Volume 62, Issue 6 Page 1515

Stanford Law Review

KEYNOTE ADDRESS: SYMPOSIUM ON STATE CONSTITUTIONS

Hon. Ronald M. George

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It is a great pleasure to return once again to Stanford Law School, where in 1964 a J.D. degree launched me into a seven year legal career as a California Deputy Attorney General and what, to this point, has been an almost thirty-eight year career as a judge.

The class that I most enjoyed in law school was Constitutional Law, and I was fortunate to have Gerald Gunther as my professor. The educational experience provided by that class no doubt had a substantial bearing upon my decision to enter the field of public law.

Stimulating and comprehensive as Professor Gunther's course was, the subject of *state* constitutional law was rarely if ever mentioned here or elsewhere. Ultimately United States Supreme Court Justice William Brennan and my late colleague California Supreme Court Justice Stanley Mosk wrote extensively on the subject, but the focus has remained even to this day almost exclusively on the federal aspects of constitutional law.

Perhaps this focus is natural and inevitable, given the circumstance that our pre-eminent law schools consider themselves "national" institutions of learning, but this imbalance gives inadequate attention to the reality that more than ninety-five percent of the cases heard in American courts are filed in state courts rather than federal courts. And, of course, federal courts often have to contend with issues of state law even though they do not have the final word in resolving those issues.

In light of this background, it is particularly fitting that a Symposium on state constitutions has been organized by the *Stanford Law Review*, with the participation of the Stanford Constitutional Law Center and the Stanford chapters of the Federalist Society and the American Constitution Society. As stated by the planners in announcing the Symposium, "This is an area of the law that has been insufficiently addressed in the legal literature, yet is a critically important source of law in our system of federalism."

Your ambitious range of topics is too broad for any one speaker to address, and thus I shall leave it to others to discuss theoretical issues of state constitutions, contemporary issues of state constitutional law such as gay marriage and abortion rights—although I have authored opinions for the

* Chief Justice of the California Supreme Court. These remarks were delivered on February 19, 2010 at the *Stanford Law Review* Symposium, "State Constitutions."

California Supreme Court on those subjects, how state constitutional provisions can inform the common law, and the bearing of those provisions on judicial elections and judicial ethics.

I intend to focus, in the time allotted to me, upon the ramifications of the provisions of California's State Constitution—with some comparisons to the constitutions of other jurisdictions—that afford public participation in direct democracy through the initiative process. I also shall comment upon how this process has led to the ease with which California's Constitution can be—and regularly is—amended, resulting in the perpetual instability of California's state constitutional law.

The subject of initiative measures to amend California's constitution has of necessity been a matter of continued professional concern to me—the interpretation of state constitutional provisions certainly qualifies as an occupational hazard for any state high-court jurist. But this subject also has troubled me as an individual resident of this state who periodically is called upon to vote at the polls on ballot proposals to change our state constitution, and as one who—like all Californians—has to live with the consequences when these measures pass, especially when they involve the structure and powers of state and local government.

In 1898, South Dakota authorized voter initiatives, becoming the first of about two dozen states to do so, including California in 1911. But among these states, nowhere is the practice of government by voter initiative as extreme as it is in California.

California's constitution permits a relatively small number of petition signers—equal to at least eight percent of the voters in the latest gubernatorial election—to place before the voters a proposal to amend any aspect of its constitution. If approved by a simple majority of those voting at the next election, the initiative measure goes into effect on the following day.

The legislature (by a two-thirds vote of each house) shares with the voters the power to place proposed constitutional amendments before the electorate. California, however, is unique among American jurisdictions in prohibiting its legislature, without express voter approval, from amending or repealing even a *statutory* measure enacted by the voters unless the initiative measure itself specifically confers this authority upon the legislature. One study concluded: "No other state in the nation carries the concept of initiatives as 'written in stone' to such lengths as to forbid their legislatures from updating or amending initiative legislation."[1]

Thus it is considerably easier to amend the California Constitution than the United States Constitution, under which an amendment may be proposed either by a vote of two-thirds of each house of Congress or by a convention called on the application of the legislatures of two-thirds of the states. An amendment to

1. CTR. FOR GOVERNMENTAL STUDIES, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 114 (2d ed. 2008).

the Federal Constitution can be ratified only by the legislatures of (or by conventions held in) three-quarters of the states.

