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EITHER WAY YOU GET SAUSAGES: ONE LEGISLATOR'S VIEW OF THE INITIATIVE PROCESS

*Sheila James Kuehl**

I. INTRODUCTION

Even before I was elected to California's State Assembly, I had heard, more than once, "There are two things you never want to watch being made: sausages and law." The origin of the witticism may be shrouded in historic fog but its meaning is clear. The legislative process is long, verbal, filled with compromise and subject to endless, seemingly random, amendment. The movement of a bill from idea to signature can involve several layers of analysis, testimony, scrutiny, amendment, discussion, reworking and rewriting.

This Article suggests, however, that the legislative process is infinitely preferable to the process by which an initiative becomes law, whereby a group of people decides there ought to be a law, drafts it, gathers signatures based on an extremely foreshortened and often misstated summary of the intent, puts it on the ballot and, using advertising and other marketing techniques, gets it into statutory law, or, even worse, into the state constitution.

II. THE LEGISLATIVE PROCESS

The journey of a piece of legislation is difficult and tortuous. In late fall or winter, a legislator, advocate, or lobbyist has an idea that a change is needed in the statutory law or the state constitution. If a legislator decides that the change is indeed appropriate, he or she submits the idea, sometimes with proposed amendment language, to the Legislative Counsel, which then drafts a bill that accomplishes the desired result in the law. At that point, the bill returns to the author,

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who then consults with staff, advocates, proponents, agencies and organizations to see if the bill language is appropriate. If so, the bill is put "across the desk" in time to meet a late February deadline and then receives a number—an AB Number for State Assembly bills or an SB Number for State Senate bills. The bill then goes to the Rules Committee which will assign it to a policy committee for a hearing based on the subject matter of the bill. Each policy committee has a particular subject matter jurisdiction. Often, the Rules Committee "double-refers" a bill, that is, refers the bill to more than one committee. The Rules Committee also "keys" the bill to indicate whether it is fiscal or non-fiscal—fiscal meaning it will cost the state some money to implement. Because they incur implementation costs, fiscal bills must surmount an extra hurdle.¹

The bill is sent to the first policy committee to be set for hearing.² At the same time, the author of the bill circulates a "Co-Author" letter, which asks other members to read the bill and decide if they want to become co-authors. The policy committee consultant who deals with the particular subject matter of the bill analyzes the bill in conjunction with the staff member on the member's staff also assigned to work on the bill. The analysis explains the bill, points out flaws, and recommends amendments. Armed with the analysis, the committee members come to the hearing, listen to pro and con witnesses and ask questions, some of which may be prepared for them by their own staff. If the bill passes out of the committee, it may then go to a second policy committee where the process starts all over again. If not—and if the bill is fiscal—it goes to the Appropriations Committee where it receives another hearing related to the cost of the bill. If it passes this committee, it is sent to the Floor, where it is analyzed again, presented to the members, argued, and possibly amended to address concerns of opponents and other members. If it passes off the Floor, it begins the entire process again in the other house.³

1. In addition to being heard in a policy committee, the bill must also be heard in the Appropriations Committee before coming to the Floor for a vote.

2. If a bill is "double-referred," it goes to one policy committee and then if it passes, to the next. The order is set by agreement of the Chairs of the two policy committees.

3. Assembly members' bills—those that begin with AB—start in the Assembly Committees, continue through the Assembly Appropriations Committee, and are voted on the Assembly Floor. These bills then start over in the Senate. Senate bills—those that begin with SB—start in a Senate policy committee or committees, continue through the Senate Appropriations Committee—if fiscal—

During the time of consideration in the Assembly and Senate, which lasts from March to August, the bill is poked, prodded, questioned, discussed, debated and scrutinized. Many bills do not make it out of committee. More lose out at the Appropriations Committee. More fail to pass the Floor. More fail in the second house. Those that escape both houses go to the governor for signature or veto. Many are vetoed. Constitutional amendments then go on for an additional step and are placed on the ballot for a public vote.

III. THE APPEAL OF THE INITIATIVE PROCESS

Compare the rigors of the legislative process⁴ with the initiative process, which seems, on its face, to be sorely deficient. Only its proponents have a hand in drafting the proposed initiative, and as a result, the proposal does not benefit from a great deal of critical shaping. The debate over the provisions of an initiative is not the least bit exhaustive, detailed, or "nit-picky." Rather, a limited group of people, corporate entities, or organizations propose their version of good public policy and try to sell it to the voters on a take-it-or-leave-it basis, with the wording set in stone and unamendable.

