

Checking California's Plebiscite

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Tens of thousands of pages have been written on the role of courts in a democratic society, reflecting the struggle of hundreds of law professors, judges, practitioners, and law students to resolve an inherent conflict posed by the judicial role. On the one hand, the ability of an elite group of judges to invalidate laws seems profoundly undemocratic. This view rests firmly on a commitment to majority rule, a trusting faith that the majority will not infringe the rights of the minority, and a belief that a people with a demonstrated capacity for self-government will correct their own errors if left alone. On the other hand is the argument that government in a democracy is not synonymous with raw majoritarianism. Governments are limited. There are things no government may do. Yet, history has taught us that government will occasionally, if not more frequently, stray beyond those limits. An independent judiciary uncooperated by the political majority seems the only realistic check against such abuses.

The battle among these competing positions has traditionally pitted the judiciary against a legislative body. The latter defends its enactment, presumed to represent the will of the current majority, against the judicial invocation of a higher law, also claimed to originate from commands of the people. Yet laws subject to constitutional attack do not always originate in a representative body. In California and half the American states, and in scores of cities, many located outside those states, law may emanate from the electorate itself. When the people speak directly rather than through an agent, ought the tension between the lawmaker and the judge be played out differently? Although the question is seldom explicitly addressed, the unspoken assumption seems to be that the analysis need not vary. The thirty-two decisions of the United States Supreme Court that have reviewed ballot propositions contain scarcely a word on the subject. The rare recognition that the law under attack originated

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with the electorate is usually followed with a boilerplate statement somewhat like Chief Justice Burger's in the *Berkeley Rent Control* case. "It is irrelevant," wrote Justice Burger, "that the voters rather than a legislative body enacted [this law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."¹

Decisions of state courts reveal little more in the way of attention to the popular origin of laws. The occasional state court that takes note of the fact that a challenged law has not come to it by way of the ordinary legislative process is almost guaranteed to afford it identical treatment. For example, the California Supreme Court observed in 1983 in *Legislature v. Deukmejian* that "[a] statutory initiative is subject to the same state and federal constitutional limitations as are the legislature and the laws which it enacts."²

The thrust of my paper is that the judicial role in this setting ought to be very different from its role in reviewing ordinary legislation. My conclusion that less deference is ordinarily due to enactments by the electorate is likely, however, to seem counterintuitive, politically unrealistic, and downright un-American. The intuitive tendency, of course, would be to give the electorate greater deference if distinctions were to be made at all. If the debate over judicial review is one that seeks to resolve the conflict between majority rule and minority rights, then doesn't the argument for judicial intervention become weaker as the claim of the lawmaker to speak for the majority becomes stronger? There is more than a little political discomfort associated with negating the people's will.

While we talk about such a thwarting of popular will when legislation is voided, the judge may no doubt comfort himself or herself by questioning whether the legislative abuse being corrected was *really* representative of the electorate. No such fiction is available when the principal rather than the agent has spoken. I recognize, therefore, that the task of defending my position will not be an easy one.

The starting point of my thesis is the United States Constitution. I will reserve my treatment of the California Constitution until a little later. The United States Constitution does not favor the operation of majority will. Indeed, one may well argue that the primary motivation behind the document was to curb self-interested and short-sighted major-

1. *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 295 (1981).

2. *Legislature v. Deukmejian*, 34 Cal. 3d 658, 674, 669 P.2d 17, 26, 194 Cal. Rptr. 781, 790 (1983).

ity rule. The Framers used several routes for achieving this goal. The one we tend to talk about most is the imposition of specific substantive limits on governmental action. Thus, for example, regardless of majority sentiment, laws may not curb free speech or religious freedom. Another route provides for procedural regularity—rules of prospectivity, generality, due process, and equality. In fact, however, the Framers intended neither of these two routes as the primary control of rampant majoritarianism. In the end, they saw the structure of government itself as the most effective protection against the abuses of power. This structural vision had three components. The first was a system of representative government. Madison and his colleagues from Philadelphia were deathly afraid of

the evils incident to popular assemblages so quickly formed, so susceptible of contagious passions, so exposed to the misguidance of eloquent and ambitious leaders, and so apt to be tempted by the facility of forming interested majorities into measures unjust and oppressive to minor parties.³

Those who established our constitutional structure envisioned a representative government as a buffer between the passions of the masses and the rights of minorities whose interests were in danger of being ignored, if not trampled. Admittedly, it was the rights of the wealthy and the propertied minorities that the framers had in mind, while the minorities whose interests concern me are markedly different.

