THE EYE OF A CONSTITUTIONAL STORM: PRE-ELECTION REVIEW BY THE STATE JUDICIARY OF INITIATIVE AMENDMENTS TO STATE CONSTITUTIONS

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INTRODUCTION

A phenomenal constitutional storm has struck the American states.[1] Turbulent societal issues such as abortion,[2] the legalization or decriminalization of drugs,[3] gay marriage,[4] health care,[5] collective bargaining rights,[6] renewable energy,[7] gambling,[8] and even public school class size[9] are being decided through initiative petitions to amend state constitutions.[10] Interest groups understand that they can utilize this process to constitutionalize their policy preferences,[11] and the public vigorously guards its right to the initiative as its only method of directing constitutional change. Although most

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1. *See* Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 304 (2008).

2. *See, e.g.*, Mississippi Statewide Initiative Measure No. 26 (2011).

3. *See, e.g.*, Colorado Amendment 64 (2012); Nevada Question No. 9 (2002); Matt Pearce, *Unlikely Allies, Arguments Lead Voters to Legalize Pot*, L.A. TIMES, Nov. 11, 2012, at A22, *available at* http://articles.latimes.com/2012/nov/11/nation/la-na-marijuana-20121111.

4. *See, e.g.*, Arkansas Amendment 3 (2004).

5. *See, e.g.*, Arizona Proposition 101 (2008); Colorado Amendment 63 (2010).

6. *See, e.g.*, Colorado Amendment 47 (2008); Protect Our Jobs v. Bd. of State Canvassers, 822 N.W.2d 534, 544 (Mich. 2012); Steven Greenhouse, *In Michigan, a Setback for Unions*, N.Y. TIMES, Nov. 9, 2012, at B1, *available at* http://www.nytimes.com/2012/11/09/business/in-michigan-a-setback-for-unions.html?pagewanted=all.

7. *See, e.g.*, Michigan Proposal 3 (2012); *see also* Jim Malewitz, *On the Ballot (And in the Constitution?): Michigan's Energy Future*, STATELINE (Nov. 5, 2012), http://www.pewstates.org/projects/stateline/headlines/on-the-ballot-and-in-the-constitution-michigans-energy-future-85899427718.

8. Oregon Measure 82 (2012).

9. *See, e.g.*, Florida Amendment 9 (2002).

10. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 160-61 (1998).

11. *See* Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1046 (2001); Editorial, *Detroit Free Press Endorsements: Of the Six Statewide Ballot Proposals, Keep One, Discard Five*, DETROIT FREE PRESS (Oct. 21, 2012), http://www.freep.com/article/20121021/OPINION01/310210022/Detroit-Free-Press-Endorsements-Of-the-six-statewide-ballot-proposals-keep-one-discard-five; *cf.* J. Harvie Wilkinson III, *Hands Off Constitutions: This Isn't the Way to Ban Same-Sex Marriage*, WASH. POST, Sept. 5, 2006, at A19, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/04/AR2006090400700.html.

commentators desire to will the initiative amendment away,[12] or focus their energies on strict post-passage policing of this process,[13] particularly by the federal courts, this Article adopts a different approach. It considers pre-election review by the state courts to be the focal point for inquiry and improvement of the initiative process, and recommends a more active pre-election role by the state judiciary than previously practiced by the courts or proposed by the commentators.

Although we understand the problems and dangers posed by the initiative process, we accept and respect the people's right to actively participate in amending state constitutions through the initiative process, and seek to better define the state judiciary's role prior to the vote on the initiative. We envision the state judiciary having a dual role: (1) to protect the integrity of the state constitutions and the processes for changing them, and (2) to protect the people's, as opposed to the particular proponents', rights in the process. This calls for a vigilant pre-election review by the state judiciary, as it sits in the eye of this storm of constitutional activity.

Part I of this Article discusses the background and history of the initiative, the commentary and criticism it has drawn, and the role of the state judiciary. Part II lays out the different steps in the initiative process, and the procedural questions courts may be asked to address before a proposition is placed on the ballot. Parts III and IV review the subject-matter and other substantive limitations imposed by state constitutions, which are mostly accepted as ripe for pre-election adjudication. Part V examines substantive constraints based on the federal constitution, which are often decided post-election, and argues for pre-election review by the state judiciary where an initiative clearly conflicts with United States Supreme Court precedent. Part VI considers the practical implications of rigorous pre-election review by elected state judges, and concludes that a robust but carefully constrained process of pre-election judicial review is not only consistent with the obligations and responsibilities of state judges under the federal and state constitutions, but also would not be subject to the same political pressures as post-passage rejection of a popular initiative.

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12. Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294.

13. *See, e.g.*, Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L.J. 1503, 1507-08 (1990); Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 237-38 (1999).

I. THE INITIATIVE AMENDMENT PROCESS AND THE ROLE OF THE STATE JUDICIARY

A. The Initiative Amendment: A Distinctive Feature and Recent Phenomenon of State Constitutional Law

There is no initiative process for amending the federal Constitution. We the people do not make constitutional change directly under the federal Constitution.[14] Indeed, Article V makes no reference to the people in the amendment process and renders the federal Constitution "one of the most difficult constitutions in the world to amend."[15] The federal amendment process, which has never itself been amended, is as follows:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . . .[16]

Since the ratification of the U.S. Constitution in 1788 and the Bill of Rights in 1791, there have been only seventeen amendments. Constitutional change under the federal Constitution is made by judges, not the people themselves.[17]

In contrast to the federal Constitution, state constitutions are regularly amended.[18] There have been approximately 400 amendments to state constitutions in the last six years.[19] California alone has had more than 500 amendments since 1879.[20] These constitutional changes can be initiated by

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14. Eule, *supra* note 13, at 1529. *But see* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458-94 (1994).

15. Krislov & Katz, *supra* note 1, at 297 n.4 (relying on the work of political scientist Donald Lutz).

16. U.S. Const. art. V.

17. *See* Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 37, 43-61 (Sanford Levinson ed., 1995). *See generally* Sanford Levinson, *Accounting for Constitutional Change (or, How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) All of the Above)*, 8 CONST. COMMENT. 409 (1991).

18. *See* TARR, *supra* note 10, at 23-24. In all, over 7,300 amendments to state constitutions have been adopted. *See* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 11 (2012), *available at* http://knowledgecenter.csg.org/drupal/system/files/1.1_2012.pdf.

19. *See* John Dinan, *State Constitutional Developments in 2011*, *in* COUNCIL OF STATE GOV'TS, *supra* note 18, at 3, 4 tbl.A, *available at* http://knowledgecenter.csg.org/drupal/system/files/dinan2012_table_a.pdf.

20. *See* Strauss v. Horton, 207 P.3d 48, 60 (Cal. 2009).

the legislature in virtually every state.[21] Every state but Delaware requires the electorate to approve these amendments, but voters are mostly limited to changes acceptable to legislators.[22] In eighteen states, however, the people can initiate constitutional change.[23]

The initiative was first adopted by South Dakota in 1898 and subsequently embraced by a number of western states.[24] It was championed by Populists and Progressives of the early twentieth century as a remedy for political corruption, the influence of big business, and the perceived inability or unwillingness of legislators to represent the interests of the body politic.[25] Currently sixteen states have direct constitutional initiatives, while two others, Massachusetts and Mississippi, have indirect constitutional initiatives that will also be discussed in this Article.[26]

An empirical study concerning the use of the initiative process found that "within jurisdictions featuring the Direct Constitutional Initiative, there have been dramatic increases in the appeal of this particular lawmaking process in recent years. For these states, the recent surge of American Direct Democracy should substantially be characterized as a constitutional phenomenon."[27] This phenomenon has multiple aspects. Between 1977 and 2006, the "relative share of [constitutional] change undertaken pursuant to the Direct Constitutional Initiative increased rapidly while the corresponding use of the Constitutional Legislative Referendum declined steadily."[28] Continuing this trend, between 2007 and 2011, over 36% of the amendments proposed and nearly 30% of the amendments adopted in the eighteen constitutional initiative states were placed on the ballot through the initiative process.[29] Also, the data reveals that the number of direct constitutional

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21. Krislov & Katz, *supra* note 1, at 302.

22. *See* COUNCIL OF STATE GOV'TS, *supra* note 18, at 13-15, tbl.1.2.

23. *See* M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 12 (2003).

24. *See* Ronald M. George, Keynote Address at the Stanford Law Review Symposium: State Constitutions (Feb. 19, 2010), *in* 62 STAN. L. REV. 1515, 1516.

25. *See* Krislov & Katz, *supra* note 1, at 300; David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 16 (1995); Miller, *supra* note 11, at 1039-44.

26. *See* WATERS, *supra* note 23, at 12.

27. Krislov & Katz, *supra* note 1, at 304.

28. *Id.* at 305-06. The Constitutional Legislative Referendum refers to popular votes on constitutional amendments proposed by state legislatures.

29. *See* John Dinan, *State Constitutional Developments in 2008*, *in* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 3, 4 tbl.A (2009), *available at* http://knowledgecenter.csg.org/drupal/system/files/Dinan_2008.pdf; John Dinan, *State Constitutional Developments in 2009*, *in* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 3, 7 tbl.C (2010), *available at* http://knowledgecenter.csg.org/drupal/system/files/01_Cr.pdf; John Dinan, *State Constitutional Developments in 2010*, *in* COUNCIL OF STATE GOV'TS, THE BOOK OF STATES 3, 7 tbl.C (2011), *available at* http://knowledgecenter.csg.org/drupal/system/files/ Dinan2011.pdf; John Dinan, *State Constitutional Developments in 2011*, *in* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 3,

initiatives by the people "far outpaces the complementary statutory process," demonstrating advocacy groups' preference for constitutionalizing their policy preferences.[30] This constitutional phenomenon and the judiciary's role in reviewing it are the subjects of this Article.

B. Causes for Concern and Critics of the Process

The process is not without its significant problems or critics. As James Madison explained in Federalist No. 63, "There are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn."[31] Also, the ability of advocacy groups to drive the agenda and secure the outcome they desire in the initiative process is well documented.[32] This is particularly true after the Supreme Court's decision in *Meyer v. Grant*,[33] which invalidated Colorado's ban on paid signature gatherers.[34] It takes a considerable amount of money, typically in the millions of dollars, to secure the large number of signatures necessary to qualify an initiative for the ballot.[35] Well-funded interest groups therefore play an outsized role in the initiative process, as do political candidates and parties hoping to use controversial or popular initiatives to boost voter turnout among their supporters.[36]

The people's prejudices play out in the initiative process as well. The Colorado initiative addressed by the Supreme Court in *Romer v. Evans*[37]

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9 tbl.C, *available at* http://knowledgecenter.csg.org/drupal/system/files/dinan_2012_table_c.pdf.

30. Krislov & Katz, *supra* note 1, at 305-06.

31. THE FEDERALIST NO. 63, at 410 (James Madison) (Clinton Rossiter ed., 1961).

32. *See, e.g.*, Magleby, *supra* note 25, at 13-31; George, *supra* note 24, at 1518.

33. 486 U.S. 414, 416 (1988).

34. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY 34 (July 2002), *available at* http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf ("A campaign that has adequate funds to pay circulators has a nearly 100 percent chance of qualifying for the ballot in many states.").

35. *See* Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform*, *in* THE BATTLE OVER CITIZEN LAWMAKING 73, 76-78 (M. Dane Waters ed., 2001).

36. *See* Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 969-74 (2005); K.K. Duvivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1048-50 (2007); Miller, *supra* note 11, at 1059.

37. 517 U.S. 620, 623-24 (1996).

was driven by anti-gay bias.[38] Racial discrimination has also contaminated initiatives in the not-so-distant past.[39]

In response to these concerns, there has been fierce criticism of the initiative process. Many call for its abolition.[40] Others, such as Justice Hans A. Linde, one of the most influential state constitutional law experts, have proposed broad and highly subjective bans on its use, going so far as to prohibit initiatives that "appeal to majority emotions to impose values that offend the conscience of other groups in the community."[41] Still others call for heightened standards of review by the federal courts to cull and cure its undesirable outcomes.[42]

C. Practical Realities

Despite its problems, the initiative process is here to stay. The initiative process has survived federal constitutional challenges based on the Republican Form of Government Clause in art. IV, § 4 of the United States Constitution for over a century.[43] The initiative amendment is also popular; the people have no intention of giving up their right to direct constitutional change.[44] Even in states such as California, where widespread use of the initiative process has led to what *The Economist* and the state's own former Chief Justice refer to as a dysfunctional democracy, the initiative retains its powerful place in political life.[45] Politicians in states with initiative processes are not going to lead campaigns to try to take the people's right to the

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38. *See generally* William E. Adams, Jr., *Pre-Election Anti-Gay Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583, 584-85 (1994) (discussing initiatives directed at homosexuals).

39. *E.g.*, Reitman v. Mulkey, 387 U.S. 369, 375-76 (1967) (finding that the California initiative precluding the enforcement of anti-discrimination laws in private residential housing violates the equal protection clause as it unconstitutionally involves the state in racial discrimination).

40. *See, e.g.*, Chemerinsky, *supra* note 12, at 306 ("My preference would be to see the initiative process declared unconstitutional in all circumstances and for all uses.").

41. Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 42 (1993).

42. *See* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 544-54 (1994) (discussing arguments by proponents of heightened standards of review).

43. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 142-43 (1912). *But see, e.g.*, State v. Wagner, 752 P.2d 1136, 1197 n.8 (Or. 1988) (Linde, J., dissenting) (arguing that state courts should do their own independent analysis of the Republican Form of Government Clause to hold an initiative unconstitutional), *vacated*, 492 U.S. 914 (1989); Chemerinsky, *supra* note 12, at 304 (concluding that these cases are wrongly decided).

44. *What Do You Know? How Voters Decide*, ECONOMIST, April 23, 2011, at 13, 15 [hereinafter *What Do You Know*]; ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 391 (2009).

45. *See What Do You Know*, *supra* note 44; George, *supra* note 24, at 1518-19.

initiative away from them if they are interested in reelection themselves.[46] Abolition is unrealistic, and the more theoretical proposals for restricting its use will not be adopted.[47]

D. The People's Right to Change Their Constitutions

There is also great value in having the people directly involved in constitutional change.[48] The inherent right of the people to reform their own governments is a fundamental aspect of American political thought and action, especially at the state level.[49] This was the battle cry of the American Revolution and a historic emphasis in state constitutions.[50] As one commentator has written, "In order for the federal constitutional dialogue to work, its debate over rights must include the voices of people. One of the great contributions of state constitutions to our system is the place they provide for these voices."[51]

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46. *See* John Ferejohn, *Reforming the Initiative Process*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 313, 313 (Bruce E. Cain & Roger G. Noll eds., 1995) ("Reforming the initiative process can be politically dangerous because such attempts often appear to be undemocratic and high handed.").

47. *See* WILLIAMS, *supra* note 44, at 390 ("Limits on the substance of initiated amendments to state constitutions, championed by Hans Linde, have been foreclosed."); Krislov & Katz, *supra* note 1, at 322.

48. *See* Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 474-76 (1993).

49. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 323, 362-63 (1998); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 53-54 (2004); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 172-73 (enlarged ed. 1992).

50. *See, e.g.*, Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976) (en banc) (citations omitted) ("The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them."); *In re* Initiative Petition No. 360, 879 P.2d 810, 814 (Okla. 1994) (citation omitted) ("We have recognized that the people's right to institute change through the initiative process is a fundamental characteristic of Oklahoma government. The initiative process is precious to the people . . . ."); Coppernoll v. Reed, 119 P.3d 318, 321 (Wash. 2005) (en banc) (citation omitted) ("The initiative is the first power reserved by the people in the Washington Constitution . . . [and is] deeply ingrained in our state's history . . . .").

51. Witte, *supra* note 48, at 475.

E. Federal Oversight of the Initiative Process

The people's right to direct constitutional change is of course not unlimited.[52] The federal Constitution places critical checks on "majoritarian excesses."[53] This federal restraint on the initiative process is an essential safeguard, particularly in regard to measures that target minorities that have been the subject of historic discrimination.[54] That being said, federal constitutional oversight, particularly post-passage review by federal judges, is not sufficient to ensure that the initiative process functions as it was intended and serves the valuable purpose of providing the people with a voice in constitutional change.[55] Nor is the solution to problems with the initiative process even stricter post-passage federal review, as some commentators propose.[56] Rather, rigorous pre-election enforcement of the initiative provisions' own requirements by the state judiciary is the best way to improve the initiative process.

