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Forum Column  
By Karl Manheim

We have yet to hear the last word on the state recall election, which is turning out to be the most-litigated election in state history. The federal legal claims — denial of equal protection, violation of the Voting Rights Act, irregularities in signature gathering and questions about succession — could fill a constitutional-law course for a semester.

The first of these claims convinced the 9th U.S. Circuit Court of Appeals to suspend the election Monday. *Southwest Voter Registration Educ. Project v. Shelley*, 2003 U.S.App.LEXIS 18994 (9th Cir. Sept. 15, 2003). Recall proponents have threatened to appeal.

By coincidence, the U.S. Supreme Court convened early this term to hear an election-reform case involving the McCain-Feingold Act. Will it extend its special session to make September “election month” at the Supreme Court? Stay tuned.

In any event, *Southwest Voter* involves only pre-election claims. If the election goes forward as scheduled, post-election cases could be far more serious and disruptive and take longer to resolve.

The recall election is a mess for a reason: The entire process is ill-conceived and probably unconstitutional under structural provisions of the California Constitution. Current cases have not raised this argument, perhaps because it is somewhat arcane and not nearly as sexy as “the right to vote.” Moreover, it is based on the state constitution and, thus, is not the province of the federal courts. The state Supreme Court appears to be staying far away from this election, so it is unlikely that it would entertain this argument. Still, considering this constitutional problem may be useful in examining the morass in which we find ourselves and the way that we got here.

There is little denying that California is in a crisis, both economically and electorally. State

government’s ability to govern, from a legislative and budgetary standpoint, has been compromised severely by a flood of initiatives in the past quarter-century.

This deluge started with Proposition 13’s property-tax limits, includes the Gann government-spending limits and continues unabated with Proposition 49’s after-school programs, which Arnold Schwarzenegger promoted.

These measures lock revenue-cutting or spending measures into the state constitution, without any regard for the actual and changing needs of California. The damage that they do to the state is rivaled only by punitive and racially charged initiatives — including Proposition 54, on the October ballot — that feed momentary passions but do nothing to promote a better California.

Add a recall election to the initiative frenzy that has devastated our state finances and civic culture, and an obvious pattern emerges. Something is rotten with “direct democracy.” Sure, it sounds good on paper and in sound bites, but the founders of this country had a reason for rejecting direct democracy in favor of a “republican” — that is, representative — form of government.

The distinction between direct democracy and republicanism was a major battleground in the federal constitutional debates. James Madison, Alexander Hamilton and others argued that “pure democracy” would lead to “tyranny of the majority.” The remedy for this “disease” lay in a “proper structure” for government. According to Madison, one of the virtues of the U.S. Constitution was its “total exclusion of the people in their collective capacity.”

So strong was this sentiment that the U.S. Constitution contains a “guarantee to every state in this union [of] a republican form of government.” Some see ratification of the Constitution, which

signified the Federalists' triumph over the Anti-Federalists, as a repudiation of direct democracy.

The California Constitution of 1849, required by Congress as a condition of statehood, was founded on similar principles. Although it recognized that "all political power is inherent in the people," as did the federal constitution ("We the people ... do ordain and establish this Constitution"), it lacked any mechanism for direct democracy. Rather, the people exercised their inherent political power through representative government.

This structure remained intact during the political turmoil of the 19th century. But by the end of that century, people saw representative government as corrupt. All three branches of government had fallen under the control of powerful special interests.

In 1879, California held a second constitutional convention, principally to reign in the power of the Legislature and give greater power to cities and counties. Yet the constitution that emerged (the one now in force) made no fundamental change in the nature of our republican government.

It was not until Gov. Hiram Johnson called a special election in 1911 that state government abruptly changed. Senate Constitutional Amendment 22 passed in the Senate by 35-1, in the Assembly by 72-0 and at the polls by a vote of 168,744 to 52,093. In one fell swoop, Amendment 22 added the initiative, the referendum and the recall to the state constitution.

These three devices gave the electorate a power over their representatives that never before was seen in our country and was disdained by its founders for its propensity to cause mischief.

It's hard to criticize the early 20th century reforms. The voters obviously felt betrayed by their government institutions, as many do now. Corruption and influence-buying hardly are new phenomena. Yet a credible argument exists that the reforms were unconstitutional because of the way in which they were developed and presented to the people.

The genius of constitutional government in the United States lies in the built-in mechanism for reform. The U.S. Constitution, and every state constitution, provides for its own amendment — unlike some other constitutional democracies in which the founders thought that their basic instruments were perfect and never needed to be changed.

But change ought not be accomplished too easily, lest it be used for expedient and temporary needs. We have amended the U.S. Constitution only 18 times in 215 years (counting the first 10 amendments as a single instance). That is because of the multiple institutions and super-majorities needed for amendment.

The state constitution of 1849 provided two mechanisms for change: "revision" and "amendment." The former refers to fundamental or sweeping change to the constitution or to the structure of state government. The latter refers to less significant change, "within the lines of the original instrument." *Livermore v. Waite*, 102 Cal. 113 (1894).

The distinction becomes apparent when considering the mechanisms provided for each. Under the 1849 constitution, only a constitutional convention could propose a "revision," whereas the Legislature could propose an "amendment."

Because revision is more fundamental, it required the deliberation of the polity, assembled for that purpose. Minor changes — amendments — could be made on a more routine basis.

The 1879 state constitution retained the distinction between revision and amendment. Indeed, it still exists today. The constitution can be "amended" by initiative but not "revised." Thus, the state Supreme Court has invalidated several initiatives because they were "revisory" in nature. As the court stated in *McFadden v. Jordan*, 32 Cal.2d 330 (1948), the voters have "[no] power to initiate directly a revision of ... the Constitution."

The significantly more difficult route prescribed for "revision" serves a salutary purpose:

It ensures that temporary passions cannot work permanent harm. In *McFadden*, the court described “the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision.”

The wisdom of that precaution is apparent. With initiatives — and now recall elections — up for sale, direct democracy has begun to run amok. It has decimated legislative powers, weakened the judiciary and the executive and crippled local governments. At the extreme, these changes in the structure of state government could jeopardize our state’s status as “republican in form.”

Amendment 22, adding the initiative, referendum and recall, was clearly “revisory.” It substantially altered the balance of power and the framework of constitutional government in California, as it was intended to do. It is hard to argue that these processes were minor reforms, “within the lines of the original instrument.” Their proponents surely did not.

But Amendment 22 was proposed by the Legislature, not by convention. In 1911, constitutional “revisions” could not be made in that manner. *Livermore*.

Had the reforms been subject to deliberation and debate in convention, as required by the 1879 constitution, they might have taken a different form. For instance, convention delegates might have forbidden electors from meddling in state finances or decided that gubernatorial candidates at a recall election should need more than 65 signatures to get on the ballot.

Our generation has experienced firsthand the seamy side of “direct democracy.” The wisdom of our founders, preferring republican government, is no less important today than it was in 1787 or 1849. If we want to give “all power to the people,” let us do so by proper and constitutional means. The 1911 reforms may have been made with good intentions, but their unconstitutionality is now apparent.

Had the state Supreme Court been asked after the 1911 election to invalidate Amendment 22 as

an improper “revision” of the state constitution, there is a good chance that it would have done so. Is it too late — a century later — to ask the court to do so now?

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