Judicial Review and the Democracy Act

by
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In this essay I examine some questions about judicial review and the Democracy Act. The Act specifically precludes judicial review of the challenges to the constitutionality of "initiatives that change the Constitution." It also bars pre-adoption judicial review of initiatives submitted to the people for our consideration. Finally, it specifically authorizes judicial review for constitutionality of ordinary laws adopted by the initiative process.

The first question I examine is perhaps the broadest, but it is the one to which I will devote the least attention: What would the courts do about the Democracy Act itself? Plainly the Democracy Act is to be adopted by a process that does not conform to the specific terms of our written Constitution; indeed, in some ways this irregular process of adoption is the whole point of the enterprise. I have little doubt that if one surveyed constitutional scholars today, a substantial majority would say that the irregular process of adoption renders the Democracy Act ineffective and, in the ordinary sense, unconstitutional. I have even less doubt that if one surveyed judges sitting today, one would find an even larger majority holding that view.

On this question, I make only two points. First, probably fortunately, it seems quite difficult to see how a constitutional challenge could be mounted to the Democracy Act itself, if the courts were to apply to the Act today's standards for justiciability. The argument against justiciability is simple: The Democracy Act does not *do* anything properly subject to judicial review. It simply sets up a mechanism by which the people can do something later on –enact a constitutional amendment or a new law. In the terms of today's law of justiciability, a challenge to the Democracy Act ought to be regarded as unripe. The time to challenge the enactment process as constitutionally irregular is after the people adopt something that itself alters legal rights, for example by changing the First Amendment or by altering campaign finance rules.

The reason delay between the Democracy Act's adoption and any constitutional challenge to it, or more properly to legislation adopted pursuant to it, may be fortunate is that the very process by which the Act is adopted may change the views of legal elites, and specifically judges, about its constitutionality. Today's judges almost certainly would not accept the theory of constitution making that underlies the Democracy Act. But, judges – even the very same judges who now sit on the courts – are not immune from rethinking their positions in light of important social and political developments. Once the people had acted, perhaps the way judges and constitutional scholars think about constitution making would change.

This is of course quite speculative, and that is why I turn from this broadest question to some more narrow ones. I address questions about pre-adoption judicial review, review of constitutional amendments, and review of laws adopted by the initiative process.

Some courts in states with initiative and referendum processes do engage in pre-adoption judicial review. They typically invoke one of two reasons. First, sometimes the authorizing legislation states that an initiative can deal with some things, a referendum with others, and ordinary legislation with still others, and the courts entertain challenges based on arguments that what has been submitted, as an initiative is not properly the subject of *that* process. Second, the courts sometimes review initiatives for what we can call proper *form*. The authorizing provisions say something about what can be said on the ballot, or about the titles of proposals, and the courts entertain challenges based on arguments that the initiative as submitted is not in the proper form.

The first type of challenge might be called a jurisdictional challenge, in the sense that the arguments the courts hear assert that the initiative process is being used for something it was not designed to do. As I read the Democracy Act, jurisdictional challenges could not arise, because there are no subjects outside the scope of the initiative process. Challenges as to form, however, are another matter. Two grounds for possible objection to particular initiatives on the basis of form jump out from the text. Initiatives are to have "a Summary that accurately summarizes the initiative's content," and they are to "address only one subject." It is trivially easy to imagine someone objecting to a proposal that the ballot summary is "inaccurate" or that the proposal addresses more than one subject.

Many state constitutions contain "single-subject" restrictions, usually on legislation. State courts have dealt with these restrictions for many years, without much success. The difficulty has been that it is always possible to describe the "subject" of legislation in a broad enough way that *anything* deals with that single subject. Courts have been uncomfortable with an analysis that deprives the single-subject restriction of any real bite, but they have been largely unsuccessful in coming up with analytically satisfying ways of enforcing the "single-subject" restriction.

The difficulty goes beyond the merely analytic, however, and identifying the deeper problem helps justify the Democracy Act's preclusion of pre-adoption review. Challenges to initiatives for failures of form are, I believe, always brought by people who disagree with the proposals on the merits, but who fear that they will be unable to prevail at the ballot box. They seek to avoid that defeat through success in the courts. And, particularly if the courts stop an initiative from going forward (but, to a lesser extent, even if they allow it to proceed), the losers will interpret the courts' decisions as having resulted from the judges' views about whether the initiative, if adopted, would be a good thing or not. To put it more crudely, judges will uphold objections based on form only if they do not want the initiative to be adopted. It is hard to justify placing power in the courts' hands if it is going to be used in that way, and experience suggests that that is indeed how it will be used.

