VERDICT

Doubling Down on the Case for the Unconstitutionality of the California Recall

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We have recently argued in the New York Times and the Los Angeles Times that the California recall process for governor is unconstitutional because in the event that Newsom loses the recall, the election's structure is likely to give more weight to the preferences of voters who favor his replacement than it gives to Newsom's supporters. If the recall succeeds, it is almost certain that far more will vote to keep Newsom in office than the number of votes for any of the challengers. As such, the procedures used for the election deprive voters who favor Newsom of equal protection by violating a central principle of democracy —the one-person, one-vote principle, articulated by the Supreme Court under

Warren.

Vikram David Amar and Evan Caminker disagree. They have argued here on *Verdict* that the California Supreme Court already rejected our argument in the Gray Davis recall and that we are wrong about the unconstitutionality of the recall procedure.

As for the former point, the California Supreme Court dismissed Davis's petition without opinion. Lawyers who want to challenge the recall in the California Supreme Court should feel free to do so because no legal precedents were created by the California Supreme Court during the Davis recall. It is true that Davis did make arguments similar to ours, together with an assortment of other arguments. And it is true that the California Supreme Court denied Davis relief by dismissing the petition. But there is no way to know why Davis's petition was dismissed. We can't know if it was because of ripeness or justiciability or because the relief Davis wanted was inappropriate or impractical at the time he requested it, or for any number of other possible defects. Amar and Caminker imply that the California Supreme Court ruled on the merits of the argument we raise, and that is not so.

As for the substance of the argument by Amar and Caminker, the recall ballot is structured with two questions. The first question asks if Newsom should be recalled, and the second is about who should replace him. If Newsom loses the first question on the recall ballot, it is likely to be by a slim margin, as he is currently still polling above 50% among likely voters. Larry Elder leads among replacement candidates but is likely to get less than 20% of the votes according to recent polls. It could easily be that Newsom loses the recall with 49% of the vote but is replaced by Elder who enjoys roughly one-third of Newsom's support. In that case, this structure effectively weights Elder's supporter's votes at three to one vs. Newsom supporters.

As we wrote in the LA Times, "The recall ballot accomplishes in two steps what would be patently unconstitutional and unacceptable in one. Weighting votes of Newsom opponents more than his supporters would never be constitutional in a single ballot question where all candidates were on the ballot. And the U.S. Supreme Court has made clear that if an election process is unconstitutionally skewed, it cannot simply be restructured to accomplish the same result."

There are many possible remedies for the problem we identify. Newsom's name might be added to the second ballot. Or, if there is no time for that, the Court might decide to effectively strike the second question as unconstitutional so that if Newsom is recalled, the Lt. Governor replaces him rather than a candidate favored by a small percentage of voters.

Amar and Caminker say the "fatal flaw" of our analysis is that we treat the votes on the two recall questions as one and then object to the way votes are counted in the one hypothetical election. But we think that is exactly how the recall should be viewed. There is one election being held with one ballot. In short, the ballot is an election for who will be governor, and the candidate with the most votes should be the one chosen.

Amar and Caminker offer an alternative view. They see the first question as a vote on whether to disqualify the governor. If so, they see the second question as a separate election of who should replace him. But this is really an argument from definition; they want to treat each question on the ballot as a separate election and don't want to compare the votes between the two questions on the ballots. That is a plausible way of thinking of it, but we think it ignores that it is one ballot to decide who among all of the candidates, including Newsom, should be the governor.

Amar and Caminker make worthy points. But contrary to what readers might

reasonably surmise from reading their piece, they have no California Supreme Court precedent on their side. And in the end, this election points to a foundational and fundamental problem in California's recall process. It has the potential to replace a governor with someone who at that election and on that ballot gets many, many fewer votes.

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