

DIRECT DEMOCRACY BY THE MAJORITY CAN JEOPARDIZE THE CIVIL RIGHTS OF MINORITY OR OTHER POWERLESS GROUPS

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Like my colleagues at Harvard, Henry Louis Gates and Cornel West, I am a “race-man.” Of course, that is not to be confused with a racist. What I mean by “race-man” is that I spend my time and focus my attention on studying the culture and the law of discrimination based upon race, gender, or sexual preference. Drawing upon that, I would like to extend today’s discussion of ballot initiatives and the First Amendment into the arena of civil rights.¹

Upon consideration of this topic, I am reminded of a controversy that was initiated during the late 1950s by Professor Herbert Wechsler. Professor Wechsler pointed out that, while *Brown v. Board of Education*² involved the proposition that racial segregation was a “‘denial of equality for the minorities against whom it is directed,’”³ this was only one side of the coin. According to Wechsler, the other, overlooked side of the coin was the associational rights of segregationist whites.⁴ He posited the controversial argument that the push for integration of the state-segregated schools actually represented a situation in which African-Americans wanted to integrate and associate with

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1. The specific focus of this discussion will be on how direct democracy jeopardizes the civil rights of certain identified, though not necessarily judicially protected, groups. In addition, I will point out how the increasing use of direct democracy measures has produced a number of recent decisions which lend support to my position.

2. 347 U.S. 483 (1954).

3. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW*, § 7.11.1 (3rd ed. 1992) (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959)).

4. *Id.*

whites who were opposed to the principle.⁵ In the end, Wechsler theorized that *Brown* had created a conflict between the whites' freedom of association, which presumably included the right not to associate with blacks, and certain principles of equality with respect to blacks.⁶ He pondered whether there was a neutral principle that could balance the proverbial jurisprudential coin on its side such that both rights were equally displayed. He concluded, however, that reconciling the two constitutional maxims was not likely and that there probably was a principle that would elevate racial equality over the free-association rights of segregationists.⁷

Professor Derrick Bell later added his impressions to this argument and redefined it. He proposed that what Wechsler's discussion really represented was a mask of an intellectually accepted form of a much deeper truth, "the positive truth", about the subordination of law to interest group politics and issues involving race.⁸ The premise of Professor Bell's argument is that whites will always seek to retain their majoritarian status regardless of what the law is or should be, and that they will sometimes use the law to perpetuate their standing.⁹ Professor Bell argues that *Brown* was actually intended to serve that purpose.¹⁰ It is not, however, the lawmakers and politicians whom Bell classifies as being the greatest danger to racial equality. Bell maintains that less affluent whites represent the strongest opponents of

5. BELL, *supra* note 3 ("[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant.'").

6. This argument is one from which the current well of controversy has sprung. It adequately represents the beginning of the balancing of civil rights with other constitutional rights and guarantees. These rights include the right to vote and the guarantee of a republican form of government—both of which I will speak to in this article.

7. Wechsler never could quite think of what the principle would be. Moreover, he was not sure that he could ever write one. This led him to quip that the difficulty of discovering and defining the solution was the challenge of the school desegregation cases. See *supra* note 3.

8. BELL, *supra* note 3, at § 7.11.2.

9. See *id.* at § 7.11.6.

10. The *Brown* decision represented an unstated understanding that legally-sanctioned segregation no longer furthered and in fact was now harmful to the interests of those whites who make policy for this country. . . . *Brown*, while taking from whites the benefits of segregation . . . has proved of greater value to whites than blacks. Certainly it has been a great blessing to whites in policy-making positions able to benefit from the economic and political advances at home and abroad that followed abandonment of apartheid in our national law.