The relative ease with which the California Constitution can be amended is dramatically illustrated by the frequency with which this has occurred. Only seventeen amendments to the United States Constitution (in addition to the Bill of Rights, ratified in 1791) have been adopted since that document was ratified in 1788. In contrast, more than five-hundred amendments to the current California Constitution have been adopted since ratification of that document in 1879.

Although the majority of these amendments were placed before voters by the legislature, many with the most severe impact on the operation of state and local government have been the product of the initiative process.

Former United States Supreme Court Justice Hugo Black was known to pride himself on carrying in his pocket a slender pamphlet containing the federal Constitution in its entirety. I certainly could not emulate that practice with California's constitutional counterpart of approximately 65,000 words.

One Bar leader has observed: "California's current constitution rivals India's for being the longest and most convoluted in the world . . . . [W]ith the cumulative dross of past voter initiatives incorporated, it is a document that assures chaos."[2]

Initiatives have enshrined myriad provisions into California's constitutional charter, including a prohibition on the use of gill nets and a measure regulating the confinement of barnyard fowl in coops. The latter constitutional amendment was enacted on the same 2008 ballot that amended the state constitution to override the California Supreme Court's decision recognizing the right of same-sex couples to marry. Chickens gained valuable rights in California on the same day that gay men and lesbians lost them. More than sixty initiative measures are currently circulating for possible placement on this year's ballot—although not the largest number in California history. One of these proposals would ban divorce.

Perhaps most consequential in their impact on the ability of California state and local government to function are constitutional and statutory mandates and prohibitions—often at cross-purposes—limiting how elected officials may raise and spend revenue. California's lawmakers, and the state itself, have been placed in a fiscal straitjacket by a steep two-thirds-vote requirement—imposed at the ballot box—for raising taxes. A similar super-majoritarian requirement governs passage of the state budget. This situation is compounded by voter initiative measures that have imposed severe restrictions upon increases in the assessed value of real property that is subject to property tax, coupled with constitutional requirements of specified levels of financial support for public

2. Jeffrey A. Lowe, *The View-Fixing California's Convoluted Constitution Is the Only Way to Move Forward*, CAL. LAW., Sept. 2009, http://www.callawyer.com/story.cfm?eid=904555&evid=1.

transportation and public schools.

These constraints upon elected officials—when combined with a lack of political will (on the part of some officials) to curb spending and (on the part of others) to raise taxes—often make a third alternative, borrowing, the most attractive option (at least until the bankers say "no").

Much of this constitutional and statutory structure has been brought about not by legislative fact-gathering and deliberation, but rather by the approval of voter initiative measures, often funded by special interests. These interests are allowed under the law to pay a bounty to signature-gatherers for each petition signer. Frequent amendments—coupled with the implicit threat of more in the future—have rendered our state government dysfunctional, at least in times of severe economic decline.

Because of voter initiatives restricting the taxing powers that the legislature may exercise, California's tax structure is particularly dependent upon fluctuating types of revenue, giving rise to a "boom or bust" economic cycle. The consequences this year have been devastating to programs that, for example, provide food to poor children and health care for the elderly disabled. This year's fiscal crisis also has caused the Judicial Council, which I chair, to take the reluctant and unprecedented step of closing all courts in our state one day a month in order to offset a portion of the more than $400 million reduction imposed by the other two branches of government on the nearly $4 billion budget of California's court system.

The voter initiative process places other burdens upon the judicial branch. The court over which I preside frequently is called upon to resolve legal challenges to voter initiatives. Needless to say, we incur the displeasure of the voting public when, in the course of performing our constitutional duties as judges, we are compelled to invalidate such a measure.

On occasion, we are confronted with a pre-election lawsuit that causes us to remove an initiative proposal from the ballot because, by combining insufficiently related issues, it violates our state constitution's single-subject limitation on initiative measures. At other times, a voter initiative—perhaps poorly drafted and ambiguous, or faced with a competing or "dueling" measure that passed at the same election—requires years of successive litigation in the courts to ferret out its intended meaning, and ultimately may have to be invalidated in whole or in part.

One thing is fairly certain, however. If a proposal, whatever its nature, is sufficiently funded by its backers, it most likely will obtain the required number of signatures to qualify it for the ballot, and—if it does qualify—there is a good chance the measure will pass. The converse certainly is true—poorly funded efforts, without sufficient backing to mount an expensive television campaign—are highly unlikely to succeed, whatever their merit.

