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How the Supreme Court crippled direct democracy

The initiative process in dozens of states just got a whole lot weaker

By JOSHUA SPIVAK

Gay marriage advocates won a big dual victory in two cases decided by the Supreme Court on Wednesday. But one of the two decisions, the ruling that effectively struck down California's Proposition 8, may have a very significant impact on governing that's separate from the gay-marriage issue.

The Prop 8 ruling may have dealt a body blow to the ideal of direct democracy.

California voters approved Prop 8 in 2008. A district court decision later overturned the Prop. 8 law, and California's elected officials refused to appeal. So the supporters of Proposition 8 sued instead. They won their case over whether they had the right to sue in the California Supreme Court. The U.S. Supreme Court saw things much differently. The Supreme Court, in a 5-4 decision, held that the plaintiffs lacked standing. The court ignored the underlying issue of gay marriage, and instead held that the anti-gay-marriage advocates couldn't show they were harmed by the state government's decision to ignore the initiative. The decision quotes an older Supreme Court ruling noting that the doctrine of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." But usurping the power of the political branches is exactly what the initiative is specifically designed to do.

The entire reason for initiatives is to bypass the office-holders in government. Former California Gov. Hiram Johnson, who was responsible for the state's passage of the direct democracy provisions, said that the initiative would "give to the electorate the power of action when desired." Frequently, the laws passed by initiative are unpopular or politically unpalatable with elected officials. Consider, for instance, California's popularly approved initiative that stripped the power of redistricting from the state legislature.

The Supreme Court's decision may mean that initiatives are now at the mercy of elected officials. Imagine a popularly approved referendum that is challenged and struck down in court. The government can just elect not to appeal — and thanks to the Supreme Court, no private citizens can step in to fill this void.

The track record of elected officials acting against their perceived self-interest is not good. You don't just have to look at the sorry state of campaign finance laws, which frequently assist the incumbent, or in the use of redistricting to gerrymander impregnable districts. There's also the initiative's direct democracy cousin, the recall. In the past two years, we have seen numerous instances of elected officials across the country in local jurisdictions working to subvert the use of the recall against themselves or their colleagues. The officials may refuse to schedule a vote. In other cases, they sue under very questionable legal arguments to stop the recall from taking place. In one instance, a city council tried to kill the adoption of a recall law, only to be overturned by a charter commission and the voters.

Elected officials already have a great weapon. Supporters of recalls or initiatives have to pay legal fees out of their own pocket to force the elected officials to act. Elected officials

usually have the luxury of defending the sometimes questionable decisions using government funds. But even that advantage pales in comparison to strength they've just been given by the Supreme Court.

Initiatives are frequently divisive and controversial, as Prop 8 shows. But the voters and officials of the 27 states with the initiative or popular referendum process in place are the ones who decided to grant people this power. They adopted these laws specifically to provide a way to bypass the governor and legislature and enact politically unpalatable laws. The Supreme Court may have just effectively shut that route down.

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