Does California's Initiative Process Need to be Reformed?

VOICES OF REFORM

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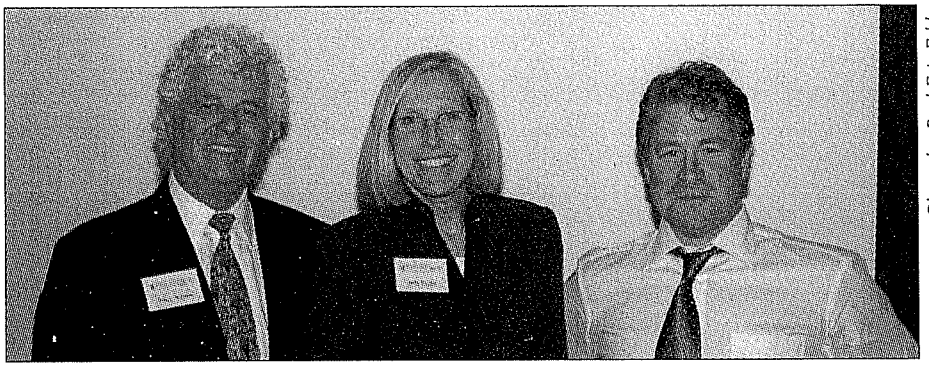

Photos by Paul Eric Felder

From left: Tracy Westen, Judy Nadler and Harvey Rosenfield.

California's initiative process was established in 1911 by reformers in the Progressive movement (many of whom were founders and early activists of The Commonwealth Club). The initiative has been popular ever since. Nonetheless, nearly 75 percent of the public believes changes are needed. On Election Day, voters encounter initiatives that are complicated and, in some cases, expressly intended to deceive. And qualifying a measure for the ballot in the first place costs millions of dollars, putting the process out of reach for the majority of Californians. Some experts have asked whether this process still works, and whether it could be updated to better serve the public interest.

Judy Nadler: I'm sure you all know about the initiative process, but I want to let you know that actually it didn't start with Prop. 13, although most people in other parts of the country seem to think that that is how it started. You may know that back in 1911 a special election was called by the governor that established the initiative process. It is one that has grown considerably, not only in the number and scope of the issues that have come before the voters in California, but about the time that my voter's pamphlet is going to arrive I wonder, *Should I bring the wheelbarrow out to the mailbox?* – because it can be quite an awesome tome to try to go through all of the initiatives. The direct initiative process allows citizens to bypass the Legislature and go to the public; and then there is the indirect way, where you go before the Legislature and the Legislature places that initiative on the ballot. It is important to know that you are making public policy when you go to vote on these initiatives, and that it is long lasting, far-ranging, and you want to make sure you understand that as we proceed.

Tracy Westen: California's ballot initiative process is now almost 100 years old – and boy, does it have problems. Critics argue initiatives are too long and complex, that voters lack the capacity to understand them, that they're too inflexible, that proponents can't amend them to correct errors before the ballot, and the Legislature can't amend them after enactment, leaving the public stuck for decades with ill-conceived measures. The Legislature is excluded from the process, with no incentive to negotiate, since the proponents can't change the text anyway. The circulation process has become distorted; collecting signatures from the supermarket is outmoded and expensive in the Internet era, and that money distorts the process. It takes $1 million-plus to qualify an initiative, but if you have that kind of money you can probably qualify virtually anything. On the other hand, hundreds of millions are spent during the campaign, often on misleading TV ads. Sometimes the expenditures are lopsided, one-sided, leaving the public unsure of the truth.

Voters lack information. It takes about 12 hours for the average voter to read the ballot pamphlet. And that's not including the text of the messages; that's just all the other materials. On top of this, the United States Supreme Court has (ill-advisedly, in my view) made reforms more difficult. It's declared that contribution limits on the amounts of money given to ballot-measure committees are unconstitutional. It has also said that bans on paid signature gatherers are unconstitutional, as abridgments of free speech. So, those two remedies look like they're off the table. And finally, the FCC (in an incredibly wrongheaded decision, in my view) repealed the Fairness Doctrine as it applies to ballot-measure committees. What that meant, when it was in effect, is that if one side has a lot of money to spend on paid ads, the broadcaster was

required to present some time on the other side so the public at least heard contrasting views; not equal, but maybe a ratio of 1-to-3, 1-to-4. That's gone as well. We can't limit the money, we can't limit paid signature gatherers, and there's no longer a check in the broadcasting industry to make sure voters hear both sides.

