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Panelists at the October 5, 2011 symposium, “Can Direct Democracy Be Saved?”
LEFT TO RIGHT: Robert Stern; Peter Schrag; Justice Carlos Moreno (Ret.); Joel Fox;
Moderator Trudy Schaefer. (FULL STORY ON PAGES 3 TO 7.)

PHOTO BY GREG VERVILLE

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“Can Direct Democracy Be Saved?”

A SYMPOSIUM HELD IN LOS ANGELES, OCTOBER 5, 2011



Joel Fox, former President of the Howard Jarvis Taxpayers Association, vigorously defended California's system of direct democracy, pointing out that 75 percent of Californians polled favor it, while only 20 percent approve of the Legislature's performance.



Retired California Supreme Court Associate Justice Carlos Moreno offered a straightforward recommendation when asked for one reform to improve the initiative process in California: impose a word limit on ballot measures and require that they be written in “simple, plain English.”

PHOTOS BY GREG VERVILLE

The California Supreme Court Historical Society marked the centennial of the initiative process in California by co-sponsoring a symposium on its historical, legal, and political legacy over the past 100 years. The Society partnered with the League of Women Voters of California and Zócalo Public Square in presenting a panel discussion in downtown Los Angeles on October 5, 2011. That date is almost exactly a century after California voters enacted the modern system of direct democracy by approving Proposition 7, which established the initiative and referendum, in October 1911.

The symposium was titled “Can Direct Democracy Be Saved?” and the issue for discussion was framed in the following terms:

“The promises of direct democracy are to promote citizen involvement and level the playing field of politics. But after a century of initiative and referendum in California, many wonder how level the playing field is, and whether ballot box legislation has advanced the

cause of good governance, or only contributed to governmental dysfunction. In recent decades, dozens of initiatives have profoundly changed the state's budgeting process, its criminal justice system, its educational system, and the autonomy of local governments. What are the practical and legal limits of governing by initiative, and is California better or worse for it? When it comes to direct democracy, whose voice is being heard?”

Those questions, and others, provoked a lively exchange of views among the distinguished panelists:

JOEL FOX, a political consultant, author, and former president of the Howard Jarvis Taxpayers Association;

HON. CARLOS MORENO, a former federal district court judge and recently retired Associate Justice of the California Supreme Court;

PETER SCHRAG, author and columnist, as well as former editorial page editor of the *Sacramento Bee*; and



Peter Schrag, former editorial page editor of the Sacramento Bee, was blunt when asked what he would do to improve the initiative system: "I'd like to eliminate it, period."



Robert Stern, President of the Center for Governmental Studies and the first General Counsel of California's Fair Political Practices Commission, challenged the audience to "Name one initiative that the voters later regretted passing."



Zócalo Public Square Managing Director Dulce Vasquez welcomes audience, thanks CSCHS and League of Women Voters for co-sponsorship.

ROBERT STERN, President of the Center for Governmental Studies and former general counsel for the California Fair Political Practices Commission

The evening's discussion was expertly facilitated by the knowledgeable moderator, Trudy Schaefer, the League of Women Voters Senior Director for Programs and, like Joel Fox, a member of the 2000–2001 commission on the initiative appointed by then-Assembly Speaker Robert Hertzberg.

Opinions about the desirability of California's brand of direct democracy ranged across the spectrum.

Peter Schrag was the system's most severe critic, declaring unequivocally "I'd like to eliminate it, period." He observed that half of the states do not have anything resembling California's system and doubted that anyone could successfully argue that California was better governed than they are. He also pointed out that initiatives, whose express purpose is to restrict the power of the legislature, often provoke legislative responses which in turn lead to additional initiatives in a self-perpetuating and harmful cycle, further reducing the legislature's effectiveness. For example, Proposition 13 was followed in 1979 by the "Gann initiative," which imposed a limit on both the State's receipt and expenditure of taxes. In 1987, when Governor Deukmejian decided that the State had exceeded its "Gann limit" he refunded hundreds of millions of dollars to taxpayers, thereby reducing

funding for schools. This led school interests to support Proposition 98 the following year, guaranteeing a floor for K-12 educational spending. Although protecting schools, this led the legislature to take revenues from local governments, giving rise in turn to initiative measures that insulated local governments from state “raids” on their revenues but only by further limiting State legislative control over public finance.

Joel Fox took the opposite view: “When you look at the polling, 75 percent of the people like direct democracy and only 20 percent like the legislature. So maybe we should be talking about how do we save the legislature.” In response to suggestions that there are too many initiatives, he noted that in 100 years only 116 laws have been enacted by initiative, while in the last seven months alone the legislature passed over 600 bills, many of which emerged only at the last minute and were never the subject of committee hearings. Finally, he emphasized that initiatives arise only when the legislature fails to act on perceived problems.

Bob Stern, a principal co-author of the 1974 California Political Reform Act (an initiative measure passed by 70 percent of the voters) recognized problems with the initiative process but championed reforming the current system rather than eliminating it. He challenged the audience to “Name me an initiative that’s passed, since the beginning, where the voters regretted passing it.” He also argued that there are some subjects that the legislature will never act on, such as term limits, redistricting reform, and political/campaign ethics.

