Understanding the Prop 8 Litigation: The Scope of Direct Democracy and Role of Judicial Scrutiny

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JUDICIAL SCRUTINY
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Introduction
Once the California Supreme Court decision is handed down, the precise contours of the battle over Proposition 8 and marriage equality will change, but nothing on the political horizon will make moot many of the fundamental issues direct democracy raises for California and the nation. A special and enduring element of the Prop 8 controversy is the role of judicial review in the scrutiny of the results of ballot propositions. A slice of conventional wisdom seems to suggest that the results of plebiscites should be nearly immune from judicial review. On the other hand, many political and legal scholars are more skeptical, and some even argue that judicial review of direct democracy should be more searching, given that the usual vetting and deliberation has not occurred. This article seeks to place the debate over Prop 8 into the broader context of an ongoing discussion about the place of direct democracy in legal and constitutional change.

I. Modern Democracy Cannot be Reduced to Mere Rule by Plebiscite.
The official opponents of marriage equality, recognized as interveners in the Prop 8 litigation, frame the debate with rhetoric about “the rich and storied history of California” and “the many decades of our state’s jurisprudence.” Their rhetoric soars with stirring references to “an abiding, unshakable faith in the people” as the “one unifying principle [which] serves as the foundation for our life together in community.” But for all their rhetorical flourish, they are seeking to draw the mantle of Lincoln’s “government ultimately not only for the people but by the people” over an ahistorical and plainly wrong attempt to equate “government by the people” with the version of plebiscitary majoritarianism embedded in their arguments. After all, the initiative process was completely foreign to the “government by the people” that Lincoln knew and celebrated.

II. Popular Sovereignty Does Not Require Simple Majoritarianism.
Misleading hyperbole about the fate of democracy suffuses the opposition to the California Supreme Court’s scrutiny of Prop 8. The official interveners’ Preliminary Opposition Brief says the people “have spoken and their will should be respected.” The Campaign for California Families argues that “overturning Proposition 8... would wreak havoc on the democratic process.” Such arguments often are trafficking in linguistic imprecision and conceptual confusion, which not only misdirects the public debate, but also risks misleading the court. That imprecision and confusion can be cleared somewhat by looking to scholars of the political system, such as the eminent political scientist Austin Ranney, who specified that direct democracy can refer to four separate mechanisms: “constitutional referendum (the most widely accepted), legislative referendum, legislative initiative and constitutional initiative (the least widely accepted).”

Some in the current debate elevate the unusual mechanism of constitutional initiative so high as to make it seem the sine qua non of popular sovereignty. But such paens to direct democracy obscure the fact that no modern industrial democratic country, with the sole exception of Switzerland, allows constitutional change by direct initiative--let alone by a simple majority vote in a single election without even prescribed turnout minimums. The United States itself does not allow for legislative referendum, legislative initiative or constitutional initiative, and though the federal government imposed procedures for constitutional referendum on the later-admitted states, the federal Constitution itself does not include a simple mechanism for constitutional
referendum. The records of the Constitutional Convention indicate that the Framers *84 never considered allowing for a direct popular vote on constitutional amendments.10

Currently, 21 (some count 23) American states have a mechanism for statutory change by legislative initiative, but only 16 allow constitutional change by initiative.11 And there is no momentum for more states to adopt the initiative process. In a survey of state-level initiative politics, political scientists Shaun Bowler and Todd Donovan note that “[o]nly four states adopted the initiative process after 1918; it is almost exclusively an artifact of politics at the turn of the 20th century.”12 It is also largely an artifact of the Progressive Movement in central and western states; save for Arkansas, only two states east of the Mississippi adopted “I&R”--Massachusetts and Maine.13

A simple tally of the number of states where the initiative process is technically available actually misrepresents the political realities. According to M. Dane Waters of the Initiative and Referendum Institute at the University of Southern California, “over 60% of all initiative activity has taken place in just six states - Arizona, California, Colorado, North Dakota, Oregon and Washington.”14 And of those six, California and Oregon are the only states in which use of the initiative process could be called common.15

