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PERSPECTIVE

Two cooks in California's policy kitchen

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It's an election year, so the California initiative process is enduring the usual complaints about the initiative as "an institution that needs to be up for scrutiny" and the state needing to steel itself for a "blockbuster year of ballot measures." Should you gird your loins, squint at the November ballot, and worry that California is about to self-destruct?

Hardly. There are 12 measures in the November general election, and that may seem like a lot — it's more than double the five-per-year historical average number of initiatives. But this is nothing compared to the three years with the highest number of ballot propositions: 48 in 1914 (most ever), 41 in 1988, and 45 in 1990. And just seven of this year's dozen are citizen initiatives; the rest are proposed by the Legislature (there's also one referendum). So there's no problem with the number of initiatives — what about the subject matter?

No landmines here. None of the initiatives on the November 2020 ballot contain silly proposals like seceding from the Union or dividing California into several new states. Instead, the voters will consider a slate of good-government proposals aimed at righting wrongs and fixing endemic policy problems. One measure (Proposition 14) is a stem-cell research



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Hiram Johnson, who helped establish direct democracy in California.

bond, two measures (Propositions 20 and 25) concern criminal sentencing and cash bail, and Proposition 21 expands local rent control. Those measures all submit rational public policy choices to the voters for their approval (or not). And all demonstrate the self-government spirit that inspired the initiative's birth in 1911.

Governor Hiram Johnson, the godfather of California direct democracy, admitted that it would not be "the panacea for all our political ills," but argued that direct democracy was the best way to "arm the people to protect themselves," to accomplish their desired reforms, and to prevent the misuse of legislative power. He was right. Of course, the

electorate does sometimes err. As one high-profile example, Proposition 8's ban on same-sex marriage was unjust and ultimately was overturned by the U.S. Supreme Court. But the initiative in California solves more problems than it causes, serving its intended purpose of empowering the voters to solve intractable problems and break political stalemates. Without the initiative we wouldn't have legislative term limits (Proposition 140 in 1990), the Citizens Redistricting Commission (Proposition 20 in 2010), or a functioning state budget process (Proposition 25 in 2010). All were initiative measures that tackled problems the Legislature failed to address — exactly as Johnson intended.

Take for example Proposition 24, a prime example of a proper initiative. In 2018, the Legislature convinced the proponents of a qualified privacy initiative to remove it from the ballot, promising that the Legislature would enact consumer privacy legislation. And the Legislature did so: In June 2018 Gov. Jerry Brown signed the California Consumer Privacy Act. But since then the legal and technical landscape has shifted, undercutting the law. Two years later, the same proponents are back with Proposition 24, to increase consumer privacy protection and allow further privacy legislation only if it would increase those protections. That's the kind of citizen problem-solving Hiram Johnson would have endorsed.

More broadly, one could be concerned by the very concept of a state that since 1911 has lived with two legislatures: both the California Legislature and the state electorate have plenary legislative power. That sounds like two equal-and-opposite forces destined for mutual annihilation. But the California Supreme Court prevents that by interpreting the electorate's direct democracy powers as a limit on the Legislature's powers — the state's entire lawmaking authority is vested in the Legislature, *except* for the initiative and referendum. And the system is designed to prevent endless cycling because the electorate has a trump card.

Deadlock is prevented because the electorate has the final say. California Constitution Article II, Section 10(c) provides that the Legislature “may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.” That section gives the electorate control over amendments to its initiatives, and it suggests that the state’s two legislative bodies are not actually equal in power. The electorate has the last word on California legislative decisions because it can both set the terms of and end a policy debate.

Proposition 24 again illustrates that dynamic. It permits legislative amendments if those “amendments are consistent with and further the purpose and intent” of the measure, which is “to further protect consumers’ rights, including the constitutional right of privacy.” That statement of intent sets the floor and creates a one-way ratchet: The Leg-

islature can only amend it by increasing privacy protections. Courts will enforce whatever conditions the voters attach to the Legislature’s amendatory powers, and generally legislative amendments consistent with the electorate’s expressed intent are permitted. Under that standard the Legislature could for example amend Proposition 24 to add an opt-in regime, an expanded private right of action, or strengthen the law’s anti-discrimination features. Those amendments would be permitted because they are consistent with the measure’s conditions; Proposition 24 does not expressly bar them; and all would increase consumer protections and so are consistent with its intent.

Measures like Proposition 24 (with explicit instructions for courts when reviewing attempted legislative amendments) hobble the Legislature — because when the Legislature and the electorate conflict, the electorate prevails. A fundamental aspect of the initiative power is its ability to override the state Legislature, making

the electorate’s policy decision the final one. Article II, section 10(c) effectively gives the electorate a veto (perhaps even the equivalent of a line-item veto) over legislative amendments (and the referendum is an actual veto). No one has a veto over initiative acts. This makes the electorate the ultimate authority in policy matters. And it makes the Legislature the electorate’s servant on any matter covered by an initiative, because the electorate controls

future changes to those laws.

Hiram Johnson said that reserving to “the electorate the power of action when desired” gave the voters the means to protect themselves. His opponents, who argued that the people can’t be trusted, have been proved wrong by California’s rise to the fifth largest economy in the world. Not only does the state electorate have power to govern — it has *ability* to govern. Use your power wisely, Californians. ■

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