Still, Californians love their initiatives.⁵ They do not like reading the long ones.⁶ They do not like it when the courts strike them down for their constitutional defects.⁷ They do not like finding out later that they were wrong or misled about the contents.⁸ But generally, the people of California jealously guard their ability to make and shape the law independent of the legislature.⁹ For the most part, the people feel excluded from the long and arduous process of legislation.¹⁰ They read about the new laws on January 1 of each year and

and pass off the Senate Floor to start over in the Assembly. If amended in the second house, the bill returns to the Floor of the house of origin for concurrence.

4. See *supra* Part II.

5. See *A Love-Hate Affair With the Initiative Process: Complaints Aside, the Public Seems to Want to Keep the System*, L.A. TIMES, Nov. 10, 1997, at B4.

6. See Dan Morain, *Open Primary's Impact Big, But Unpredictable*, L.A. TIMES, Mar. 28, 1996, at A1.

7. See Ron Prince, *Commentary Out of Purgatory, Let 187's Appeals Begin Illegal Immigration*, L.A. TIMES, Mar. 24, 1998, at B7.

8. See Tony Perry, *Suit to Overturn bill Net Ban Dismissed*, L.A. TIMES, Mar. 12, 1994, at A22.

9. See *A Love-Hate Affair*, *supra* note 5, at B4.

10. See generally Eric Bailey & Nick Anderson, *Democrats Seek New Bilingual Education Plan Reform*, L.A. TIMES, Jan. 27, 1998, at A3 (comparing the public's involvement in a bilingual education initiative with their relative lack of involvement in failed attempts of the California legislature to pass a bill on the same subject).

shake their heads or wonder at the omissions. The initiative process provides the people with a way to remedy the paralysis and inaction they perceive in the legislature.¹¹

IV. PROBLEM ONE: SOMETIMES INACTION IS ACTUALLY REFUSAL

The journey negotiated by each piece of legislation through the legislature is a minefield. At any juncture, it can blow up. The audience is very small—just fifty percent plus one on any committee.¹² A hostile amendment can cost the deciding vote. In many cases, the solutions to perceived problems proposed by the bill may not be considered good public policy by committee members. Given the kind of careful vetting given to bills, it is more likely that a bill will die than succeed.¹³ Often, legislation does not make it through the process during the first year of its proposal, but the lessons learned help to shape the bill in the next legislative cycle. Still, the failure to produce a bill is seen by the public as a failure to address a problem in a timely manner.¹⁴

Bilingual education is a good example. One bill set out a modest solution to the issues raised by bilingual education and allowed each school district, within limits, to design a program they thought would work for their students.¹⁵ The bill failed to get the requisite votes.¹⁶ Some members believed it did not go far enough and wanted bilingual education eradicated altogether.¹⁷ Others thought it opened the door to simple English immersion classes, which they feared would just keep mono lingual, non-English speaking students adrift in an incomprehensible sea.¹⁸ While these forces struggled, the bill was slowed, then stopped.¹⁹ This should have been perceived as a rational refusal by the legislature to hurriedly adopt an unworkable solution to a complicated problem, and as a way of working toward a more

11. See *A Love-Hate Affair*, *supra* note 5, at B4 (“The initiative is viewed as a method for citizens to write their own laws when the Legislature fails to act.”).

12. A simple majority of the members of any committee.

13. See generally *California Preview: It's Time to See How Bills Measured Up*, L.A. TIMES, June 13, 1997, at D2 (“about 40% of the more than 3,000 bills introduced at the start of the 1997-98 Session failed to clear the house in which they were first submitted”).

14. See Bailey & Anderson, *supra* note 10, at A3.

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. See *id.*

intelligent approach during the next legislative session. Instead, it was perceived as a failure.²⁰

Into the void stepped an initiative, which chose one solution—a solution, which, in my opinion, had already been declared unconstitutional. Yet it looked at first blush to be a popular approach.

V. PROBLEM TWO: DRAFTING

One of the most frequently heard complaints made by voters about initiatives is that they are too complicated.²¹ This complaint is rendered even more serious by the fact that the voters do not read the actual language of the initiative but only the summaries prepared for the voter pamphlet.²² The language of the amendments made to current law in the initiative may be circular, inappropriately placed in the statutory framework, awkward, vague, unclear, imprecise, and, in some cases, may not even accomplish the simple end sought by the proponents.²³ Yet, the initiative language does not undergo any real scrutiny.²⁴

One solution may be to require that the proposed language of an initiative be submitted for vetting by some concomitant of the Legislative Counsel's office. This body would have a precise mandate to check for placement in the state codes, precision of language, and analysis of the effect of the language in comparison to the stated desired effect. This would provide a guideline for authors to check the effects of the proposed initiatives.

