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A.B. 1245 OF 2003 – AN ATTEMPT AT MODEST REFORM OF CALIFORNIA’S INITIATIVE PROCESS

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This Essay chronicles my experience, as a California Assemblymember, with a modest effort to bring more deliberation to the California initiative process. The story begins when I was elected to the California Legislature in November 2002, arriving in Sacramento with a belief that California’s governmental process had serious problems and that the strength of the state’s economy and diversity were lost in the state’s broken governmental system. I strongly believed that one of the problems was, and is, the initiative process.

Wishing to improve this important piece of California’s governance system, I proposed a modest reform to make the initiative process more deliberative and to improve the quality of initiative proposals presented to California voters. My reform proposal (ultimately embodied in A.B. 1245 of 2003) would have required initiative sponsors to make their draft legislation available for a public comment period. Passed by both houses of the Legislature, A.B. 1245 never became part of the California statute books because then-Governor Gray Davis vetoed it.¹

In this Essay, I explain my proposal’s rationale, and describe some of the key developments and dynamics as it moved through the Legislature and stalled at the gubernatorial desk. Specifically, Part I summarizes the history and purpose of the initiative process. Part II

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1. Gov. Gray Davis’s Veto Message to A.B. 1245 (Oct. 14, 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1201-1250/ab_1245_vt_20031014.html.

catalogues the problems with the initiative process and explains how my bill sought to respond to them. Part III summarizes key stages as the bill moved through the legislature and the adverse reception in the Governor's office. Part IV briefly concludes by reflecting on the continuing need for reform along the lines of A.B. 1245 and on the lessons that can be drawn from its ultimate defeat.

I. THE HISTORY AND PURPOSE OF THE INITIATIVE PROCESS

Before the initiative process was authorized a century ago, only the Legislature could propose a law or a constitutional amendment.² Railroad owners in the late 1800s exercised immense economic power—charging exorbitant, monopolistic rates for freight transportation.³ The railroad owners recognized that the only entity that had the ability to limit the power of the railroads was the Legislature.⁴ So, the railroad owners essentially bought the Legislature to prevent that from happening.⁵

A backlash against the railroads in the early 1900s resulted in the election of Governor Hiram Johnson and a new Legislature.⁶ Together, they placed a constitutional amendment on the ballot to authorize initiatives, which gained popular approval along with the recall.⁷ Ever since, new laws and constitutional amendments can be accomplished either through the Legislature or independently by the public via the initiative process.⁸

Under the initiative process, anyone may draft a proposed new law and submit it to the California Secretary of State, along with a modest \$200 fee.⁹ The official title and summary for the measure is prepared by the Attorney General, thereby assuring that the measure

2. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 34 (1992), available at <http://www.cgs.org/images/publications/DemocracybyInitiative.pdf> [hereinafter DEMOCRACY BY INITIATIVE].

3. See *id.* at 37-38.

4. See *id.* at 37.

5. See *id.* at 37-39.

6. *Id.* at 41.

7. See CAL. CONST. art. II, § 8(a).

8. See *id.* art. XVIII, §§ 2-4.

9. See CAL ELEC. CODE § 9001 (West Supp. 2011).

gets a reasonably honest description.¹⁰ State finance entities make a cost estimate, assuring that the measure gets a competent cost analysis.¹¹

However, the state has no authority to change the language of a proposed initiative measure.¹² If it is poorly written: too bad. If there are errors: too bad. If there are unintended consequences: too bad. If sufficient signatures are gathered, the measure goes on the ballot. If the initiative measure gets a majority vote, the measure is approved.¹³

The initiative has been popular, if the amount of use is any indication. In the last century, over 1,200 measures were submitted to the Secretary of State on a very wide variety of subjects—from education, taxes, regulation, local government, to medical treatment, labor, and gambling.¹⁴

It is important to understand what the initiative represents: it is a weapon. If you want a change in the law and you don't think the Legislature will be helpful, then the initiative is often the chosen alternative—especially if you can spin a good story and have the significant amount of money necessary to pay for the gathering of signatures and the running of an extensive television campaign.

