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THE PERILS OF DIRECT DEMOCRACY:

THE CALIFORNIA EXPERIENCE

REMARKS BY:

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It is an honor to speak as a representative of the new class of Academy members. I would like to share some thought s with you on a matter that has been of recent and continued professional concern to me, but that I believe may be of general interest to members of the Academy, because it fundamentally implicates how we govern ourselves. This is the increasing use of the ballot Initiative process available in many states to effect constitutional and statutory changes in the law, especially in the structure and powers of government.

A not-too-subtle clue to my point of view is reflected in the caption I have chosen for these remarks — "The Perils of Direct Democracy: The California Experience." Although two dozen states in our nation permit government by voter Initiative, in no other state is the practice as extreme as in California.

By the terms of its Constitution, California permits a relatively small number of petition signers — equal to at least 8% of the voters in the last gubernatorial election — to place before the voters a proposal to amend any aspect of our Constitution. (The figure is only 5% for a proposed non-constitutional statutory enactment.) If approved by a simple majority o f those voting at the next election, the Initiative measure goes into effect on the following day.

The legislature (by two-thirds vote of each house) shares with the voters the power to place proposed constitutional amendments before the electorate. California, however, is unique among all American jurisdictions in prohibiting its legislature, without express voter approval, from

amending or repealing even a statutory measure enacted by the voters, unless the Initiative measure itself specifically confers such authority upon the legislature.

The process for amending California's Constitution thus is considerably easier than the amendment process embodied in the United States Constitution, under which an amendment may be proposed either by a vote of two-thirds of each house of Congress or by a convention called on the application of the legislatures of two-thirds of the states. It can be ratified only by the legislatures of (or by conventions held in) three-quarters of the states.

The relative ease with which the California Constitution can be amended is dramatically illustrated by the frequency with which this has occurred. Only 17 amendments to the United States Constitution (in addition to the Bill of Rights, ratified in 1791) have been adopted since that document was ratified in 1788. In contrast, more than 500 amendments to the California Constitution have been adopted since ratification of California's current Constitution in 1879.

Former United States Supreme Court Justice Hugo Black was known to pride himself on carrying in his pocket a slender pamphlet containing the federal Constitution in its entirety. I certainly could not emulate that practice with California's constitutional counterpart.

One Bar leader has observed: "California's current constitution rivals India's for being the longest and most convoluted in the world . . . . [W]ith the cumulative dross of past voter initiatives incorporated, [it] is a document that assures chaos."

Initiatives have enshrined a myriad of provisions into California's constitutional charter, including a prohibition on the use of gill nets and a measure regulating the confinement of barnyard fowl in coops. This last constitutional amendment was enacted on the same 2008 ballot that amended the state Constitution to override the California Supreme Court's decision recognizing the right of same-sex couples to marry. Chickens gained valuable rights in California on the same day that gay men and lesbians lost them.

Perhaps most consequential in their impact on the ability of California state and local government to function are constitutional and statutory mandates and prohibitions — often at cross-purposes — limiting how elected officials may raise and spend revenue. California's lawmakers, and the state itself, have been placed in a fiscal straitjacket by a steep two-thirds-vote requirement — imposed at the ballot box — for raising taxes. A similar supermajoritarian requirement governs passage of the state budget. This situation is compounded by voter Initiative measures that have imposed severe restrictions upon increases in the assessed value of real property that is subject to property tax, coupled with constitutional requirements of specified levels of financial support for public transportation and public schools.

These constraints upon elected officials — when combined with a lack of political will (on the part of some) to curb spending and (on the part of others) to raise taxes — often make a third alternative, borrowing, the most attractive option (at least until the bankers say "no").

Much of this constitutional and statutory structure has been brought about not by legislative

fact-gathering and deliberation, but rather by the approval of voter Initiative measures, often funded by special interests. These interests are allowed under the law to pay a bounty to signature-gatherers for each signer. Frequent amendments — coupled with the implicit threat of more in the future — have rendered o ur state government dysfunctional, at least in times of severe economic decline.