For example, imagine an initiative that would require California to give full faith and credit to any domestic violence restraining order issued by another state, territory, or tribal court. The proposed draft may be deficient in that there may be several sections of either the Family Code or the Code of Civil Procedure that would need to be

20. *See id.*

21. *See A Love-Hate Affair, supra* note 5, at B4.

22. *See generally* Frank del Olmo, *Perspective on Prop. 227: Take High Road in Bilingual Debate*, L.A. TIMES, Feb. 15, 1998, at M5 (discussing the misleading nature of initiative summaries).

23. *See, e.g.,* Sandy Sohcot, *Between the Lines of the Civil Rights Initiative*, S.F. BUS. TIMES, May 24, 1996, at 39 (noting that the hidden purpose of Proposition 209 Clause c would not be understood by voters to accomplish the stated objectives of the initiative).

24. *See* *Legislature v. Eu*, 54 Cal. 3d 492, 501, 816 P.2d 1309, 1313, 286 Cal. Rptr. 283, 287 (1991) (declaring it is the court's "solemn duty to jealously guard the precious initiative power"); *Amador Valley Joint Union Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 219, 583 P.2d 1281, 1283, 149 Cal. Rptr. 239, 241 (1978) (stressing the limited nature of the judicial inquiry).

amended while the draft addresses only two. Or, the proposed draft may require more deference to the other state than the Constitution allows or may fail to comport with a federal statute. A pre-initiative review by the Legislative Counsel's office would bring to light such deficiencies early in the process, give proponents the opportunity to correct such deficiencies early in the process, and give proponents the opportunity to structure the initiative's language to achieve their goals without violating the state or federal constitutions.

Another solution would be to require only that the language be tested in court against the California and Federal Constitutions. This process would be akin to an advisory opinion rendered by the court or could simply be in the form of an opinion by the Attorney General's office.²⁵ Again, the opinion rendered would be communicated to the authors for their consideration. While the authors would not be required to make any of the recommended changes, the opinion might be made available to the public which, in turn, would allow opponents to consider the arguments for their own purposes.

VI. PROBLEM THREE: SHORT ON INFORMATION, LONG ON IMAGINATION

One of the most unfortunate aspects of the public's relationship with an initiative is how little specific information they are given about the actual provisions of the initiative and how much they imagine in that regard.²⁶ Since most of the initiatives are sold to the public through the use of sound bites and billboards,²⁷ the voters feel

25. The State of Florida has used the advisory opinion process as a pre-election review of initiatives. The advisory opinion is not binding on a later, post-election review, but it is "extremely persuasive" in a later challenge. See CALIFORNIA COMMISSION ON CAMPAIGN FINANCE, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 108-09 (1992).

26. Proponents of 209, for example, labeled the California Civil Rights Initiative as an amendment which guaranteed "equality of opportunity" and eliminated the "entitlements . . . that underlie the current racial and ethnic spoils system." Glynn Custred & Tom Wood, *Racial Gender Preferences Hurt Everybody*, S.F. CHRON., Jan. 19, 1995, at A21. Although citizens, are, presumably, "fair-minded people who truly want equal opportunity . . . and diversity," opponents argued that Proposition 209 has potentially far-reaching, negative consequences beyond what supporters said to the press. Sohcot, *supra* note 23, at 39; see also Julia A. Guizan, Comment, *Is the California Civil Rights Initiative a Wolf in Sheep's Clothing?: Distinguishing Constitutional Amendment From Revision in California's Initiative Process*, 31 LOY. L.A. L. REV. 261, 289 & n.199 (1997).

27. See, e.g., Dave Leshner, *Initiative's Backers, GOP Both Intensify Ad Campaigns*, L.A. TIMES, Nov. 1, 1996, at A3 (noting the onslaught of money being

unjustifiably confident and well acquainted with a few aspects of the initiative which they believe to represent the whole. Most voters who voted in favor of term limits,²⁸ for instance, understood that they were voting against career politicians but were not aware that they were also denying legislators the ability to participate in any kind of retirement fund.²⁹ Public sentiment, even predating the term limit initiative, supported the proposition that legislators should not be allowed simply to serve a few years and then go off into the sunset with a hefty, lifetime pension.³⁰ The term limit initiative, however, did not even allow legislators to participate in the general state retirement system to the extent of their service, dollar for dollar.³¹

Similarly, voters who supported the "three strikes"³² initiative continue to express concern that the third strike is not required to be a violent or even serious felony.³³ Most believed they were voting to get hard-core career criminals off the streets.³⁴

Further, voters who supported Proposition 209³⁵ believed they were voting against preferences on the basis of race and gender in employment and education.³⁶ After the election, they were surprised to learn that they had also voted to lower the standard by which the state is judged when it discriminates against someone on the basis of

spent to promote different views of Proposition 209 prior to the 1996 vote).