Justice Moreno offered a measured assessment, based on the several occasions he had to consider the legal validity of initiatives during his 10 years on the California Supreme Court. He observed that initiatives tend to be overly-long and poorly drafted, in part because their proponents do not necessarily have the benefit of professional staff, which the Legislative Counsel’s office provides for bills. In addition, he observed, they don’t have the “record” that the legislative process typically develops through committee hearings, staff reports and findings of fact. This makes it more difficult for the courts to determine the intent of the drafters and voters.

Turning to possible reforms, the panelists found more areas of agreement.

Without abandoning his preference for complete abolition of the initiative, Peter Schrag recommended that California incorporate provisions (in effect in several other states) that place an automatic “sunset date” on initiative measures or that allow the legislature to amend or repeal an initiative measure after a specified number of years.

Joel Fox thought that the power to write the ballot summary and assign the ballot title to initiatives should be removed from the Attorney General because it is a partisan office.

Bob Stern felt that the time limit within which signatures must be gathered on initiative petitions (150 days) is far too short. It effectively requires the use of paid signature gatherers, giving an advantage to those interests with plenty of money. His assertion that “If you have \$2 million you are guaranteed to get on the ballot” was not challenged by Joel Fox. However, Mr. Fox insisted that



CSCHS board members John Caragozian and Bob Wolfe react differently to a point made by a panelist.



Peter Israel, judicial staff attorney at the California Court of Appeal, Second District, and CSCHS board member Ray McDevitt.



CSCHS President Dan Grunfeld, former California Supreme Court Associate Justice Carlos Moreno, CSCHS board members John Caragozian and Bob Wolfe.



Pepperdine School of Law Professor and CSCHS board member Kristine Knaplund.

money would not similarly guarantee *passage*, pointing to the failure of two recent measures, one sponsored by Mercury Insurance the other by Pacific Gas and Electric Co., despite those companies having vastly outspent their opponents. Stern recommended the time limit to circulate petitions be extended to one year, enabling “grass roots” groups to more easily qualify measures. He also encouraged the audience to look at the range of other reforms recommended by the Center for Governmental Studies in its report on the initiative, “Democ-

racy by Initiative: Shaping California’s Fourth Branch of Government,” which can be found at www.cgs.org.

Justice Moreno’s plea was straightforward: a word limit on initiatives and a requirement that drafters use “simple, plain English.”

All agreed that greater disclosure of the identity of the principal supporters and opponents of initiative measures would be useful to voters, as would clear information on those measures’ likely governmental costs and other financial effects. None of the panelists thought that on-line voting for initiatives was ready to be implemented, given the concerns for both accuracy in tabulating results and preserving individual voters’ privacy. And most of the panelists, regardless of their views about the initiative process generally, thought that proponents of a measure should have “standing” to defend it in court if neither the Governor nor the Attorney General are willing to do so.

Justice Moreno provided the evening’s most fascinating personal observation. He remarked that this was the first time he had been in the theater in which the panel discussion was being held, recalling that when he was a child growing up in Los Angeles the theater showed Japanese language films. He also remembered getting his hair cut at the “Barbers College,” right next door to the theatre, where haircuts cost only 25 cents — and were free if you went to the chairs in the back.

Society board members Bob Wolfe and John Caragozian worked diligently to coordinate the Society’s

CSCHS Administrative Director Chris Stockton welcomed audience members, managed the MCLE sign-up process, and distributed information about the Society.

involvement with its two co-sponsors in this program and deserve much credit for its success. The Society's administrative officer Chris Stockton capably handled logistical details before, during and after the event. Vice President Eric Joss and Paul Hastings, LLP, arranged for attorneys attending the symposium to receive State Bar CLE credit, distributing a comprehensive compilation of court opinions and scholarly analysis of the law in California on the initiative and referendum.

The complete audio/video recording of the panel presentation can be viewed online at the Zócalo website, <http://zocalopublicsquare.org>. The Zócalo website also contains a series of brief, briskly-written essays on the topic "This Doggone Democracy — Would California be Better Off Without Ballot Initiatives?" under the heading "Up for Discussion." Contributors include Tracy Gordon, a Brookings Institution Fellow; Roger Noll, emeritus professor of economics at Stanford University and senior fellow at Stanford's Institute for Economic Policy Research; Jessica Levinson, visiting associate professor at Loyola Law School, Los Angeles; David McCann, associate professor of economics at Sonoma State University; and Robert Stern, President of the Center for Governmental Studies and one of the participants in the Symposium. ★



100 Years of Direct Democracy in California, 1911–2011



California Governor Hiram Johnson successfully campaigned for several Progressive causes including popular election of United States senators, women's right to vote, and direct democracy. The latter two were approved by California voters in 1911.



In October 1911, California voters enacted the modern system of direct democracy by approving Proposition 7, which established the initiative and referendum. In the same election, voters approved a constitutional amendment giving women the right to vote.