Of the distinct minority of states that does allow for constitutional amendment by direct initiative, all impose some procedural or substantive constraints, such as excluding certain subjects from the initiative process, and requiring the ballot propositions related to a single subject.16 In an extreme case, Illinois permits constitutional initiatives only with regard to one article of its state constitution.17

Thus, contrary to much of the misleading public debate and litigation rhetoric, the reality is that most democratic jurisdictions, including the federal government and the large majority of states of the United States, consider amendment by unconstrained initiative to be unnecessary. Democratic government and popular sovereignty are not only possible, but currently thrive without the sort of unbridled, unmediated, and immediate majoritarianism that is at the core of a common but simplistic conception of democracy. And it would seem that if democracy can exist on the federal level and *85 in most states without any mechanism for direct initiative, it can certainly survive the rather modest procedural provision at issue in the Prop 8 case. After all, what democracy really does require is adherence to the rule of law, including the California Constitution’s mandate that constitutional revisions cannot be done through direct initiative but instead must proceed by legislative referral.

III. Revision by Referendum After Legislative Referral Is Not Inconsistent With Popular Sovereignty.

Of course, popular sovereignty means the people can always have what they want; that is the essence of democracy. But modern democratic republicanism as practiced in the United States is premised on the essential principle that a bare majority of the people should not always get everything they want at the very moment they want it. Since the time of the Federalist Papers, the “science of politics” has recognized that the true sine qua non of modern constitutional government is a healthy respect for the principles of checks and balances, deliberation, and constitutional procedure.18

Under the federal constitution, popular sovereignty is paramount and nothing ultimately can deny the will of the people. No procedural mechanism or piece of paper can thwart an idea that has captured the loyalty of the majority. But, by careful and explicit design of the Framers, a constitutional amendment supported by a majority of the people over the opposition of the existing political representatives cannot be enacted easily or immediately.

A little thought experiment demonstrates the point: Imagine that a wildly radical idea for fundamental constitutional change grips the American citizenry. How soon could that change be enacted if the popular passion was resisted by the whole of the existing political establishment? It takes two years to re-populate the House of Representatives, four years to replace the President, and 12 years to replace the two-thirds of the Senate required to overcome filibusters. At that point a constitutional amendment could be proposed, which would have to be supported in the presumably re-populated state legislatures or in constitutional conventions. Alternatively, the Supreme Court could be stacked or replaced (historically, vacancies occur about once every 22 months on average). So the most radical constitutional change imaginable, one opposed by the whole of the existing representative class, could be lawfully made in just over 12 years.

Thus, the fundamental premise of much of the debate about judicial scrutiny of Prop 8 is false. The anti-8 demand *86 that significant or controversial constitutional change should be made only upon reflection and via the proper process is not somehow the end of democracy as we know it--it actually is democracy as we know it. In fact, legislative referral to a constitutional convention or a popular referendum is the only mechanism for any constitutional change under the U.S. Constitution and most state Constitutions, and the only mechanism mandated by the California Constitution for substantial change to the state Constitution.

While some modern scholars of democratic theory and practice are positive about prospects for initiatives and referenda to promote greater citizen participation and improve the quality of democracy, they also offer some severe cautions. They have noted the possibility, and often the reality, of referenda initiatives being used by powerful special interest groups to capture the
powers of the state in self-interested ways, and more ominously, to threaten the civil rights of vulnerable minorities or exploit and increase racial or ethnic tensions.\textsuperscript{19} There is a substantial body of academic literature offering cautions about California’s practice of ballot propositions on all of these grounds.\textsuperscript{20} Political scientists and legal scholars have documented what reason and history suggest—majorities can tyrannize minorities at the ballot box. Across the whole panoply of ballot propositions voted on, minorities may suffer only a slight disadvantage as compared to whites—after all, most tax breaks or construction bonds are color-blind.\textsuperscript{21} However, even in a study sympathetic to the value of the initiative process, Hajnal and his co-authors conceded that “[o]n minority-targeted initiatives, Latinos consistently lose out,” and that “Latinos, indeed, have much to worry about when issues that target their rights are decided via direct democracy.”\textsuperscript{22}

