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Foreword

A More Perfect Union? Democracy in the Age of Ballot Initiatives

Tom Pryor*

During each election, Americans go to the polls to decide who will represent them in government. Increasingly, voters are also being asked to vote on ballot measures that directly enact policy or even amend state constitutions. In 2012, Americans around the country voted on more than one hundred ballot measures that touched on issues ranging from smoking bans to property taxes to same-sex marriage. The increasing use of ballot measures to enact policy raises serious questions. To what extent is direct democracy consistent with a constitutional requirement of a republican form of government? Given evolving First Amendment jurisprudence, how should laws governing campaigning apply to ballot measures? Are voters capable of making informed choices on ballot measures, and how should judges interpret and understand those choices? Are there issues that should not be left up to the voters? In short, is direct democracy consistent with our constitutional democracy?

* Symposium Articles Editor, Volume 97, *Minnesota Law Review*. The author thanks Dean David Wippman and the University of Minnesota Law School for their incredible and consistent support of the *Law Review* and the symposium. The author also thanks Professors Herbert Kritzer, William McGeeveran, and Elizabeth Beaumont for moderating the panels and lending their expertise and insight to the discussion. The symposium would not have been possible without the monumental efforts of the Board and Staff members of the *Law Review*, both in running the symposium and in producing the symposium issue. The author would like to thank, in particular, Brittany Bakken, Brian Burke, and Paul Schneider for their help and guidance throughout the development of the symposium. The author extends special appreciation to Vice President Walter Mondale for generously donating his time and more importantly wisdom to help design and shape the symposium. The *Law Review* is indebted to the wonderful panelists who flew in from across the nation and to Secretary of State Mark Ritchie who took time away from a busy schedule to speak on these important issues on a cold fall day in Minnesota. Finally, Editor-in-Chief Chris Schmitter was a constant source of helpful advice, judgment, and encouragement throughout the entire process for which the author is sincerely grateful. Copyright © 2013 by Tom Pryor.

These questions were particularly relevant to Minnesotans in 2012. Voters there were asked to decide on two ballot measures that would amend the state constitution. Amendment 1 would have amended the constitution to define marriage as being only between one man and one woman and Amendment 2 would have required voters to present valid photo identification to vote. After hotly contested campaigns, neither measure was passed. The *Minnesota Law Review's* 2012 symposium, "A More Perfect Union? Democracy in the Age of Ballot Initiatives," held on the eve of that election, was designed to advance public and scholarly discussion on the role that ballot measures play in a modern democracy. Panelists with diverse backgrounds and expertise came from across the nation to address the complex legal, political, and practical issues associated with legislating through the ballot. Instead of addressing the policy merits of any particular ballot measure, the discussion was focused on the institution of direct democracy as a whole.

The first panel, titled "Citizens as Legislators," explored voters' role in direct democracy in contrast to representative democracy. The panelists discussed citizens' obligations when voting directly on legislation; whether citizens are competent enough to meet those obligations; and whether and how judges should consider the citizenry's intent when ruling on the constitutionality of ballot measures. Professor Mathew McCubbins of USC presented findings on new empirical research that he and co-author Professor Craig Burnett conducted on voters' behavior regarding ballot measures. Social science research on voter competence raises doubts about voters' ability to match their votes to the candidate that best represents their interests or values; in a sense, many voters may lack the information and skills to "vote correctly." One of the most common defenses of candidate elections, however, is that partisanship operates as a useful heuristic or cue that helps voters vote correctly more often and more efficiently. Unfortunately, this important cue—party labels—is missing in ballot measure campaigns.

The conventional (if largely untested) wisdom is that endorsements of ballot measures can operate as heuristic cues in much the same way that partisanship operates, allowing voters to cast votes for and against ballot measures with as much confidence as if they understood the content of the measures themselves. To test the extent to which voters are capable of using endorsements as effective heuristics, Professors McCubbins and Burnett generated the largest dataset of survey responses

on this subject to date and used advanced statistical techniques to measure the relationship between being exposed to an endorsement and voting correctly. They found that the effect of endorsements on voting behavior was highly conditional and inconsistent, raising doubts about the level of voter competency in direct democracy campaigns, especially on issues that are more technical in nature and that lack political saliency.