The Framers were not content, however, with representative government as a guard against an oppressive majority. Representative government itself, they recognized, was capable of being captured by factions—a majority, or possibly something less. To guard against such a threat, the drafters imposed a second structural component: a system of checks and balances. By dividing the powers of government, they hoped to check, balance, and stalemate self-interest in a way that popular democracy could not. These checks included bicameralism, the executive veto, and a vertical division of power between the states and the federal government.

Third, but certainly not least, the Framers envisioned a judicial check upon the action of the other two branches, at least if we are to believe Madison, Hamilton, and John Marshall. As I stated at the outset, the nature and extent of this judicial check has been the subject of much debate. The question has been how to reconcile the checking role

3. See *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 410 (M. Meyers ed. 1981) (quoting unmailed letter of James Madison written in 1833).

with the basic principle of democratic theory that the power to make law ultimately should reside in representative institutions. Just as the judiciary must serve to check the legislature and the executive, it is necessary that the judiciary itself be curbed by both external and internal restraints. The internal curb, the so-called doctrine of self-restraint recently championed by Robert Bork,⁴ demands that courts ordinarily not upset the will of the people's representatives. The late Professor Alexander Bickel of Yale Law School termed this the "counter-majoritarian difficulty,"⁵ but the term counter-majoritarian is a poor one. The constitutional structure does not embrace majoritarian decisionmaking; rather, it favors representative decisionmaking with both a relative detachment from and an ultimate accountability to the electorate. Viewed as a counter-republican difficulty, the doctrine of judicial restraint takes on a different and historically more accurate color. Both in theory and in practice, the initiative process (I will address the referendum separately) lacks the attributes that warrant judicial deference.

I am not contending here that it is unconstitutional for a state like California to have direct democracy as a part of its lawmaking process. I do not so believe. Nor am I arguing that direct democracy is an inferior method of lawmaking, although for the most part I believe that it is seriously flawed and in need of major reform. My point is a more subtle one. Our federal constitutional system embraces a delicate blend of checks and balances. The judicial check is a part of this structure, and must be exercised in a manner that respects the fact that it is merely one of several. Because the system of direct democracy lacks many of the checks imposed on raw majoritarianism by the federal constitution, laws enacted through such a system must be subjected to a more rigorous judicial check.

To begin with, legislation enacted by initiative lacks the benefit of bicameralism and an executive veto, both of which embody central features of the guard against factionalism. Now it is true that neither the command of bicameralism nor executive presentment are made applicable to the states by the United States Constitution. Furthermore, in some legislatures bicameralism is either nonexistent—as in Nebraska and most local government councils—or superfluous. To be sure, the Framers intended to allow the states a large degree of flexibility in structuring their own governments, and it is the very judicial unwillingness to define ex-

4. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

5. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

actly what is envisioned by a republican form of government that has led the Guarantee Clause to be labeled nonjusticiable. But it would be wrong to allow the flexibility and nonjusticiability of the constitutional command that each state guarantee its citizens a republican form of government to render the Framers' vision a dead letter. The history of the clause reveals that it was designed to check direct democracy as well as monarchy. This does not mean that a state may not experiment with direct democracy or that such an effort is unconstitutional. It ought to mean, however, that when we argue over the judicial role in our structure, it is republicanism and not majoritarianism that serves as our benchmark.

It is worth noting that the Guarantee Clause is not the only constitutional provision that suggests the document's vision of the role of the electorate. The Supremacy Clause imposes an obligation on the part of state judicial, legislative, and executive officers to support the United States Constitution. It makes no mention, however, of the electorate's obligation. The amendment procedures of Article V similarly omit mention of a role for the electorate in initiating constitutional amendments, as the California Supreme Court correctly concluded in *AFL-CIO v. Eu*.⁶

The initiative process in practice confirms the prescience of the Framers' fears. Special-interest groups, aided by one-sided spending and voter ignorance, enjoy the very position of power that a representative government with its checks and balances is designed to prevent. The problem is exacerbated by deceptive wording, practices, and sloganeering, as well as by the large number and complexity of ballot measures. In addition, lack of deliberative mediation, debate, or individual commitment to a consistent or fair course of conduct further taints the republican ideal. Voters act in private and are thus unaccountable for their preferences. Secrecy leaves prejudice and self-interest uncurbed.

