Proposition 9 and pre-election challenges to ballot initiatives

Overview

Proposition 9 (commonly referred to as Three Californias) was a proposed initiative to divide California into three smaller states.[1] The initiative received enough signatures to go on the ballot in November 2018. But in a ruling on a pre-election challenge the California Supreme Court ordered the Secretary of State to remove Proposition 9 from the ballot.[2] Proposition 9 had several flaws that likely would have doomed it in a post-election challenge.[3] But this was a pre-election attack, and courts ordinarily are reluctant to prevent measures from going on the ballot.

The court's order removing Proposition 9 from the ballot was brief, and it cited just two cases. This article reviews the two cited authorities and presents two justifications for the decision. First, however, a brief review of the history of pre-election challenges will help explain the court's rather opaque explanation of its reasons.

Precedent Establishing Pre-Election Challenges to Initiatives

There are few restrictions on the California electorate's initiative power.[4] Because the electorate exercises legislative power through the initiative, separation of powers concerns and judicial restraint motivate the courts to "jealously guard" the electorate's initiative prerogative: "we should not interfere with the exercise of the electorate's franchise for the purpose of determining the question of constitutionality, a matter which can, if necessary, be more appropriately passed upon after the election."[5]

There is no express constitutional process for challenging an initiative pre-election; consequently, writ relief is typically sought.[6] Historically, both substantive and procedural attacks have been permitted before an election: challengers commonly claim that the initiative is outside the electorate's initiative power,[7] or that the measure failed to comply with a qualification requirement.[8]

Despite the long list of authorities that could have been cited to justify blocking Proposition 9 on either substantive or procedural grounds, the court cited two cases that do not appear to be the strongest authority. While both cited cases deal with procedural or substantive challenges, each also supports a third rationale: that an initiative may be blocked simply because it is (to borrow from criminal law) so inherently impossible that it is doomed to fail regardless of its passage. If the order on Proposition 9 can be interpreted as the court adopting this new rationale, it would signify a significant loosening of the restraints on pre-election challenges to initiatives.

The Two Cases Cited by the Court

In its order removing Proposition 9 from the ballot the court cited two cases: *Howard Jarvis Taxpayers Association v. Padilla****[9]*** and *American Federation of Labor v. Eu.****[10]***

In *Howard Jarvis* the legislature sought guidance on whether to pursue an amendment to the U.S. Constitution that would overturn *Citizens United v. Federal Election Commission*.[11] The question was whether the legislature could place advisory questions on the ballot as initiatives. The case is different from most pre-election initiative challenges in that it concerned a pre-election challenge to a legislatively-proposed measure, which moots any argument about guarding the electorate's powers.

The *Howard Jarvis* decision turned on the risk of erroneously disallowing a politically timely and valid measure. In a preliminary ruling the court ordered the initiative removed from the 2014 ballot because the "validity was uncertain and the cost of postponing a potentially lawful proposition to a later ballot . . . was outweighed by the cost of permitting a potentially invalid proposition to reach the ballot."[12] This "effectively remov[ed] the advisory question from the November 2014 ballot."[13] Yet when the court later addressed the merits it reversed course and held that the initiative was "a reasonable and lawful means of assisting the Legislature" with "no constitutional obstacle."[14]

The merits decision in *Howard Jarvis* reads like a court acknowledging that its initial decision to bar the initiative from the ballot was incorrect. Consequently, that

decision is weak authority for a decision to bar another measure from the ballot. It is particularly weak authority for barring a voter initiative, because *Howard Jarvis* concerned a legislatively-referred measure.

The other authority cited in the Proposition 9 order was *American Federation of Labor v. Eu*, in which the court dealt with the inverse of *Howard Jarvis* — an initiative seeking to direct the legislature to propose an amendment to the U.S. Constitution mandating a balanced federal budget.[15] The opinion noted the general rule that "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election."[16] The court qualified this by reasoning that pre-election challenges are appropriate when they challenge "the power of the electorate to adopt the proposal in the first instance."[17] The court found that since the challenge was to "the power of the electorate to adopt the proposed initiative" it was a permissible pre-election challenge.[18]