Latinos lost out in the Hajnal study because the ballot propositions in the study that were clearly identified as minority-targeted were aimed at Latinos, but the principle applies just as well to other minorities. Based on a nationwide study, scholar Barbara Gamble has shown that initiatives that restrict civil rights pass more regularly than other types of initiatives.\textsuperscript{23} *87 Studies of California’s Propositions 187 (denying some rights and privileges to undocumented immigrants and their children) and 209 (ending most state affirmative action) similarly have concluded that racial anxieties and fear were a significant component of the white vote.\textsuperscript{24}

Though these studies and certain recent experiences counsel caution, they probably will not change the fact that California is committed to the progressive era vision of a direct voice for the citizenry. However, they should remind the public and the courts that this commitment must be respected within its legitimate scope; California’s adoption of the progressive institutions of initiative and referendum expressly did not give unlimited scope to the mechanism of a direct initiative.

**IV. The California Constitution Follows the Wisdom of Modern Democratic Thought by Distinguishing Amendments Via Initiative From Revision Via Legislative Referral.**

The misleading arguments of the ballot proposition absolutists notwithstanding, the essential wisdom of modern democratic thought is enshrined in the California Constitution. Though like only a small number of other states it allows for “amendment” via a ballot initiative, the Constitution mandates that substantial changes cannot be made via constitutional initiative, but must be made only on the basis of legislative referral to a popular referendum or a constitutional convention and subsequent popular referendum. “Although ‘[t]he electors may amend the Constitution by initiative’ (Cal.Const., art. XVIII, § 3), a ‘revision’ of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification (id., § 2), or by legislative submission of the measure to the voters (id., § 1).”\textsuperscript{25} In the very distinction between amendment and revision made in Article 18, the California Constitution plainly requires that substantial constitutional change be accorded the more deliberative and consultative process required by all other modern democracies. Thus, while the California courts are obliged to protect the people’s right under Article 18, section 3 to amend the Constitution by initiative, they cannot ignore the distinction between amendment and revision mandated by Article 18, section 1. Due deference must be shown to any legitimate amendment via initiative, but it is equally imperative that the courts not abdicate their essential and exclusive *88 responsibility to distinguish an amendment from a revision.\textsuperscript{26}

The numerous cases cited by the opposition briefs in the post-election Prop 8 challenge that allegedly support the argument that the court “must” give effect to a legitimate amendment by initiative are thus largely irrelevant. None of those cases alters the fact that this court has the sole authority and obligation to distinguish between a legitimate amendment and a purported “amendment” that is in fact an illegitimate attempt to revise the Constitution outside the prescribed mechanism of legislative referral.\textsuperscript{27}

Indeed, several of the cases touted in the opposition papers as creating a supposed invulnerability for initiatives actually reference judicial respect for the principle of popular sovereignty enshrined in the double faceted prerogative of “initiative and referendum.” Decisions holding that a referendum upon a legislative referral rather than a direct initiative was the proper procedure for the change proposed are fully consistent with that prerogative. For example, Associated Home Builders v. City of Livermore states that “the theory that all power of government ultimately resides in the people” is reflected in “the initiative and referendum.”\textsuperscript{28} That case goes on to note that it is “the initiative and referendum” which “articulate[s] one of the most precious rights of our democratic process,” and that it is the double faceted reserved right of initiative and referendum which is deserving of liberal construction.\textsuperscript{29}

The popular sovereignty to which the court owes deference includes not just the initiative, but also referendum after legislative referral. The invocation that deference provides no support for an attempt to elevate one mechanism over the other, particularly where the judiciary is the exclusive actor with authority to decide which mechanism is proper in a given case.

