

JEFFERSON
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LIVING WITH DIRECT DEMOCRACY:

The California Supreme Court and the Initiative Power — 100 Years of Accommodation

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Justice Werdegar has been an eloquent and highly respected voice in the vital dialogue of recent years regarding constitutional principle and democratic governance. Her contributions both to scholarship and to the jurisprudence of California's high court are of enduring importance, and her lecture will deal with an issue — the initiative power in relation to the judicial role — which has been a key feature of conflicts over modern-day legal process in our state.

— Harry N. Scheiber

Thank you, Professor Scheiber and Chancellor Birgeneau, for your generous introductions. And good afternoon to all of you. I'm delighted to be with you today, back at my alma mater. And I'm deeply honored to have been invited to deliver the Spring 2012 Jefferson Memorial Lecture, as I'm aware of the many distinguished speakers who have preceded me.

* Associate Justice, California Supreme Court. This article is a slightly revised version of the Jefferson Memorial Lecture delivered by Justice Werdegar on March 20, 2012, at the invitation of the Graduate Council of UC Berkeley. Introductions were delivered by Jefferson Lectures Committee chair Harry N. Scheiber, the Riesenfeld Professor of Law and History; and Robert Birgeneau, chancellor of UC Berkeley. [The article is styled in accordance with the California Style Manual published by the Supreme Court.]

Thomas Jefferson, although not a true proponent of direct democracy, is the founding father most frequently quoted by those who are. Thomas Cronin, in his book “Direct Democracy: The Politics of Initiative, Referendum, and Recall,” tells us that Jefferson, more than most of the founding fathers, was willing to place his trust in the wisdom and goodness of the majority. As long as citizens were informed, he believed, as long as they had good schools and good newspapers, they could be entrusted with their own governance.¹ According to editor Horace Greeley, writing in 1838, the cardinal principle of Jeffersonian Democracy, the political theory that takes his name, was that “the People are the sole and safe depository of all power, principles and opinions which are to direct the Government.”² This principle is echoed in our state Constitution, which declares, “All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.”³

As we know, the framers of the U.S. Constitution, wary of the potential excesses of direct democracy, in the end established a republic, that is, an indirect democracy, a representative democracy. James Madison, writing in the Federalist Papers in support of the Constitution, pushed strongly for a barrier between what he described as the passions of the popular will and sober governance of the nation through a legislative branch. Pure democracies, he wrote, “have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”⁴ There was nothing in direct democracy, he was concerned, “to check the inducements to sacrifice the weaker party or an obnoxious individual.”⁵ As Cronin puts it, “Even Jefferson’s faith in the mass of the people was tempered,” first by his recognition of a “natural

¹ Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (1989) page 40 (hereafter Cronin).

² Greeley, *Editorial*, *The Jeffersonian* (Feb. 17, 1838) page 287, quoted and cited in Wikipedia <http://en.wikipedia.org/wiki/Jeffersonian_democracy> (as of Mar. 20, 2012).

³ California Constitution, article II, section 1.

⁴ *The Federalist* No. 10, page 81 (James Madison) (Clinton Rossiter, ed. 1961).

⁵ *Ibid.*

aristocracy” who would be best equipped to govern, and second by his concern that the “urban masses” would be easily corrupted.⁶

Yet an impulse toward direct democracy has been a part of our political history throughout. Some view direct democracy as complementary to our republican form of government, others see it as in direct conflict. But this question is not for the courts; more than a century ago the United States Supreme Court held that questions about the guaranty clause of the Constitution — the clause guaranteeing the states a republican form of government — are the province of politics, not law.⁷

The challenge for the courts, as I will discuss, is to effectuate the will of the people as expressed through direct democracy, while holding true to the fundamental principles of our Constitutions, federal and state. Hence the title of my speech: *Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accommodation*.

In the next few minutes I would like to touch on the history of the initiative, the limits on the power, and how the California Supreme Court has responded to legal challenges to initiative measures. My comments, I should note, reflect my personal assessment only and should not be taken as speaking for the court, nor do they indicate in any way how the court — or I — would rule in any particular future case involving an initiative.

HISTORY

One hundred years ago, in a dramatic move toward direct democracy, the citizens of California approved a state constitutional amendment giving themselves the power of the initiative — the power of voters, on their own, to initiate laws and amend the Constitution independent of the Legislature. As is now familiar, the initiative and its attendant provisions were

⁶ Cronin, page 19.

⁷ *Pacific Telephone Co. v. Oregon* (1912) 223 U.S. 118; see generally Miller, *Direct Democracy and the Courts* (2009) page 34 (hereafter Miller); Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution* (1998) 31 *Loyola L.A. L.Rev.* 1305, 1305–1306.

enacted as reforms in reaction to the stranglehold on California politics of the Southern Pacific Railway.⁸

California was not the first state to allow for voter initiatives. In the 1880's and '90's a strong populist movement emerged in the country, particularly in the West and Midwest, and with it a push for direct democracy or direct legislation by the people.⁹ As Thomas Cronin tells us in his book, because direct democracy was initially promoted by groups regarded as cranks — groups such as socialists and single-issue groups — incumbent legislators tended to dismiss the measures as too radical, but by the late 1890's the numbers of converts were increasing throughout the West.¹⁰ Proponents claimed direct democracy devices would diminish the impact of corrupt influence on the Legislature and would induce legislators to be more attentive to public opinion.¹¹ The initiative was viewed as a means to “increase government responsiveness to the will of the people and encourage greater citizen participation.”¹²

Heeding the call, in 1898 the State of South Dakota became the first state in the country to incorporate the initiative process into its Constitution.¹³

But there was opposition. As a push for the initiative developed in California, the Los Angeles Times asserted that the “‘ignorance and caprice and irresponsibility of the multitude’ would be substituted for the ‘learning and judgment of the Legislature’; radical legislation would result, and business and property rights would be subject to constant turmoil at the hands of agitators.”¹⁴ In Colorado, the Denver Republican lamented, “‘The initiative and referendum both conflict directly with the representative principle, and to the extent to which they may be applied representative government will be overthrown. . . . Must [the people of Colorado] adopt every new fangled

⁸ See Comment, *Putting the “Single” Back in the Single Subject Rule: A Proposal for Initiative Reform in California* (1991) 24 U.C. Davis L.Rev. 879, 882 and footnote 16 (hereafter *Putting the “Single” Back*); see generally Broder, *Democracy Derailed* (2000) pages 38–41.

⁹ Miller, page 24.

¹⁰ Cronin, page 50.

¹¹ *Id.*, page 53.

¹² *Putting the “Single” Back, supra*, 24 U.C. Davis L.Rev. at pages 881–882.

¹³ Cronin, table 3.1, page 51; see generally Miller, page 25.

¹⁴ Cronin, page 52.