The initiative weapon lets the proponent bypass the Legislature to go directly to the people and to attack whatever he or she desires—political or business opponents, government regulation, taxes, or whatever. For example, in 1998 California voters banned the eating of any part of a horse, through the initiative process.¹⁵

The initiative process was brought to us by Governor Hiram Johnson to protect the public from special interests. Unfortunately, the initiative has now become a tool for special interests. Anyone with several million dollars can get an initiative written and then pay people to gather signatures to qualify an initiative measure for the state ballot. For many special interests, a few million dollars is a very cheap investment because about one-third of measures reaching the

10. *See id.* § 9004.

11. *See id.* § 9005.

12. *See id.* § 9034.

13. CAL. CONST. art. II, § 10(a).

14. *See* CAL. SEC'Y OF STATE, A HISTORY OF CALIFORNIA INITIATIVES 9 (2002), available at www.sos.ca.gov/elections/init_history.pdf

15. *Id.* at 8. Proposition 6 was approved with 59.39% of the vote. *Id.*

ballot have been approved by the voters¹⁶—so the odds are reasonable.

II. DEFICIENCIES OF THE INITIATIVE PROCESS—AND HOW A.B. 1245 SOUGHT TO ADDRESS SOME OF THEM

A. Initiative-Process Problems and the Political Dynamics Affecting Reform Efforts

The first problem with initiatives is that they usually are written in secret, with no public comment or hearings—and no opportunity for amendment to correct errors or confusing provisions. If the measure is approved by the voters, errors or confusing provisions sometimes have to be resolved by the courts. Then we hear proponents argue that the courts are “interfering with the will of the people”—where the real problem is that the proponents did a poor job of drafting the measure or drafted a measure that was unconstitutional.

A second problem with initiatives is that they typically only address the “positive” consequences, without describing the “negative consequences.” As an example, the proponents might pose the following “positive” policy question to the voters: “Do you want repeat, violent criminals to serve longer prison sentences?” The proponents, however, never say that the state budget is in the red and that college tuition may have to be raised substantially to pay for the longer prison sentences. To be “balanced,” an initiative would ask the voters something such as, “Do you want longer prison sentences and higher taxes to pay for it?” or “Do you want longer prison sentences and higher college tuition to pay for it?”

A third problem is that the actual proponents can hide behind “front groups,” making it difficult or impossible for the public to understand who is really behind the initiative they are asked to sign. Also, members of the public generally do not know when someone is being paid to get his or her signature.

Reform groups have proposed changes to the initiative process in recent years. In 1992, the California Policy Seminar recommended allowing proponents to make language changes during signature

16. See Debra Bowen, *The California Initiative Process at Its Centennial*, 47 CAL. W. L. REV. __, __ (2011).

circulation.¹⁷ In 1992, the California Commission on Campaign Financing recommended that legislative hearings be held after initiative qualification to make language changes.¹⁸ In 1994, a Citizens Commission on ballot measures recommended a forty-five-day negotiating period whereby proponents could negotiate language changes with the Legislature.¹⁹ In 1998, the League of Women Voters recommended that initiative sponsors submit language to an unspecified state authority for prior determination of legality and language clarity.²⁰

Despite all these proposals, there have been no changes to the initiative system. Not one.

Polling demonstrates that the public is of two minds on the process.²¹ The public both supports the initiative process and thinks that the process needs to be fixed, although the voters are not clear what should be done.