F. Procedural and Subject-Matter Limitations Within the Initiative Provisions

Initiative provisions in state constitutions contain significant requirements and limitations on their use. These requirements and limitations reflect decisions by the framers of the state constitutions and the people them-

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52. *See In re* Initiative Petition No. 349, 838 P.2d 1, 12 (Okla. 1992) (footnotes omitted) ("[T]he right of the initiative is not absolute. There are constitutional and statutory limits on the process. . . . Although state law may afford greater rights than those guaranteed by federal law, it may not curtail rights guaranteed by . . . the United States Constitution.").

53. Witte, *supra* note 48, at 475; *cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-104 (1980).

54. Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 26 (1978); Chemerinsky, *supra* note 12, at 304; Eule, *supra* note 13, at 1539 ("A state may experiment with unfiltered majoritarianism only because the Federal Constitution provides a secure safety net."); *see also* Reitman v. Mulkey, 387 U.S. 369, 373 (1967); Linde, *supra* note 41, at 36-37.

55. *See* James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 313-16 (1989).

56. *See, e.g.*, Eule, *supra* note 13, at 1539; Pak, *supra* note 13, at 239. *But see* Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373, 382-83, 384-85, 390-92. When courts overturn publicly approved initiatives, it breeds more cynicism, not a more active citizenry. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 30 ("Critics of the initiative system believe that post-election court challenges are dangerous to the U.S. system of government. Challenges anger citizens, who often may assume that an initiative would not have made it to the ballot if it were not constitutional . . . .").

selves that certain procedures must be followed to ensure that the initiative process functions as it was designed.[57] As will be explained in more detail in the discussion of the different procedures,[58] these requirements are designed to ensure that the people can make an informed decision on a comprehensible constitutional question.[59] They help ensure that elections on the initiatives properly reflect the will of the people, as opposed to just the views of the proponents of the particular proposals.[60] They also conform to inflexibilities in the initiative process itself, which requires the people themselves to vote up or down on the initiative without amending it[61] or engaging in required deliberation.[62]

Some initiative provisions also exclude certain subject matter from the initiative process, including, for example, freedom of religion or the reversal of judicial decisions, acknowledging that certain rights are not appropriately addressed by direct democracy initiatives.[63] The most common subject-matter exclusion involves initiatives that call for appropriations.[64] As this Article explains, there is a recognition that initiatives distort the appropriation process, but there is no clear resolution of the problem even in the states that focus on the issue.

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57. *See, e.g.*, Duggan v. Beermann, 544 N.W.2d 68, 75 (Neb. 1996) (per curiam); Duggan v. Beermann, 515 N.W.2d 788, 794 (Neb. 1994); *In re* Initiative Petition No. 364, 930 P.2d 186, 196 (Okla. 1996).

58. *See infra* Part II.

59. *Cf.* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 57, 197-98 (1984). *See generally* PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 113-80, 226-31 (1998).

60. *Cf.* Gordon & Magleby, *supra* note 55, at 315-16.

61. At least five states (Maine, Massachusetts, Michigan, Nevada, and Washington) allow the legislature to place alternatives to initiatives on the ballot. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 14. Although not the same as an amendment, it does allow for some voter choice. In Mississippi, the legislature can amend an initiative, in which case both the original and the amended propositions are placed on the ballot. MISS. CONST. art. XV, § 273, cl. 7.

62. The absence of deliberation is often the focal point of the initiative's critics. *See* WILLIAMS, *supra* note 44, at 389. At least in the Madisonian sense of deliberation, in which legislators "'refine and enlarge the public views,'" that is true. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 41 (1985) (quoting THE FEDERALIST NO. 10, at 60 (James Madison) (Paul Leicester Ford ed., 1898)). However, commentators such as Professor Tushnet are skeptical "that the implicit contrast [regarding the quality of deliberation by the legislature and the deliberation in the initiative process] is accurate across all issues—and particularly with respect to the subset of public policy issues that both become the subject of direct legislation and raise non-trivial federal constitutional questions." Tushnet, *supra* note 56, at 380 (footnote omitted). The intense societal debate that many initiative amendments unleash is another form of deliberation.

63. *See, e.g.*, MASS. CONST. art. XLVIII, pt. II, § 2.

64. *See* MAGLEBY, *supra* note 59, at 38-39.

G. The Role of the State Judiciary

The state judiciary is the ultimate guardian of the procedural and substantive provisions of state constitutions, including the initiative provisions.[65] Unlike the federal courts, which have treated the federal amendment process as a political question,[66] the state courts have taken an active role in reviewing the state amendment process.[67] They have thus willingly accepted their responsibility for defending both the constitution and the people's right to amend the constitution.[68] At the pre-election stage, the state courts are the final authority for resolution of the disputes between the proponents and opponents regarding the initiative process and the government actors involved in the implementation of that process.[69] Given the high political stakes in these measures, disputes are inevitable.

The state judiciary is also responsible for enforcing the federal Constitution.[70] The state judiciary cannot therefore just leave federal constitutional problems in the initiative process to the federal judiciary. At the same time, they are not the ultimate expositors of the meaning of the federal Constitution.[71] At the pre-election stage, the role of the state judiciary in deciding federal constitutional questions is therefore particularly difficult. Do the state judges reserve judgment on federal constitutional challenges until after the vote on the initiative to avoid unnecessary federal constitutional interpretation (and the short-circuiting of the initiative process) even when they believe a proposal violates the federal Constitution? How certain must they be of that federal constitutional violation to intervene? This Article attempts to answer these most difficult questions.

II. THE INITIATIVE PROCESS AND ITS PROCEDURAL CHALLENGES

A. The Different Initiative Processes in the States

As previously stated, eighteen states permit their constitutions to be amended through an initiative process.[72] In contrast to constitutional amendments, statutory initiatives can typically be revised or overridden by the legislature, although a few states' statutory initiatives have similar ("quasi-constitutional") characteristics due to the difficulty of amending or

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65. *See* TARR, *supra* note 10, at 26-27; Gordon & Magleby, *supra* note 55, at 315.

66. *See, e.g.*, Coleman v. Miller, 307 U.S. 433, 447-56 (1939); *id.* at 457-60 (Black, J., concurring).

67. *See* TARR, *supra* note 10, at 26-27; Gordon & Magleby, *supra* note 55, at 315.

68. TARR, *supra* note 10, at 6-7 (1998); WILLIAMS, *supra* note 44, at 401.

69. *See* Gordon & Magleby, *supra* note 55, at 315.

70. *See* U.S. CONST. art. VI.

71. *See infra* notes 336–38 and accompanying text.

72. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 63.

repealing them through the regular legislative process.[73] The processes by which constitutional amendments can be enacted share many common features, though they may differ in the details.[74]

There are two broad types of initiatives used for constitutional amendments: direct and indirect.[75] Under the direct initiative, citizens can have an amendment placed on the ballot, pass it, and have it take effect without any action by the legislature.[76] Most states use the direct initiative, at least for constitutional amendments.[77] Two states instead use an indirect initiative process, which involves the legislature before the amendment can pass.[78] Mississippi's procedure requires an initiative amendment to be sent to the legislature once it receives enough signatures, and the legislature may adopt, amend, or reject it.[79] If the legislature adopts, rejects, or fails to act on the petition for four months, it is placed on the ballot.[80] If the legislature amends the initiative, both the amended version and the original version are placed on the ballot.[81] In Massachusetts, an amendment receiving a sufficient number of signatures must receive the votes of at least 25% of a joint session of the legislature in two successive legislative terms to be placed on the ballot.[82] A three-quarters vote of the joint session can amend the initiative before it goes on the ballot.[83]

By the time a proposed amendment reaches the ballot, it must generally incorporate the text of the changes to the constitution as well as a short title[84] and a brief summary.[85] The individuals or group submitting a proposed amendment often include a draft title and/or summary.[86] However, in certain states some of these elements are established by[87] or in conjunction with[88] a government agency. Other materials are prepared to inform the vot-

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73. *See id.* at 11; Miller, *supra* note 11, at 1046-47.
74. *See* WATERS, *supra* note 23, at 12.
75. *See* MAGLEBY, *supra* note 59, at 35-36.
76. *See* DUBOIS & FEENEY, *supra* note 59, at 27-28.
77. *See* WATERS, *supra* note 23, at 12.
78. *See id.* at 12-14.
79. MISS. CONST. art. XV, § 273, cl. 6.
80. *Id.*
81. *Id.* § 273, cl. 7.
82. *See* Op. of the Justices to the Acting Governor, 780 N.E.2d 1232, 1234 (Mass. 2004).
83. MASS. CONST. art. XLVIII, pt. IV, § 3.
84. *See, e.g.*, COLO. REV. STAT. § 1-40-106 (2012).
85. *See, e.g.*, MICH. CONST. art. XII, § 2; S.D. CODIFIED LAWS § 12-13-25.1 (West, Westlaw through 2012 Sess.).
86. *See, e.g.*, FLA. STAT. ANN. § 101.161(2) (West Supp. 2012).
87. *See, e.g.*, MICH. COMP. LAWS § 168.474a(1) (2012) (detailing the summary prepared by Board of State Canvassers); S.D. CODIFIED LAWS § 12-13-25.1 (Westlaw) (stating that the Attorney General prepares a title and explanation).
88. *See, e.g.*, OKLA. STAT. tit. 34, §§ 9(A), (D) (West, Westlaw through 2012 2d. Reg. Sess.).

ers in many states, such as a fiscal impact statement by a neutral government agency[89] or a voter guide with arguments for and against the proposal submitted by various parties.[90]

Proponents of a constitutional initiative commence the process by submitting the putative initiative to a designated official, often the Secretary of State.[91] There may be additional requirements at the outset, such as a token number of voter signatures,[92] but they typically appear to be easily satisfied. The form of the initiative petition is usually established by statute[93] or in the state constitution.[94]

Before the initiative is circulated for signatures, officials such as the Attorney General review the petition.[95] In some cases the proponents are given nonbinding advice on the form or substance of the amendment.[96] Some states only permit officials to review the form of the amendment at this stage, deferring questions of substance.[97] Other states require a more searching review to ensure that the amendment meets subject-matter and other substantive and procedural requirements before time, energy, and money are spent on gathering signatures.[98] A decision to certify or not certify a proposed amendment, or its title or summary, is subject to expedited judicial review in many states.[99]

Once a petition is in its final form, a threshold number of voter signatures must be gathered in order to place the proposed amendment on the ballot.[100] The number of signatures required varies by state, but is usually a percentage of either the total votes cast in a recent election (such as for gov-

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89. *See, e.g.*, NEV. REV. STAT. § 295.015(3)(a) (2012).

90. *See, e.g.*, OR. REV. STAT. § 251.185(1) (2011) (providing that voters' pamphlet must include, among other things, the title and text of each measure, financial impact statements, a neutral explanation of the measure, and arguments relating to the measure); *id.* § 251.255(1) (including the provision that "any person" may file an argument supporting or opposing a measure to be printed in the guide if he or she pays a $1,200 fee or submits the signatures of 500 voters agreeing with the argument).

91. *See, e.g.*, ARIZ. REV. STAT. ANN. § 19-111(A) (2007).

92. *See, e.g.*, MASS. CONST. art. XLVIII, pt. II, § 3 (requiring signatures of "ten qualified voters").

93. *See, e.g.*, OKLA. STAT. tit. 34, § 2.

94. *See, e.g.*, MO. CONST. art. III, § 50.

95. *See* DUBOIS & FEENEY, *supra* note 59, at 37.

96. *See, e.g.*, MISS. CODE ANN. § 23-17-5 (2012) (stating that Attorney General gives advisory suggestions to filer of initiative petition).

97. *See, e.g.*, MO. REV. STAT. § 116.332 (2012).

98. *See, e.g.*, MASS. CONST. art. XLVIII, pt. II, § 3.

99. *See, e.g.*, COLO. REV. STAT. § 1-40-107 (2012); *cf.* FLA. CONST. art. IV, § 10; FLA. STAT. § 16.061 (2012) (requiring Attorney General to seek judicial review of initiatives once certain requirements are met).

100. *See* DUBOIS & FEENEY, *supra* note 59, at 33-35.

ernor)[101] or the total number of residents or voters.[102] Some states require that the signatures be geographically dispersed within the state to ensure that a measure has a broad base of support.[103] States often place restrictions on how signatures can be gathered, such as where[104] and when[105] they can be collected, who can collect them,[106] how signature gatherers can be paid,[107] and what can and cannot be written on the copies of the petitions signed by voters.[108]

The signatures must be counted and verified to meet the legal requirements before the amendment is placed on the ballot.[109] After all these steps are taken, the voters weigh in on the proposed amendment. A simple majority vote is usually sufficient to pass the amendment,[110] although some states have different or additional requirements.[111] If the initiative fails, many states impose a waiting period before the same or a similar amend-

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101. *See, e.g.*, ARIZ. CONST. art. XXI, § 1 (requiring 15% of votes in last gubernatorial election).

102. *See, e.g.*, N.D. CONST. art. III, § 9 (requiring 4% of total resident population as of last federal census).

103. *See, e.g.*, MISS. CONST. art. 15, § 273(3) (providing that no more than one-fifth of required signatures may be from any congressional district).

104. *See, e.g.*, NEV. REV. STAT. §§ 293.740(1)(b), (4)(e) (2012) (banning solicitation of signatures within 100 feet of polling places).

105. *See, e.g.*, CAL. ELEC. CODE § 9014 (West Supp. 2012) (providing for 150-day period for collecting signatures).

106. *See, e.g.*, N.D. CONST. art. III, § 3 (providing that only resident citizens of voting age may circulate a petition). *Compare* Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 616-17 (8th Cir. 2001) (upholding this provision), *with* Yes on Term Limits, Inc. v. Savage, 550 F.3d 1023, 1029-31 (10th Cir. 2008) (holding that ban on non-resident petition circulators violates First Amendment).

107. *See, e.g.*, OR. CONST. art. IV, § 1b (prohibiting payment based on the number of signatures obtained on an initiative petition); *see also* Prete v. Bradbury, 438 F.3d 949, 968, 971 (9th Cir. 2006) (upholding Oregon's pay-per-signature ban against First Amendment challenge); *cf.* Meyer v. Grant, 486 U.S. 414, 422-28 (1988) (holding that Colorado provision prohibiting *any* payment to petition circulators violated First Amendment).

108. *See, e.g.*, Hurst v. State Ballot Law Comm'n, 696 N.E.2d 531, 534 (Mass. 1998) (holding that only exact copies of petition, with no extraneous writing, markings, or highlighting, were acceptable); *see also* Walsh v. Sec'y of the Commonwealth, 713 N.E.2d 369, 371-73 (Mass. 1999) (same).

109. *See* DUBOIS & FEENEY, *supra* note 59, at 39; WATERS, *supra* note 23, at 22-24.

110. *See* Krislov & Katz, *supra* note 1, at 317.

111. *See, e.g.*, FLA. CONST. art. XI, § 5(e) (requiring a sixty percent supermajority for all amendments); MASS. CONST. art. XLVIII, pt. IV, § 5 (requiring that an amendment must be approved by a majority of those voting on the amendment and at least thirty percent of all votes cast in that election); NEV. CONST. art. XIV, § 2(4) (requiring a simple majority in two successive general elections); OR. CONST. art. II, § 23 (requiring that any amendment creating a supermajority requirement for initiatives must be approved by that same supermajority).

ment may be proposed again.[112] If it passes, it becomes part of the state constitution and takes effect.[113]

Litigation impacting an initiative can occur at one or more of several points, both before and after the election. Any pre-election disputes are generally heard in state courts; federal courts usually refuse to intervene before an election because of federalism concerns or a perceived lack of justiciability.[114] Opponents may often challenge the form of an initiative, its title, or the summary included on the petition before it is circulated for signatures.[115] Once signed petitions are submitted, opponents frequently challenge the signatures on various grounds in an attempt to reduce the number of valid signatures below the threshold necessary to make it onto the ballot.[116] If there are sufficient signatures, the courts may be asked to decide challenges to the wording or content of the title, summary, and/or fiscal impact statements to be placed before the voters.[117] At some point, generally before a vote, opponents may also contest a proposed amendment as substantively invalid for reasons such as addressing a subject-matter specifically excluded from initiatives in the state constitution, running afoul of the single subject rule in states that have it, or representing a clear violation of the federal constitution.[118] Finally, if an amendment passes, those affected by it may seek to have its enforcement enjoined on the basis that it violates the federal Constitution or laws, or possibly substantive rights guaranteed by the state constitution.[119] Once an amendment passes, however, the election is thought to have "cure[d]" technical or procedural defects in many states, and those are

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112. *See, e.g.*, MASS. CONST. art. XLVIII, pt. II,§ 3 (providing that the initiative must not be substantially the same as one voted on in prior two biennial elections); NEB. CONST. art. III, § 2 ("The same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years.").

113. *See* DUBOIS & FEENEY, *supra* note 59, at 85-86 and authorities cited.