Some argue the initiative process should be eliminated altogether, or at the very least it ought to be harder to qualify them and they ought to be cut back. I disagree with that, and the California Commission on Campaign Financing, which Bob Stern and I both worked on, produced a report. We disagree for these reasons: First, the public overwhelmingly wants the initiative process; they support the initiative process over the legislative process almost by a ratio of 2-to-1. Secondly, it's still needed. The Legislature is often blocked by special-interest money, term limits are having a problem, redistricting is having a problem. Until the Legislature becomes truly responsive, the ballot initiative process is there as a safety valve; that's what it was created for and

that's what it is still used for. In fact, the number one category of ballot measures passed over the last 70, 80 years has been government reform itself. It's very difficult for the Legislature to reform itself, and that's one of the key reasons for the initiative process.

Since 1911, the U.S. Constitution has been amended 11 times, the California Constitution over 425 times, the ballot initiative process virtually none – once, in 1966. We think it's time that the ballot initiative process be modernized and brought into the 21st century and integrated with the other structures of government.

What are some of the changes? First, a small one, but it may be useful: Initiatives ought to be capped at 5,000 words or less. Easier to read, shorter, they prevent advocates from paying money to buy their provisions into the measure and it delegates more discretion to the Legislature or to an administrative body. Instead of trying to write every single measure in high detail, pass them in broad brush, leave the administration with some flexibility.

Second: Require a legislative hearing once the measure qualifies for the ballot. That will expose the problems early to public view, and it will force the Legislature to engage, to a certain extent, in the content of that measure.

Third, more controversial, more important: Allow the proponent to make minor amendments to the initiative after it qualifies for the ballot but before it goes on the ballot. Why? To let them correct problems that they overlooked, errors, contradictions, omissions. The process of circulating a ballot measure is when everybody begins to focus on it, and that's when they begin to identify problems. Today, the proponent has to say, "What problems? There aren't any problems, it's perfect," knowing all along that they've missed stuff. This would allow them to fix deficiencies. But we would say you could only amend that initiative if it is consistent with the purposes and intent of the initiative. In other words, you can't throw it out and substitute a brand-new initiative. Bill authors can amend bills; we think proponents ought to be able to amend their bills as well.

Four, and maybe the most important: We want to encourage the Legislature to negotiate with the proponent of the initiative before the election to see if they can reach a compromise. If they can reach a compromise, the proponent can then pull it off the ballot and the Legislature enacts legislation as a substitute; maybe it's 80 percent, maybe it's 85 percent. If there's no compromise, the proponent still has full power to put it on the ballot after all; it just gives him an option of negotiating. Under California law today, once it qualifies, it has to go on the ballot even if the proponent then thinks it's a mistake or thinks that there's a better way of going about it. We want to give the proponent the flexibility to negotiate with the Legislature to see if they can reach a compromise. California has the most rigid system of any state; this would catch mistakes, encourage legislative compromises and allow the parties to fix errors. And it takes nothing away from the proponent; if they don't like the deal, put it on the ballot.

Fifth, perhaps the most controversial: We would allow the Legislature to make amendments to initiatives after enactment – but under certain restrictive conditions. First, they should only be allowed to do it by a supermajority, and we suggest 60 percent. Secondly, the amendments have to be consistent with the purposes and intent of the initiative; they can't repeal it, they can't substantially change it, they have to be corrective amendments. The Political Reform Act allowed the Legislature to make amendments. It's been amended 150 times without significant problems. Imagine if those 150 amendments had to all be circulated by initiative; it's completely unworkable. So we would build flexibility in before and after passage. We might also say that if the Legislature amends it and the proponent

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doesn't agree and wants to challenge it, the proponent gets attorney's fees if they win. Or possibly even the proponent would have a veto over the amendment. That's a little more problematical; how do you find them 30 years later? In other words, there ought to be some amendability built in. All other states allow some sort of legislative amendment afterwards. California is the only one that forces a second initiative to amend the first.