BELL, *supra* note 3, at § 7.11.3.

laws or court decisions that have the effect of attenuating the historical racial divide which has always placed whites in a superior position.¹¹

Bell's view is important because the vast majority of white voters are not affluent. As racial barriers began to fall, white voters with no alternatives started to band together via direct democracy measures to protect their heretofore superior status. As Professor Bell noted while discussing the *City of Eastlake*¹² case:

Even the most unsophisticated voters recognize [that direct democracy] measures are intended to exclude poor and nonwhite groups. Here . . . the referendum as a medium for perpetuating discrimination is effective because so many whites . . . are convinced that their own insecure social status may be best protected by opposing equal rights for blacks.¹³

Over the past thirty years, there have been a handful of United States Supreme Court cases implicating this subject of making and repealing laws and policies through the use of ballot initiatives¹⁴ and the attendant effects with respect to racial discrimination. In fact, as far back as 1967, the Supreme Court analyzed these issues in *Reitman v. Mulkey*.¹⁵ That case dealt with an amendment to the California Constitution via referendum, which provided that a seller or holder of property had absolute discretion to reject for any reason a buyer or renter in any kind of exchange for that property.¹⁶ The effect of the referendum, dubbed Proposition 14, was to nullify well-known California anti-discrimination provisions in housing. It virtually repealed them. The Court declared that singling out a particular group and nullifying statutes designed to protect that group without any rational ba-

11. See BELL, *supra* note 3, at § 7.11.4.

Segregated schools and facilities were established by legislatures at the insistence of the white working classes who saw color barriers as official confirmation that the establishment would maintain them in a permanent societal status superior to that designated for blacks. . . . We now know more clearly that many whites at any class level will oppose any school remedy or minority admissions plan, particularly if it threatens their status and prerogatives.

Id.

12. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976).

13. BELL, *supra* note 3, at § 8.3.4.

14. Note that throughout this discussion the terms ballot "initiative," "referendum," and "proposition" are used interchangeably. For the specific differences amongst the terms and which states use them, see generally Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988).

15. 387 U.S. 369 (1967).

16. See *id.* at 371.

sis violated the Equal Protection Clause, rendering Proposition 14 unconstitutional.¹⁷

A couple of years later, the Court reviewed a similar initiative from Ohio in *Hunter v. Erickson*.¹⁸ In *Hunter*, an anti-discrimination measure in housing had to be approved by referendum rather than through the usual legislative process. Once again, the Supreme Court held that this subjected a discrete and insular group to a more onerous requirement for achieving civil rights protection under the law than did the manner normally available—namely the passage of laws through the representative legislating body.¹⁹

Although the trend had been to recognize the damaging effect on civil rights perpetrated by use of ballot initiatives, the Court soon labored to point out that the balance between civil rights and ballot initiatives did not always weigh in favor of the former. In the 1971 *James v. Valtierra*²⁰ decision, civil rights advocates attacked a measure that required a referendum to approve any proposed development of low-income housing.²¹ Here the Supreme Court said that such a measure did not have any per se racially discriminatory impact. Moreover, the Court noted that the referendum requirement was a fair and reasonable means for voters to determine whether they wanted to accept a particular type of program.²² Accordingly, the majority held that the referendum measure was acceptable.²³

In 1982, the Supreme Court examined direct democracy measures in another school desegregation case, *Crawford v. Board of Education*.²⁴ In *Crawford*, the Court reviewed Proposition 1, which amended the California Constitution to change the standard of proof for a state equal protection violation from a de facto rule to an intent test,²⁵ the same standard required under the United States Constitution. This ballot initiative voided a California Supreme Court ruling which had found the Los Angeles school district illegally segregated

17. *See id.* at 380-381.

18. 393 U.S. 385 (1969).

19. *See id.* at 392-93.

20. 402 U.S. 137 (1971).

21. *See id.* at 139 n.2.

22. *See id.* at 141 (“Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.”).

23. *See id.* at 143.

24. 458 U.S. 527 (1982). During the same term, the Court also decided *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), holding unconstitutional a referendum which purported to ban all busing. For the difference between this case and *Crawford*, 458 U.S. at 536 n.12.

25. *Crawford*, 458 U.S. at 542.

school children based on race and ethnicity.²⁶ The Supreme Court held that simply repealing a school desegregation decision did not rise to the level of a constitutional violation.²⁷ The Court held that Proposition 1 was not racially motivated and was therefore a permissible ballot initiative.²⁸

The above cases, while not exhaustive, are representative of the precedents that have led up to the more recent era of clashes between direct democracy and civil rights. Two of the more recent decisions that come to mind are *Yniguez v. Arizona*²⁹ and *Romer v. Evans*.³⁰ In *Yniguez*, the Ninth Circuit reviewed an “English-only” voter referendum in Arizona. Hispanic and other civil rights advocates challenged the initiative as violative of the First Amendment right to freedom of speech.³¹ The court affirmed the District Court’s decision to strike down the referendum, holding the measure facially overbroad and in violation of the First Amendment,³² but reversed and remanded the District Court judgment insofar as it denied Yniguez an award of nominal damages.³³ In March, 1997, the Supreme Court vacated the decision for mootness and lack of standing.³⁴

