Proposition 1 is good enough

Overview

In their SCOCAblog article “Fix the fatal flaw in SCA 10” Allison Macbeth and Elizabeth Bernal argued that California abortion rights, which rely on the same unwritten privacy interests the U.S. Supreme Court abrogated in *Dobbs v. Jackson Women’s Health Organization*, are similarly vulnerable to judicial repeal. They suggested that an initiative measure could add specific, detailed reproductive liberty rights to California’s constitution. Absent that specificity, Macbeth and Bernal argued that a California version of *Dobbs* remained a risk.

Macbeth and Bernal were right to argue for improvements to a law that will constitutionalize a woman’s right to choose in California, and advocates should be aware of future legal risks to Proposition 1. Losing a constitutional liberty interest to crabbed judicial interpretation is always a risk: no matter how specific the drafters are, a clever writer can always find an escape. Drafters must balance that concern against the reality that it’s impossible to foresee and prevent all future interpretive issues. Because California courts have repeatedly upheld the electorate’s direct democracy acts, a narrow reading of Proposition 1 is unlikely. And even if a California court were dismissive of Proposition 1, further initiatives and retention elections are potent threats to courts that ignore majority preferences.

Discussion

Dobbs shows two paths: one for California courts to abolish California abortion rights, and an escape route for a hypothetical court determined to limit Proposition 1. Identifying those valid concerns and urging the legislature to address them in the draft bill was worthwhile. Draft legislative language can always be improved: highlighting potential problems, proposing alternate solutions, and arguing about what should be in a bill are all essential parts of the drafting process. Critiquing a draft is the best way to educate advocates as they fight for implementation. Congress is struggling with that drafting process right now on a bipartisan abortion rights bill (and apparently everyone hates it).

That doesn't mean that Proposition 1 is a bad law — it's still an effective way for the voters to give abortion rights constitutional status and protection. Completely preventing that outcome is probably impossible, so the practical question now is whether Proposition 1 does what it needs to do: give abortion rights express constitutional status in California. It's one thing for a stakeholder to push the legislature to improve its bill text, but evaluating a real ballot proposition is another matter. Once the proposition language is final, the perspective changes to be focused less on theoretical problems in a work-in-progress and more on the realistic consequences of an actual law. Edge-case concerns about the draft bill fade once Proposition 1 becomes a reality.

Now that Proposition 1 has graduated from mere thought experiment to a live ballot measure, technical legal concerns should not make the perfect the enemy of the good. Questions about how a future court might interpret a ballot proposition are necessarily speculative, and such issues are secondary to the more immediate decision about whether or not a voter wants abortion rights protected by the California constitution. Interpretation questions are a potential future problem the courts may confront, but they are not a reason to vote for or against Proposition 1 now.

Proposition 1 is clear enough that California courts will grasp its intended meaning. Its intent to protect existing abortion rights should be obvious to all but the willfully blind. Macbeth and Bernal identified a valid concern, but it's only one possible future that by itself is not a sufficient reason to vote for or against Proposition 1. Now that it's on the ballot, the view in favor of Proposition 1 is that it is a chance to tell California courts that the electorate wants abortion rights to have express constitutional protection. The theoretical risk that California courts could (as the U.S. Supreme Court did in *Dobbs*) ignore what the people want does exist. But that risk is always present — and making a loud, clear statement about what the voters want the law to be is hard for California courts to ignore.

If it passes, Proposition 1 will make a California version of *Dobbs* difficult and unlikely. Think about just how loudly Proposition 1 will ring in judicial ears after a supermajority of the legislature endorsed it and the electorate (probably) approves it. Rather than a court seeing a wide-open door to interpret judge-made law on

nontextual rights, California courts will see a legislative policy decision that matches the 2002 Reproductive Privacy Act, which declares that women have a "fundamental right to choose to bear a child or to choose and to obtain an abortion." And those courts will hear the electorate endorsing that decision by adding equivalent language to the state constitution. That's hard for a court to write around.

Amending the state constitution is no substitute for the statutes that currently provide protection for abortion. Two sources of protection are better than one, they are not mutually exclusive, and having constitutional protection is both better than and supportive of statutory protection. Constitutional and statutory protections reinforce each other: the general constitutional guarantee is implemented and defined by the statutes, and leaving room for legislative regulation ensures that abortion supporters retain some political control rather than ceding all future development authority to the courts. Leaving interpretive control only to either the legislature or the courts is a recipe for capture.

Proposition 1 can help California avoid the capture mistake made at the federal level: forgoing legislative solutions in favor of expecting the high court to always simultaneously advance liberty and match the public's expectations on liberty issues. No one should be surprised at the outcome there (capture) nor at being left without recourse after decades of focusing on judicial solutions to public policy debates. Liberty needs both the courts and the legislature to thrive — both constitutionalism *and* political policy-making. As a New York Times guest essay recently argued, "If legislatures just passed rules and protected values majorities believe in, the distinction between 'higher law' and everyday politics effectively disappears."

Conclusion

No law is perfect; the questions are what Proposition 1 needs to achieve and whether it does that. This is a vote for ideals, a campaign about giving abortion rights express constitutional status. If it passes Proposition 1 is a major step in that direction. If it fails, fighting to embed liberty principles in the state constitution is never wasted effort. Even if it passes, this is not the end of the abortion battle. Proposition 1 could be a permanent solution, or future court battles may reveal the need to change the constitution again. In that case California's ballot box is open

twice a year.

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This opinion essay contains informational legal analysis; it does not advocate for a vote for or against a pending ballot measure. Senior research fellow Brandon V. Stracener contributed to this article.