28. See Proposition 140, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 137-38 (Nov. 6, 1990) [hereinafter 1990 CALIFORNIA BALLOT PAMPHLET] (amending several sections of California Constitution).

29. See Paul Jacobs, *Initiative Cuts More Than Term of Office*, L.A. TIMES, Oct. 28, 1990, at A3.

30. See *id.* (noting that every legislator could earn a substantial monthly pension).

31. See Proposition 140 § 4, in 1990 CALIFORNIA BALLOT PAMPHLET, *supra* note 28, at 137 (enacted as CAL. CONST. art. IV, § 4.5).

32. See Proposition 184, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 64-65 (Nov. 8, 1994) (codified at CAL. PENAL CODE § 1170.12 (West Supp. 1998)).

33. See *California Tomorrow: By Promoting Mass Transportation, Banning Smoking in Public and Increasing Prison Terms For Career Criminals, California Ballot Propositions Reflect Growing Statewide Concerns About Transportation, Public Health, and Crimes*, S.F. CHRON., Oct. 23, 1994, at 12Z1.

34. See *id.*

35. See Proposition 209, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 94 (Nov. 5, 1996) [hereinafter 1996 CALIFORNIA BALLOT PAMPHLET] (enacted as CAL. CONST. art. I, § 31).

36. Proposition 209 was officially titled "Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities. Initiative Constitutional Amendment." See *id.* at 30. See 1996 CALIFORNIA BALLOT PAMPHLET, *supra* note 35, at 30.

their gender.³⁷ If, for example, a man had been given a job instead of a woman on the basis that the state thought men were simply better at that kind of work, prior to Prop. 209 the state was required to show a compelling reason, which is a very stringent standard.³⁸ After Prop. 209, the state's action just needs to be reasonable.³⁹

I have spoken to voters who supported the proposed anti-bilingual education initiative,⁴⁰ but did not believe that it simply requires students to be immersed in classes taught in English. They imagined a panoply of services that will help monolingual students ease their way into a more rapidly assimilated English proficiency,⁴¹ including instruction in the English language. This desirable set of programs is not in the initiative.⁴² These voters will be disappointed when they later discover the disparity between what they believed they were supporting and the actual language of the initiative.

Many who supported Proposition 208⁴³ thought that they were supporting campaign reform that gave less, not more, power to special interest groups.⁴⁴ They were wrong. Proposition 208 provided incentives to political candidates who voluntarily adopted campaign spending limits.⁴⁵ State Assembly candidates could not spend more than \$200,000 in the general election, and State Senate hopefuls would be limited to \$400,000.⁴⁶ Because State Senators represent

37. See generally Erwin Chemerinsky & Laurie Levenson, *Sex Discrimination Made Legal*, L.A. TIMES, Jan. 10, 1996, at B9.

38. See *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 16-17, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971).

39. See Chemerinsky & Levenson, *supra* note 37, at B9.

40. The initiative has been numbered Proposition 227 by California Secretary of State Bill Jones. See *9 State Propositions for June Ballot Get Numbers*, L.A. TIMES, Feb. 11, 1998, at A19.

41. See Nick Anderson, *Debate Rises as Prop. 227 Vote Nears*, L.A. TIMES, Mar. 23, 1998, at A3 (noting voter support for giving children more English education while preserving the bilingual safety net).

42. See *id.* (explaining that the "English for the Children" initiative only includes a year of lessons for the least proficient children before requiring the children to be immersed in regular classes).

43. Supporters of Proposition 208 included Californians for Political Reform, a committee sponsored by the League of Women Voters of California, the American Association of Retired Persons-California (AARP), Common Cause, and United We Stand America. See *Proposition Debate* (visited Mar. 30, 1998) <<http://www.vidya.com/caprops/208/info.html>>.

44. See *Proposition Debate (Debate on Proposition 208)* (visited Mar. 30, 1998) <<http://www.vidya.com/HyperNews/get/props/208.html>>.