The Democracy Act's provisions should reduce any anxiety people might have about "improper" initiative submissions, and in particular about the possibility that the initiative summary might be misleading. State courts have also struggled, and again not terribly successfully, with claims that ballot summaries were misleading. The Democracy Act makes clear what the issue in cases raising challenges as to form actually is. Challenges as to form are really claims that the Electoral Trust's approval of the initiative form was mistaken. That is, the question is not, "Is the summary misleading?," but is instead, "Was the Electoral Trust

mistaken in believing that the summary was accurate?" Posed in that way, the question also would require the courts to determine the amount of deference to be given to the Electoral Trust's evaluation. The same administrative law question about deference should arise under state law, but the setting is different. Again, to summarize crudely, the certifying agency in state initiative processes is typically the Secretary of State, who is usually an elected official himself or herself, and is in any event quite well-connected to the state's political leaders. It may be appropriate, in such a setting, to be skeptical about whether the certifying official can take a disinterested view of a summary's accuracy. A Secretary of State sympathetic to an initiative will find the summary accurate; one unsympathetic to the initiative will find the same summary inaccurate. The Electoral Trust, however, is designed to be substantially more disinterested in its processing of initiative proposals. Were there to be pre-adoption review, the Electoral Trust's evaluations should therefore receive substantial deference.

Now, combine the argument for deference to the Electoral Trust with the skepticism about the *courts'* disinterestedness, as supported by the evidence from the state court cases. Is the fairness of the initiative process likely to be improved by introducing pre-adoption review? It certainly seems reasonable to think that it would not be improved. The Electoral Trust might make some mistakes, as any decision-maker will. The Trust may sometimes allow initiatives to go forward that deal with more than one subject, or that have inaccurate summaries. Courts given the opportunity to review proposals before their adoption may identify some (although, being themselves imperfect, not all) of these improperly submitted initiatives. But, pre-adoption review will also introduce new errors, with the courts barring consideration of initiatives that actually do deal with a single subject and that actually do have accurate summaries. The relative disinterestedness of the Trust coupled with suspicion about the courts' ability to separate questions of form from the judges' views on the merits of proposed initiatives justifies barring pre-adoption review entirely.

Next I consider the possibility of judicial review of constitutional amendments. I suspect that the idea that a constitutional amendment could itself be unconstitutional is quite bizarre to most people in the United States. In other nations, however, the courts have asserted that they have the power to hold constitutional amendments unconstitutional, and sometimes under circumstances that help explain why that might seem to be a good idea. In its first major decision the German Constitutional Court said that it had the power to hold a constitutional amendment unconstitutional if the amendment would undermine fundamental principles of the nation's political organization. It has recently reasserted that position in a case dealing with the increasing integration of the European Union. But, having asserted that it had this *power*, the German Constitutional Court did not exercise it.

The Indian Supreme Court, in contrast, has actually held constitutional amendments unconstitutional. The setting is extremely important. The amendments it struck down were adopted during the period of India's so-called emergency, when Prime Minister Indira Ghandi suspended constitutional rights and, through her domination of the legislature, secured constitutional amendments that endorsed her actions.

The Indian example shows why it might make sense for a constitutional court to find a constitutional amendment unconstitutional. But, we can understand the example in two ways, which have different implications. First, we might think that the amendments were *substantively* unconstitutional because they fundamentally altered the nation's system of government or undermined fundamental human rights that any decent government simply must respect. Or, we might think that the amendments were *procedurally* improper even though they were adopted through a process that satisfied all the formal requirements of the Indian Constitution. The problem is that those formal requirements did not require sufficient popular participation to give the amendments the quality of fundamental law that a constitution should have.

The processes under the Democracy Act obviate procedural concerns about unconstitutional constitutional amendments, and explain why judicial review of constitutional amendments cannot be justified by concerns about the lack of popular endorsement of changes in fundamental law. But, of course, substantive concerns might remain.