114. *See, e.g.*, Spaulding v. Blair, 403 F.2d 862, 865 (4th Cir. 1968); Diaz v. Bd. of Cnty. Comm'rs, 502 F. Supp. 190, 193 (S.D. Fla. 1980); *see also* Gordon & Magleby, *supra* note 55, at 304-11. On the other hand, opponents of a successful initiative may be more likely to file post-election challenges in federal court, where judges not facing elections are thought to view such suits more favorably. *See* Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1250-59 (1998).

115. *See, e.g.*, COLO. REV. STAT. § 1-40-107 (2012).

116. *See, e.g.*, *id.* § 1-40-118.

117. *See, e.g.*, CAL. ELEC. CODE § 9092 (West Supp. 2012); CAL. GOV'T CODE § 88006 (West Supp. 2012).

118. *See* Gordon & Magleby, *supra* note 55, at 314-17.

119. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 370-73 (1967); *see also* Schulman v. Attorney Gen., 850 N.E.2d 505, 511-12 (Mass. 2006) (Greaney, J., concurring) (raising issue whether initiative amendment can violate state constitution's equal protection provision).

no longer grounds for invalidating the amendment.[120] Some courts will hear procedural challenges after the election,[121] but may require a heightened showing to overturn the results of the voting.[122]

B. Pre-Election Procedural Review

1. *Identification of Sponsors and Sources of Funding*

Many state constitutions include provisions designed to identify the sponsors and financial backers of initiative amendments.[123] These requirements may appear in legislation authorized by the initiative provisions in the state constitution.[124] The identification of sponsors and funding sources are important in promoting a fuller understanding by the people of who or what is driving an initiative amendment.[125] The sponsor requirements should be enforced pre-election by the state judiciary.[126] After *Citizens United*,[127] these disclosure requirements serve as important, albeit isolated, safeguards against the undue influence of money in the political process.[128] There gen-

120. *See* Gordon & Magleby, *supra* note 55, at 314 nn.109-10 and accompanying text; Montanans for Equal Application of Initiative Laws v. State *ex rel.* Johnson, 2007 MT 75, ¶¶ 27-48, 336 Mont. 450, 154 P.3d 1202 and cases cited; *see also* Miller v. Burk, 188 P.3d 1112, 1125 (Nev. 2008) (holding that post-election challenge to initiative based on ambiguity of petition language and single-subject rule was barred by laches).

121. *See* State *ex rel.* Armstrong v. Harris, 773 So. 2d 7, 18-21 (Fla. 2000) (noting that an election cures minor and technical defects, but a seriously misleading title and summary "goes to the very heart of the amendment" and undermines the fairness of the election); Mont. Citizens for the Pres. of Citizens' Rights v. Waltermire, 738 P.2d 1255, 1255, 1257-64 (Mont. 1987) (voiding an amendment after the election due to a misprint in the voter guide and failure to publish the text of the amendment in newspapers according to the constitution).

122. *See* Miles v. Veatch, 220 P.2d 511, 520-22 (Or. 1950) (holding that improper campaign disclosures would have justified withholding initiative from ballot, but not invalidating it after the election, and that ballot defects also did not warrant voiding the election because voters were not misled); *cf.* Amador Valley Joint Union High Sch. v. State Bd. of Equalization, 583 P.2d 1281, 1298-99 (Cal. 1978) (en banc) (considering attack on allegedly misleading title and summary, and upholding measure based in part on extensive publicity and presumption that voters were properly informed).

123. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 53-56.

124. *See* Loontjer v. Robinson, 670 N.W.2d 301, 307-08 (Neb. 2003) (stating that "[t]he Nebraska Constitution . . . authorizes legislation to facilitate the operation of the initiative process," including sworn statements by sponsors of the legislation which the court has treated as a safeguard against fraud and deception).

125. Krislov & Katz, *supra* note 1, at 333; *see also* RICH BRAUNSTEIN, INITIATIVE AND REFERENDUM VOTING: GOVERNING THROUGH DIRECT DEMOCRACY IN THE UNITED STATES 96 (2004).

126. *Cf. Veatch*, 220 P.2d at 520-21.

127. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (striking down certain campaign finance restrictions on First Amendment grounds).

128. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 54 ("With contribution and expenditure limits out of the question, states are left with only one avenue

erally is no right to stealth sponsorship and support of a people's initiative.[129]

The requirements related to the review of signatures and addresses are also a part of this identification process, as well as necessary to ensure that the initiative petition has the requisite support to trigger an election. States usually require that signers of a petition be registered voters in that state.[130] Signers typically must provide their addresses along with their signatures to facilitate verification.[131] State or local officials or petition challengers may check the names, signatures, and/or addresses of signers against voter registration records to ensure that those who signed the petitions were eligible to do so.[132] In order to provide accountability, a petition circulator must provide an affidavit for each set of signatures attesting to compliance with pertinent laws and his or her belief that the signatures are valid.[133] There may be a presumption of validity, but signatures can be disqualified if for a variety of reasons they are found not to be genuine, valid, or verifiable.[134] These defects include illegible, duplicate, or forged signatures,[135] fraudulent or defective affidavits,[136] signers who are not registered to vote[137] or did not

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of regulating money in initiative campaigns: disclosure."). For example, organizations in California and Arizona have been accused of concealing the sources of millions of dollars they spent on advertising relating to initiative amendments in those states in 2012. *See* Yvonne Wingett Sanchez, Mary Jo Pitzl & Sean Holstege, *Arizona-Based Non-Profit Releases Donor Names*, REPUBLIC (Phoenix) (Nov. 5, 2012), http://www.azcentral.com/news/politics/free/20121105arizona-group-release-donor-names.html. In California, this alleged concealment could lead to significant penalties for money laundering. *See id.*

129. *Cf. Citizens United*, 130 S. Ct. at 916 (noting that disclosure requirements are permissible, but "would be unconstitutional as applied . . . if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed" (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 198 (2003))).

130. *See, e.g.*, State *ex rel.* Bellino v. Moore, 576 N.W.2d 793, 794-95 (Neb. 1998); Stumpf v. Lau, 839 P.2d 120, 125 (Nev. 1992), *overruled on other grounds by* Herbst Gaming, Inc. v. Heller, 141 P.3d 1224 (Nev. 2006).

131. *See, e.g.*, Assembly v. Deukmejian, 639 P.2d 939, 946-47 (Cal. 1982) (en banc).

132. *See* Kromko v. Superior Court of Maricopa, 811 P.2d 12, 14 (Ariz. 1991) (en banc); *Bellino*, 576 N.W.2d at 795; *cf. In re* Initiative Petition No. 365, 2001 OK 98, ¶¶ 17-23, 55 P.3d 1048, 1052-53. Some states provide for verification of all signatures. *See, e.g.*, *Bellino*, 576 N.W.2d at 795. In others, officials begin by verifying a random sample, and check the rest of the signatures only if the petition seems to be close to the threshold to trigger an election. *See, e.g.*, CAL. ELEC. CODE §§ 9030-31 (West 2003); Brosnahan v. Eu, 641 P.2d 200, 200-01 (Cal. 1982); *cf. Kromko*, 811 P.2d at 14.

133. *See* Montanans for Justice v. State *ex rel.* McGrath, 2006 MT 277, ¶ 10, 334 Mont. 237, 146 P.3d 759, 764; *Stumpf*, 839 P.2d at 125.

134. *See, e.g.*, *In re* Initiative Petition No. 365, 2001 OK ¶¶ 5-6, 55 P.3d at 1050.

135. *See id.* at 1052; *In re* Initiative Petition No. 317, 648 P.2d 1207, 1215 (Okla. 1982).

136. *See Montanans for Justice*, 2006 MT ¶¶ 83-85; *In re Initiative Petition No. 365*, 2001 OK ¶¶ 13-14, 55 P.3d at 1051; *In re* Initiative Petition No. 272, 388 P.2d 290, 293 (Okla. 1963).

correctly state their address of residence,[138] ineligible petition circulators,[139] and a finding that signers were actively misled about the contents or nature of the initiative.[140]

2. *Clarity of Purpose*

Poorly drafted initiatives are a well-recognized problem.[141] Can a vote on an initiative truly reflect the will of the people if voters are confused about the meaning or consequences of the proposal?[142] The state judiciary therefore has an important role in ensuring the clarity of an initiative amendment before an election.[143] The people have the right to understand the initiative amendment's essential purpose and effect without being confused, misled, or manipulated by the initiative and the accompanying explanatory materials such as ballot titles and summaries.[144] Where there are competing initiative proposals, the possibility of confusion is particularly pronounced.[145]

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137. *See Stumpf*, 839 P.2d at 125; *In re Initiative Petition No. 365*, 2001 OK ¶¶ 9-14, 55 P.3d at 1050-51; *In re* Initiative Petition No. 142, 55 P.2d 455, 458 (Okla. 1936).

138. *See* Whitman v. Moore, 125 P.2d 445, 453 (Ariz. 1942), *overruled in part by* Renck v. Superior Court, 187 P.2d 656, 660-61 (Ariz. 1947); Yes to Stop Callaway Comm. v. Kirkpatrick, 685 S.W.2d 209, 211-12 (Mo. Ct. App. 1984); *cf. In re Initiative Petition No. 365*, 2001 OK ¶ 21, 55 P.3d at 1053.

139. *See* Kromko v. Superior Court of Maricopa, 811 P.2d 12, 14 (Ariz. 1991) (en banc); *Stumpf*, 839 P.2d at 125.

140. *See* Montanans for Justice, 2001 MT ¶¶ 74-79. *But see* Jocelyn Friedrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 FORDHAM URB. L.J. 889, 889-92 (2007) (describing widespread fraud and deception in gathering signatures for Michigan anti-affirmative action petition, and inability or refusal of state and federal officials and courts to remedy the alleged fraud).

141. *See* DUBOIS & FEENEY, *supra* note 59, at 113-20; *see also* Chemerinsky, *supra* note 12, at 297 (contrasting the multiple levels of review and redrafting required in the legislative process with the drafting of initiatives); Eule, *supra* note 13, at 1516 ("The propositions themselves tend to be lengthy, complex, technical, carelessly phrased, and ambiguous.").

142. *See* MAGLEBY, *supra* note 59, at 142-44 (discussing causes of voter confusion and citing one 1980 California rent-control initiative where over three-quarters of the voters, misunderstanding the effects of the proposal, voted the opposite of their policy preferences).

143. *Compare* Pak, *supra* note 13, at 264 ("Ultimately, courts should not be left wondering what the voters thought they were voting for or whether they understood what a 'yes' vote meant—that should be clear on the face of the initiative."), *with* Krislov & Katz, *supra* note 1, at 323, 325 (describing courts' general reluctance to entertain "challenges to vague or misleading ballot initiatives" and the problems "posed by state constitutional amendments not adequately reviewed, analyzed, or explained before facing the voters").

144. *See* Adams, *supra* note 38, at 624.

145. *See* Krislov & Katz, *supra* note 1, at 331 n.136; Eule, *supra* note 13, at 1517.

Often, legislation implementing the initiative provision imposes a clarity-of-purpose requirement. Michigan, for example, has a statute that states that the ballot question

> shall be worded so as to apprise the voters of the subject matter of the proposal or issue. . . . The question shall be clearly written using words that have a common everyday meaning to a general public. The language used shall not create a prejudice for or against the issue or proposal.[146]

Other implementing statutes define the requirements of the summary of the initiative or ballot title.[147] In order to inform voters fairly, "Proposed initiative summaries in all states are required to be impartial and non-argumentative."[148] These ballot titles and summaries are crucial, as it is reasonable to expect that many voters will "never read more than the title and summary of the text of initiative proposals."[149] This is not surprising given the length and complexity of many initiatives.[150]

The National Conference of State Legislatures has also recommended that states "should require the drafting of a fiscal impact statement for each initiative proposal."[151] Where such a requirement has been imposed by law, this is also essential to a clear understanding of a proposal and must be enforced pre-election.[152] The public often does not appear to understand the

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146. Citizens for Prot. of Marriage v. Bd. of State Canvassers, 688 N.W.2d 538, 540 (Mich. Ct. App. 2004) (quoting MICH. COMP. LAWS § 168.485 (LexisNexis 2004)); *see also In re* Advisory Op. to the Attorney Gen.—Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994) (describing FLA. STAT. §101.161 (1993)).

147. *See, e.g.*, DUBOIS & FEENEY, *supra* note 59, at 142-43 (describing stringent requirements applied in Florida to make initiatives more understandable).

148. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 25-26. Usually there are concise word limits as well. *Id.* at 25-26; *see also* Burgess v. Miller, 654 P.2d 273, 275 (Alaska 1982) (describing requirement of a true and impartial 100-word summary); Hope v. Hall, 316 S.W.2d 199, 201 (Ark. 1958); *In re* Second Initiated Constitutional Amendment, 613 P.2d. 867, 869 (Colo. 1980) (en banc) (requiring "a fair, concise, true and impartial statement of the intent of the proposed measure"); Sears v. Treasurer of Mass., 98 N.E.2d 621, 631 (Mass. 1951); Rooney v. Kulongoski, 902 P.2d 1143, 1154 (Or. 1995) (en banc).

149. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 24; Pak, *supra* note 13, at 254.

150. *See What Do You Know*, *supra* note 44, at 13 ("In the 1980s each [initiative in California] typically contained between 1,000 and 3,000 words . . . . But nowadays they often exceed 10,000 words apiece.").

151. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 27.

152. *See In re* Proposed Initiative Measure No. 20, 1999-CA-00912-SCT (¶¶ 15-19) (Miss. 2000) (affirming pre-election review of fiscal impact statement and noting that "[t]he government revenue impact statement is a requirement designed to protect the integrity of the constitutional initiative process and to prevent the electors of this state from being presented with false and misleading initiative petitions"), *overruled in part by* Speed v. Hosemann, 2011-CAC-01106-SCT (Miss. 2011); *In re* No. 26 Concerning Sch. Impact Fees, 954 P.2d 586, 593 (Colo. 1998) (en banc) ("[I]nitiative summaries should contain adequate data to allow the electorate to make informed decisions."); *see also* NAT'L CONFERENCE OF STATE

financial consequences of an initiative and the trade-offs that it will require.[153] A good example is the 2002 class-size limitation amendment in Florida.[154] It limited class sizes in grades K-12 to between eighteen and twenty-five students.[155] The cost of this initiative, however, has been over $18 billion to date, and the continuing costs have been estimated at $4 billion per year.[156] Schools have struggled to meet this mandate given their shrinking budgets, and a 2010 attempt to repeal the class-size amendment received a majority of votes but not the necessary 60% supermajority.[157]

At a minimum, the materials prepared by public officials to explain the initiative amendment should meet the clarity of purpose requirements even in the absence of statutory requirements. "[I]t is [after all] *a constitution*" that is being amended.[158] If public officials and judges cannot determine its meaning, how can the people themselves?

Clarity of purpose, however, is not the same as a comprehensive analysis of the initiative and all of its ramifications and interpretive difficul-

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LEGISLATURES, *supra* note 34, at 27-28. *But see* Smith v. Coal. to Reduce Class Size, 827 So. 2d 959, 963-64 (Fla. 2002), *superseded by constitutional amendment*, FLA. CONST. art. XI, § 5(c) (striking down statutory requirement for fiscal impact statement because it is not essential for the integrity of the ballot process). The impact of *Smith* was limited by the adoption of a constitutional amendment later that year permitting the legislature to require a financial impact statement. *See* Advisory Op. to the Attorney Gen. Re Public Prot. from Repeated Med. Malpractice, 880 So. 2d 686, 687-88 (Fla. 2004) (Lewis, J., specially concurring).

153. *See* Kousser & McCubbins, *supra* note 36, at 961-69; *cf.* Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. CAL. L. REV. 299, 306 n.23 (2007).

154. *See* Advisory Op. to the Attorney Gen. re Fla.'s Amendment to Reduce Class Size, 816 So. 2d 580, 581-82 (Fla. 2002) (per curiam); *Florida's Amendment to Reduce Class Size 01-02*, FLA. DEP'T OF STATE, DIV. OF ELECTIONS, http://election.dos.state.fl.us/initiatives/initdetail.asp?account=34393&seqnum=1 (last visited Feb. 3, 2013).

155. *See* FLA. HOUSE OF REPRESENTATIVES, EDUCATION FACT SHEET 2010-11: CLASS SIZE 60 (2010), *available at* http://www.myfloridahouse.gov/FileStores/Web/HouseContent/Approved/Web%20Site/education_fact_sheets/2011/documents/2010-11%20Class%20Size.3.pdf.