Most defenders of the initiative process have argued that its critics glorify an idealized vision of the legislative process. They argue that criticisms of plebiscites must be comparative and that the critics have overstated the capacity of legislative processes to serve the public interest. My response here is twofold. First, in some sense, the choice between the competing models is not unguided by constitutional choice. The Framers have entrenched their preferences. At least when challenges under provisions of the federal Constitution are made, the need for rigorous enforcement of the substantive limitations on majority preferences becomes more compelling if the structural protections against majority tyr-

6. *American Fed'n of Labor-Congress of Indus. Orgs. v. March Fong Eu*, 36 Cal. 3d 687, 704, 686 P.2d 609, 620, 206 Cal. Rptr. 89, 100 (1984).

anny are absent. Second, the issue here is not one of choosing between the two models, but merely of exploring whether the differences warrant a different judicial role. When the legislative process breaks down and fails to operate as intended, increased judicial scrutiny is clearly warranted.⁷ The defect in plebiscites, however, is structural, and the presumption of constitutionality that the constitution implicitly creates for the work product of the representative system is absent. The place for judicial restraint is therefore less apparent.

It is no doubt clear that the foregoing treatment of judicial review of plebiscites assumes a challenge under the United States Constitution. When the electorate's action is challenged under the California Constitution, my call for an increased judicial review encounters both theoretical and practical obstacles. To begin with, the state constitution seems to give parity to direct democracy. Nothing contained therein can be fairly read to afford representative decisionmaking a favored position. Indeed, one might well contend precisely the opposite. For example, the language at the onset of the article on initiatives says, "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."⁸ There is some evidence to suggest that the California Constitution ennoble majoritarianism and thus envisions a less active judicial role in reviewing plebiscites. Note that in the early years of this century, the Colorado and Nevada Constitutions actually prohibited judicial invalidation of direct legislation; and the judicial recall provision adopted at the same time in other states such as California were in large part also designed to prevent the undoing of initiatives by courts sympathetic to the powers that controlled the legislature.

More stringent judicial review of plebiscites under state constitutional provisions would also encounter serious practical impediments. In California, the constitution may be amended with no greater majority required than for the previously enacted statutory initiative, although the signature requirements for getting on the ballot are higher. Not only may a California court's decision thus prove transient, but the electorate's subsequent rejection of the judicial opinion might enhance the conditions for later attacks on the judges themselves.

Obviously, within the context of this short presentation, I am unable to do much in the way of either explaining what reduced judicial re-

7. See generally *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (outlining the circumstances in which a court is justified in invoking more than mere rationality review); see also J. ELY, *DEMOCRACY AND DISTRUST* (1980).

8. CAL. CONST. art II, § 1.

straint would actually look like, or discussing how my theory of absent checks and balances plays out differently in the referendum process, where the electorate *adds* a check to the process of lawmaking, rather than bypassing the existing ones. In any event, I want to leave enough time for responses from my esteemed commentators, and for questions from the audience. I do, however, want to make certain to interject both a note of realism and a note of caution in concluding my remarks.

First, my note of realism. In California, indeed in all but one of the states that have direct legislation, the state judiciary is subsequently accountable to the voters. I plan to argue in a more extensive version of today's paper⁹ that accountable judges are far more at risk when invalidating voter action than when they invalidate legislative product. Such matters tend to be more visible. Political organizations that backed the initiative will be in place to defend their interests against the justices who thwarted their efforts. Two conclusions flow from the threat of political retaliation. First, it is highly unlikely that state courts will embrace the stance I have urged. Even if we assume that judicial behavior is not influenced by the prospect of retaliation on such highly visible issues—an assumption I reject—it is nonetheless possible that the makeup of courts will ultimately be affected by these elections. Advocates of deference to majoritarianism may replace serious checkers. Second, the absence of a vigilant judicial check at the state level produces yet another argument against judicial deference by federal courts applying the U.S. Constitution. The lack of an executive or bicameralism check will become compounded by the inadequacy of the state judicial check. When the state's direct system of lawmaking collapses all three branches of government into the plebiscite, the resemblance to a republican form of government all but disappears.

Finally, my note of caution. Much as I see plebiscites replete with process defects, calling for a greater judicial checking role, I recognize the risks. By removing majorities, however tyrannical they may be, from a meaningful ability to influence the making of social policy, we increase the possibility that these majorities will cease to see these issues and values as something that they ought to care about. Distrust of government and a feeling of powerlessness have led to growing voter apathy and popular indifference to the workings of government. Plebiscites often generate voter interest and provide an escape valve against a seemingly unresponsive government. If we give plebiscites less deference and block judicial accountability by placing the dirty task of checking in the federal courts, won't resentment, cynicism, and disengagement flourish? This is

9. Eule, *Judicial Review of Direct Democracy*, 99 YALE L. J. — (forthcoming May 1990).

a risk that cannot be discounted. Ironically in the end, the very dangers of transient passions that warrant stricter review of direct democracy, and make the state court an unlikely candidate for the performance of such a task, render the execution of such a role by the federal judiciary a most treacherous venture.