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JUDGING THE JUDGES OF INITIATIVES: A COMMENT ON HOLMAN AND STERN

*Richard L. Hasen**

INTRODUCTION

In a provocative article in this Symposium,¹ Craig Holman and Robert Stern argue that federal judges have been insufficiently deferential to California voters—at least compared to their state court counterparts—in evaluating the constitutionality of ballot initiatives. To remedy this problem, Holman and Stern advocate federal review of voter initiatives by three-judge courts.

In this brief Comment, I take issue with both points. I argue in Part I that Holman and Stern have not proven that federal judges have been less deferential to voters than California state judges, though a theoretical basis exists for believing that federal judges are in fact less deferential. In Part II I explain that the three-judge court proposal is at best an indirect way to resolve what Holman and Stern believe to be the major evil of federal court review: initiative challengers shopping for ideologically sympathetic federal district court judges to hear their cases. I also consider more direct ways of dealing with this judge-shopping problem.

I. JUDGES ON VOTING AND VOTING FOR JUDGES

Holman and Stern compile some apparently damning statistics regarding the relative willingness of California state judges and federal court judges to strike down voter initiatives passed by a majority of the California electorate. In the 1964-1990 period, when initiative

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1. See Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239 (1998).

challengers rarely used federal courts,² California courts struck down eight out of eighteen—44%—initiatives challenged solely there, and federal courts struck down the only initiative challenged solely there.³ In the 1990-1996 period, when federal court review became more common,⁴ California courts struck down neither of the two initiatives challenged solely there and federal courts struck down three out of five—60%—initiatives challenged solely there.⁵

Standing alone, however, these statistics prove little. If we take out of the 1990-1996 sample the three federal cases still pending in the Ninth Circuit—the challenges to Propositions 187 (rights of non-citizens), 198 (open primary), and 208 (campaign finance reform)⁶—as well as challenges in California courts to Proposition 213 (limits on noneconomic damages recoverable by uninsured motorists),⁷ we are left with a universe of three very controversial initiatives: Propositions 184, 164, and 209. First, in a series of cases, the California Supreme Court has upheld various portions of Proposition 184, California's "three strikes" initiative.⁸ Second, the United States

2. In that period challengers went to federal court to challenge only three initiatives out of a total of 21 challenged initiatives. *See id.* at 1252. One of the three challenged initiatives was reviewed solely in federal court, and the other two initiatives were reviewed in both federal and state courts. *See id.*

3. *See id.* These figures do not count initiatives reviewed in both federal and state courts.

4. In this period challengers went to federal court to challenge seven initiatives out of a total of nine challenged initiatives. *See id.* at 1254. Five of the challenged initiatives were reviewed solely in federal court, and two were reviewed in both federal and state courts. *See id.*

5. *See id.* These figures do not count initiatives reviewed in both federal and state courts.

6. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1301 n.1 (9th Cir. 1997) (reviewing motion for intervention and noting pendency of Proposition 187 litigation); *California Pro-life Council Political Action Comm. v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998) (Proposition 208); *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. Cal. 1997) (Proposition 198).

7. The California Supreme Court has not yet considered the constitutionality of Proposition 213. One lower court upheld its constitutionality generally. *See Quackenbush v. Superior Court*, 60 Cal. App. 4th 454, 70 Cal. Rptr. 2d 271 (1997). Another lower court upheld the initiative's retroactive application. *See Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 68 Cal. Rptr. 2d 553 (1997).

8. California courts' analyses of the initiative have been complicated by the California legislature's earlier decision to pass a nearly identical law. The California Supreme Court has construed both laws to be constitutional. *See People v. Hazelton*, 14 Cal. 4th 101, 926 P.2d 423, 58 Cal. Rptr. 2d 443 (1996) (rejecting vagueness challenge); *People v. Superior Court*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996) (construing "three strikes" law as not violating California Constitution's separation of powers doctrine).

Supreme Court struck down state-imposed congressional term limits,⁹ thereby indirectly nullifying Proposition 164, California's initiative enacting congressional term limits. Finally, the Ninth Circuit upheld Proposition 209, California's anti-affirmative action initiative.¹⁰ The data pool is simply too small from which to draw any meaningful conclusions about federal versus state court treatment of voter initiatives. It is not surprising therefore that Holman and Stern do not perform any statistical tests on these data.

An equally serious problem with the analysis is selection bias.¹¹ If initiative challenges were assigned randomly to either state or federal court, it might be possible, assuming a large enough data pool, to draw some conclusions regarding the courts' relative willingness to overturn initiatives. Alternatively, if state and federal courts routinely reviewed the very same legal questions posed in these cases and reached differing results, we might draw some statistically significant conclusions from this natural experiment.¹² Holman and Stern's Tables 1 and 2 indicate that state and federal courts reviewed four of the same initiatives from 1964-1996; in each case both sets of courts apparently reached the same conclusion regarding these initiatives.