156. *Id.* at 61-62; Sarah D. Sparks, *Study Questions Cost of Florida Class-Size Initiative*, EDUC. WEEK (Oct. 8, 2010, 7:10 AM), http://blogs.edweek.org/edweek/inside-school-research/2010/10/study_gives_pause_to_florida_c.html.

157. *See* Sam Dillon, *Tight Budgets Mean Squeeze in Classrooms*, N.Y. TIMES, Mar. 6, 2011, at A1, *available at* http://www.nytimes.com/2011/03/07/education/07classrooms.html?pagewanted=all; Cara Fitzpatrick, *To Keep Class Sizes Low, Broward Schools Will Cap Classes, Put Some Students in Offices*, SUN SENTINEL (Feb. 7, 2012), http://articles.sun-sentinel.com/2012-02-07/news/fl-broward-class-size-plans-20120207_1_class-sizes-cap-classes-broward-schools; Nicole Martins, *Budget Cuts Crowd Classrooms*, SUN SENTINEL (Nov. 2, 2011), http://articles.sun-sentinel.com/2011-11-02/specialsection/fl-tl-1103overcrowding-20111102_1_class-size-compliance-large-classes-budget-cuts.

158. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

ties.[159] That must be accomplished through the public debate that ensues from the initiative process.[160] Titles and summaries must be less than comprehensive by definition.[161] As one court held, "No doubt details may be omitted or in many instances covered by broad generalizations, but mention must be made of at least the main features of the measure."[162] Minor omissions in summaries or accompanying materials should not stop or void the initiative process.[163]

A close case along these lines is *Jones v. Bates*.[164] *Jones* involved an interpretation of Proposition 140, which was considered by the California voters in 1990.[165] The initiative amended the state Constitution to provide that "'[n]o *Senator* may serve more than 2 terms'" and "'No *member of the Assembly* may serve more than 3 terms.'"[166] The issue was whether it was clear from the initiative language and the accompanying materials whether the term limits proposed constituted a lifetime ban.[167] The California Supreme Court, in a post-election challenge, concluded that the materials were adequate.[168] A divided panel of the Ninth Circuit disagreed[169] and was sub-

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159. *See, e.g.*, Rooney v. Kulongoski, 902 P.2d 1143, 1158 (Or. 1995) (stating that "[p]roponents and opponents of the measure are free to trumpet its purported effects or to point to its possible ambiguities, but it is not the court's role to engage in an abstract exercise of pre-enactment constitutional interpretation" in evaluating the adequacy of a summary).

160. At a minimum, however, the ballot summary and title must not be false or misleading. Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982) ("A proposed amendment cannot fly under false colors . . . . The burden of informing the public should not fall only on the press and opponents of the measure—the ballot title and summary must do this.").

161. *See* Bowe v. Sec'y of the Commonwealth, 69 N.E.2d 115, 124 (Mass. 1946) ("[A] law of substantial length and complication could seldom be fully described in fewer words than those of the law itself."); Op. of the Justices, 256 N.E.2d 420, 428 (Mass. 1970) ("The summary, if cluttered with detailed explanation and discussion, could no longer rightly be called a summary . . . ."); Plugge v. McCuen, 841 S.W.2d 139, 141 (Ark. 1992) ("The title is not required to be perfect, [nor] is it reasonable to expect the title to cover or anticipate every possible legal argument the proposed measure might evoke."); *In re* Proposed Petition, 907 P.2d 586, 591-92 (Colo. 1995) (en banc) ("Not every feature of a proposed measure must appear in the title . . . and summary. . . . If each of the numerous changes were listed in the title . . . , the goal of brevity in titles would be defeated.").

162. Sears v. Treasurer of Massachusetts, 98 N.E.2d 621, 631 (Mass. 1951).

163. *See, e.g.*, Amador Valley Joint Union High Sch. v. State Bd. of Equalization, 583 P.2d 1281, 1298-99 (Cal. 1978) (upholding initiative despite deficiencies in summary because "the title and summary, though technically imprecise, substantially complied with the law, and we doubt that any significant number of petition signers or voters were misled thereby").

164. Jones v. Bates (*Jones I*), 127 F.3d 839 (1997), *rev'd en banc*, Bates v. Jones (*Jones II*), 131 F.3d 843 (9th Cir. 1997), *cert. denied*, 523 U.S. 1021 (1998).

165. *Jones II*, 131 F.3d at 845.

166. *Jones I*, 127 F.3d at 845 (quoting CAL. CONST., art. IV, § 2(a) (as amended) (emphasis added)).

167. *See id.* at 846.

168. *See* Legislature of Cal. v. Eu, 816 P.2d 1309, 1314-16 (Cal. 1991).

169. *See Jones I*, 127 F.3d at 855-64.

sequently reversed by the court acting en banc.[170] The original Ninth Circuit dissenter pointed out that the argument against the proposition included in the ballot pamphlet "clearly states that legislative officers are 'banned for life.'"[171] As Judge Thompson wrote for the en banc majority, there were no fewer than eleven references to the lifetime ban in the opposition materials submitted to voters.[172] Furthermore, the language of the initiative was similar to the language in the Twenty-second Amendment precluding the President of the United States from serving more than two terms, which the court stated was well understood to constitute a lifetime ban.[173] Despite some ambiguities in the initiative itself, the materials taken as a whole were adequate to notify the voters of the clear purpose of the initiative.[174]

3. *Failure of Governmental Officials to Act*

An unresponsive government is the very reason for the initiative.[175] If the officials designated to execute the initiative process can just ignore or otherwise short-circuit it, then it is a dead letter. The courts have the constitutional responsibility to enforce officials' performance of the actions necessary to effectuate the initiative.[176] These include officials responsible for drafting the initiative titles or summaries, preparing financial analyses where they are called for,[177] and monitoring signature gathering, as well as the legislature and governor, where they have a role in the process.

a. Non-compliance by Non-constitutional Officials

Where government officials refuse or neglect to perform their duties altogether, the court should order them to comply by means of mandamus actions or other forms of injunctive relief.[178] In *Citizens for Protection of*

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170. *See Jones II*, 131 F.3d at 846.

171. *Jones I*, 127 F.3d at 864 (Sneed, J., dissenting) (citation omitted).

172. *Jones II*, 131 F.3d at 846.

173. *Id.* (citing *Jones I*, 127 F.3d at 866).

174. *Contra* Smith v. Am. Airlines, Inc., 606 So. 2d 618, 621 (Fla. 1992) (finding a proposed ballot summary concerning taxation of leaseholds inadequate when it did not explain that post-1968 leases would be taxed at different rate than pre-1968 leases).

175. *See supra* note 25 and accompanying text.

176. *See* Mich. Civil Rights Initiative v. Bd. of State Canvassers, 708 N.W.2d 139, 146-47 (Mich. Ct. App. 2005) (holding that board of canvassers lacked authority to investigate possible fraud and stating "[b]ecause there is no dispute that the form of the petition is proper or that there are sufficient signatures, we conclude that the board is obligated to certify the petition, . . . and we issue an order of mandamus").

177. At least thirteen states require that a fiscal impact statement be prepared for each initiative proposal. *See, e.g.*, FLA. STAT. ch. 100.371(5) (West 2008); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 27.

178. *See* Gordon & Magleby, *supra* note 55, at 304, 311-12.

Marriage v. Board of Canvassers,[179] for example, the Board of Canvassers deadlocked on whether to certify an initiative petition to amend the Michigan Constitution to limit marriage to one man and one woman.[180] It was undisputed that the initiative complied with all of the procedural requirements for certification, but two of the Board's four members believed it was unconstitutional.[181] Under Michigan law, however, the Board had no right to perform such pre-election review, as the issue of substantive validity was reserved to the courts alone.[182] The court granted the complaint for mandamus because the Board had a clear legal duty to certify the petition and the act that the Board refused to perform was ministerial.[183] The court, concluding that the Board would continue to deadlock on the ballot language due to internal differences, further ordered the use of ballot language prepared by other state officials.[184]

A court must also act when it is confronted with initiative responsibilities that are performed incompletely or misleadingly by government officials.[185] In *In re Initiative Petition No. 360*,[186] the Supreme Court of Oklahoma rewrote the ballot title prepared by the Attorney General for a term limits initiative after concluding that it contained a misleading statement.[187] The statement was: "Unless similar measures are approved in other States, their United States Representatives and Senators could serve longer terms than Oklahoma's Representatives or Senators."[188] This statement was held to be argumentative and speculative.[189] Such a rewriting was, however, ex-

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179. 688 N.W.2d 538 (Mich. Ct. App. 2004).

180. *Id.* at 540-41.

181. *Id.* at 540.

182. *Id.* at 540-42; *cf.* Wyman v. Sec'y of State, 625 A.2d 307, 311 (Me. 1993) (holding that the Secretary of State could not refuse to provide petition forms based on his belief that the petition was unconstitutional). The issue of substantive validity should generally be reserved for courts, not other government officials, to decide. Gordon & Magleby, *supra* note 55, at 311.

183. *See Citizens for Protection of Marriage*, 688 N.W.2d at 541-42.

184. *Id.* at 542-43. Although the court held that mandamus was not an appropriate remedy on this issue given the discretion inherent in crafting ballot language, it nonetheless was implicitly empowered and obligated to break the deadlock. *Id.*; *see also Wyman*, 625 A.2d at 311.

185. *See, e.g.*, Josh Goodman, *Fate of Ballot Measures Often Depends on the Wording*, STATELINE (Mar. 9, 2012), http://www.pewstates.org/projects/stateline/headlines/fate-of-ballot-measures-often-depends-on-the-wording-85899377387 (discussing overwhelming effects of potentially skewed summaries prepared by elected officials).

186. 879 P.2d 810 (Okla. 1994).

187. *Id.* at 820.

188. *Id.* at 818 (quoting Initiative Petition No. 360). If this were not in the ballot title itself, such a statement about the potential consequences of an initiative would, we think, not be inappropriate. *See id.* at 818-19.

189. *Id.* at 820.

pressly authorized by Oklahoma statute.[190] In other cases, the courts have remanded and required the materials to be completed or revised consistent with their instructions.[191] The latter approach is clearly preferable, if time permits, as it ensures that the official responsible for preparing the materials according to the constitution or statute does so.[192]

b. Non-compliance by the Legislature

A different issue is presented by non-compliance by the legislature in the two states where it has a role in the initiative process. Here, separation of powers concerns come clearly into play, and the court has more limited authority.

In Mississippi, inaction by the legislature is less of a concern, because it does not prevent the initiative from going forward.[193] In contrast, in Massachusetts, an initiative amendment to the Constitution cannot be placed on the ballot unless it gains the support of at least twenty-five percent of the legislature meeting in successive joint sessions.[194] The purpose of such a provision "is to ensure that initiative amendments submitted to the people for approval have at least a reasonable amount of public support."[195] The legislature, however, has used this power to exercise control over the initiative process.[196]

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190. *See In re* Initiative Petition No. 362, 899 P.2d 1145, 1149 n.4 (Okla. 1995).

191. *See, e.g., In re* Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the City of Antonito, 873 P.2d 733, 742 n.6 (Colo. 1994) (remanding for redrafting of misleading summary where it was not clear which items applied statewide and which to only one locality); Fairness & Accountability in Ins. Reform v. Greene, 886 P.2d 1338, 1346-49 (Ariz. 1994) (holding that summary was argumentative and ordering legislative council to prepare an impartial summary).

192. *See Greene*, 886 P.2d at 1348-49 (ordering compliance by legislative council, and distinguishing a prior case where an initiative was stricken from the ballot because there was insufficient time to comply with applicable statutes).

193. *See* MISS. CONST. art. XV, § 273, cl. 6.

194. *See* Opinion of the Justices, 780 N.E.2d 1232, 1234 (Mass. 2002).

195. Opinion of the Justices, 436 N.E.2d 935, 943 (Mass. 1982).

196. Although the Massachusetts Constitution has been amended fifty-five times since 1918, only twice has the Constitution been amended by the people through the initiative process under Article 48, and one of those amendments, Article 72, was nullified by a legislative amendment. *See Massachusetts Statewide Ballot Measures: An Overview*, MASSACHUSETTS SECRETARY OF THE COMMONWEALTH, http://www.sec.state.ma.us/ele/elebalm/balmover.htm (last visited Jan. 4, 2013); MASS. CONST. amend. LXXV. The other fifty-three amendments have been proposed by the legislature. *See* Office of the Secretary of the Commonwealth, *Massachusetts Statewide Ballot Measures: An Overview*, *supra*. Among the initiatives that were short-circuited by legislative inaction or parliamentary procedures were universal health insurance, *see* Comm. for Health Care for Mass. v. Sec'y of Commonwealth, 881 N.E.2d 1137, 1139 n.4 (Mass. 2008) (joint session did not discharge amendment from committee in 2007); term limits, *see* LIMITS v. President of the Senate, 604 N.E.2d 1307, 1308 (Mass. 1992) (joint session adjourned without vote in 1992); separate amendments

In regard to the initiative petition limiting marriage to a man and a woman, the Massachusetts legislature meeting in joint session used a variety of procedural motions to avoid taking a vote on the initiative amendment.[197] As the deadline for consideration of the initiative approached, the proponents of the initiative brought suit in state court seeking a declaratory judgment or mandamus against the legislature.[198] The court, respecting constitutional separation of powers concerns, concluded that it did not have mandamus powers over the legislature.[199] It did, however, sternly instruct the legislature on its constitutional duty to act according to the initiative amendment procedures, and explained that the only remedy available for non-compliance was the people's ability to vote recalcitrant legislators out of office.[200] The result was an expeditious vote on the initiative.[201]

There is much to commend in this judicial approach to legislative non-compliance. The court fulfills its duty to explicate the meaning of the constitution and the different actors' constitutional responsibilities in the initiative process without exceeding its enforcement powers. The public is thereby fully informed of the legislature's constitutional obligations in regard to the initiative process, the court's limited ability to enforce compliance, and the people's own power over legislative officials disrespecting the initiative process.

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regarding reproductive rights and equal rights to education, *see* Robert G. Millar, Legislative History of Petitions for Initiative Amendments to the Massachusetts Constitution 13-14 (unpublished paper) (on file with the Massachusetts State Archives); Commonwealth of Massachusetts, Journal of the Senate 498-502, 1416-17, 2077-78 (1990) (joint session adjourned without vote in 1990); and state budget process reform, *see* Commonwealth of Massachusetts, Journal of the Senate 819-828, 1373-74, 2298-99 (1982) (joint session adjourned without final vote in 1983). *See generally* Alexander G. Gray, Jr. & Thomas R. Kiley, *The Initiative and Referendum in Massachusetts*, 26 NEW ENG. L. REV. 27, 95-98 (1991); Millar, *supra* at 5-7.

197. *Cf.* Doyle v. Sec'y of Mass., 858 N.E.2d 1090, 1092-93 (Mass. 2006).

198. *Id.* at 1092.

199. *See id.* at 1092-95; *LIMITS*, 604 N.E.2d at 1309-10.

200. *Doyle*, 858 N.E.2d at 1095-96; *see also* League of Women Voters of Mass. v. Sec'y of the Commonwealth, 681 N.E.2d 842, 847 (Mass. 1997) (stating that the only remedy is "the power of the people to elect a sufficient number of legislators who would not defy the requirements of the Constitution").

201. Enough legislators supported the amendment for it to be considered in the next session. Scott Helman & Andrew Ryan, *After Second Vote, Gay Marriage Ban Still Advances*, BOS. GLOBE (Jan. 2, 2007), http://www.boston.com/news/globe/city_region/breaking_news/2007/01/after_second_vo.html. However, during the next legislative session, less than 25% of the legislature voted in favor of putting the initiative on the ballot. Frank Phillips, *Legislators Vote to Defeat Same-Sex Marriage Ban*, BOS. GLOBE (June 14, 2007), http://www.boston.com/news/globe/city_region/breaking_news/2007/06/legislators_vot_1.html.

4. *Substantial Compliance*

Not all procedural violations of the initiative petition process warrant withholding the initiative petition from the ballot. As the California Supreme Court held, so "long as the fundamental purposes underlying the applicable constitutional or statutory requirements have been fulfilled, . . . there has been 'substantial compliance' with the applicable constitutional or statutory provisions and . . . invalidation of a petition and preclusion of a vote on the measure is not warranted."[202] This substantial compliance approach provides a useful model for deciding what types of procedural errors are harmless in the initiative process.