In 1996, the Supreme Court reviewed a case which implicated the rationale underlying decisions such as *Hunter* and *Crawford*. In *Romer*, the Court again considered a repeal of anti-discrimination laws through direct democracy. There the people of Colorado, via statewide referendum, voted to amend the state’s constitution to preclude all legislative, executive, or judicial action at any level of state or local government aimed at protecting the status of persons based on their sexual orientation, conduct, practices, or relationships.³⁵ The amendment specifically targeted gay men, lesbians, and bisexuals. The Court held Colorado’s Amendment 2 unconstitutional because, among other things, it was not rationally related to any legitimate state interest. In pursuing this line of reasoning, the Court suggested that the right of the people of Colorado to pass a measure which has the effect of singling out a specific group of persons and denying them

26. See *Crawford v. Board of Education*, 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976).

27. 458 U.S. at 535-540.

28. *Id.* at 536.

29. 69 F.3d 920 (9th Cir. 1995).

30. 116 S. Ct. 1620 (1996).

31. See *Yniguez*, *supra* note 29.

32. *Id.* at 924.

33. *Id.* at 949.

34. See *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997).

35. *Romer*, 116 S. Ct. at 1623.

protection could not outweigh the right of those persons to participate in the political process.³⁶ According to the majority, Amendment 2 denied those groups of persons their right to seek protections under the law. The right to vote in the exercise of direct democracy, in this case, had to succumb to the civil rights of gays, lesbians, and bisexuals.

What is evident in these cases is the amount of stretching the Supreme Court is willing to do to reach a decision that allows the civil rights side of the proverbial jurisprudential coin to land face up. It seems as though the Court has assumed the last line of defense role whenever ballot initiatives premised on First Amendment and free expression rights of voters threaten civil and individual rights.³⁷ In other words, the Court, in a truly Madisonian fashion, guards the interests of the minority against the will of the majority.³⁸

One example of this is evident in the *Romer* decision. There the majority struck down Amendment 2 by saying it could not pass a mere rationality test.³⁹ What makes the finding particularly interesting is the fact that the Court has never really recognized gays and lesbians as any kind of insular or discrete minority entitled to protected class status. It is a stance that I doubt the Court relishes taking. One of the reasons is that such an intellectual extension places the Court's decisions on less firm ground, leaving it open to criticism from within and without.

Several commentators have offered means of reconciling obvious tension in deciding cases which require the Court to balance the First Amendment against other Bill of Rights guarantees regarding civil rights. According to Cynthia L. Fountaine and many others,⁴⁰ the Court has refused to interpret the Constitution to decide whether direct democracy measures are repugnant to the Guaranty Clause⁴¹ and thereby have no place in the legislative processes of our governments.⁴² By avoiding such a determination, the Court is likewise avoiding the answer to its problem. For, as Fountaine observes, "the Constitution's guarantee of a republican government requires that the states maintain representative governments [D]irect democracy

36. *Id.* at 1624. While the state argued that Amendment 2 merely repealed extra protection and placed homosexuals in the same position as everyone else, the Court considered this argument flawed. *See id.*

37. *See* Douglas H. Hsiao, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 1992 DUKE L.J. 1267.

38. *See* THE FEDERALIST NO. 10 (James Madison).

39. *Romer*, 116 S. Ct. at 1627.

40. *See also* Hsiao, *supra* note 37, at 1291.

41. U.S. CONST., art. IV, § 4.

42. Fountaine, *supra* note 14, part II.

as a way of enacting [and repealing] laws and amending constitutions . . . violates the [Guaranty Clause] and should be declared unconstitutional.”⁴³ By declaring direct democracy unconstitutional, the Court would no longer have to assume the quasi-legislative role that Douglas H. Hsiao attributes to it.⁴⁴ The Court will instead have to make policy determinations prior to interpreting the law in order to guard the rights and interests of minorities.