There are, however, significant groups that oppose changes to the initiative process, largely because they are in the business of supporting or opposing initiatives or because they use the current system to effect the changes they want.²²

So, let's go back to my efforts as a freshman legislator to improve the initiative process, starting with my options. The California Constitution establishes the major parts of the initiative process, leaving only procedural parts for the Legislature to determine.²³ I could propose a major change by proposing an amendment to the

17. PHILLIP L. DUBOIS & FLOYD F. FEENEY, *IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE* 96 (1992).

18. CALIFORNIA COMM'N ON CAMPAIGN FINANCING, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 4 (1992), available at http://www.cgs.org/index.php?option=com_content&view=article&id=128:PUBLICATIONS&catid=39:all_pubs&Itemid=72 (recommending a requirement that "the legislature . . . hold a public hearing on each initiative within 10 days after it has qualified for the ballot").

19. CITIZENS COMM'N ON BALLOT INITIATIVES, *REPORT AND RECOMMENDATIONS ON THE STATEWIDE INITIATIVE PROCESS* 3-4 (1994).

20. LEAGUE OF WOMEN VOTERS OF CAL., *INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST?* 22 (1998).

21. See PUB. POLICY INST. OF CAL., *CALIFORNIANS AND THE INITIATIVE PROCESS* (2008), http://www.ppic.org/content/pubs/jtf/JTF_InitiativeJTF.pdf.

22. *Id.*

23. See CAL. CONST. art. II, §§ 8-11.

California Constitution, but that would require a two-thirds vote in each house of the Legislature followed by a public vote. Republicans told me that they were unlikely to support a major change, so that option appeared likely to fail. The second option would be to make a statutory change to the procedural parts, which would only require a majority vote in each house, which was achievable.

B. Envisioning A.B. 1245 as a Modest, Practical Response

After talking to a large number of people, I decided to focus on the problem of badly written initiatives—and specifically on the problem that there is no opportunity for public review and comment on an initiative’s language. It would not be a major policy change, but it would be a step in the right direction—and public policy is often made through a series of small steps.

I decided to pattern the solution somewhat after the way that a bill is processed in the Legislature. When a bill is introduced into the Legislature, the language is made available to the public in the form of printed bills and on the Internet.²⁴ Any interested person or interest may provide comments to the author, other legislators, or legislative committees. The bill is heard in several committees and on the legislative floors where amendments may be proposed and accepted.

I introduced A.B. 1245 in February of 2003.²⁵ The bill required the proponents of an initiative to provide the Secretary of State a draft of the measure, which would then be placed on the Secretary of State’s website for thirty days. Any interested person could submit written comments to the website on the language or the policy. After receiving the comments the proponents could amend the language, but would not be required to do so. They then could proceed with the gathering of signatures.

My overall objectives were to allow public comment and to encourage the proponents to fix language errors, policy flaws, or

24. In order to allow time for the public and interested parties to review legislation, Section 8(a) of Article IV of the California Constitution generally provides for a 30 day wait before newly introduced bills may be acted upon by the Legislature.

25. See A.B. 1245, 2003-2004 Leg., Reg. Sess. (Cal. 2003), available at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1201-1250/ab_1245_bill_20030221_introduced.pdf.

unintended consequences—a modest objective in a modest bill. Having public input could lead to a discussion of both policy and legal issues while still permitting the draft initiative to be changed. Hopefully changes in the language would reduce the likelihood of post-election litigation and associated costs.

III. THE PROGRESS OF A.B. 1245 THROUGH THE LEGISLATURE, BUT NOT THE GOVERNOR'S OFFICE

A. Key Legislative Stages

As the bill moved through legislative committees, a number of issues were raised. How much would this measure cost? It was estimated that the Secretary of State's setup costs would be approximately \$100,000, and ongoing costs would be about \$15,000 per year.²⁶ Would initiative proponents *have* to answer questions raised during the thirty-day public comment period? No, the bill did not specify that the proponents must answer any questions. If good questions or suggestions were made, the proponents would decide whether to amend or not amend their initiative.

The League of California Cities, California State Association of Counties, and the Secretary of State came out in support.²⁷ The Howard Jarvis Taxpayers Association, which has been quite successful in using the initiative process to reduce and limit taxes, opposed.²⁸

As the bill moved through the lower house of the Legislature, a partisan divide on the bill emerged. Democrats generally supported the bill, and Republicans generally opposed.