As further explained by California's Chief Justice George:

> [W]hen California courts have encountered relatively minor defects that the court finds could not have affected the integrity of the electoral process *as a realistic and practical matter*, past decisions generally have concluded that it would be inappropriate to preclude the electorate from voting on a measure on the basis of such a discrepancy or defect.[203]

Where the errors were "'so minor as to pose no danger of misleading the signers of the petitions'" or the voters at the election, the court would allow the election to go forward.[204] Where, in contrast, the errors were "misleading . . . regarding a significant feature of the proposed measure," the election could not proceed.[205]

The California case law provides examples on each side of the divide. A simple case where the defects were insubstantial involved minor departures from the statutory requirements in the title of an initiative by (1) the use of twelve point boldface type instead of eighteen point Gothic type, and (2) using twenty-four words instead of the maximum of twenty.[206] A closer question was presented in an initiative designed to transfer the power to define election districts from the legislature to a three-member panel of retired judges.[207] There, the version presented to the Attorney General differed from the petitions circulated for signature, despite a requirement that they

202. Costa v. Superior Court of Sacramento, 128 P.3d 675, 690 (Cal. 2006).

203. *Id.*

204. *Id.* at 693 (quoting Assembly of Cal. v. Deukmejian, 639 P.2d 939, 948 (Cal. 1982)).

205. *Id.* at 689.

206. Cal. Teachers Ass'n v. Collins, 34 P.2d 134, 134 (Cal. 1934). *Compare* Stand Up for Democracy v. Sec'y of State, 492 Mich. 588, 619 (2012) (rejecting substantial compliance test for font size in legislative referendum, but finding actual compliance) *with id.* at 620-21 (Young, C.J., concurring in part and dissenting in part) (rejecting substantial compliance test and finding no actual compliance), *id.* at 646-47, 649 (Markman, J., concurring in part and dissenting in part) (same), *and id.* at 632 (Cavanagh, Marilyn Kelly, and Hathaway, JJ., concurring in part and dissenting in part) (arguing for application of substantial compliance test).

207. *Costa*, 128 P.3d at 677.

be the same.[208] The differences were substantive, but did not involve a significant feature of the initiative petition.[209] For example, the time period for legislative leaders to challenge the list of judges was changed by one day, and the declaration of purpose for the initiative had been rewritten.[210] The court ruled that the petition was appropriately placed on the ballot, emphasizing that the errors were "inadvertent" and unlikely to mislead.[211]

On the other hand, the California Supreme Court would not allow an election to proceed in *Boyd v. Jordan*.[212] In that petition, the title formulated by the proponents included on the top of every page of the initiative petition a reference to an "Initiative Measure Providing for Adoption of Gross Receipts Act."[213] The title neglected to mention that the measure was actually a constitutional amendment, which would cause a tax to be levied on gross receipts of money from all sources and significantly reshape the structure of state and local taxes.[214] The Court concluded that the title was far too misleading to allow an election on the initiative.[215]

Not all courts have adopted the substantial compliance test. An interesting case along these lines is *Nevadans for Nevada v. Beers*.[216] That case involved a constitutional initiative that would have imposed spending limits for state and some local governments.[217] The voter-signed initiative, however, differed from the filed petition in an important respect: although presented in technical language and requiring calculations, the circulated version would have allowed for a 21% increase in state spending over two years, while the filed version would have capped state spending growth at 7.4%.[218] Over the relevant time period, this difference would amount to over $1.5 billion.[219] Additionally, as the Court explained, "Under the circulated version, spending could continue at or even beyond its historic rate [so that] the primary purpose of the . . . measure would not be effectuated under the circulated version."[220]

Although the Court's comparative financial analysis provides another good example of an initiative that did not substantially comply with applicable requirements, the Court expressly rejected that approach in favor of a

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208. *Id.* at 677, 689.
209. *Id.* at 678.
210. *Id.*
211. *Id.* at 701.
212. *See* 35 P.2d 533, 534 (Cal. 1934).
213. *Id.*
214. *See id.*
215. *Id.*
216. 142 P.3d 339 (Nev. 2006).
217. *Id.* at 341.
218. *Id. at* 343.
219. *Id.*
220. *Id. at* 346.

strict adherence test.[221] What is strange, however, is that the analysis of the merits of the substantial compliance test was unnecessary, as the Court readily concluded that there had not been strict adherence to the requirement that the circulated version be the same as the filed petition.[222] The Court felt compelled to explain why the difference was material and important before asserting that only strict adherence would suffice.[223] Although a primary example of an alternative approach, *Nevadans for Nevada* ends up providing more support for adoption of the substantial compliance test it rejected.

C. Single Subject Limitations

Twelve states limit initiative petitions to a single subject.[224] This requirement serves an important purpose in making initiatives manageable and understandable for the voting public.[225] It is a requirement that corresponds well with the limitations in the initiative process.[226] It helps render the proposed constitutional change comprehensible to the ordinary citizen.[227] It focuses the inquiry that is inevitably generated in the media.[228] It prevents logrolling.[229] It thereby ensures that the people support or reject the subject-matter they are voting for, rather than have popular measures garner support for unpopular ones.[230] The initiative process cannot separately evaluate, and thereby determine the wisdom of severing or joining, combined proposals.[231]

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221. *See id* at 348-52.

222. *Id.* at 352.

223. *See id.* at 346.

224. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 16. Others have a separate vote requirement so that "if more than one amendment is proposed, the voters must be accorded the opportunity to vote separately on them." WILLIAMS, *supra* note 44, at 405.

225. Adams, *supra* note 38, at 600.

226. *Cf.* Anne G. Campbell, *In the Eye of the Beholder: The Single Subject Rule for Ballot Initiatives*, *in* THE BATTLE OVER CITIZEN LAWMAKING, *supra* note 35, at 133-35.

227. *See* Fine v. Firestone, 448 So. 2d 984, 998 (Fla. 1984).

228. *See* Amador Valley Joint Union High. Sch. v. State Bd. of Equalization, 583 P.2d 1281, 1291 (Cal. 1978); Brosnahan v. Brown, 651 P.2d 274, 283 (Cal. 1982); *Fine*, 448 So. 2d at 989.

229. Adams, *supra* note 38, at 600; *see also* Evans v. Firestone, 457 So. 2d 1351, 1354 (Fla. 1984).

230. *See, e.g.*, *In re* Advisory Op. to the Att'y General—Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1019-20 (Fla. 1994) ("When voters are asked to consider a modification to the constitution, they should not be forced to 'accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support.' The single-subject rule is a constitutional restraint placed on proposed amendments to prevent voters from being trapped in such a predicament." (quoting *Fine*, 448 So. 2d at 988)).

231. Some states do allow competing initiatives or legislative alternatives to initiatives. *See generally* DUBOIS & FEENEY, *supra* note 59, at 158-62. Although more flexible than the simple up -or -down vote, they are also not conducive to the evaluation of combined proposals. *See id.* at 162-63. In fact, in states like California, those opposing an initiative may

More complex revisions to a constitution require a constitutional convention or another process that is more interactive and flexible than the initiative.

The single-subject rule is also designed to be enforced prior to the election.[232] It thereby prevents voter confusion relating to combined proposals, as well as the cynicism caused by post-passage rejection of initiatives that violate the rule.[233]

Determining whether a single-subject initiative actually contains only a single subject is not so simple.[234] Challenges are not limited to totally unrelated measures.[235] For example, term limits proposals for different constitutional offices have been challenged unsuccessfully as a violation of the single subject rule.[236] Given their common subject and purpose, these types of initiatives should not violate the single subject rule. Initiatives that combine proposals and funding methods to pay for the initiative have also been challenged,[237] as have those that combine the substance of the initiative with proposals to address negative side-effects of an initiative.[238] For example, casino gambling initiatives may properly be combined with gambling addiction programs or increased funding for public safety services. They may not be combined with those having "no natural or necessary connection with each other and/or with the general subject of gambling."[239] Where the proposals are related programmatically, the single subject restriction should not be violated.

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put forward one or more counter-initiatives, possibly deceptively named or advertised, in an attempt to confuse the voters or deter them from adopting any of the proposals. *See id.*

232. *See* Senate of Cal. v. Jones, 988 P.2d 1089, 1096-97 (Cal. 1999); Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 828 (Mo. 1990).

233. *See Jones*, 988 P.2d at 1096-97; *Blunt*, 799 N.W.2d at 828.

234. *See generally* Campbell, *supra* note 226, at 147-61.

235. *See Fine*, 448 So. 2d at 989-90.

236. *See In re* Initiative Petition No. 360, 879 P.2d 810, 816-17 (Okla. 1994); *cf.* Op. of the Justices to the Senate, 595 N.E.2d 292, 301 (Mass. 1992).

237. *See* Kennedy Wholesale, Inc. v. State Bd. of Equalization, 806 P.2d 1360, 1365-66 (Cal. 1991) (upholding initiative directing tobacco tax revenue to tobacco-related education and research, indigent medical care, and environmental and fire prevention programs); Cal. Ass'n of Retail Tobacconists v. State, 135 Cal. Rptr. 2d 224, 237-41 (Ct. App. 2003) (upholding initiative combining tobacco tax with anti-smoking education and child health care services).

238. *Cf. In re* Title, Ballot Title & Submission Clause, Summary Clause for 1997-1998 No. 74, 962 P.2d 927, 928-29 (Colo. 1998) (upholding an initiative that would impose a "school impact fee" to fund free education that also would allow school districts to provide financial exemptions for those who could not afford it).

239. Loontjer v. Robinson, 670 N.W.2d 301, 306, 314 (Neb. 2003) (Hendry, C.J., concurring) (citation omitted) (criticizing gambling initiative that included bonuses for certified teachers). *Contra* Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 340 (Fla. 1978) (upholding gambling initiative directing tax money to education and local law enforcement).

There are times, however, where there is a meaningful relationship between the proposals but the change in the constitution is too significant to be addressed as a single subject. As one court explained, "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement."[240] An argument was made along these lines to contest a 1982 California proposition that provided that the California Constitution could not be interpreted to provide greater rights to criminal defendants than those provided in analogous provisions in the federal Constitution.[241] More particularly, it stated:

> "In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, . . . shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States . . . ."[242]

Although the California Supreme Court rejected this single subject challenge,[243] we believe the breadth of such a provision, incorporating so many different rights, should not have been considered a single subject.[244] This is different from an initiative requiring that the state judiciary interpret the state's corollary to the Fourth Amendment as providing no greater protection; such an initiative would at least be restricted to the interrelated areas of search and seizure.

D. Amendment vs. Revision

In addition to single subject requirements, some states have different processes for revising a constitution as opposed to amending it, limiting initiatives to amendments.[245] As one commentator summarized: "This is a somewhat unclear distinction that must be enforced by the courts."[246] However, a court should be able to determine how much an initiative would

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240. Evans v. Firestone, 457 So. 2d 1351, 1353 (Fla. 1984).

241. *See* Raven v. Deukmejian, 801 P.2d 1077, 1079, 1086 (Cal. 1990).

242. *Id.* at 1086 (quoting Proposition 115).

243. *See id.* at 1083-85. It did, however, reject a portion of the initiative on other grounds discussed below. *Id.* at 1089.

244. *See id.* at 1090, 1095-97 (Mosk, J., concurring and dissenting).

245. *See, e.g.*, McFadden v. Jordan, 196 P.2d 787, 788-89 (Cal. 1948); Holmes v. Appling, 392 P.2d 636, 638 (Or. 1964); MONT. CONST. art. XIV, §§ 2, 8-9. The Florida Supreme Court also adopted this rule in *Adams v. Gunter*, but the Florida Constitution was later changed to permit revisions by initiative as well. *See* 238 So. 2d 824, 829-31 (Fla. 1970); Weber v. Smathers, 338 So. 2d 819, 822-23 (Fla. 1976) (England, J., concurring).

246. WILLIAMS, *supra* note 44, at 403.

change the constitution on the face of the proposal, and therefore this issue can and should be decided before the election.

The constitutional revision issue has generated significant litigation, particularly in California.[247] There the distinction between amending and revising the constitution has a long history that predates the initiative process:

> [A]s originally adopted [in 1849], the constitutional amendment/revision dichotomy in California—which mirrored the framework set forth in many other state constitutions of the same vintage—indicates that the category of constitutional revision referred to the kind of wholesale or fundamental alteration of the constitutional structure that appropriately could be undertaken only by a constitutional convention, in contrast to the category of constitutional amendment, which included any and all of the more discrete changes to the Constitution that thereafter might be proposed.[248]

In fact, the 1990 criminal law proposition discussed in the single subject section above[249] was rejected by the California Supreme Court as constituting a prohibited revision to the constitution.[250] The Court reached this conclusion because the initiative "contemplates such a far-reaching change in our governmental framework" as to constitute a revision and not just an amendment to the constitution.[251] Such wholesale changes in the governmental plan could be quantitative or qualitative or both.[252] Proposition 115 in *Raven* was considered a "devastating" qualitative change because "California courts in criminal cases would no longer have authority" to interpret the state Constitution's criminal provisions independently.[253] In contrast, the California Supreme Court concluded that Proposition 8, which "reserv[ed] the official designation of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law," was not a revision but an amendment of the constitution, despite its societal importance.[254] The Court wrote:

> As a quantitative matter, petitioners concede that Proposition 8—which adds but a single, simple section to the constitution—does not constitute a revision. As a qualitative matter, the act of limiting access to the designation of marriage to opposite-sex couples does not have a substantial or, indeed, even a minimal effect on the

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247. *See* Bruce E. Cain et al., *Constitutional Change: Is It Too Easy to Amend Our State Constitution?*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA, *supra* note 46, at 265, 279.

248. Strauss v. Horton, 207 P.3d 48, 61 (Cal. 2009) (emphasis omitted).

249. *See supra* notes 241–42 and accompanying text.

250. Raven v. Deukmejian, 801 P.2d 1077, 1089 (Cal. 1990) (in banc).

251. *Id.* at 1080.

252. *Id.* at 1085.

253. *Id.* at 1088. Another example of a qualitative change that would constitute a revision and not an amendment to a constitution was the initiative rejected by the Florida Supreme Court that would have transformed the Florida House and Senate into a unicameral legislature. *See* Adams v. Gunter, 238 So. 2d 824, 830-31 (Fla. 1970).

254. Strauss v. Horton, 207 P.3d 48, 61-62 (Cal. 2009) (emphasis omitted).

> governmental plan or framework of California that existed prior to the amendment.[255]

Proposition 8 undoubtedly had a significant, personal impact on those it affected directly, but it did not represent a fundamental change to the structure of California government.[256]

III. SUBJECT-MATTER RESTRICTIONS ON THE INITIATIVE

Many state constitutions exclude certain subjects from the initiative process altogether.[257] The most common subject-matter restrictions limit or prohibit the implementation of taxes and appropriations through the initiative.[258] Two states, Mississippi and Massachusetts, have particularly extensive subject-matter restrictions.[259]

A. Restrictions on Appropriations

Appropriation restrictions primarily address the expenditure of money, but have also been applied to other situations such as the transfer or dedication of land.[260] The amount of revenue that can or must be raised and spent depends on the economy and requires comparison and prioritization of expenditures.[261] The inherent up-or-down aspect of the initiative distorts the appropriation process by singling out specific programs for special consideration. The architects of the initiative in those states with appropriation restrictions thus decided to exclude appropriations from the initiative, limit its applicability, or at least require disclosure of revenue impacts.[262] They

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255. *Id.* at 62.

256. *See id.* at 61-62.

257. *See* DUBOIS & FEENEY, *supra* note 59, at 81-84.

258. *See, e.g.*, MASS. CONST. art. XLVIII, pt. II, § 2; MO. CONST. art. III, § 51; MONT. CONST. art. III, § 4, cl. 1; NEB. REV. STAT. § 32-1408 (West, Westlaw through 2011 Sess.); NEV. CONST. art. XIX, § 6; OHIO CONST. art. II, § 1e. *See generally* DUBOIS & FEENEY, *supra* note 59, at 83. *See also* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 20.

259. DUBOIS & FEENEY, *supra* note 59, at 81-82.

260. *See* Alaska Action Ctr., Inc. v. Municipality of Anchorage, 84 P.3d 989, 993-94 (Alaska 2004).

261. *See* DUBOIS & FEENEY, *supra* note 59, at 83; *cf. The People's Will*, ECONOMIST, Apr. 23, 2011, at 3, 5.