This dysfunctional situation has led some to call for the convening of a convention to write a new constitution for California to replace our current 1879 charter, which in turn supplanted the original 1849 document. There have

been 232 constitutional conventions in the history of the United States, and the last one that was successful in bringing about a new constitution was a convention held in Rhode Island in 1993.

Although a recent poll reflects that seventy-nine percent of Californians say the state is moving in the wrong direction, only thirty-three percent believe that the state's constitution requires "major" changes, and approximately sixty percent are of the view that decisions made by Californians through the initiative process are better than those made by the legislature and the governor.

Add to this mix a split among scholars concerning whether a constitutional convention, if called, could be limited in the subject matter it is empowered to consider. Some argue that a convention would be open to every type of proposal from any source, including social activists and special interest groups. There also is controversy over the most appropriate procedure for selecting delegates for such a convention.

A student of government might reasonably ask: Does the voter initiative, a product of the Populist Movement that reached its high point in the early twentieth century in the midwest and western states, remain a positive contribution in the current form in which it exists in twenty-first century California? Or, despite its original objective—to curtail special interests, such as the railroads, that then controlled the legislature of California and of some other states—has the voter initiative now become the tool of the very types of special interests it was intended to control, and an impediment to the effective functioning of a true democratic process?

John Adams—who I believe never would have supported a voter initiative process like California's—cautioned that "democracy never lasts long . . . . There never was a democracy yet that did not commit suicide."[3] The nation's Founding Fathers, wary of the potential excesses of direct democracy, established a republic with a carefully crafted system of representative democracy. This system was characterized by checks and balances that conferred authority upon the officeholders of our three branches of government in a manner designed to enable them to curtail excesses engaged in by their sister branches.

Perhaps with the dangers of direct democracy in mind, Benjamin Franklin gave his much-quoted response to a question posed by a resident of Philadelphia after the adjournment of the Constitutional Convention in 1787. Asked the type of government that had been established by the delegates, Franklin responded: "A republic, if you can keep it."[4] And, as former Justice David Souter recently observed in quoting this exchange, Franklin "understood

3. Letter from John Adams to John Taylor (Apr. 15, 1814), *in* 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 484 (Charles Francis Adams ed., 1851).

4. *Papers of Dr. James McHenry on the Federal Constitution of 1787*, 11 AM. HIST. REV. 595, 618 (1906).

that a republic can be lost."[5]

At a minimum, in order to avoid such a loss, Californians—and perhaps the residents of other states—may need to consider some fundamental reform of the voter initiative process—a process described by a recent article in The Economist as "a fourth branch of government, an industry and a circus."[6] If we fail to undertake such reform, I am concerned we shall continue on a course of dysfunctional state government, characterized by a lack of accountability on the part of our officeholders as well as the voting public.

In contrast to the almost unfettered initiative process in California, some of the other state constitutions that embrace the initiative power do not permit it to be used to propose and adopt amendments to the constitution; only statutory enactments can be adopted by initiative. Some state constitutions expressly prohibit resort to the initiative process to modify designated provisions of the constitution, such as rights set forth in the state charter's bill of rights. Some state constitutions require the signatures of a percentage of voters higher than California's eight percent on an initiative petition in order to qualify the measure for the ballot, or require the vote of a supermajority of the electorate in order to adopt the proposed constitutional amendment. Other jurisdictions have additional hurdles that must be met in order to place a measure on the ballot (such as obtaining a specified percentage of affirmative legislative support in successive legislative sessions), or forbid payment to initiative petition signature-gatherers. There are state constitutions that permit legislative amendment of a qualifying initiative measure before it has been placed on the ballot, or following its adoption by the voters—after a specified period of time has elapsed, or by a supermajoritarian vote of the legislature.

I hope that all of us accept the premise that the initiative process, at least as set forth in the Constitution of the State of California, is sorely in need of reform.

By focusing for these two days on a wide range of fundamental issues underlying the role of state constitutions as sources of law in the system of American federalism, Stanford Law School is making an important contribution to the study of the vital role occupied by these constitutions in our democratic system of government.

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5. Justice David H. Souter, Remarks at American Bar Association Opening Assembly: Remarks on Civic Education 9 (Aug. 1, 2009), www.abanet.org/publiced/JusticeSouterChallengesABA.pdf.

6. *The Tyranny of the Majority*, ECONOMIST, Dec. 19, 2009, at 47.