Professor Ethan Leib of Fordham Law took a step back and, instead of asking what voters are capable of doing when voting on a ballot measure, asked what they are obligated to do. Professor Leib's and his coauthor Michael Serota's argument begins with the simple observation that the morally relevant distinction between voting for a ballot measure and voting for a candidate is that the former directly enacts legislation that has the coercive force of law whereas the latter elects a representative who is tasked with the responsibility to draft and enact such legislation. Elected representatives are commonly believed to have a moral obligation to consider the public interest, and not just their private interests, when voting on legislation. By analogy, voters in direct democracy campaigns should observe similar moral duties. It may be morally permissible to use self-interest as a driving motivation to vote for a candidate—such self-interested votes are, after all, filtered through the behavior of a representative who is obligated to uphold the public interest—but something more is required when voting on a ballot measure. Professor Leib argues that citizens casting votes in direct democracy contests, like elected representatives casting roll call votes, must make a sincere effort to vote in a way that would pursue the public interest.

Professor Michael Gilbert, University of Virginia School of Law, concluded the first panel by analyzing whether and how judges should consider citizens' intent when construing ballot measures. When dealing with ambiguous phrasing or a novel statutory question, it is not uncommon for judges to look to the legislative intent behind enacted legislation to help determine the proper application of the law. This task can be onerous as legislatures are made up of many scores of representatives, each with his or her own private motivations for voting for legislation and each with his or her own individual understanding of what the resulting law does or should mean. When analyzing laws passed as ballot measures in which hundreds of thousands or even millions of voters cast votes, the task of determining voters' intent appears almost impossible. Although the task ap-

appears daunting at first glance, Professor Gilbert argues that determining voters' intent for ballot measures is actually possible in ways that discerning legislative intent is not. Professor Gilbert's article analyzes judicial behavior to show that judges currently do consider voters' intent when construing ballot initiatives and argues that, while this is a normatively positive endeavor, it comes with important tradeoffs as well.

The second panel, "Ballot Campaigns: Politics as Usual?," discussed in more depth the differences between ballot and candidate campaigns. Provost Elizabeth Garrett of USC has used the term "hybrid democracy" to describe America's system of government because it combines elements of direct and representative democracy. This poses pressing problems for our campaign finance and regulation regime: Do we need to worry about quid pro quo corruption in direct democracy campaigns, and if not, does government have any interest in regulating donations to ballot measure campaigns? Do the issues raised during ballot measure campaigns generate risks or harms that are distinct from candidate campaigns?

Provost Garrett began the panel by pointing out that we live in a "hybrid democracy" not just because our elections feature elements of direct and representative democracy that operate side-by-side, but because there is significant overlap between those two elements. Nowhere is this more evident than in recall elections. By analyzing two high profile gubernatorial recalls—the 2003 California recall of Governor Gray Davis and the 2012 Wisconsin attempted recall of Governor Scott Walker—Provost Garrett demonstrates how direct democracy campaigns to recall a candidate overlap in principle and in practice with candidate campaigns to reelect or replace the recalled official. The financing laws that govern the two campaigns, however, are substantially different. Candidates and advocacy groups are able to raise significantly more money to fund campaigns that oppose or support a recall effort than they can for campaigns to reelect or replace a specific candidate if and when the recall is successful. Provost Garrett persuasively argues that the same justifications for limits on candidate campaign donations should apply to many aspects of recall campaigns as well: if a large donation to a candidate's election campaign raises the specter of quid pro quo corruption, for example, than a large donation to a candidate's anti-recall campaign should be equally troubling.

Professor Michael Kang of Emory Law next raised related questions about disclosure laws. Government regulation of direct democracy campaigns can be justified on several grounds. In addition to the government's interest in preventing or mitigating the appearance of quid pro quo corruption, the government also has an interest in providing important information to voters that will aid in their decision making processes. As Professor McCubbins established, it is more difficult to cast correct votes on ballot measures than in candidate elections because of the comparative dearth of information: the most important and relevant cue—partisanship—is absent. Disclosing the identity of individuals or groups that fund ballot measure campaigns can, however, act as a substitute cue. Donations to campaigns are costly and hence are made by people who sincerely believe in the issue for which they are advocating. If voters can access information about a ballot measure's supporters and opponents, they can treat those donations as endorsements and form their own opinions on the matter accordingly.

Professor Kang notes that this form of campaign regulation has traditionally been relatively uncontested and noncontroversial. Reports of harassment surrounding California's Proposition 8 campaign, however, have catapulted disclosure laws into the limelight. Opponents of disclosure laws argue that they generate a risk of targeted harassment—a fear made more palpable in the age of ubiquitous Internet access and open information—and as such will chill political participation. Professor Kang acknowledges that there are real and serious concerns surrounding the use of disclosure laws but argues that legislatures, and not the courts, are the more competent and appropriate branch to determine how to strike a proper balance between the informational benefits of disclosure and the risks of harassment and chilled speech.

