

Cambridge University Press
978-0-521-74771-4 - Direct Democracy and the Courts
Kenneth P. Miller
Frontmatter
[More information](#)

Direct Democracy and the Courts

Who should have the last word on fundamental policy issues? This book analyzes the rise of two contenders – the people, through direct democracy, and the courts. Introduced in the United States during the Progressive Era and now available in nearly half the states, direct democracy has surged in recent decades. Through an outpouring of ballot measures, voters have slashed taxes, mandated government spending, imposed term limits on elected officials, enacted campaign finance reform, barred affirmative action, banned same-sex marriage, and adopted many other controversial laws. In several states, citizens now bypass legislatures to make the most important policy decisions. However, the “people’s rule” is not absolute. This book demonstrates that courts have used an expanding power of judicial review to invalidate citizen-enacted laws at remarkably high rates. The resulting conflict between the people and the courts threatens to produce a popular backlash against judges and raises profound questions about the proper scope of popular sovereignty and judicial power in a constitutional system.

Kenneth P. Miller is an associate professor of Government at Claremont McKenna College in California. He holds a BA from Pomona College, a JD from Harvard Law School, and a PhD from the University of California at Berkeley. His most recent publication is a volume coedited with Frédérick Douzet and Thad Kousser titled *The New Political Geography of California* (2008). He has published articles on topics including the initiative process, the recall of California governor Gray Davis, and the federal Voting Rights Act. He has also served as a political analyst in various media outlets, including National Public Radio, BBC World Service Radio, and the *Los Angeles Times*.

Cambridge University Press
978-0-521-74771-4 - Direct Democracy and the Courts
Kenneth P. Miller
Frontmatter
[More information](#)

Direct Democracy and the Courts

KENNETH P. MILLER
Claremont McKenna College



Cambridge University Press
978-0-521-74771-4 - Direct Democracy and the Courts
Kenneth P. Miller
Frontmatter
[More information](#)

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9780521747714

© Kenneth P. Miller 2009

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2009

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Miller, Kenneth P.
Direct democracy and the courts / Kenneth P. Miller.
p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-76564-0 (hardback) – ISBN 978-0-521-74771-4 (pbk.)

1. Direct democracy – United States. 2. Judicial review – United States. I. Title.

JF494.M55 2009

328.273–dc22 2009010900

ISBN 978-0-521-76564-0 Hardback

ISBN 978-0-521-74771-4 Paperback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party Internet Web sites referred to in
this publication and does not guarantee that any content on such Web sites is,
or will remain, accurate or appropriate.

Cambridge University Press
978-0-521-74771-4 - Direct Democracy and the Courts
Kenneth P. Miller
Frontmatter
[More information](#)

Contents

<i>List of Tables and Figures</i>	<i>page</i> vi
<i>Preface</i>	vii
Introduction: A Clash of Rising Powers	I
PART I THE QUEST FOR MAJORITY RULE	
1 The Epic Debate	19
2 Direct Democracy Gathers Force	41
PART II COUNTERING THE MAJORITY	
3 The Counter-Majoritarian Power	75
4 The Courts at Work	101
5 Conflicts Over Rights	124
6 Conflicts Over Powers	156
PART III THE MAJORITY STRIKES BACK	
7 The People’s Check on the Courts	189
Conclusion: A New Constitutional Equilibrium	216
<i>Appendix: Post-Election Initiative Invalidations</i>	225
<i>References</i>	245
<i>Index</i>	265

List of Tables and Figures

TABLES

1.1 State Adoptions of the Initiative Process	<i>page</i> 36
2.1 State Ranking, Voter-Approved Initiatives, 1904–2008	50
2.2 Initiatives by Subject Category, 1904–2008	56
4.1 Post-Election Initiative Challenges and Invalidations by Decade, Five Strongest Initiative States, 1904–2008	106
4.2 Initiative Litigation Outcomes by Initiative Subject Matter, Five Strongest Initiative States, 1904–2008	114
4.3 Specific Legal Bases for Invalidation of Voter-Approved Initiatives, Five Strongest Initiative States, 1904–2008	116
6.1 Term Limit States	163
7.1 State DOMAs Placed on Ballot by Legislatures, 1998–2006	210
7.2 State DOMAs Placed on Ballot by Citizen Initiatives, 2000–2008	211

FIGURES

1.1 Geographic Distribution of Initiative States	37
2.1 Voter-Approved Initiatives, All Initiative States, 1900s–2000s	42
2.2 State Ranking, Voter-Approved Initiatives, 1970–2008	52
2.3 Initiative Subjects, Five Strongest Initiative States, 1904–2008	57
2.4 Initiative Subjects, Other 19 Initiative States, 1904–2008	57
4.1 Initiative Adoptions, Post-Election Challenges, and Post-Election Invalidations, Five Strongest Initiative States, 1900s–2000s	107
4.2 Outcomes for Voter-Approved Initiatives Challenged in Federal Court, Five Strongest Initiative States, 1912–2008	110
4.3 Outcomes for Voter-Approved Initiatives Challenged in State Court, Five Strongest Initiative States, 1904–2008	112