Finally, it is also worth noting that judicial review of ballot propositions is nothing unusual. Indeed, 52% of initiatives passed in California, Oregon, Colorado, and Washington from 1960 to 2000 were challenged in court, and 54% of those saw part or all of the ballot proposition struck down.\textsuperscript{30}
V. Revising the Constitutional Principles of Equal Protection Cannot be Reduced to a Ballot Battle of Bare Majorities.

In general, courts should be suspicious of claims that respect for popular sovereignty should lead the court to disregard the constitutionally mandated mechanism of legislative referral required for revisions. And ignoring that required constitutional procedure in the Prop 8 case is a literal invitation to reduce constitutional jurisprudence to an unseemly ping-pong of pro and con ballot propositions.

In fact, some among the Prop 8 supporters explicitly admit that their arguments would erect a model of equal protection law under which the fundamental rights of protected minorities are reduced to nothing more than a cycle of ballot battles. So, they blithely suggest, “[i]f Petitioners desire to overturn Proposition 8, their only recourse under state law is to amend the Constitution once again.”

The population is closely divided on the issue of marriage equality, and results in future elections could hinge on whether there is a Presidential election on the ballot, whether a proposition appears on a November ballot or at some other time of the year, or on any number of other factors that affect turnout, both in terms of the number and the demographics of voters. Already some proponents of equal marriage rights for same-sex couples are planning a signature drive. If they mount a successful campaign, their counter-proposition could succeed and the right to same-sex marriage might be restored by a slim majority. Opponents of marriage equality would no doubt prepare a counter-counter-proposition, which could succeed in once again removing marriage equality from the Constitution.

This invitation to turn marriage law in California into a ping-pong match of competing ballot propositions suggests just how irrational, impracticable and destructive this position can be to equal protection jurisprudence and to the institution of marriage. The situation easily could degenerate into what political scientists half-jokingly call a “neverendum”:

Given that one of the claims of proponents of referendums is that they provide a means of resolving difficult and complex issues, what happens in those instances where an issue is not “resolved”? Can the losing side demand another referendum? . . . What happens to public confidence if the “referendum” becomes a “neverendum”?

Political minorities should not have to await each election cycle to see if their rights have survived. Fundamental changes to the California Constitution do not belong on proposed ballot “amendments.”

VI. Beyond Prop 8: Judicial Scrutiny of Direct Democracy.

The staunchest critics of the initiative process wonder whether too much direct democracy constitutes a violation of the federal constitutional guarantee of a republican form of government. Whether the initiative process can ever violate the republican guaranty clause was held to be a non-justiciable political question in Pacific States Tel. & Tel. Co. v. Oregon. However, that ruling does not constitute a holding that on the merits the initiative process can never constitute a violation of republican principles, much less a judgment as to whether the process might not sometimes be unwise.

In his essay, “Who is Responsible for Republican Government?” noted scholar and jurist Hans Linde has warned that the initiative process is increasingly being misused “to enact ordinary laws. . . in the form of constitutional text so as to insulate a law from change by elected lawmakers as well as review of is constitutionality.” That general concern is reflected in the specifics of the Prop 8 case, and what Linde calls a misuse of the process seems very much to have been the goal of the Prop 8 proponents and of the opponents to the petition for post-election judicial scrutiny.

Similarly, scholar Philip Frickey has argued that direct democracy may well produce pathological results because, rather than a public and accountable debate, “direct democracy allows each citizen to follow her preconceptions anonymously and unaccountably in isolation from any interaction with others having different views.”

Some elements of the controversy over Prop 8 are limited to the specifics of this proposition and the debate over marriage equality. But the case also stands as a teaching moment in which a complex debate over the role of judicial scrutiny of process of direct democracy has bubbled up to the attention of a broader public. Hopefully, that debate can get beyond simple platitudes about “the voice of the people.” The newly attentive audience needs to understand why, instead of arguing that courts should defer to ballot propositions, “[w]ith a few dissenting voices, scholars have urged the Court to scrutinize popular initiatives for equal protection violations more vigorously than the Court reviews ordinary statutes adopted by legislatures.”

