**PROP 1’s IMPACT ON FUTURE LITIGATION**

**A primer on interpreting vague or deficient legal language.**

**Laws take many forms:**  constitutional, constitutional amendments, statutes, and regulations. Each category has its own origin in our legal process, but they are all subject to the same general “rules of construction” — that is, the rules governing how language is interpreted. These rules of construction are varied and many, and in their variety and impact show how even the most obvious language can be transformed into meanings not clear from the text itself.

An example of this is how cases like *Roe v. Wade* came to be. The Supreme Court drew upon multiple United States Constitution provisions to “imply” a right to privacy that in turn was used to “find” a constitutional right to abortion where no such language actually existed in the Constitution. The California state constitution has been subject to the same judicial creativity. The historic California Supreme Court trend has been to strike down voter or legislative limitations on abortion, leaving intact only loose and imprecise restrictions that can only be evaluated by reviewing many judicial decisions, and even then there will not be a clear answer. It is these loose and imprecise restrictions that Proposition 1 proponents call “existing law.” In other words, “existing law” is an imprecise standard and provides virtually no certainty.

**Given this, there are multiple problems with the argument that “Prop 1 only states existing law.”** All of these problems can be analyzed using basic “rules of construction.”

***First***, **if Prop 1 merely enshrines existing law, then why doesn’t it say so?**  We know the answer. Proposition 1 could not possibly enshrine “existing law” because there is no “existing law” that is definite enough to warrant mention in Prop 1.

***Second***, **the absence of language in Prop 1 stating that it merely reflects existing law is itself evidence that Prop 1 is not intended to state “existing law”, but is intended as an entirely new law that has no reference to prior law** — because if it was meant to merely state existing law, it would have said so. Under applicable “rules of construction,” “silence” is evidence of intent not to limit Prop 1 to “existing law.”

***Third***, **the “reproductive” language in Prop 1 has no limitations whatsoever, and is defined to include “contraception,” something not done by so-called “existing law.”** This means that contraception and abortion are now joined and equal, each defining the other under the category “reproduction.” This means that abortion under this new law is directly associated with contraception as a right. If one’s contraception fails, then abortion is the appropriate constitutional alternative, regardless of the point in the pregnancy the woman chooses to abort due to her birth control failing.

***Fourth***, **there is also no limitation on application of Prop 1 because the plain language of the statute imposes no time limitation — silence, again, is evidence of intent not to limit it.** One rule of construction that if the drafter of the language under interpretation wanted to include certain language, the language would have been inserted. That is particularly so here. *Roe* did indeed identify time frames for regulation. The *Dobbs* case also involved a time limitation — the 10 week point beyond which abortion could be restricted. Abroad, all civilized countries (with notable exceptions like the UK and the Netherlands) have limitations on abortion based on time. With all of these cues showing how time limits could have been incorporated into the statute, there being no time limits is powerful evidence of intent that no time limits were intended. Prop 1 imposes ***no limits*** though it could easily have done so if limits were intended. Limits were not included because limits were ***not intended***.

**All laws, even precise ones, lead to litigation.** The tax code is very precise, but leads to litigation. The Second Amendment is very broad, but leads to litigation. Business contracts that are hundreds of pages long with every conceivable contingency supposedly addressed leads to litigation. Family law custody arrangements that are specific down to the minute lead to litigation. Prop 1, being a constitutional amendment drawn without any specifics, is a perfect incubator for litigation.

**What form could Prop 1 litigation take?**

Language as broad as that contained in Prop 1 provides a petri dish of possibilities.

Prop 1 does not refer to male or female, father or mother, meaning that any who can claim legitimate involvement in “reproduction” may have constitutional rights under
Prop 1.

While we normally think of abortion as a “woman’s right,” Prop 1 says nothing about women, a deliberate and political omission in deference to the transgender movement. Reproduction becomes simply a “person’s” right. And what could this mean? After intercourse that results in a pregnancy, it would appear that all participants in this “reproduction” have rights under Prop 1, including the right to force the other party to carry the fetus to term.

Indeed, if Prop 1 only expresses existing law, and if existing law is read to restrict abortions in the third trimester, then (conceivably) “existing law” would be joined to the broad language of the statute to create rights in all participants in the reproductive act. If what we refer to as a man asserts this right, on what ground would it be denied to him — since Prop 1 is silent on which reproductive voice holds greater power.

While California believes it should be an abortion sanctuary, other states do not adhere to such a view, and their laws may well be in direct conflict with California’s. Consider the case of an Arizona married couple, male and female, who engage in intercourse and produce a pregnancy. In the 8th month, the woman (in Arizona, she would still be considered a woman) wants to abort. Her husband not only objects, but it is also late in the pregnancy, and abortion is not available in Arizona. So, she travels to California to abort, bypassing her state’s laws, while also disregarding her husband’s wishes not to abort a nearly full-term fetus, a viable infant. Now consider her husband suing in California under Prop 1 to stop the abortion, arguing that as a participant in the “reproductive event” that led to the pregnancy, he has rights too. Since its language does not limit Prop 1 to just “women,” “men” too have reproductive rights — here, the right to see the reproductive event through to fulfillment.

**The language of Prop 1 is vague enough to support nearly any scenario we can throw at it:**

* **Any suggestion that abortions are limited in any way are undone by reference to the statute itself.** There is no “existing law” that can be read into Prop 1 to limit it. Certainly, those opposed to a particular abortion (such as a husband asserting his “reproductive rights”) may be able to plausibly argue they have standing to object, the reality is otherwise: the one clear and explicit preference of Prop 1 is to elevate abortion as the pre-eminent right, trumping any other competing right (such as a father asserting his reproductive rights to a completed pregnancy).
* **Do not underestimate the blunder of eliminating “woman” from Prop 1’s language.** The “father” could argue that the Prop 1 language provides him with rights of action against an abortion, particularly a late-term abortion. What would the response to this be? Having removed “woman” from the mix, there is no basis in the language to favor the “woman’s” position over the “man’s” position. In fact, with the gender-neutral language being used in Prop 1, it could be argued that favoring the “man” over the “woman” following a “reproductive event” is a denial of equal protection and without basis in the plain language of the statute.
* **What about developments in science?** A fetus has its own DNA signature. It is not a DNA clone of either parent. When do we grant personhood to a being with its own DNA signature? What about developments in neo-natal care that take viability to earlier and earlier points in the pregnancy? Prop 1 is on a collision course with science and scientific advancement. If a five-month fetus can be viable due to medical advances, doesn’t he or she have rights of survival? Doesn’t the law protect a viable being? At what point will constitutional law be required to recognize personhood? One could even make a plausible argument that the instant Prop 1 is enacted (should it be approved), the rights of viable *in utero* infants can instantly be asserted in court on the argument that Proposition 1 is a full-frontal assault on myriad other constitutional rights available to “persons.”