262. *See, e.g.*, 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917-1918, at 829 (1918) ("[A]n appropriation by the people of specific sums of money would knock spots, if I may use a slang expression, out of any State budget, and prevent any real regulation and careful administration of the finances of the State."); *id.* at 816 (noting that appropriation exclusion was aimed at demagogues "who would hoist themselves into public office by pledging their influence in order that this or that species of property may be transferred from one man's pocket to another's"); Thomas v. Bailey, 595 P.2d 1, 7-8 (Alaska 1979) (discussing debate and experiences in several states). *See generally* Note, *Limitations on Initiative and Referendum*, 3 STAN. L. REV. 497, 504-05 (1951).

recognized the undue advantage given to proposals for lower taxes or greater benefits without making clear the necessary cuts or taxes required, given that almost all states must have balanced budgets.[263] To this end, some states allow appropriations in initiatives only if they generate the necessary revenue through taxes or other means.[264] In light of these concerns and the fact that the existence of an appropriation can usually be determined on the face of a proposal, courts have properly entertained pre-election challenges on this basis.[265]

California's financial troubles demonstrate the problems of initiatives that mandate appropriations.[266] California's problematic experiment in fiscal policy by initiative dates back at least to 1978, when Proposition 13 slashed property taxes and imposed a two-thirds supermajority requirement for any tax increase.[267] When combined with an existing two-thirds supermajority requirement for passage of the budget,[268] this initiative led to a dysfunctional "fiscal straitjacket," which left the state subject to wild swings in revenue based on the health of the economy.[269] Other unamendable initiatives, such as those dictating a required percentage of the state budget to be spent on education, further reduced legislative flexibility.[270] Some have estimated that the legislature has control over only 10% of the state budget.[271] During the most recent financial crisis, California was not far from insolvency, sometimes having to pay state employees with IOUs.[272] In November 2012, California voters approved, by initiative amendment, a general tax increase for the first time in two decades, but some commentators noted the state's

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263. *See generally* NAT'L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS (2010), *available at* http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf.

264. *See, e.g.*, MO. CONST. art. III, § 51.

265. *See, e.g.*, Slama v. Att'y Gen., 428 N.E.2d 134, 138 (Mass. 1981); *Alaska Action Ctr., Inc.*, 84 P.3d at 989-90; Herbst Gaming, Inc., v. Heller, 141 P.3d 1224, 1233 (Nev. 2006); Comm. for a Healthy Future v. Carnahan, 201 S.W.3d 503, 506, 510 (Mo. 2006) (en banc).

266. *See* DUBOIS & FEENEY, *supra* note 59, at 83.

267. *The Perils of Extreme Democracy*, ECONOMIST, Apr. 23, 2011, at 11; Miller, *supra* note 11, at 1049.

268. *See Supermajority Vote Requirements to Pass the Budget*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 2008), http://www.ncsl.org/issues-research/budget/supermajority-vote-requirements-to-pass-the-budget.aspx.

269. George, *supra* note 24, at 1517-18; *see also* JOE MATHEWS & MARK PAUL, CALIFORNIA CRACKUP: HOW REFORM BROKE THE GOLDEN STATE AND HOW WE CAN FIX IT 45-49 (2010).

270. *See* California Proposition 98 (1988); *cf. The Perils of Extreme Democracy*, *supra* note 267, at 11; *PBS Newshour* (PBS television broadcast Nov. 1, 2011), *available at* http://www.pbs.org/newshour/bb/business/july-dec11/california_11-01.html.

271. *See The Perils of Extreme Democracy*, *supra* note 267, at 11.

272. *See id.* This also occurred in 1992. MATHEWS & PAUL, *supra* note 269, at 48.

fiscal situation was still precarious.[273] This situation has led many, including the then-Chief Justice of the California Supreme Court, to call for far-reaching reform of the state's initiative process.[274]

Courts applying anti-appropriation provisions have, however, read them narrowly. For instance, an initiative in Massachusetts does not make a prohibited "specific appropriation" unless it directly sets certain revenue beyond the legislature's control through a "rigid, inflexible, and permanent mandate to disburse public funds for a discrete purpose."[275] Similarly, Nevada interprets "appropriation" to mean an initiative that "leaves budgeting officials no discretion in appropriating or expending the money mandated by the initiative—the budgeting official must approve the appropriation or expenditure, regardless of any other financial considerations."[276] These principles are designed to ensure that the legislature has discretion to decide how to raise and spend revenue.[277] To this end, the Montana Supreme Court has limited its appropriation prohibition to revenue from the general fund as a matter of constitutional interpretation.[278] It therefore upheld an initiative that established a cigarette tax, designated the proceeds for a special fund, and used that fund to pay benefits to veterans.[279] An initiative may establish programs and designate that certain funds should be used to support them, as long as it does not take the final step of setting aside revenue from the state treasury to be spent without legislative intervention.[280]

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273. *See* Mike Rosenberg, *Proposition 30 Wins: Gov. Jerry Brown's Tax Will Raise $6 Billion to Prevent School Cuts*, MERCURY NEWS (Nov. 6, 2012), http://www.mercurynews.com/elections/ci_21943732/california-proposition-30-voters-split-tax-that-would; Chris Megerian, *Prop. 30 Victory Is No Cure-All*, L.A. TIMES, Nov. 12, 2012, at A11.

274. *See* George, *supra* note 24, at 1517-20.

275. For examples, *see* Bates v. Dir. of Office of Campaign & Political Fin., 763 N.E.2d 6, 20 (Mass. 2002) and cases cited.

276. Herbst Gaming, Inc. v. Heller, 141 P.3d 1224, 1233 (Nev. 2006); *see also* Rogers v. Heller, 18 P.3d 1034, 1036-39 (Nev. 2001) (rejecting initiative requiring at least 50% of state revenue to be spent on education).

277. *See, e.g.*, *Bates*, 763 N.E.2d at 15-19 (discussing debate over appropriations limitation in Massachusetts initiative provision); Alaska Action Ctr., Inc. v. Municipality of Anchorage, 84 P.3d 989, 993-94 (Alaska 2004) (explaining that limiting initiatives is necessary to ensure the legislature has control of the state's assets); *cf. In re* Initiative Petition No. 332, 776 P.2d 556, 557-59 (Okla. 1989) (holding that appropriations are a legislative function and allowing executive officials to spend money in their discretion would violate separation of powers).

278. State *ex rel.* Graham v. Bd. of Exam'rs, 239 P.2d 283, 293 (Mont. 1952) and cases cited.

279. *Id.* at 286, 293.

280. *See, e.g.*, *Bates*, 763 N.E.2d at 20-21; Mazzone v. Att'y Gen., 736 N.E.2d 358, 366 (Mass. 2000) ("[A]n appropriation occurs when . . . monies are committed and released by the Legislature to the executive branch and no longer within the control of the Legislature.").

B. Other Subject-Matter Limitations

As stated above, appropriations are not the only subject placed beyond the reach of the popular initiative in various states. Mississippi excludes, among other things, initiatives related to the state bill of rights.[281] The Mississippi Supreme Court has stated that these exclusions "seek[] to temper the initiative induced tension between the unchecked will of the majority versus the inherent rights of individuals."[282] Mississippi is the most recent state to adopt the initiative, and its authors were no doubt aware of other states' experiences with the initiative.[283] Its high court has thus interpreted the bill of rights carve-out as a check "to ensure that the rights of individuals [and] minorities . . . are not easily trampled and ignored by majority impulses."[284]

Article 48 of the Massachusetts Constitution precludes initiative provisions related to freedom of religion, religious practices, or religious institutions, and those related to judicial appointment, tenure and compensation, or the reversal of a particular judicial decision.[285] The framers of the Massachusetts initiative provision believed that the people could not be trusted to restrain their religious zeal or maintain a firm separation between church and state.[286] As the author of the amendment excluding religious matters from the initiative stated, "I am endeavoring, by means of my amendment, to protect the initiative and referendum from the efforts [from proselytizers] . . . to drag constantly before the people these religious fights."[287] They also understood the need to insulate the judiciary from the initiative.[288] As one delegate stated: "If we wish to preserve the integrity of the judge, if we intend to make him independent, . . . it is absolutely essential to remove his office as far as possible from the pressure of politics and politicians."[289] Pre-election enforcement of these subject-matter exclusions is an important part of the responsibility of the state judiciary in ensuring that the initiative process stays within its defined constitutional bounds.

Whether a measure is excluded, however, is not always clear-cut. Courts have been careful to ensure that the exclusions do not eviscerate the

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281. MISS. CONST. art. XV, § 273, cl. 5(a).

282. *In re* Proposed Initiative Measure No. 20, 1999-CA-00912-SCT (¶ 21) (Miss. 2000), *overruled by* Speed v. Hosemann, 2011-CA-01106-SCT (Miss. 2011).

283. *See id.* at 402-03; WATERS, *supra* note 23, at 242.

284. Proposed Initiative Measure No. 20, 1999-CA-00912-SCT (¶ 20).

285. MASS. CONST. art. XLVIII, pt. II, § 2.

286. *See* 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION, 1917–1918, *supra* note 262, at 767.

287. *Id.*

288. *See id.* at 790.

289. *Id.* It is worth noting that Massachusetts has an appointed, not an elected judiciary. *See* MASS. CONST. ch. III, art. I. *See also* MASS. CONST. pt. I, art. XXIX.

initiative process itself.[290] Opponents of the initiative in Massachusetts to limit marriage to a man and a woman brought various challenges, including that the initiative violated the subject-matter exclusion related to decisions reversing a particular judicial decision.[291] The Supreme Judicial Court had previously decided in *Goodridge v. Department of Public Health*[292] that there was no rational basis under the Massachusetts Constitution to limit marriage to a man and woman.[293] In *Schulman v. Attorney General*,[294] the Court concluded that "[t]he 'reversal of a judicial decision' has a specialized meaning in our jurisprudence," that is, "to vacate or to set aside the decision in a particular case."[295] In contrast, "The 'overruling' of the prospective application of a court decision, by amending the Constitution . . . is fundamentally different."[296] The Court noted that a broader interpretation of this subject-matter exclusion would effectively cause every law construed or applied in a court decision to be insulated from amendment by the initiative, sharply diminishing the scope of the initiative.[297] The Court's interpretation of the meaning of reversal of a judicial decision was designed to reflect the dual purpose of the framers of the Massachusetts initiative provision: to protect the initiative power as well as the independence of the judiciary.[298]

IV. SUBSTANTIVE STATE CONSTITUTIONAL REVIEW

In addition to evaluating procedural requirements and subject-matter prohibitions, state courts are being asked to perform substantive state constitutional analysis in pre-election challenges to initiative petitions.[299] This analysis is more complicated than determining whether procedural or subject-matter restrictions contained within an initiative provision are being violated.[300] It requires a determination of whether the substance of an initiative provision violates another state constitutional provision as presently interpreted.[301] This type of substantive analysis can be further divided into substantive analysis required by the initiative provision itself and substantive analysis of state constitutional provisions separate and apart from the

290. *See* DUBOIS & FEENEY, *supra* note 59, at 84.
291. *See* Schulman v. Att'y Gen., 850 N.E.2d 505, 506-07 (Mass. 2006).
292. 798 N.E.2d 941 (Mass. 2003).
293. *Id.* at 968.
294. 850 N.E.2d 505.
295. *Id.* at 507.
296. *Id.*
297. *See id.* at 509-10; Mazzone v. Att'y Gen., 736 N.E.2d 358, 369-70 (Mass. 2000).
298. *Schulman*, 850 N.E.2d at 509-11; *Mazzone*, 736 N.E.2d at 369-70.
299. *See generally* Gordon & Magleby, *supra* note 55, at 302, 304 nn.48-49.
300. *See id.* at 302, 316-17.
301. *Cf. id.* at 302, 317.

initiative provision.[302] This distinction can be seen by examining the Massachusetts Constitution and case law.

Article 48, the initiative provision in the state Constitution, provides:

> No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.[303]

The Massachusetts Supreme Judicial Court has had to deal with pre-election challenges to initiatives on the basis that they conflict with one or more of these rights.[304]

Performing this type of complicated inconsistency analysis under the time pressures of the initiative process is a difficult task.[305] Free speech, search and seizure, and takings cases are notoriously knotty areas of constitutional law. Nevertheless, as such analysis is called for in the initiative provision itself, we conclude that it should be performed before the election.[306] Indeed, the Supreme Judicial Court has undertaken this analysis prior to elections on initiatives.[307] The stakes here are high: errors of interpretation will remove an initiative from the ballot. However, the people previously expressed their will that these "subjects" be off limits in the initiative process.[308] Where the initiative provision requires substantive analysis, and

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302. *Cf. id.* at 316-17.

303. MASS. CONST. art. XLVIII, pt. II, § 2.

304. *See, e.g.*, Yankee Atomic Electric Co. v. Sec'y of the Commonwealth, 526 N.E.2d 1246, 1248-51 (Mass. 1988) (holding that initiative to ban nuclear power generation did not necessarily constitute taking without compensation); Bowe v. Sec'y of the Commonwealth, 69 N.E.2d 115, 128-31 (Mass. 1946) (striking down initiative banning unions from political activity as violating rights to free speech, press, and assembly, but upholding initiative requiring unions to file reports of officers' salaries against similar challenges).

305. *See* Gordon & Magleby, *supra* note 55, at 302, 307-08.

306. *See Bowe*, 69 N.E.2d at 127-28 (citations omitted) ("The people for their own protection have provided that the initiative shall not be employed with respect to certain matters. Unless the courts had power to enforce those exclusions, they would be futile, and the people could be harassed by measures of a kind that they had solemnly declared they would not consider. We think that the question whether an initiative petition relates to an excluded matter is a justiciable question.").

307. *See* Op. of the Justices to the Senate, 595 N.E.2d 292, 295-301 (Mass. 1992) (interpreting term limit provisions not to be inconsistent with the free elections provision in advisory opinion). *See generally* Gordon & Magleby, *supra* note 55, at 304-13, 317 (arguing that substantive challenges should be heard only after the election and that this provision of the Massachusetts constitution is a substantive constraint rather than a subject-matter restriction suitable for pre-election review).

308. *Bowe*, 69 N.E.2d at 127-28.

the substantive analysis identifies a proposal as subject matter excluded from the initiative process, that proposal should be excluded pre-election.[309]

Massachusetts and other states have also flirted with another type of substantive review that raises greater difficulties and conceptual questions. In a concurring opinion addressing an initiative seeking to redefine marriage as between one man and one woman,[310] Justice Greaney asked the question whether the "initiative procedure may be used to add a constitutional provision that purposefully discriminates against an oppressed and disfavored minority of our citizens in direct contravention of the principles of liberty and equality protected by [Article] 1 of the Massachusetts Declaration of Rights."[311] He opined further that such a provision would look "starkly out of place in the Adams Constitution, when compared with the document's elegantly stated, and constitutionally defined, protections of liberty, equality, tolerance, and the access of all citizens to equal rights and benefits."[312]

He did not, however, contend that this type of analysis should be performed pre-election.[313] Nor would there have been support for this interpretation in the initiative provision itself, as it did not include Article 1 or equal protection of the laws in the subjects that could not be addressed by initiative.[314] Further complicating matters, if the initiative were properly passed according to the initiative amendment process, there is the obvious question of how a state constitutional amendment could be said to violate the state constitution.[315] The usual rules of state constitutional interpretation would likely deem later, more specific amendments to a state constitution to be controlling over earlier, more general provisions.[316] This is not to suggest

309. *See id.*

310. *Cf.* Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) ("We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.").

311. Schulman v. Att'y Gen., 850 N.E.2d 505, 512 (Mass. 2006) (Greaney, J., concurring).

312. *Id.* at 512-13.

313. *See id.* at 512 & n.2; *Bowe*, 69 N.E.2d at 125-27 (holding that substantive state and federal constitutional challenges cannot be heard before adoption of an initiative).

314. *See* MASS. CONST. art. XLVIII, pt. II, § 2.

315. *See* Sasha Volokh, *Who Is Sovereign in Massachusetts—the Justices or the People?*, VOLOKH CONSPIRACY (July 10, 2006, 6:38 PM), http://www.volokh.com/2006/07/10/who-is-sovereign-in-massachusetts-the-justices-or-the-people/.

316. *See* M. Lederman, Comment to *Who Is Sovereign in Massachusetts—the Justices or the People?*, VOLOKH CONSPIRACY (July 11, 2006, 12:18 AM), http://www.volokh.com/2006/07/10/who-is-sovereign-in-massachusetts-the-justices-or-the-people/#comment-524075584; Eugene Volokh, *Laurence Tribe Responds About the Massachusetts Justices' Concurrence*, VOLOKH CONSPIRACY (July 12, 2006, 12:17 AM), http://www.volokh.com/2006/07/12/laurence-tribe-responds-about-the-massachusetts-justices-concurrence/.

that the provision could not be contested at all.[317] Obviously such an amendment could be challenged, at least post-election, as violating federal constitutional law.[318] Indeed, Justice Greaney framed the marriage initiative as presenting a *Romer v. Evans*[319] problem.[320] But to challenge a properly passed state constitutional amendment on grounds that it generally violated the state constitution as it existed prior to amendment would be novel, to say the least.[321] Such a claim would present questions too difficult and fundamental to be resolved before the election.