45. See 1996 Cal. Legis. Serv. No. 10, A-6 (West).

46. See *id.*

approximately 800,000 people⁴⁷ and State Assembly members represent about 395,000,⁴⁸ this amounts to a little less than fifty cents per potential constituent. Our ability to inform the electorate about who we are and what we favor was vastly limited by the initiative. No such limitation was placed on the special interests, however. Proposition 208 merely prohibited special interests from conferring with legislators before publishing literature about us,⁴⁹ which means that your understanding of my positions would not have been seen or shaped by me.

VII. PROBLEM FOUR: THE MEDDLESOME COURT

A court is required to decide questions properly before it.⁵⁰ Very much like legislators who have a green “yes” button and a red “no” button on their desks on the Floor, but no “beats the heck out of me” button, the court must render an opinion. This unfortunate task of having to judge the constitutionality of initiatives⁵¹—most of which are deficient for all the reasons set forth above—leads to yet another problem: the dissatisfaction of the voters with the third and “least dangerous” branch of government.⁵² The voters perceive the court’s thoughtful analyses as “judicial activism”⁵³ while misperceiving the

47. The State Senate consists of 40 senators, representing a total population of 31,589,153. See CAL. CONST. art. IV, § 2(a) and THE WORLD ALMANAC AND BOOK OF FACTS 1997 at 657 (Robert Famighetti ed., 1996) (population figure from 1995).

48. The State Assembly consists of 80 members. See CAL. CONST. art. IV, § 2(a), representing the same population as the State Senate.

49. See *Campaign Funding Limits Go On Trial*, L.A. TIMES, Nov. 3, 1997, at A3.

50. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169 (1803); *Kopp v. Fair Political Practices Comm’n*, 11 Cal. 4th 607, 673, 905 P.2d 1248, 1292, 47 Cal. Rptr. 2d 108, 151 (1995).

51. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

52. See *Thing v. La Chusa*, 48 Cal. 3d 644, 675, 771 P.2d 814, 835, 257 Cal. Rptr. 865, 886 (1989) (Kaufman, J., concurring) (“The legitimacy, prestige and effectiveness of the judiciary—the ‘least dangerous branch’—ultimately depend on public confidence in our unwavering commitment to [the principled declaration of public norms].”).

53. See *Kopp*, 11 Cal. 4th at 673-74, 905 P.2d at 1292, 47 Cal. Rptr. 2d at 152 (Mosk, J., concurring). In upholding the validity of Proposition 73, Justice Mosk noted the traditional limits of the court:

[I]f . . . this court had general authority to rewrite a statute—as the dissenters evidently believe in their remarkable . . . display of judicial activism—so too would [all other state courts] The enactment of a statute would not be the end of the legislative process Rather, we have consistently maintained the obvious and significant

requirement placed on the court to balance the interests of those voting in the majority and the constitutional protections accorded a minority or a process.

Every time the court finds a constitutional flaw in an initiative, those who voted for it complain that the court has thwarted the "will of the People."⁵⁴ The complaint would be well taken but for two things. First, the court is required to thwart the will of the people, the will of the legislature, the will of Congress, the will of city councils, and even the will of mosquito abatement boards,⁵⁵ if that will runs afoul of the protections found in the state and federal constitutions.⁵⁶ Second, the court must consider the actual language of the initiative and not simply the sound bites with which it was sold to the voters.

VIII. CAN THE INITIATIVE PROCESS BE SAVED?

Not only can the initiative process be saved, it must be saved. The initiative process is thriving and the ballot is crowded with ideas. The question might better be asked, "can the populace be saved from the initiative process?" Ideas abound for revisions and I suggest an incremental approach. Let us begin by trying to help proposed language be as constitutional as possible and by eliciting the help of a neutral, yet knowledgeable, body in the drafting. In addition, perhaps debates could be presented, in the same way as candidate debates are presented, only more in the mold of a committee hearing, with witnesses pro and con, questions by people pro and con that probe each section, nothing left in the shadow.

After all, perhaps we would like to know what is in our sausage, if only to make some intelligent choices.

distinction between interpreting a measure and making changes in its words.

Id. (Mosk, J., concurring).

54. See *Howard Jarvis Taxpayers' Assoc. v. Fresno Metro. Projects Auth.*, 40 Cal. App. 4th 1359, 1362, 48 Cal. Rptr. 2d 269, 271 (1995).

55. See *Los Angeles Cty. Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal. 2d 331, 333 P.2d 1 (1958).

56. See *Howard Jarvis*, 40 Cal. App. 4th at 1362, 48 Cal. Rptr. 2d at 271.