Because of voter Initiatives restricting the taxing powers that the legislature may exercise, California's tax structure is particularly dependent upon fluctuating types of revenue, giving rise to a "boom or bust" economic cycle. The consequences this year have been devastating to programs that, for example, provide food to poor children and health care for the elderly disabled. This year's fiscal crisis al so has caused the Judicial Council, which I chair, to take the reluctant and unprecedented step of closing all courts in our state one day a month. That decision will enable us to off set approximately one-fourth of the more than $400 million reduction imposed by the other two branches of government on the $4 billion budget of our court system.

The voter Initiative process places additional burdens upon the judicial branch. The court over which I preside frequently is called upon to resolve legal challenges to voter Initiatives. Needless to say, we incur the displ easure of the voting public when, in the course of performing our constitutional duties as judges, we are compelled to invalidate such a measure.

On occasion, we are confronted with a pre-election lawsuit that causes us to remove an Initiative proposal from the ballot because, by combining insufficiently related issues, it violates our state Constitution's single-subject limitation on such measures. At other times, a voter Initiative — perhaps poorly drafted and ambiguous , or faced with a competing or "dueling" measure that passed at the same election — requires years of successive litigation in the courts to ferret out its intended meaning, and ultimately may have to be invalidated in whole or in part. < o:p>

One thing is fairly certain, however. I f a proposal, whatever its nature, is sufficiently funded by its backers, it mo st likely will obtain the requisite number of signatures to qualify for the ballot, and — if it does qualify — there is a good chance the measure will pass. The converse certainly is true — poorly funded efforts, without sufficient backing to mount an expensive television campaign — are highly unlikely to succeed, whatever their merit.

This dysfunctional situation has led some to call for the convening of a convention to write a new Constitution for California to replace our current 1879 char ter, which in turn supplanted the original 1849 document. Yet, although a recent poll reflects that 79% of Californians say the state is moving in the wrong direction, only 33% believe that the state's Constitution requires "major" changes and approximately 60% are of the view that decisions made by Californians through the Initiative process are better than those made by the legislature and the governor.

Add t o this mix a split among scholars concerning whether a constitutional convention, if called, could be limited in the subject matter it is empowered to consider. Some argue that a convention would be open to every type of proposal from any source, including social activists and special interest groups. There also is controversy over the most appropriate procedure for selecting delegates for such a convention.

A student of government might reasonably ask: Does the voter Initiative, a product of the Populist Movement that reached its high point in the early 20th century in the mid-west and western states, remain a positive contribution in the form in which it now exists in 21st century California? Or, despite its original objective — to curtail special interests, such as t he railroads, that controlled the legislature of California and of some other states — has the voter Initiative now become the tool of the very types of special interests it was intended to control, and an impediment to the effective functioning of a true democratic process?

John Adams — who I believe never would have supported a voter Initiative process like California's — cautioned that "democracy never lasts long . . . . There is never a democracy that did not commit suicide." The nation's Founding Fathers, wary of the potential excesses of direct democracy, established a republic with a carefully crafted system of representative democracy. This system was characterized by checks and balances that conferred authority upon the officeholders of our three branches of government in a manner designed to enable them to curtail excesses engaged in by their sister branches.

Perhaps with the dangers of direct democracy in mind, Benjamin Franklin gave his much-quoted response to a question posed by a resident of Philadelphia after the adjournment of the Constitutional Convention in 1787. Asked the type of government that had been established by the delegates, Franklin responded: "It would be a republic, if you can keep it." And, as Justice David Souter recently observed in quoting this exchange, Franklin "understood that a republic can be lost."

At a minimum, in order to avoid such a loss, Californians may need to consider some fundamental reform of the voter Initiative process. Otherwise, I am concerned, we shall continue on a course of dysfunctional state government, characterized by a lack of accountability on the part of our officeholders as well as the voting public.