V. SUBSTANTIVE FEDERAL CONSTITUTIONAL REVIEW

State courts and scholars have struggled with whether a court should keep an initiative off the ballot because it violates the federal Constitution.[322] In an influential 1989 article, Gordon and Magleby argued that

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317. *See Schulman*, 850 N.E.2d at 512 (Greaney, J., concurring) ("If the initiative is approved by the Legislature and ultimately adopted, there will be time enough, if an appropriate lawsuit is brought, for this court to resolve the question whether our Constitution can be home to provisions that are apparently mutually inconsistent and irreconcilable.").

318. *See* Perry v. Brown, 671 F.3d 1052, 1068 (9th Cir.), *reh'g en banc denied*, 681 F.3d 1065, 1066 (9th Cir. 2012), *cert. granted.* Hollingsworth v. Perry, No. 12-144, 2012 WL 3109489 (9th Cir. July 30, 2012).

319. 517 U.S. 620 (1996). In *Romer*, a state constitutional amendment would have prevented the State of Colorado and its subdivisions from adopting or enforcing any anti-discrimination provisions protecting homosexuals. *Id.* at 624. The Supreme Court held that this amendment violated the Equal Protection Clause because it singled out an identified group to deny it the protections allowed to others, and did so with no rational explanation beyond discriminatory animus. *Id.* at 631-32, 635-36.

320. *Schulman*, 850 N.E.2d at 513 n.3.

321. Statutes implementing such a constitutional amendment might, however, be subject to challenge if they were found to violate other provisions of the constitution. This occurred in Massachusetts in regard to the death penalty. In *District Attorney for the Suffolk District v. Watson*, the Supreme Judicial Court declared the death penalty to violate Article 26 of the Massachusetts Constitution. 411 N.E.2d 1274, 1286-87 (Mass. 1980). Article 26 is the counterpart to the cruel and unusual punishment provision of the United States Constitution. *See* MASS. CONST. art. XXVI, pt. I. A constitutional amendment then passed, which stated: "No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The [legislature] may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law . . . ." MASS. CONST. art. CXVI. Thereafter, the Supreme Judicial Court declared the new death penalty statute unconstitutional because it interpreted the statute as imposing the death penalty only on those who exercised their right to a jury trial and not those who pleaded guilty. Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 124 (Mass. 1984).

322. *See, e.g.*, Duggan v. Beermann, 544 N.W.2d 68, 76-77 (Neb. 1996); Stumpf v. Lau, 839 P.2d 120, 122-23 (Nev. 1992), *overruled by* Herbst Gaming, Inc. v. Heller, 141 P.3d 1224 (Nev. 2006); JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 105-07 (1989); Michael J. Farrell, Note, *The Judiciary and Popular*

courts should refrain from such substantive review until after the election, with a possible exception where irreparable injury such as widespread violence is threatened.[323] We conclude that an additional category of initiatives should be subjected to scrutiny before the election. Courts should be willing to strike an initiative amendment if it plainly violates the federal Constitution as defined by well-established Supreme Court precedent.[324]

Some courts have adopted or at least anticipated this approach already. A court struck down an initiative attempting to establish term limits for members of Congress, holding it clearly unconstitutional[325] even before the Supreme Court decided that term limits violated Article I of the federal Constitution.[326] At least one court struck down an abortion initiative that was inconsistent with the Supreme Court decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[327] Courts have also withheld from the ballot initiatives attempting to compel the proposal or adoption of an amendment to the federal Constitution,[328] contrary to the amendment process of Article V.[329]

In discussing their reasons for deciding pre-election challenges to initiative amendments, the courts have also listed hypothetical examples of initiatives they would consider patently unconstitutional. These include initiatives establishing an official religion,[330] mandating school segregation based on race,[331] abolishing the state legislature,[332] and limiting eligibility for

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Democracy: Should Courts Review Ballot Measures Prior to Elections?, 53 FORDHAM L. REV. 919, 930-35 (1985).

323. *See* Gordon & Magleby, *supra* note 55, at 304-13, 318-20.

324. *See, e.g.*, *In re* Initiative Petition No. 349, 838 P.2d 1, 12 (Okla. 1992). The same court had occasion to reaffirm its prior holding in striking a so-called "personhood" amendment from the ballot twenty years later. *See In re* Initiative Petition No. 395, 2012 OK 40, 286 P.3d 637 (Okla. 2012).

325. *See Stumpf*, 839 P.2d at 122-23; *cf. In re* Initiative Petition No. 360, 879 P.2d 810, 813-14 (Okla. 1994) (declining to decide question pre-election because the constitutionality of term limits was not sufficiently clear and the United States Supreme Court was expected to rule on the question imminently). We endorse the cautious approach taken by the Supreme Court of Oklahoma on this issue.

326. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837-38 (1995).

327. *See In re* Initiative Petition No. 349, 838 P.2d at 4.

328. *See* Donovan v. Priest, 931 S.W.2d 119, 128 (Ark. 1996); *In re* Initiative Petition No. 364, 930 P.2d 186, 191 (Okla. 1996); State *ex rel.* Harper v. Waltermire, 691 P.2d 826, 831 (Mont. 1984); Am. Fed'n of Labor v. Eu, 686 P.2d 609, 622 (Cal. 1984).

329. *See In re Initiative Petition No. 364*, 930 P.2d at 191-92 (discussing Hawke v. Smith, 253 U.S. 221 (1920) and Leser v. Garnett, 258 U.S. 130 (1922)).

330. *See* Hessey v. Burden, 615 A.2d 562, 574 (D.C. 1992).

331. *See* Kodiak Island Borough v. Mahoney, 71 P.3d 896, 900 n.22 (Alaska 2003).

332. *See In re* Advisory Op. to Att'y Gen.—Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1022 (Fla. 1994) (Kogan, J., concurring) (arguing that such an initiative would violate Art. IV, § 4 of the federal Constitution as well as the state single-subject and anti-revision requirements).

state employment to Anglo-Saxon males.[333] These extreme proposals would so clearly contravene the federal constitution that they should not be presented to the voters.[334]

Except in cases of clear unconstitutionality, there are strong reasons for courts to defer ruling on the substance of initiatives until after an election. Unlike procedural and subject-matter restrictions, limits imposed by the federal Constitution are external to the initiative provisions that the state judiciary is charged with enforcing.[335] The state judiciary is also not the ultimate authority on the meaning of the federal Constitution;[336] that is the U.S. Supreme Court's responsibility.[337] As the state courts are not the final interpreters of the meaning of the federal Constitution, they are not, in the words of Justice Jackson, "infallible."[338] Also, the consequences of misinterpreting the federal Constitution are enormous for pre-election review.[339] If a state court misinterprets the federal Constitution and strikes an initiative from the ballot erroneously, it has interfered with the right of the people to effect constitutional change.[340] The initiative process needs to begin again. Thus, state courts should prevent the initiative process from going forward only when the federal prohibition is crystal clear.[341]

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333. *See id.* at 1023 (Kogan, J., concurring) (noting, however, that "this Court could not remove this hypothetical initiative from a vote solely because it would be invalid under the federal Constitution" given the limited scope of pre-election review).

334. *See* Utz v. City of Newport, 252 S.W.2d 434, 437 (Ky. 1952) ("The court ought not to compel the doing of a vain thing and the useless spending of public money.").

335. *See* Alaska Action Ctr. v. Municipality of Anchorage, 84 P.3d 989, 992 (Alaska 2004) ("[T]hese restrictions were devised to prevent certain questions from going before the electorate at all . . . ."); Bowe v. Sec'y of the Commonwealth, 69 N.E.2d 115, 125-27 (Mass. 1946).

336. *See In re* Initiative Petition No. 349, 838 P.2d 1, 7 (Okla. 1992) ("Because the United States Supreme Court has spoken, this Court is not free to impose its own view of the law as it pertains to the competing interests involved.").

337. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400-01 (1819).

338. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) ("We are not final because we are infallible, but we are infallible only because we are final.").

339. *See In re Initiative Petition No. 349*, 838 P.2d at 12 (footnotes omitted) ("The right of the initiative is precious and it is one which we are zealous to preserve to the fullest measure of the spirit and the letter of the law. All doubt as to the construction of pertinent provisions is resolved in favor of the initiative. However, the right of the initiative is not absolute. . . . [A petition must be stricken if it is] incontrovertibly clear that the petition could not withstand a constitutional challenge.").

340. *See* GRODIN, *supra* note 322, at 106 ("A court that intervenes to keep a measure off the ballot is perceived as obstructing the expression of the popular will. In addition, if the measure is highly controversial, . . . supporters will charge the court with acting for 'political' reasons.").

341. *See* Alaska Action Ctr. v. Municipality of Anchorage, 84 P.3d 989, 992 (Alaska 2004) (explaining that substantive pre-election challenges may only succeed if "'controlling authority' leaves no room for argument about [a proposal's] unconstitutionality").

Patently unconstitutional initiatives present a different set of concerns from other initiatives. There are obvious reasons not to allow such an initiative to proceed to an election. They are costly in terms of time, money, and effort, thereby wasting limited state resources.[342] They are also often divisive: extreme examples include desegregation cases of the late 1960s, where anti-fair housing initiatives provoked racial tension and riots.[343] More recently, initiatives proposing restrictions on abortion have inflamed passions on both sides even when it is clear that they could have no effect under controlling Supreme Court precedent.[344] Furthermore,

> The presence of an invalid measure on the ballot steals attention, time and money from [any] valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.[345]

Allowing votes on such initiatives, and then overturning them post-election, thereby breeds confusion and cynicism on the part of the electorate, and also resentment of the judiciary.[346]

Nonetheless, only a few courts have been willing to keep even "clearly" or "palpably" unconstitutional initiatives off the ballot.[347] A majority of courts to decide this issue have refused to engage in substantive federal con-

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342. *See* Legislature v. Deukmejian, 669 P.2d 17, 21 (Cal. 1983) (citing estimated costs of $15 million to conduct election for invalid initiative); Coal. for Political Honesty v. State Bd. of Elections, 359 N.E.2d 138, 142 (Ill. 1976) (observing estimated costs of $1.75 million just to determine sufficiency of petition and signatures).

343. *See generally* Otey v. Common Council of Milwaukee, 281 F. Supp. 264 (E.D. Wisc. 1968); Holmes v. Leadbetter, 294 F. Supp. 991 (E.D. Mich. 1968).

344. *See, e.g.*, Erik Eckholm, *Voters in Mississippi to Weigh Amendment on Conception As the Start of Life*, N.Y. TIMES, October 26, 2011, at A16 (reflecting varying assessments of such an initiative as "transformative," "a dangerous intrusion of criminal law into medical care," "extreme," "an inspired moral leap," and "reckless"); Mississippians for Healthy Families, "Why No on 26," http://www.votenoon26.org/content/why-no-26 ("[An anti-abortion initiative] would force the victim of rape or incest to carry a pregnancy caused by her attacker, forcing her to relive the horror of her attack."); Brad Prewitt, *Why Mississippi Should Vote YES! on Initiative 26*, PRO-LIFE MISS. (Aug. 2011), *available at* http://prolifemississippi.org/newsletters/2011AugustNewsletter.pdf ("Nearly forty years have passed since Roe and the abomination of abortion that followed." "[Many lives] are lost to irresponsible, embryo-destroying experimentation, such as cloning.").

345. Am. Fed'n of Labor v. Eu, 686 P.2d 609, 615 (Cal. 1984).

346. *See* Senate of Cal. v. Jones, 988 P.2d 1089, 1096-97 (Cal. 1999); NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 30.

347. *See* Stumpf v. Lau, 839 P.2d 120, 122-23 (Nev. 1992); *In re* Initiative Petition No. 360, 879 P.2d 810, 813-14 (Okla. 1994); *In re* Initiative Petition No. 349, 838 P.2d 1, 12 (Okla. 1992); Donovan v. Priest, 931 S.W.2d 119, 128 (Ark. 1996); *In re* Initiative Petition No. 364, 930 P.2d 186, 191 (Okla. 1996); State *ex rel.* Harper v. Waltermire, 691 P.2d 826, 831 (Mont. 1984); Am. Fed'n of Labor v. Eu, 686 P.2d 609, 622 (Cal. 1984).

stitutional pre-election review.[348] Courts have sharply split[349] and sometimes reversed course[350] on whether and how to conduct such review.

State courts declining to decide an initiative's constitutionality before the election frequently cite factors similar to those identified by federal courts in refusing to issue advisory opinions.[351] Some state that the judicial function is ill-suited to resolve abstract questions without a concrete factual basis, particularly when there may not be sufficient time, money, or inclination by the parties before the court to brief the relevant issues.[352] Judicial restraint and judicial economy also suggest to many courts that they should wait to decide potentially difficult constitutional issues until absolutely necessary.[353] A proposal's defeat at the ballot box usually ends the lawsuit and renders its constitutionality moot;[354] ripeness is therefore a significant concern.[355] Finally, some courts draw on separation of powers, analogizing the pre-election review of an initiative to review of a law before it is passed by the legislature.[356]

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348. *See, e.g.*, Hughes v. Hosemann, 2010-CA-01949-SCT (¶¶ 4-17) (Miss. 2011); League of Ariz. Cities & Towns v. Brewer, 146 P.3d 58, 60-61 (Ariz. 2006); Herbst Gaming, Inc. v. Heller, 141 P.3d 1224, 1229-31 (Nev. 2006); Duggan v. Beermann, 544 N.W.2d 68, 76 (Neb. 1996); Plugge v. McCuen, 841 S.W.2d 139, 142-43 (Ark. 1992); Advisory Op. to the Att'y Gen.—Ltd. Political Terms in Certain Elective Offices, 592 So. 2d 225, 226-27 (Fla. 1991); Bowe v. Sec'y of the Commonwealth, 69 N.E.2d 115, 125-27 (Mass. 1946).

349. *See, e.g.*, *In re* Legislative Referendum No. 334, 2004 OK 75, ¶ 5 n.9, 107 P.3d 556 (Opala, J., concurring) (citing over twenty years' worth of concurrences and dissents on this issue).

350. *Compare* Stumpf v. Lau, 839 P.2d 120, 123 (Nev. 1992) (striking initiative from ballot as violating Federal constitution), *and In re* Proposed Initiative Measure No. 20, 1999-CA-00912-SCT (¶¶ 15-19) (Miss. 2000) (approving substantive pre-election review), *with Herbst Gaming, Inc.*, 141 P.3d at 1229-31 (overruling *Stumpf* and holding that substantive review must occur after the election), *and Hughes*, 2010-CA-01949-SCT (¶¶ 15-17) (repudiating substantive pre-election review).

351. *See generally* Gordon & Magleby, *supra* note 55, at 304-11.

352. *See id.* at 316 n.121 (citing cases where courts refused to hear pre-election challenges due to insufficient time before the election).

353. *See, e.g.*, Winkle v. City of Tucson, 949 P.2d 502, 507 (Ariz. 1997); State *ex rel.* Dahl v. Lange, 661 S.W.2d 7, 8 (Mo. 1983).

354. *See* GRODIN, *supra* note 322, at 106 ("[T]here is no question that a court that undertakes to block voting on an initiative runs an institutional risk. Whether that risk is any less if the court waits until after the election and then declares the initiative invalid is another matter; but of course there is the possibility that the initiative will not pass, in which instance the court will not have to decide the issue at all.").

355. *See* Gordon & Magleby, *supra* note 55, at 309-11; Hessey v. Burden, 615 A.2d 562, 572-73 (D.C. 1992) (citing cases rejecting pre-election challenges on ripeness grounds).

356. *See, e.g.*, League of Ariz. Cities & Towns v. Brewer, 146 P.3d 58, 60-61 (Ariz. 2006). An initiative, however, is on different footing from a bill before the legislature because a legislative bill can be amended before passage, whereas an initiative amendment's text is finalized well before the election. *Cf. In re* Initiative Petition No. 349, 838 P.2d 1, 11 (Okla. 1992). In addition, the legislature is charged with enforcing its own procedures and rules, whereas no actor besides the courts has the authority to ensure that the initiative pro-

However, a facial challenge to an initiative on grounds of patent unconstitutionality presents a pure issue of law,[357] which judges often address in the normal course of judicial business.[358] Courts that entertain substantive pre-election challenges are therefore willing to remove an initiative where its unconstitutionality is clear and straightforward, as when the United States Supreme Court has recently ruled on the issue.[359] Judicial economy is not served by delay if a constitutional infirmity is obvious at the outset, yet a second set of challenges must make its way through the courts if the initiative passes.[360] And if the initiative would take effect immediately or within a short time period, the court might be forced into expedited decision-making anyway.[361] Ripeness concerns and constitutional avoidance are premised on the idea that no injury can occur before a proposal takes effect, but in at least some unconstitutional initiatives (such as those targeting minorities),[362] the election itself can cause harm by providing a focus for bigotry and intolerance.[363] Also, as explained above, allowing an invalid initiative to remain on the ballot requires state and local entities to spend money, often signifi-

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ceeds as intended. *See* Paisner v. Att'y Gen., 458 N.E.2d 734, 738-40 (Mass. 1983); Gordon & Magleby, *supra* note 55, at 315.