The final vote on the Senate floor was 26-11,²⁹ and the Assembly floor vote on concurrence was 47-32.³⁰ Except for support from two

26. Cal. Bill Analysis, A.B. 1245, Appropriations Comm., 2003-2004 Reg. Sess. (Aug. 18, 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1201-1250/ab_1245_cfa_20030818_102455_sen_comm.html

27. Cal. Bill Analysis, A.B. 1245, S. Floor, 2003-2004 Reg. Sess. (Aug. 20, 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1201-1250/ab_1245_cfa_20030820_110112_sen_floor.html

28. *Id.*

29. Senate Floor Vote, A.B. 1245, Unofficial Ballot (Sept. 4, 2003), *available*

Republican state senators, Senators Aanestad and McPherson,³¹ the bill was passed in each house on a straight party-line vote.

B. Gubernatorial Consideration and, Ultimately, Rejection

The bill went to the Governor's desk at a unique time in California's political history. Governor Gray Davis was engaged in a bloody recall campaign, and political considerations in the bill signing period were stronger than might normally be the case.

After the bill went to the Governor, the Governor's staff expressed concern that the initiative proponents could present an initiative in "spot form" to get around this law. That meant that they would put a "fake" draft on the Internet, get through the comment period, and then amend the initiative to its real form without ever meeting the goal of public review and comment. The Governor's staff also thought that if the initiative was amended that it should go back for a second thirty-day review.

My staff and I had thought of these issues before the bill was introduced and we rejected them for two reasons. First, our principal objective was to encourage the initiative's proponents to amend their draft initiative to eliminate errors and other problems. If the proponents had to go through another thirty-day review they probably would not amend the initiative. Second, we thought that if a proponent tried the "fake" draft trick, voters would punish them at the polls for deliberately avoiding the public input and comment process.

My staff argued these points with the Governor's staff, but in the end, the Governor vetoed the bill. In his veto message, he wrote, in part:

I am concerned that an initiative could receive either a negative or positive public comment while displayed on the Secretary of State's web site; the proponents may then revise the initiative, but they are not required to repost it. Consequently, the public may see one version of the initiative prior to the election and an entirely

at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1201-1250/ab_1245_vote_20030904_1055AM_sen_floor.html [hereinafter Senate Floor Vote].

30. Assembly Floor Vote, A.B. 1245, Unofficial Ballot (Sept. 8, 2003), available at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1201-1250/ab_1245_vote_20030908_0637PM_asm_floor.html

31. Senate Floor Vote, *supra* note 29.

different initiative during the election.³²

Of the thirteen bills I put on the Governor's desk that fall, this was the only bill that he vetoed. I was very disappointed. A chance at genuine, but modest initiative reform was lost.

IV. CONCLUSION: THE FUTURE OF DELIBERATIVE REFORMS

Just days after the veto, Governor Davis, a Democrat, was recalled. He was replaced by Arnold Schwarzenegger. Because most Republicans in the Legislature opposed the bill and because the new governor was a Republican, I thought it would be much harder to get a signature—and I chose not to reintroduce the bill in subsequent sessions.

Assemblymember Noreen Evans attempted this bill in the 2009-10 legislative session, but could not get the bill out of the Senate.³³ Given that Jerry Brown, a Democrat, is now the governor and that there is a clear desire for political reform, this proposal remains a modest initiative reform that should be enacted. I hope it is part of a larger package of reforms.

32. Gov. Gray Davis's Veto Message to A.B. 1245 (Oct. 14, 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1201-1250/ab_1245_vt_20031014.html.

33. *See* A.B. 2524, 2009-2010 Leg., Reg. Sess. (Cal. 2010), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2501-2550/ab_2524_bill_20100219_introduced.pdf.