The main problem with this approach is that it relies on the Court to turn away from its firmly established position that interpretation of the Guaranty Clause is a political question. Perhaps then the view my colleague Derrick Bell adopted way back in 1978 is a more practical one.⁴⁵ Bell espouses the idea that referenda that implicate civil and individual rights should be analyzed under a heightened scrutiny test.⁴⁶

In practice the test would likely have four parts. The first inquiry would be into the history of discrimination faced by the minority groups at issue. The second would be whether such barriers to equal treatment still exist. The third would look at whether the challenged ballot measure tended to increase, decrease, or have no effect on those difficulties facing the minority groups. Lastly, somewhat akin to the strict scrutiny test, the court would determine whether there were any less restrictive or harmful alternative means which could be employed to reach the same goals. Only through the adoption of this or a similar test will the courts effectively “recognize that the initiative and referendum . . . operate as a nonracial facade covering distinctly discriminatory measures” and obviate those effects.⁴⁷ In concluding his argument, Bell notes that it is up to the courts to protect the gains that minorities have realized through their participation in representative democracy against the use of referenda to destroy such advances in an attempt to secure “a false sense of racial superiority.”⁴⁸

Today, particularly in California, the subject of ballot initiatives and their use in subrogation of civil rights is extremely ripe. With the

43. *Id.* at 738.

44. Hsiao, *supra* note 37, at 1279.

45. Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

46. *Id.* at 23.

47. *Id.* Derrick Bell crystallizes his argument for the necessity of a heightened scrutiny test by noting that “[a]lthough the racial motivation is hidden, its effects are not; and the damage to minorities and to the integrity of a representative government can be as severe as that of the overtly racist laws existing in the country before 1954.” *Id.*

48. *Id.*

passage of Proposition 209, which effectively bans affirmative action programs in California, the Court may soon be faced with another difficult task. Opponents of Proposition 209 have filed a lawsuit to challenge the measure.⁴⁹ How is the Court to determine the effect of Proposition 209 in the wake of Governor Pete Wilson's declaration that California voters have ushered in a new era in which individuals will no longer be granted preferential treatment based on race, gender, or group affiliation? Wilson continued by saying that Californians will now be judged by individual merit alone.⁵⁰ While this seems like a very neutral principle, Mark Rosenblum, legal director of the ACLU of Southern California, stated that while "[n]o statewide measure in American history has ever come close in scope or effect to Proposition 209's chokehold on state and local government . . . there is nothing new in its methodology which disenfranchises minorities and women."⁵¹ As we can see, this is a recurring theme which requires a better judicial fix than the case-by-case analysis that has heretofore been utilized. This is especially true in light of the fact that the use of direct democracy is flourishing. In the 1996 election, I counted no less than 15 major referenda and initiative measures.

In closing, my interest in this subject has certainly been heightened in light of *Sheff v. O'Neill*,⁵² the landmark decision by the Connecticut Supreme Court in 1996. After a seven-year court battle, the *Sheff* court declared that the extreme racial and ethnic isolation in Hartford public schools⁵³ amounted to de facto segregation in violation of two provisions of the Connecticut Constitution. Fortunately, Connecticut has no direct democracy provision. It is widely believed that if it did, the voters, like those in California, would have initiated a ballot measure to change the Connecticut Constitution to effectively reverse the decision and discontinue the de facto segregation legal

49. In April, 1997, the Ninth Circuit held that Proposition 209 did not violate the Equal Protection Clause. *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3171 (Aug. 29, 1997).

50. Karen Brandon, *Affirmative Action Ban Sparks Suit; ACLU Says California Measure is Unconstitutional*, CHI. TRIB., Nov. 7, 1996, at 24.

51. *Id.*

52. 678 A.2d 1267 (Conn. 1996).

53. Statewide, in the 1991-1992 school year, children from minority groups constituted 25.7 percent of the public school population. In the Hartford public school system in that same period, 92.4 percent of the students were members of minority groups, including, predominantly, students who were either African-American or Latino. Fourteen of Hartford's twenty-five elementary schools had a white student enrollment of less than 2 percent.

Id. at 1272.

standard. At least for the moment, the decision of the Connecticut Supreme Court and, consequently, the students of Hartford, are safe from the rapacious effects of direct democracy.

I leave it to you, the legal theorists of the future, to ponder what standards or tests the United States Supreme Court should adopt to deal with this tension.