The absence of randomization or a natural experiment undermines any conclusions regarding causation. An alternative plausible scenario to explain the discrepancy between state and federal court reversal rates is that initiative challengers are more likely to seek vindication of what they see as a violation of their federal constitutional rights in federal court rather than in state court.¹³ If so, cases

9. See *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). This case does not fit nicely into Holman and Stern's analysis because no court directly considered the constitutionality of Proposition 164. In addition, because the United States Supreme Court handles appeals of federal constitutional issues from both state and federal courts, it is unclear whether it should be classified solely as a "federal" court for their purposes.

10. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

11. Here, I ignore other potential methodological difficulties, such as whether to count each trial court decision, the vote of each trial court and appellate judge, or only the final disposition of each challenged initiative as a single data point.

12. For an example of this approach across state court systems, see Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485 (1995).

13. Burt Neuborne made just such an argument in the civil liberties context. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). He reconsidered his position in Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995).

presenting such challenges will appear disproportionately in federal courts. Thus, even if the rate at which California and federal courts strike down initiatives for violating federal constitutional rights is identical, a selection bias by challengers would lead to more cases being struck down on constitutional grounds in federal court than in state court.

This criticism does not mean that Holman and Stern's argument is inherently implausible. Indeed, strong theoretical reasons exist for believing that judges who depend upon voters for continued employment are more likely to be deferential to voters than judges with life tenure, at least in the rare case where a judge standing for reelection is faced with a high-salience issue like the constitutionality of a voter initiative.¹⁴ Moreover, pressure on judges facing reelection to conform with the voters' will increases as it gets closer to election time.¹⁵ Life-tenured federal judges, in contrast, have just about every incentive to vote their values.¹⁶

Unfortunately, I do not believe that Holman and Stern have done much to advance the empirical case that elected judges indeed respond to electoral pressures at a higher rate than life-tenured federal judges. Such a case would be especially difficult to make in California, where appellate judges stand in retention elections only once every eleven years.¹⁷

II. OF CROCODILES AND HYDRAS

Suppose that Holman and Stern are correct that federal judges are more likely than their state counterparts to strike down voter initiatives. Further, suppose that for this reason initiative challengers have flocked to federal court, leading to invalidation of many voter initiatives.

Whether this phenomenon is good or bad may depend upon one's beliefs about judicial activism versus judicial restraint or one's

14. I develop this argument at length in Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305, 1309-35 (1997).

15. See *id.* at 1322 & n.69 (citing Hall, *supra* note 12, at 497-98).

16. See *id.* at 1330-35.

17. In judicial retention elections nationwide, nearly 99% of judges seeking retention have been retained. See Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316, 318 (1994). Of course, California has seen one high-profile retention election in which Chief Justice Rose Bird and Associate Justices Grodin and Reynoso were voted out of office. For a discussion of this highly unusual race, see Hasen, *supra* note 14, at 1321.

beliefs about the quality of the legislation passed by initiatives. One particular criticism that some have leveled against initiatives is that they tend to trample upon minority rights.¹⁸ If one views the initiative process as a way in which the voters can bypass legislators to pass good legislation that, for reasons of legislative self-interest or for other reasons, could not be passed, then routine judicial invalidation of initiatives is troubling. If, on the other hand, one views the initiative process as a way in which the majority can bypass legislators to pass legislation that tramples on minority rights, then judicial invalidation of initiatives is welcome.

Of course the reality is that some initiatives fall into each category, though my impression is that a disproportionate share of recent initiatives have had an anti-minority bias. Holman and Stern disagree, stating that legislators are just as likely as voters to pass bad laws infringing on civil liberties.¹⁹ Yet the authors must reach back to World War II or earlier to find significant examples of legislatures passing laws blatantly oppressing civil liberties.²⁰

To the extent one worries about anti-minority initiatives, one must also worry about the risk of leaving the high-salience decisions regarding the constitutionality of these initiatives to judges facing reelection, even a retention election in eleven years. The crocodile in the bathtub²¹ apparently has a good memory when it comes to high-salience judicial decisions, or at least judges reasonably may think so. Holman and Stern appear less concerned with the crocodile or the underlying law than with the unaccountable federal judge, particularly when litigants can influence which federal judge hears the initiative challenge.

Holman and Stern do not go so far as to argue against federal court review of voter initiatives. Instead, they advocate the use of a three-judge federal panel to hear such cases. According to the authors, this shift from a single judicial head to judicial hydra would increase voter confidence in the judiciary²² and decrease the chances that the "personal prejudices"²³ or "particular biases"²⁴ of a single

18. See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

19. See Holman & Stern, *supra* note 1, at 1246-47.

20. See *id.*

21. See *id.* at 1259 (quoting the late Justice Otto Kaus of the California Supreme Court).

22. See *id.* at 1261-63.

23. *Id.* at 1262.