One portion of the *Eu* opinion considered a section of the initiative that would have directed the state legislature to submit the request to Congress.[19] The court held that "the initiative, to the extent that it applies for a constitutional convention or requires the Legislature to do so, does not conform to article V of the United States Constitution" because "a state may not, by initiative or otherwise, compel its legislators to apply for a constitutional convention, or to refrain from such action."[20] Importantly, the court's reasoning that "the crucial provisions of the initiative measure are invalid under the United States Constitution, but that other, subordinate provisions are not, necessarily raises a question of severability" indicates that the court would have (absent other defects) struck only the offending portions — not for procedural or substantive reasons, but instead because the portions were inherently impossible.[21]

But the inherent impossibility theory was not the only basis for the decision. The court also held that the measure violated the California constitution, because it did not fit into one of the initiative categories defined in the California constitution: a proposed statute or constitutional amendment: "We also conclude that the measure exceeds the scope of the initiative power under the controlling provisions of the California Constitution (art. II, § 8 and art. IV, § 1). The initiative power is the power

to adopt statutes — to enact laws — but the crucial provisions of the balanced budget initiative do not adopt a statute or enact a law."[22] Instead, it was a resolution "which merely expresses the wishes of the enacting body, whether that expression is purely precatory or serves as one step in a process which may lead to a federal constitutional amendment."[23] Because resolutions are not one of the electorate's Article II initiative powers, the court held that the initiative was substantively deficient as well as inherently impossible.[24]

The *Eu* facts were the inverse of *Howard Jarvis*, and the *Eu* decision is similarly opposite: the court blocked the initiative. But this divergence was not due to a difference in legal reasoning. Instead, it rested on the difference between the electorate's powers versus the legislature's power, and on the respective substantive deficiencies in each initiative. In *Howard Jarvis*, the court found that the legislature could seek an amendment under Article V of the U.S. Constitution,[25] while in *Eu* the court found that the electorate could not.[26] In other words, in *Howard Jarvis* the legislature substantively could do what they sought advice on and did so in a procedurally correct manner, while the electorate in *American Federation* attempted to do something they substantively could not in a procedurally incorrect way.

Using *Howard Jarvis* and *Eu* to Explain the Court's Reasoning

This is the relevant portion of the order on Proposition 9 in *PCL v. Padilla*:

[The court has] made clear that in some instances, when a substantial question has been raised regarding the proposition's validity and the "hardships from permitting an invalid measure to remain on the ballot" outweigh the harm potentially posed by "delaying a proposition to a future election," it may be appropriate to review a proposed measure before it is placed on the ballot.[27]

The order is short on legal reasoning and long on case law. *Howard Jarvis* is weak precedent, considering that the court determined its pre-election action in the case was unwarranted and the facts were so dissimilar from those here. *Eu* is more on point, but like the opinion in *Howard Jarvis* it discusses at length inherent impossibility issues and devotes less space to the usual procedural and substantive challenges. Both cases are weaker supporting authority than other pre-election authorities, like *Simpson v. Hite****[28]*** or *Boyd v. Jordan*.[29] Why, then, did the court

use these two cases rather than stronger authority for removing Proposition 9 from the ballot?

I conclude that it is because the inherent possibility issue drove the decisions in *Howard Jarvis* and *Eu*. Other than *Howard Jarvis* and *Eu*, to support an inherent impossibility challenge to an initiative one can only rely on a concurring opinion in a 1982 case and dicta in a 1983 case.[30] Of these four cases that could theoretically support pre-election challenges to initiatives based on inherent impossibility, the court chose to rely on the two that most directly considered and decided that issue. This could be a coincidence, but it is plausible that the court's reliance on those cases signifies a shift towards allowing inherent impossibility pre-election challenges to initiatives. The sheer absurdity of Proposition 9 calls for such a doctrine: to avoid confusing the electorate, preventing abuse of the initiative, and conserving judicial resources. It is telling that the court used the only two opinions that could justify that doctrine, rather than relying on the myriad other authorities supporting the ordinary procedural and substantive challenges. This could mean that, going forward, *PCL v. Padilla* is authority for attacks on initiatives based on inherent impossibility.

Conclusion

Proposition 9 could have been resolved with a routine decision. But the court's particular use of supporting authority may be a clue to how future similar initiatives will be resolved. Given that the ballot proponent requested that the court make its order permanent without further briefing, further development in this area will have to wait for another day.[31] In the future, ballot measure proponents and their opponents should consider potential inherent impossibility challenges in addition to the traditional substantive and procedural challenges.