Cambridge University Press
978-0-521-74771-4 - Direct Democracy and the Courts
Kenneth P. Miller
Frontmatter
[More information](#)

Preface

As a native of California, I grew up in a state where citizens expect, as a birthright, to vote directly on questions of public policy. Multitudes in my state (and in several other states that have adopted the initiative process), regularly exercise this power. Sometimes dutifully, other times enthusiastically, we cast votes for or against citizen-initiated laws. Having participated in this process, I easily understand the appeal of a system that allows citizens to weigh the pros and cons of a policy proposal and vote “yes” or “no.”

I never considered the potential disadvantages of direct democracy until the late 1980s, when I worked for a year as a legislative assistant in the California state senate. As part of my orientation, I met with several legislative leaders. One of them said, “The initiative process has become more powerful than the legislature in this state. A big part of what we do here is clean up after ballot initiatives. You begin to feel like the guy who follows the parade and sweeps up after the elephants!”

That provocative remark made a lasting impression. It caused me to think more seriously about the quality of laws enacted through the initiative process, the institutional conflict between direct democracy and representative government, and the place of direct democracy in a constitutional system.

Several years later, as I began a graduate program at the University of California at Berkeley, my interest turned to the conflict between the initiative process and the courts. At the time, many controversial California initiatives (addressing affirmative action, term limits, campaign finance reform, open primaries, immigrant social services, bilingual education, tribal gaming, and criminal punishment, among other issues) were tied up in litigation. I found it striking that judges had somehow assumed a central role in the California initiative process. I wanted to learn how and why that had happened and to see whether other states had similar experiences.

Eventually, my attempts to answer those questions produced a dissertation, several articles, and this book. During the time I worked on the project, new controversies emerged, including the fight between popular majorities and

Cambridge University Press
978-0-521-74771-4 - Direct Democracy and the Courts
Kenneth P. Miller
Frontmatter
[More information](#)

courts over same-sex marriage. These developments confirmed the theoretical and practical importance of this conflict and renewed my hope that the book will help readers understand its dynamics.

Many people generously contributed to the book. At U.C. Berkeley, Bruce Cain, Sandy Muir, and Bob Kagan were outstanding mentors. They helped me develop a theoretical framework for analyzing the conflict between direct democracy and judicial review and an empirical approach that combined my interests in history and law. As I learned more about the initiative process, I drew on the work of many fine scholars who are listed in the notes and references. At various times, I also received specific help and encouragement from Richard Ellis, Hans Linde, Dan Lowenstein, Shaun Bowler, Dane Waters, Gerald Uelman, Dan Smith, Liz Gerber, Thad Kousser, Todd Donovan, John Dinan, and Peter Schrag.

A small legion of current and former students also provided valuable assistance. They tracked down obscure information on initiatives, summarized numerous legal cases, and confirmed other facts and citations. Morgan Rice and Laura Sucheski deserve special mention. They both made long-term commitments to this book, and their contributions were indispensable. Deonne Contine, Taryn Benarroch, Justin Levitt, Carl Vos, and Brendan Sasso also ably completed various research tasks. Finally, Andrew Lee, Josh Schneider, Abhi Nemani, and Jacinth Sohi, with their student research teams at the Rose Institute of State and Local Government, helped me build a 24-state initiative database. This resource, which provides searchable information on the initiatives and challenges summarized in these pages, is hosted at the Rose Institute's Web site, www.cmc.edu/rose.

The project was sustained by generous institutional support. At Berkeley, the Institute of Governmental Studies, under the leadership of Bruce Cain and Jack Citrin, provided a congenial research environment, an outstanding library, and expert assistance from research librarians Terry Dean and Ben Burch. At Claremont McKenna College, the Rose Institute, under the leadership of Ralph Rossum and Florence Adams, supplied research teams and other resources to support the book's empirical elements; the late Ruth Schooley at Honnold Library offered crucial research assistance; and the Dean of Faculty Greg Hess provided a junior research leave and funding for summer research.

I am greatly indebted to Eric Crahan at Cambridge University Press, who clearly understood my vision for the book and expertly shepherded it to publication. At various stages, the manuscript also benefited from careful reading by Sandy Muir, Joe Bessette, Eric Helland, and Kathy Uradnik, as well as the anonymous reviewers and the production staff at Cambridge University Press.

Finally, I wish to thank my parents and other members of my family. Over the years, they have given me abundant encouragement and support. With gratitude, I dedicate the book to them.