Here the problem is that what to one group – by hypothesis, a majority of the American people voting on an initiative – seems to be an improvement of the system of government, seems to another group the elimination of fundamental guarantees. It is easy to imagine the parade of horribles (to some observers): What about an initiative eliminating the non-establishment clause? Establishing Christianity as the national religion? Eliminating the constitutional protection of free expression? The list can go on, with each participant selecting his or her favored constitutional provision and shuddering at the possibility that an initiative would eliminate it.

The Democracy Act cannot, nor should it, preclude the possibility that the people of the United States will adopt a constitutional amendment that overrides the favored provisions anyone identifies. The thing to think about, though, is whether judicial review for substantive reasons would improve the situation. Echoing a thought of Learned Hand's, I find it hard to believe that the courts would stand in the way were the people of the United States to become so insensitive to fundamental human rights as to adopt a constitutional amendment that was unequivocally a denial of such rights. Judges participate in the wider political culture, after all, and if so many people were persuaded that the United States ought to violate unequivocally a fundamental right, my guess is that enough judges would go along that preserving the possibility of judicial review would not do much to save us.

And, of course, the proposition that the constitutional amendment unequivocally violates fundamental rights is central. Just as it is easy to parade the horribles, so it is easy to identify a constitutional amendment that does something partisans of a particular interpretation of today's Constitution think is unconstitutional: Amend the Constitution to authorize vouchers for religiously affiliated schools; amend it to authorize hate speech legislation; amend it to eliminate the *Miranda* warnings. But, with respect to *these* kinds of questions, the fact that there is real dispute about what today's Constitution means is an argument *against* substantive judicial review of such amendments. These amendments simply take one side in reasonable controversies about whether some particular rule identifies a fundamental human right. Some people reasonably think that school vouchers violate non-

establishment principles, some people reasonably think otherwise. At least once the arguments have been fully exposed to the public, and one side has prevailed in the initiative process, I find it quite hard to understand why courts should be able to step in and give the victory to the other side.

A third question about judicial review deals with review of enacted statutory initiatives. Here the Democracy Act does authorize judicial review. The questions are, "Should judicial review of laws adopted by initiative by more aggressive than review of laws adopted by the legislature itself? Should it be less aggressive? Or, are there no differences between the enactment processes that bear on the degree of judicial scrutiny of enacted legislation for constitutionality?"

These questions have been extensively addressed in scholarly examinations of states' initiative processes. The lines of the competing arguments are clear. Proponents of more aggressive review, who want the courts to be more skeptical of laws adopted by initiative, focus on the sometimes absurd simplifications to which the public is exposed through sound-bite advertisements, initiative titles thought up by media consultants who figure out ways to package the proposals while concealing their content, the fact that voters consider only a single initiative and do not engage in the kinds of legislative bargaining that can improve the quality of a statute, and the domination of initiative campaigns by well-financed interest groups. Legislatures, they say, can engage in a more deliberative process in which policy trade-offs can be made apparent, and where the important details of statutory policy can get more attention than they possibly can in an initiative campaign. Proponents of less aggressive review focus on special interest domination of legislatures through contributions to the campaigns of elected representatives and the selective access their lobbyists have to the legislatures and on the important democratic values promoted by direct public participation in enacting legislation.

My own view, expressed elsewhere, is that these arguments, made in connection with existing initiative processes, are pretty much in equipoise: Both sides have some merit, although partisans typically overstate the strength of their positions. So, I concluded, courts should give laws enacted by initiative the same degree of scrutiny, neither more nor less, than they give laws enacted by legislatures. I do not think that the Democracy Act changes the picture. Its provisions on campaign finance are designed to alleviate some of the concerns about special interest domination, but at least without some accumulated experience, I would not want to commit myself to the view that the Act has completely solved the problem of campaign finance. The Act's provisions for Electoral Trust approval of ballot summaries and dissemination of "a balanced analysis" of proposals may do something to alleviate concerns that the public deliberative processes over initiatives are seriously flawed. But, again, I think it would be wise to await experience to see how effective these measures would be in overcoming some of the defects of existing initiative processes. The Democracy Act's provisions push in the direction of encouraging courts to be more accepting of laws adopted by initiative than of laws adopted by legislatures, and in the end that might be the right outcome. But, at least at the start, judicial review of laws adopted through the Democracy Act's processes should be the same as judicial review currently is.