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[1] Timothy Draper, *Letter to Attorney General*, Cal 3 (Oct. 24, 2017). *Available at* https://cal3.com/proposed-measure/; for an in-depth analysis of Proposition 9, *see* https://ballotpedia.org/California_Proposition_9,_Three_States_Initiative_(2018).

[2] *Planning and Conservation League v. Padilla* (2018) (order to show cause issued Jul. 18, 2018, S249859).

[3] The essential flaws of the proposition were: it was qualified as a statutory amendment while it was likely a constitutional change; it was a proposed revision of the constitution which can only be done through a constitutional convention; and would likely have violated Article IV, Section 3 of the U.S. Constitution which governs the formation of new states. For a discussion on Proposition 9's problems, *see* David Carrillo & Stephen Duvernay, *Three Californias Measure is a Mortal Threat to our State*, Daily Journal (Jun. 22, 2018).

[4] Cal. Const., art. II, § 8; Cal. Const., art. XVIII, § 3; Cal. Const., art. IV, § 1.

[5] *Wind v. Hite* (1962); *City of Morgan Hill v. Bushey* (2018) (courts' duty is to "jealously guard" the referendum and initiative powers and to liberally construe those powers). *See, e.g., Legislature v. Deukmejian* (1983); *American Federation of Labor v. Eu* (1984); *Farley v. Healey* (1967).

[6] *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) ("The trial court has discretion whether to entertain preelection review of a qualified initiative.").

[7] *See, e.g., Simpson v. Hite* (1950) (blocking initiative because it was not legislative in character); *Riedman v. Brison* (1933) 217 Cal. 383, 387 (holding that a city's legislative initiative should be removed from the ballot because it was not municipal in character); *McFadden v. Jordan* (1948) (blocking an initiative because it constituted a constitutional revision).

[8] *See, e.g., Clark v. Jordan* (1936) (blocking an initiative because its title was misleading); *Boyd v. Jordan* (1934) (blocking an initiative because the petition to the secretary of state was insufficient).

[9] *Howard Jarvis Taxpayers Assn. v. Padilla* (2016); s*ee also* California Constitution Center, *Advisory Measures and the Legislature's Power to Investigate*, scocablog (Jan. 25, 2016).

[10] *American Federation of Labor v. Eu* (1984).

[11] *Howard Jarvis* (2016) *supra* note 9; *Citizens United v. Federal Election Commission* (2010).

[12] *Howard Jarvis* (2016), *supra* note 9.

[13] *Ibid.*

[14] *Ibid*.

[15] *Eu* (1984), *supra* note 5.

[16] *Id.* (quoting *Brosnahan v. Eu* (1982)).

[17] *Id.* (quoting *Legislature of the State of California v. Deukmejian* (1983)).

[18] *Eu* (1984), *supra* note 5.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid*.

[23] *Eu* (1984), *supra* note 5.

[24] *Ibid.*

[25] *Howard Jarvis* (2016), *supra* note 9 ("The federal Constitution vests state legislatures with certain powers and duties in connection with amendments to the federal Constitution.").

[26] *Eu* (1984), *supra* note 5 ("We conclude that when article V refers to an application by the 'Legislatures' of two-thirds of the states, calling for a constitutional convention, it refers to the representative lawmaking bodies in those states. Any application directly by the electorate, through their reserved legislative power, would not conform to article V.").

[27] *Howard Jarvis* (2016), *supra* note 9.

[28] *Simpson* (1950)*, supra* note 7.

[29] *Boyd* (1934), *supra* note 8.

[30] *Brosnahan v. Eu* (1982) (Mosk, J., concurring) and *Deukmejian* (1983), *supra* note 5. Lower court decisions, such as *City of San Diego v. Dunkl* (2001) and *Citizens for Responsible Behavior v. Superior Court* (1991) typically cite to *Eu* as justification for inherent impossibility challenges. I found no other cases discussing an inherent impossibility challenge that cited to any authorities other than the four cases mentioned here.

[31] Appellate Letter Brief ("This Court has asked that I 'show cause' why Proposition 9 should not be permanently kept off the ballot. I did not qualify Proposition 9 for just any future ballot. I wanted it to be on the ballot this year. The political environment for radical change is right now — such change is sweeping the globe. I understand that change is hard, change is scary, but change is evolution and this government is not evolving. But the removal of Proposition 9 from the November ballot has effectively put an end to this movement. Consequently, I do not object to the Court making its order permanent without further briefing or hearing.").