40] "Final Report," The Speaker's Commission on the California Initiative Process, January 2002. http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/CA%20Commission%20-%20Final%20I&R%20Report%20IRI.pdf (accessed December 2010). *Democracy by Initiative: Shaping California's Fourth Branch of Government*, 2d ed. (Los Angeles: The Center for Governmental Studies, 2008). "Assemblyman Mike Gatto Introduces Five Proposed Constitutional Amendments to Fix the Ballot Initiative Process,' Press Release from Mike Gatto, 10 Decemebr 2010.

[41] Mathews and Paul, *op.cit.*, 10.