Sixth: Extend the circulation period from 150 to 180 days. The problem now is that initiatives are too easy to qualify with money and too hard to qualify without money. If you have $1 million, $2 million, you can qualify anything. If you're a citizens group, if you rely on grassroots volunteers, it's extremely difficult to qualify in 150 days. We have virtually the shortest circulation period of any state. By extending it a month, you give a little more power to the citizens groups to qualify, you don't do anything for the big-money groups.

Seventh: Explore alternative measures of circulation, such as online circulation.

Eighth: We need to improve voter information. We would disclose the top two contributors on the circulation, the signature – we'd put that at the top, we'd disclose them on slate mailers and in TV ads. We'd ask the secretary of state to allow proponents and opponents to videotape statements and put them on the secretary of state's web site. We would require all legislators to vote up or down on every measure that goes in the ballot and print their votes in the voter's pamphlet. Finally, we would ask the state to petition the FCC to reinstate the Fairness Doctrine for ballot measures.

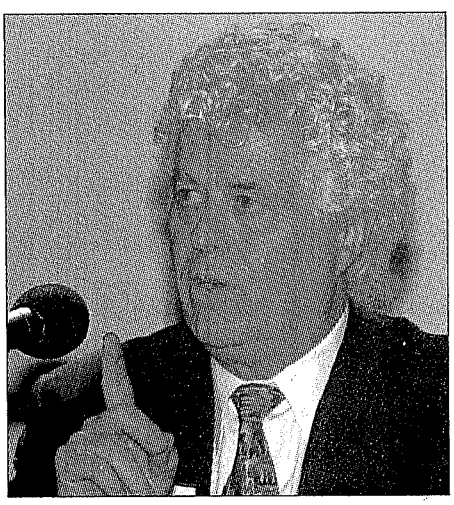
Ninth: Let's try a high-contribution limit, on contributions of $100,000, and let's try another test in the United States Supreme Court.

And finally, we would say no initiative can require a supermajority vote unless it itself passes by that same supermajority vote. That would put an end to 51 percent saying that in the future you can only amend it by a two-thirds vote, which is highly undemocratic.

Harvey Rosenfield: As the author of Prop. 103 and a proponent of measures to reform HMOs and stop the worst parts of electricity deregulation, I have always resisted proposals to "reform" the initiative process. I've always felt that they would not improve things and, in fact, might make things worse. Today, however, I am in the position of reversing a 20-year record of being against initiative reforms, and I'll tell you why.

Arnold Schwarzenegger has, in the last six months, done more to undermine and corrupt the initiative process than any other individual or event since it was first enacted in 1911. Next week, Schwarzenegger is expected to announce a special election this November for a vote on his ballot propositions. Never before, as far as I can find in the history of California, has a sitting governor invoked his constitutional authority to call a special election when the only purpose was to vote on measures he himself has sponsored. There is no public urgency or other extenuating circumstance that would require taxpayers to pay $80 million for Mr. Schwarzenegger's personal election in November. Rather, it's clear that Mr. Schwarzenegger is calling this election for his own political and partisan purposes. There's nothing in these initiatives that can't be done in November 2006.

Why is Mr. Schwarzenegger doing this now? Number one: It has allowed him to surreptitiously collect $40 million in donations, largely from special interests, that he couldn't do under state rules that prohibit donations to legislators or to elected officials of over $25,000 per person. Number two: By holding the special election this year, Schwarzenegger is trying to evade a rule that prohibits any candidate for public office from appearing in a commercial for an election in which he is on the ballot. And of course, the special election avoids that problem; he's not on this ballot, but he'd be on the November ballot or on the primary ballot in 2006. Here are two frames from Mr. Schwarzenegger's latest campaign commercial: Notice that there's a bottle of Arrowhead in the top frame and a Pepsi in the bottom frame. Anybody who works in the political environment knows that no campaign commercial ever visualizes a product, because they would be instantly sued by the maker of the product, who didn't want to be associated with it. It turns out that one of Mr. Schwarzenegger's major donors is the Nestlé Company, which owns Arrowhead, clearly visible in the top; Pepsi, Diet Pepsi down below. The rules Mr. Schwarzenegger is evading are intended to prevent exactly the abuses he is engaging in here. He is utilizing the initiative process to fund a high-visibility campaign designed to promote his partisan, political need to have his candidacy available to the voters and to promote the interests of his special-interest donors. This is exactly what the initiative process was designed to prevent; the initiative process was supposed to be



