The Legislature Thereof

CALIFORNIA VOTERS CAN'T CHANGE THE 2008 ELECTION RULES ON THEIR OWN.

By Doug Kendall
Posted Thursday, Sept. 13, 2007, at 7:34 AM ET

Republican presidential candidates are crossing the country promising voters that they'll pick judges who will be "strict constructionists" of the U.S. Constitution. Meanwhile, Republican activists in California are trying to flout the Constitution in order to change the rules for the 2008 election. Last week, their bid to change the state's method for meting out its electoral votes was endorsed by the state GOP and cleared by the California secretary of state, moving it closer to a place on the June 2008 ballot.

It's easy to see the allure for Republicans of this voter referendum, which has a predictably misleading name, the Presidential Election Reform Act. The initiative aims to replace the state's current "winner-take-all" allocation of its trove of 55 Electoral College votes. Instead of going to a single candidate, the state's electoral votes would be divvied up among multiple ones, based on the popular vote outcomes in California's 53 congressional districts. As several commentators have pointed out, including Jamin Raskin in ***Slate***, this is all about political gamesmanship. (Bush won 22 of California's congressional districts in 2004, and assuming that voting trend holds, the proposed referendum would shift approximately 20 electoral votes into the Republican column. That's enough to determine the outcome of a close election.

But there's a big problem with this referendum that has so far gone unnoticed: It's patently unconstitutional. The U.S. Constitution prohibits a ballot measure that would trump a state legislature's chosen method of appointing electors. In Article II, Section 1, the Constitution declares that electors shall be appointed by states "in such manner as the Legislature thereof may direct." That's *legislature*. California's could scrap its current winner-take-all approach and adopt a district-by-district system for allocating electors (as only Maine and Nebraska currently do). But the voters—whom the initiative supporters have turned to because they don't have the support of the Democratic-controlled legislature—cannot do this on their own.

Some of the Constitution's provisions are famously elusive. But "the Legislature thereof" is not one of them. In the 1920 case *Hawke v. Smith,* the Supreme Court ruled that a ballot initiative could not be used to undo a state legislature's decision to ratify the Constitution's 18th Amendment. The court found that the term *legislatures* is "plain, and admits no doubt in its interpretation." Justice William Day wrote, "The framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states. When they intended that direct action by the people be had they were no less accurate in the use of apt phraseology to carry out such purpose."

The Supreme Court had previously been clear about the power the Constitution delegates to state legislatures in choosing electors. In 1892, in *McPherson v. Blacker*, the court held that Article II grants "plenary power to the state legislatures in the matter of the appointment of electors." Quoting a 1874 Senate report, the majority stated: "The appointment of these electors is thus absolutely and wholly with the legislatures of the several states."

While *Hawke* and *McPherson* may seem like ancient history, California Republicans will surely recall the last time these issues came up: a little dispute known as *Bush v. Gore.* In the case that ended the battle over the outcome of the 2000 presidential election, the majority reaffirmed *McPherson,* stressing that state legislatures have plenary power to choose the manner of appointment of federal electors. In a concurring opinion, Chief Justice William Rehnquist, joined by Justices Clarence Thomas and Antonin Scalia, opined that the power the Constitution gives to state legislatures is so absolute that it divested the Florida Supreme Court of most of its power to review the Florida legislature's handiwork.

Rehnquist's reading is an aggressive one. One need not accept it, however, to see the flat-out unconstitutionality of the Presidential Election Reform Act. Indeed, in the course of a 150-page law journal article that is relentlessly critical of the majority and concurring opinions in *Bush v. Gore*, Harvard Law professor Laurence Tribe, one of Gore's lead lawyers, writes that "at least some state constitutional assignments of responsibility away from the state legislature—specifying that the manner of choosing presidential electors was to be fixed by the state's highest court, say, or by the state's chief executive, *or by the people in a statewide plebiscite*—obviously would not be consistent with Article II." (My italics.)

This is one matter of constitutional interpretation, then, on which the right and the left can agree. And that convergence makes it a good bet that, if a challenge to California's electoral-votes initiative ever reaches the Supreme Court, the justices will decide, perhaps even unanimously, that a ballot initiative

cannot be used to trump the decisions of a state legislature on the appointment of electors. (Here's more on the law and a response to the arguments made by its supporters.)

There are solid policy reasons to respect the framers' choice to keep the designation of electoral votes in the hands of lawmakers. In his canonical "Federalist 10" essay, James Madison warned of factions: groups of citizens united by "some common impulse of passion" that is adverse to "the rights of other citizens, or to the permanent and aggregate interests of the community." Madison then explained that factions are better thwarted by a representative democracy (where elected representatives enact legislation on behalf of voters) than by a direct or pure democracy (where voters themselves make laws).

Progressive-era reformists disagreed with Madison. They saw voter initiatives as a way to limit the power of 19th century industrialists—Theodore Roosevelt's "malefactors of great wealth." The progressives set up ballot initiative procedures in more than 20 states. But the initiatives haven't worked out as they planned. In the words of commentator David Broder, "The experience with the initiative process at the state level in the last two decades is that wealthy individuals and special interests—the targets of the Populists and Progressives who brought us the initiative a century ago—have learned all too well how to subvert the process to their own purposes." Californians need only recall Proposition 90 of 2006, which would have gutted the state's famous environmental and land-use laws, and almost passed after Howie Rich, a developer from New York City, poured more than $3 million into the campaign for it.

It's hard to put the direct democracy genie back in the bottle: Voters like the idea of direct democracy and the power to make laws, even if they often don't like the results.

But there are some areas of law that the initiative process simply cannot touch, because the Constitution doesn't let it. The apportionment of votes for the Electoral College is one of them.