Professor Todd Donovan of Western Washington University concluded the panel by presenting research on the collateral effects of ballot measure campaigns. Of the many differences between ballot and candidate campaigns, one important difference is that the former is focused solely on issues. This difference becomes especially relevant when the issue at question deals with the rights of a particular group within society. Professor Donovan argues that campaigns advocating for ballot measures that ban same-sex marriage can be as much about society's views of gay people as they are about substantive policy issues. He uses examples from campaign literature and

commercials to show that campaigns directly or, as is increasingly the case, implicitly frame the issues in ways that ask voters to cast their ballots based on how they feel about the group being affected. Using survey data from before and after campaigns on same-sex marriage, Professor Donovan shows that campaigns increase antipathy towards homosexuals, at least for people who were predisposed to feel such antipathy in the first place. Professor Donovan concluded by arguing that, even though our nation has become increasingly progressive on gay rights, direct democracy will continue to be used to demonize disfavored minority groups and we should therefore consider limiting the types of issues that ballot measures may address.

During the lunch recess, Minnesota Secretary of State Mark Ritchie gave a presentation on the history of direct democracy in Minnesota. He traced the institution back to the founding of the Minnesota Constitution and raised concerns over ways in which it can and, to some extent, is designed to lock-in temporary political advantages through indelible constitutional provisions. Drawing on historical examples, Secretary Ritchie also raised the important and troubling question of whether voters should be able to decide on each other's fundamental rights.

The final panel, "Direct Democracy's Challenge: Majoritarianism and the Republic," picked up where Secretary Ritchie left off by assessing the broader constitutional and philosophical arguments for and against direct democracy. Taking much of what we learned from the previous two panels, Professor Shaun Bowler of UC Riverside, Judge Timothy Tymkovich of the Tenth Circuit Court of Appeals, and Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals assessed the extent to which direct democracy is consistent with the limitations and purposes of our constitutional system of government. Judge Tymkovich questioned whether direct democracy is compatible with Article IV the U.S. Constitution. He noted that, depending upon how one defines a "Republican Form of Government," direct democracy may be inconsistent with Article IV's Guarantee Clause. Judge Tymkovich traced the purpose and use of the Clause back through history and assessed the probability that it could be used to challenge direct democracy as an institution given the Court's current justiciability jurisprudence. Although concluding that it is unlikely, Judge Tymkovich argues that it is possible that the Guarantee Clause

could be used to rule that a state constitution that allows for direct democracy is unconstitutional.

Professor Bowler responded to criticism of direct democracy by arguing that many of the attacks levied against direct democracy could be used to discredit representative democracy as well. For example, he suggested that laws passed by either process may be sub-optimal and that voters struggle to cast accurate votes for both ballot measures and for candidates. If the problems with direct democracy are shared by representative democracy, Professor Bowler asks, how can we justify limits on the former that would not apply to the latter? What critics of direct democracy need is a critique or a limiting principle that uniquely applies to direct democracy. Professor Bowler suggests that the notion of sovereignty can be used to restrain the excess of direct democracy in a fashion that is logically and philosophically consistent with limits that we place on representative democracy. If the will of the people is sovereign in a constitutional democracy, then voters should not be able to bind or burden future generations with laws and policies that are not equally binding on the present generation. It should take as many voters to pass a constitutional amendment, for example, as it would to revise or repeal that amendment. This principle of sovereignty would not necessarily prevent many problems associated with direct democracy, but it would ensure an effective mechanism to correct them through the democratic process.

Chief Judge Kozinski concluded the panel and the symposium by discussing his own experiences in dealing with direct democracy both as a voter and as a judge. He acknowledged the many failings of direct democracy as an institution but cautioned that we should not be too quick to assign to judges the task of fixing the institution or its output. Chief Judge Kozinski argued that, as a nation, we should place more faith in the voting public to make the right choices and trust in the democratic process to produce the best outcomes in the long run.

The *Minnesota Law Review's* 2012 symposium discussed the implications of direct democracy from the individual choices voters make at the polls to the decisions judges make within their chambers to the laws passed by legislatures at the capital. Many of the questions raised by the panelists in their talks and in their articles are fundamental to larger debates over democracy and the rule of law. In a system governed by laws, are some rights so fundamental that they should be removed from

the democratic process? How should we pursue our desire to improve the democratic process so as to make it more efficient and democratic without trampling on the rights of citizens to participate and express themselves? And what role should the courts play in this system? Too often we assess the decision to enact law through direct democracy as a question of political expediency and as a part of our political theater. Instead, we should be taking a more thorough approach to analyzing direct democracy, one that focuses on the type of legal, practical, and philosophical questions addressed by the authors in this issue. It is our hope and belief that their work will help foster a productive discussion on direct democracy that recognizes the profound consequences and opportunities that it presents to our constitutional democracy.