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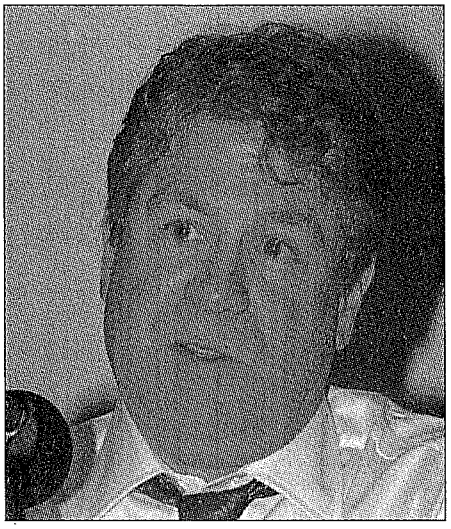
all about voters using it as a tool when elected officials in government refuse to take action. Instead, Mr. Schwarzenegger has turned this whole thing on its



face and made a mockery of this tool of democracy by using the process to feather his own nest and advance the interests of the powerful corporations whose donations he has solicited – exactly the opposite of what it's intended to do. Governors are supposed to govern; that's the operative language of the word "governor." If Mr. Schwarzenegger wants to sponsor ballot propositions, he ought to become a private citizen and he can do them all he wants.

Four months ago, I would have been here saying, "For reasons I'm about to express, do not do anything to the initiative process." But now I have two proposals for you to add to the list. Number one: Except when there's a state of emergency declared by the governor, or when the Legislature passes a resolution by a two-thirds vote, I don't think the governor should call a special election at all; they're too expensive. Number two: I don't think the governor should be allowed to sponsor or raise money for initiatives at all. I don't think any governor in California should be allowed to raise money or to solicit money for ballot measures. We elect the governor to govern. That means working with the legislative branch on the passage of legislation, and then enforcing those laws. If people want to do ballot measures, they can do what I or any of you do as private citizens.

Let me spend a couple of minutes talking about Tracy's proposals. I have a great deal of respect for Tracy and for the Center for Governmental Studies; they're really great, smart, thoughtful people. Having said that, with all due respect, I think you're completely wrong on your major proposals. Let me explain why, very quickly.

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Number one: Let's talk about allowing the proponent to negotiate with the Legislature to change a ballot measure after he or she has collected signatures, and also the idea of making minor amendments and requiring the Legislature to have hearings. The Legislature had its chance. That is the operative theory behind the initiative process; when we did in 1988, or what Howard Jarvis did in 1978, went to the Legislature, tried to get them to pass insurance reform, they did not do it. That is when the Legislature has its chance; after that, the voters take over. Now, let me explain to you what's very dangerous about letting the Legislature get involved with this after the fact. My premise is, once the people put enough signatures on the ballot to get it on the ballot, that petition belongs to those people who signed it, not to the proponent, not to me or anybody else. Can you imagine the mischief that is possible if a proponent is allowed to negotiate changes to the petition that the voters put their signature to before that thing goes on the ballot? There is a guy in Sacramento who runs an environmental organization who has sold the right to put provisions in his initiatives to special interests. He's got the utility companies to fund measures; he's got chemical polluters to fund parts of his measure. In other words, the danger of allowing the Legislature a role in this process after the fact is to disempower the people who signed that specific petition to get it on the ballot – they want that reform – and hand it all over to the people in Sacramento and some poor proponent who either may or may not have enough integrity to maintain his or her position against the possibility that somebody's going to put money into his nonprofit organization, or maybe the Legislature's going to pass some other bill. Under that proposal, initiatives could be used simply to raise money in a form of blackmail. Allowing amendments to the initiative? We did that in Proposition 103. As the constitution allows us to do, it can be amended by a two-thirds vote of the Legislature as long as it furthers the purposes of Proposition 103. Well, guess what happened up there in Sacramento: The insurance industry spent a whole bunch of money on a guy named Don Perata, who's the president pro tem of the state Senate. They gave him a bunch of money, he sponsored an amendment to Proposition 103 two years ago, which repealed a part of Proposition 103, didn't further the purpose. Of course, the Legislature found that it furthered the purpose to repeal part of Prop. 103, passed overwhelmingly, because the insurance company and their ally, Don Perata, handed out so much money that every legislator basically got a piece of it. And then the thing passed and we've had to sue the court. It's taken us two and a half years; that law is still in effect. The Superior Court in Los Angeles did