24. *Id.* at 1263.

federal judge would decide the fate of the initiative embraced by the voters of the entire state.

Holman and Stern present no evidence that the presence of three-judge panels in cases where they are currently used, primarily apportionment and Voting Rights Act cases, increases voter confidence in the judiciary.²⁵ But they are probably right that such panels minimize the importance of ideological outliers among the judiciary. If life-tenured federal judges tend to vote their values,²⁶ and values vary widely around a mean, there may be something to the idea that a randomly-chosen three-headed hydra is more likely to be moderate than the single-headed—and sometimes wrong-headed—federal judge.

But we already have a mechanism for lessening the impact of ideological outliers: the appellate process, which includes de novo review of a district court judge's legal conclusions. Every federal case filed in a federal district court in California may be appealed to the Ninth Circuit, to an en banc panel of the Ninth Circuit, and ultimately to the United States Supreme Court. Holman and Stern point to Judge Reinhardt's opinion in the Proposition 140 case on state term limits to show public dissatisfaction with the opinion of a federal judge.²⁷ But this case disproves more than it proves the need for a three-judge court. First, Reinhardt's was the *appellate* opinion of a three-judge Ninth Circuit panel; the vote was two to one. Second, Judge Reinhardt's controversial opinion was short-lived. Only months later, an en banc panel of the Ninth Circuit reversed it.²⁸ How much more, if anything, would have been gained had the case been considered by an initial three-judge court with a direct discretionary appeal to the United States Supreme Court, which more often than not fails to consider appeals from three-judge courts on the merits?²⁹

The appellate process is not a complete solution to the problem of ideological outliers. Trial court judges shape the outcome of cases

25. Michael E. Solimine discusses the lack of supporting data on this point. See Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REF. 79, 99-100 (1996).

26. See *supra* note 16 and accompanying text.

27. See Holman & Stern, *supra* note 1, at 1263 & n. 131.

28. See *Jones v. Bates*, 127 F.3d 839 (9th Cir.), *rev'd*, 131 F.3d 843 (9th Cir. 1997) (en banc), *cert. dismissed*, 118 S. Ct. 679 (1998).

29. See Solimine, *supra* note 25, at 104-09 (noting that the Supreme Court has treated appeals from three-judge courts in a way that resembles the discretionary writ of certiorari).

not only through legal conclusions but through findings of fact—and for that matter through evidentiary and other rulings within the discretion of the trial court. Those findings of fact are more or less set in stone in the trial court, and appellate courts work with those factual findings in crafting legal rules on appeal. In addition, trial judges opposed to an initiative may simply delay deciding the case for an indefinite period.

A three-judge panel could minimize the ideological outlier problem as it manifests itself in findings of fact because fact-finding would be the product of at least a two-judge majority on the three-judge court. Delay for its own sake might be less prevalent as well. These concerns might justify the use of three-judge courts, though three-judge panels significantly increase administrative costs as they require use of additional scarce judicial resources. Apparently it is not easy for litigants to try cases before three judges.³⁰ Additionally, administrative concerns may delay consideration of these cases.

Holman and Stern are silent on details of how their proposed three-judge court should function, but I assume they would want to deviate from at least two current practices. First, they probably would want judges on the panels to be selected randomly. Under current law regulating three-judge courts, one member of the three-judge panel must be the district judge in whose court the original complaint was filed. The chief judge of the circuit then picks the other two members,³¹ hardly a random process. Second, Holman and Stern may want to add an intermediate layer of review between the three-judge court and the current direct discretionary appeal to the Supreme Court.³² Perhaps appeal to an en banc circuit court would be appropriate. This intermediate review would minimize the effects of a three-judge court comprised of (of at least two) ideological outliers of similar ideology.

Ultimately, a cheaper way to ameliorate the ideological outlier problem is to increase randomization of case assignments to prevent judge shopping among single federal district judges. Holman and Stern describe the use of judge shopping by opponents of Proposition

30. *See id.* at 125-26.

31. *See* 28 U.S.C. § 2284(b)(1) (1994). In the past, allegations of bias by the chief judge were common. Now, it appears that chief judges strive to create “political balance” on these panels. *See* Solimine, *supra* note 25, at 110-15.

32. *See* 28 U.S.C. § 1253.

208,³³ an initiative the authors actively supported both before its passage and during litigation. Eliminating “related case” rules that give priority to judges who have decided cases on similar subjects—for instance, one judge in the district considers every campaign finance case—would go some way toward this goal. More elaborate venue rules that would randomize the district in California in which litigants must file challenges to initiatives would move much closer to the goal. The three-judge panel may be unnecessary with these randomization procedures in place.

Beyond these steps, the only alternatives are to eliminate either life tenure for federal judges or federal court review of state initiatives. When choosing between a viable but dangerous initiative process and an independent judiciary oriented toward protecting federal constitutional rights, I must choose the judiciary.

33. See Holman & Stern, *supra* note 1, at 1245.