Footnotes

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This article is based on research and writing that also resulted in an amicus brief in the Proposition 8 litigation. Thanks are due to many people who participated in that process, and especially to my colleague Katherine Darmer, who spent many hours working with great patience to sharpen and refine the brief, and to coordinate the logistics of bringing it all together. Thanks also to Tiffany Chang, who was an able researcher and all-around go-to person, and further thanks to Aalia Sonawalla for her efforts. Several others, especially David Codell, Deborah E. Arbabi and Steven P. Rice, read and commented on the brief in ways that assisted in developing this article, and those efforts are much appreciated. All errors and infelicities are of course my own.

Interveners’ Opposition Brief at p. 5 (hereinafter “Opposition Brief”). Note that the “Opposition” position argues in support of Prop 8; they are opposing the petition to review and hold invalid Prop 8 as approved at the November 2008 election.

Id.

Id.

Id. at 29.

Id.

Preliminary Opposition of Brief of Intervener Real Parties in Interest to Amended Petition for Extraordinary Relief, etc., at p. 4 (hereinafter “Prelim Opp Brief”).

Proposed Intervener Campaign for California Families’ Preliminary Opposition to Petition for Extraordinary Relief at p. 4 (hereinafter “CCF Prelim Opp”).


Constitutional amendments are open to citizens’ initiatives in only 20 countries in the world, and in only one country that could be counted among the advanced industrial democracies—Switzerland. The other countries include:

Africa: Cape Verde, Liberia, Uganda

Americas: Colombia, Costa Rica, Ecuador, Uruguay, Venezuela

Asia & Oceania: Philippines, Marshall Islands, Federated States of Micronesia, Palau

Europe: Belarus, Georgia, Hungary, Latvia, Liechtenstein, Lithuania, Republic of Moldova, Slovakia.


Fisch, supra note 9, at 490 (records show “no proposals that would have called for a referendum or other direct democratic involvement in the process” of constitutional amendment).


14 M. Dane Waters, Initiative and Referendum Almanac 7 (2003).


16 For a thorough survey of such procedural devices, see Waters, Almanac, supra note 15, at 15-29 (2003).

17 Ill. Const. art. XI, § 3.

18 The obligatory citation to Federalist 10 seems appropriate here: see The Federalist No. 10, at 78, 82 (James Madison) (Clinton Rossiter ed., 1961), wherein Madison worries that the actions of the majority might be “adverse to the rights of other citizens,” and argues that in a republic the public views may be “refine[d] and enlarge[d] by passing them through the medium of a chosen body of citizens, whose wisdom may best discover the true interests of their country.”


22 Id. at 171.

23 Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41 American Journal of Political Science 245 (1997) (examining local and state ballot measures related to AIDS testing, gay rights, language, school desegregation, and housing/public accommodations desegregation).


26 See Livermore v. Waite 102 Cal. 113, 118-119 (1894) (hereafter Livermore).

27 The opposition papers expressly concede the obvious--the opponents of marriage equality want to avoid the mandate of legislative referral because they know they would lose. (CCF Prelim Opp, p. 12-13.)
28 18 Cal.3d 582, 591 (1976). (Emphasis added.)

29 Id. See also Ley v. Dominguez, 212 Cal. 587, 593 (1931) (the power of referendum is a reserved power deserving a liberal construction); Mervynne v. Acker, 189 Cal.App.2d 558, 563 (1961) (defining “the reserve power” to which deference is owed as encompassing both initiative and referendum); Martin v. Smith, 176 Cal.App.2d 115, 117 (1959) (the power of referendum is a reserved power deserving a liberal construction); Laam v. McLaren, 28 Cal.App. 632, 638 (1915) (defining “the reserve power” to which deference is owed as encompassing both initiative and referendum).


31 See Prelim Opp Brief, at p. 11.


34 223 U.S. 118 (1912).