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determine that it was unconstitutional as an invalid amendment to Proposition 103, but now it's gone to the Court of Appeal. We're going to win that case; it's gonna take us four years, we're gonna get attorney's fees because the law allows that, but in the meantime, the invalid amendment to Prop. 103 is in effect. So there's another example of why the idea of allowing lawmakers to amend these things is something you've really got to be careful of. The constitution allows it. If I were to redo it, I'm not sure I would write Prop. 103 to permit legislative amendments, because that was the third time they did it. The other two times we got them invalidated by the courts.

Nadler: Well, you have my blood pressure up.

Westen: This may surprise Harvey, but I agree with him on one point: I do think the special election is ridiculous. The governor's doing that because he likes to be in the spotlight. That's what the governor does, he likes to be out campaigning in front of the people, and it pulls publicity around him – it also allows him to raise a lot of money. But the truth is if there's a special election in November, it's only seven months away from the election in June. It could all be decided in June, saving the state $80 million. Besides, John Van de Kamp lost for governor a number of years ago and he put three initiatives together and ran on a platform supporting the initiatives, and it split his money. This lets the governor not split his money. He spends this year raising millions and millions of dollars to promote his initiatives, and then he runs next year raising millions and millions of dollars to promote his campaign for governor. It's basically two bites of the apple and it's unnecessary. I disagree with everything else, but it just shows I'm not arbitrary.

First, on negotiating with the Legislature that this somehow betrays the people who signed it – I'm sure most of you have signed initiatives. How many of you have read the full text of the initiative before you signed it? Most people don't. They sign based on a caption or an understanding of the thrust of the measure. How many legislators vote on legislation after reading the entire bill? Virtually none. The proponent is a proxy for a certain message. The problem is if you don't let them amend before it goes on the ballot, you lock in all the mistakes they've made. In the legislative process, there are hearings in both houses, there's negotiation between the houses, the governor, and they still get it wrong 25 percent of the time. But if you don't allow amendment before or after, you are doomed to locking in terrible mistakes. Prop. 13 has had to be amended by initiative 13 times, the Political Reform Act, 150 times. Do you want all those on the ballot? That's an impossible way to run the sixth largest economy in the world. We have to build flexibility into the process; if we don't, we're frustrated to be painted into a corner in terms of our actions, with no way to get out. Ω

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Volunteer of the Month

September 2005

Andrew Lawton

The Commonwealth Club could not function without the hard work and dedication of its volunteers. In our "Volunteer of the Month" feature, we profile one of the many volunteers committed to serving The Club. If you are interested in volunteering, contact Volunteer Coordinator Linda Murley at lmurley@commonwealthclub.org or call (415) 597-6700.

Attracted by the caliber of the speakers and the pressing topics they address, Andrew Lawton joined The Club in 2001 and is now the chair of the Environment & Natural Resources Member-led Forum. In this role, he organizes planning meetings, and coordinates and publicizes programs.

Andrew enjoys working and associating with "the very interesting, articulate and unusually well informed people that The Club attracts," and takes great pleasure in post-program discussions that extend to a shared dinner with other members. Without equivocation he says that his all-time favorite speaker is Joni Mitchell, for whom he served as Club host. "She is a living artistic treasure," he explains, "and someone who has literally shaped American culture."

Originally from New Jersey, Andrew has traced a fascinating career at the intersection of architecture, environmentalism and information technology. He started as a Yale architecture major, working in construction and civil and acoustical engineering. Living in the Rocky Mountains and in California opened his eyes to "the positive influence an awareness of nature can have on our quality of life," and he returned to Yale to study Environmental Management. Later work introduced him to an early Internet web-browser, and he decided to return to California to join the great IT boom. Since then, he has worked as a consultant at several Bay Area IT firms, including Sun Microsystems; become a U.S. Green Building Council LEED Accredited Professional and; most recently, joined Autodesk, where he serves as an information architect on the Autocad design team. Ω