357. *Cf.* Stumpf v. Lau, 839 P.2d 120, 123 (Nev. 1992) (distinguishing a prior case allowing an initiative to proceed because it "arguably might have been applied in a constitutional manner").

358. *See generally, e.g.*, FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56.

359. *See* In re *Initiative Petition No. 349*, 838 P.2d at 5.

360. *See id.* at 12 ("The utilization of pre-submission constitutional scrutiny guarantees that Oklahomans are neither 'cut off at the pass' nor engaged in a game of 'Kings-X' after they have exercised their most precious right—the right to vote. . . . [I]t would be a disservice . . . to the citizens of this state to hold an election [on an initiative] which could not withstand the immediate . . . challenge which would be bound to follow. At that time, this Court would be forced to declare the enacted proposition unconstitutional."); Am. Fed'n of Labor v. Eu, 686 P.2d 609, 615 (Cal. 1984) ("[A]n ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.").

361. *See Eu*, 686 P.2d at 615 n.10 ("[If the initiative passed, it] would be possible for petitioners to file a petition for mandate and seek a stay . . . . But one usual argument for postelection review—that the court will have more time to consider the issues and decide the case—loses some force when the court will have to act on an application for provisional relief within a very limited time period following the election.").

362. *See generally* Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1271-91 (2008) (discussing initiatives disadvantaging racial minorities and immigrants over the past century).

363. *See, e.g.*, Oyama v. California, 332 U.S. 633, 650-62 (1948) (Murphy, J., concurring) (discussing racist anti-Japanese campaign leading to passage of 1920 California initiative banning land ownership by certain aliens). Similar bills were defeated in the legislature several times through the personal intervention of President Theodore Roosevelt before a more limited bill passed in 1913. *See id.* at 654-55. During the initiative campaign on the more expansive alien land law, "[t]he fires of racial animosity were . . . rekindled" to such an extent that war was threatened between the United States and Japan. *Id.* at 658-59.

cant sums, in the process of conducting the election.[364] Why spend taxpayer money to hold an election, and have supporters and opponents expend time and effort influencing the vote, if the vote will be immediately cast out on constitutional grounds?[365] The prudential considerations leading many courts to shy away from advisory opinions are of diminished force in the limited set of cases where the critical constitutional issue has already been decided as a matter of law.[366] Some courts have decided, on policy or free speech grounds, that voters should be allowed to express their will on an initiative even if it would ultimately be found unconstitutional.[367] However, the initiative is generally not intended to be a mere straw poll.[368] Most states restrict the initiative to laws or constitutional amendments, rather than non-binding ballot issues.[369] If a petition can have no practical effect, it falls outside the scope of the initiative process.[370] For instance, a Nebraska initiative petition that would have required the governor to urge the United States and the Soviet Union to engage in mutual nuclear disarmament was deemed "a nonbinding expression of public opinion and not a proper subject for the

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364. *See, e.g*, Legislature v. Deukmejian, 669 P.2d 17, 21 (Cal. 1983); Coal. for Political Honesty v. State Bd. of Elections, 359 N.E.2d 138, 142 (Ill. 1976).

365. *See In re Initiative Petition No. 349*, 838 P.2d at 12 ("[A]t best, [an anti-abortion initiative] would serve as an expensive, non-binding public opinion poll. Were we to allow the initiative to be submitted to the people, a costly, fruitless, and useless election would take place.").

366. *See* Wyo. Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 287-88 (Wyo. 1994) ("Because the initiative at issue is contrary to the ruling of the Supreme Court of the United States in *Roe*, recently reaffirmed in *Casey*, logic dictates that a justiciable controversy is present in the same way that one would be present if the language of the constitution were challenged directly. A ruling by this court on such a constitutional issue should not be perceived as simply an advisory opinion. The dynamics of the situation are different from that in which the constitutionality of an initiative proposition has not been previously adjudicated."). Even if decisions in these pre-election challenges were to be considered advisory opinions, the high courts of a significant number of states have the power to issue such opinions. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845-52 (2001) (identifying advisory opinions in at least twelve states).

367. *See, e.g.*, Coppernoll v. Reed, 119 P.3d 318, 322 (Wash. 2005); Greater Las Vegas Chamber of Commerce v. Del Papa, 802 P.2d 1280, 1282 (Nev. 1990).

368. *See* State *ex rel.* Brant v. Beermann, 350 N.W.2d 18, 22 (Neb. 1984) ("Government should be spared the burdensome cost of election machinery as a straw vote on the electorate's opinions, sentiments, or attitudes on public issues.").

369. *See, e.g.*, Paisner v. Att'y Gen., 458 N.E.2d 734, 738-40 (Mass. 1983) (initiative attempting to set internal rules of legislature kept off ballot because it did not propose a "law"); *see also* Phila. II v. Gregoire, 911 P.2d 389, 394-95 (Wash. 1996) (attempt to change federal law through state initiative process not valid exercise of state legislative power). *But see* 10 ILL. COMP. STAT. 5/28 (2011) (providing for advisory questions through the initiative).

370. *See Beermann*, 350 N.W.2d at 21-22 and cases cited; *In re* Initiative Petition No. 364, 930 P.2d 186, 197 (Okla. 1996) (Opala, J., concurring); Am. Fed'n of Labor v. Eu, 686 P.2d 609, 614-15, 622-28 (Cal. 1984).

initiative."[371] There is nothing preventing a state from permitting such advisory initiatives, but in states that do not allow them, a petition is not worthy of the initiative process if it could have no effect consistent with the federal Constitution.

A critical element of all the states' initiative procedures is a desire to keep the electorate honestly and fully informed of the nature and consequences of their votes.[372] Courts and commentators have largely overlooked the informational problems of having courts delay a determination of clear constitutional issues, although a few courts have remarked on it.[373] Voters should not be asked to vote on measures that state judges understand to clearly violate the federal Constitution.[374] Delaying such a decision until after the election will inevitably mislead a number of voters into believing that the measure is constitutional, or at least arguably constitutional.[375] Otherwise, "their votes, so eagerly solicited, are ultimately meaningless acts in an elaborate charade."[376]

Some have tried to use the initiative process to amend the federal Constitution, either explicitly, by compelling the legislature to propose or support an amendment,[377] or implicitly, by setting up a test case for the Supreme Court after a change in personnel.[378] Courts should be wary of test cases proposing clearly unconstitutional measures. Article V of the federal Constitution prescribes the procedure for amendment, and places the responsibility for calling for conventions and ratifying amendments solely with state legislatures.[379] As a matter of federal law, therefore, the initiative

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371. *Beermann*, 350 N.W.2d at 22-23.

372. *See generally* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 44-51.

373. *See In re* Initiative Petition No. 349, 838 P.2d 1, 9 (Okla. 1992); *Eu*, 686 P.2d at 629.

374. *See In re Initiative Petition No. 349*, 838 P.2d at 12 ("The pragmatic approach to the consideration of constitutional issues . . . strengthens rather than impairs the initiative process because voters are assured that their vote on a state question is meaningful.").

375. *See* Stumpf v. Lau, 839 P.2d 120, 126 (Nev. 1992) ("The most harm would be done, however, if the measure passed in two elections, and this court were then asked in some later legal maneuver to tell the voters that their vote was of no effect and that we knew all along that they were voting on a measure that was contrary to the provisions of the United States Constitution . . . . [T]he people of this state would be understandably and justifiably outraged and enraged at such irresponsibility on the part of the highest court in this state."); NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 34, at 30 ("[Post-election] [c]hallenges anger citizens, who often may assume that an initiative would not have made it to the ballot if it were not constitutional.").

376. In re Initiative Petition No. 349, 838 P.2d at 11.

377. *See In re* Initiative Petition No. 364, 930 P.2d 186, 189-91 (Okla. 1996); *Eu*, 686 P.2d at 611-14.

378. *See In re* Initiative Petition No. 349, 838 P.2d at 8.

379. *See* U.S. CONST. art. V.

cannot be used to bypass the legislature in this instance.[380] Several courts faced with controversial issues like abortion, term limits, and a balanced budget amendment have affirmed this principle and refused to allow votes purporting to force the hand of the legislatures.[381] At least one court has also rejected the "test case" tactic when the Supreme Court had recently settled the law on the relevant issue.[382] Because attempts to change federal constitutional law via state constitutional amendments are preempted, state courts should not permit them.

The scope of substantive pre-election review should, however, be carefully limited. Prime cases for invalidating initiatives before the election are where the Supreme Court has recently spoken directly to the issue and where there is no room for a limiting interpretation or application to prevent violation of the Constitution.[383] The court should not strike down an initiative before the election where federal law is ambiguous.[384] When there is room for an interpretation that would uphold all or a substantial and severable part of an initiative, the court should err on the side of allowing the initiative to proceed.[385] After all, challenges to the Affordable Care Act based on the Commerce Clause were derided as frivolous only a few years ago,[386] yet garnered the support of a majority of the Supreme Court.[387] State courts must be prudent if there is a plausible argument to be made that the change

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380. *See* Leser v. Garnett, 258 U.S. 130, 137 (1922); Hawke v. Smith, 253 U.S. 221, 227 (1920).

381. *See In re Initiative Petition No. 364*, 930 P.2d at 191-93; *Eu*, 686 P.2d at 617-22; State v. Waltermire, 691 P.2d 826, 829-31 (Mont. 1984).

382. *See In re* Initiative Petition No. 349, 838 P.2d at 10-11, 11 n.24.

383. *See, e.g.*, Duggan v. Beermann, 544 N.W.2d 68 (Neb. 1996); *In re Initiative Petition No. 364*, 930 P.2d 186; *In re Initiative Petition No. 349*, 838 P.2d 1.

384. *See In re* Initiative Petition No. 360, 879 P.2d 810, 814-15 (Okla. 1994) ("[W]e are unconvinced . . . that the constitutional infirmities lodged by protestants are clear or manifest . . . .").

385. In the interests of full information, it would be helpful for courts in such situations to articulate (even in dictum) any substantial constitutional reservations and for officials and interested parties to bring those concerns to the attention of the voters. *See* Plugge v. McCuen, 841 S.W.2d 139, 143 (Ark. 1992) ("[V]oters should be aware that their votes for or against this measure may ultimately have value only as an expression of public sentiment on the subject."); Stumpf v. Lau, 839 P.2d 120, 132 (Nev. 1992) (Steffen, J., dissenting) (suggesting printing a statement to this effect on the ballot rather than striking the initiative entirely); *but cf.* FLA. CONST. art. IV, § 10; FLA. STAT. ANN. § 16.061 (West 2009) (requiring Attorney General to obtain advisory opinion from state Supreme Court on validity of initiatives receiving 10% of the required number of signatures).

386. *See generally* Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012, 2:55 PM), http://www.theatlantic.com/politics/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/.

387. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586-91 (2012) (opinion of Roberts, C.J.); *id.* at 2644-48 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

is consistent with the Constitution. For instance, the Supreme Court of Oklahoma might have permitted an anti-abortion initiative when the most recent Supreme Court precedents called into question the underpinnings of *Roe v. Wade*,[388] but struck it from the ballot once *Planned Parenthood of Southeastern Pennsylvania v. Casey*[389] was decided.[390] Unless a constitutional infirmity is obvious on the face of the initiative and requires no factual assumptions to resolve, a court should wait to rule on substantive validity in the normal course, if the initiative passes.[391] The interest of the people is not served if an initiative is struck down too hastily, without due consideration or an adequate factual record.

VI. THE POLITICAL REALITIES OF RIGOROUS PRE-ELECTION REVIEW

According to a number of commentators, "[S]tate courts and even federal courts are extremely reluctant to invalidate or narrow amendments that have garnered majority support."[392] Interfering with the will of the people is never a popular task, particularly for an elected judiciary.[393] Given the high percentage of state judges answerable to the electorate, this is understandable.[394] A proper pre-election review should not, however, present the same political or practical problems as post-election review.

First and foremost, pre-election review occurs before the people have spoken.[395] On procedural questions, the judiciary is not precluding an election, but ensuring that the proper procedures have been followed prior to the election.[396] Furthermore, those procedural requirements are designed to make sure that the initiative process serves the people and not just the proponents of the proposal.[397] In rigorously enforcing the procedural and subject-matter requirements in the state constitution's initiative provision, the

388. 410 U.S. 113 (1973).

389. 505 U.S. 833 (1992).

390. *See In re* Initiative Petition No. 349, 838 P.2d 1, 4-8 (Okla. 1992).

391. *See In re* Initiative Petition No. 360, 879 P.2d 810, 814-15 (Okla. 1994).

392. Krislov & Katz, *supra* note 1, at 322; *see also* Eule, *supra* note 13, at 1545-47.

393. *See* GRODIN, *supra* note 322, at 105-06.

394. *See* Mark Kozlowski, *The Soul of an Elected Judge*, LEGAL TIMES (Aug. 9, 1999), http://www.brennancenter.org/content/resource/the_soul_of_an_elected_judge/ (suggesting that 82% of appellate judges and 87% of trial judges face some sort of election). *But cf.* Brief of the Conference of Chief Justices as *Amicus Curiae* in Support of Neither Party at *6 n.11, Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009) (No. 08-22), 2009 WL 45973 (indicating that 60% of appellate judges and 80% of trial judges face either a partisan or nonpartisan election).

395. *See* GRODIN, *supra* note 322, at 105-06 ("One might argue that . . . it would be better for the court to keep [a] measure off the ballot in the first place, if it 'knew' it was going to hold the measure unconstitutional, rather than expose the institution to the risk of having to decide the constitutional issue in the face of a popular mandate.").

396. *See* Gordon & Magleby, *supra* note 55, at 315.

397. *See id.* at 315-16.

state judiciary is therefore carrying out the will of the people as expressed in the initiative provision's past framing and present implementation.[398] The state judiciary is therefore able to defend both the state constitution and the people's right to initiate constitutional change.[399] Although the judiciary may arouse the fierce opposition of advocacy groups through pre-election review that requires proposals to be redone or corrected, and such ire is inevitably a significant concern for elected judges, pre-election review is different from overturning a popularly passed initiative.[400]

The proposed pre-election review for palpable violations of the federal constitution should also not be a political or practical problem for the state judiciary.[401] The only initiatives being excluded are those that have been clearly found to violate the federal Constitution as interpreted by the U.S. Supreme Court.[402] In these circumstances, public protest against the state judiciary would not be justified and would certainly be misdirected.[403]

CONCLUSION: MAKING THE INITIATIVE WORK FOR THE PEOPLE

Direct constitutional change by the people through initiative amendments can be unruly and unsettling, particularly in states pounded by recurrent storms of initiative activity. The solution, however, is not to wish the initiative amendment process away, because it will not go away.[404] Nor can we rely on a federal fix after the fact, because federal courts are only likely to reverse the initiative's ugliest outcomes, such as discrimination against

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398. *See* Bowe v. Sec'y of the Commonwealth, 69 N.E.2d 115, 127-28 (Mass. 1946). *But cf.* Douglas C. Michael, Comment, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CAL. L. REV. 1216, 1217, 1229, 1231-34 (1983).

399. *See In re* Initiative Petition No. 349, 838 P.2d 1, 9-12 (Okla. 1992).

400. *See* Mads Qvortrup, *The Courts v. the People: An Essay on Judicial Review of Initiatives*, *in* THE BATTLE OVER CITIZEN LAWMAKING, *supra* note 35, at 197, 205-06; GRODIN, *supra* note 322, at 105-06. For instance, three Florida judges recently won retention elections after voting to strike from the ballot a misleading constitutional amendment outlawing health care mandates, despite well-funded opposition campaigns. *See* Greg Allen, *Florida's New Battleground: The State Supreme Court*, NAT'L PUB. RADIO (Nov. 6, 2012, 3:20 AM), http://www.npr.org/2012/11/06/163232298/floridas-new-battleground-the-state-supreme-court; Aaron Deslatte, *Supreme Court Justices Cruise to Merit Retention Wins*, ORLANDO SENTINEL (Nov. 6, 2012, 10:17 PM), http://blogs.orlandosentinel.com/news_politics/2012/11/supreme-court-justices-cruise-to-merit-retention-wins.html.

401. Cf. Joseph R. Grodin, Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections, 61 S. CAL. L. REV. 1969, 1982 (1988).

402. *Cf.* Wyo. Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 287-88 (Wyo. 1994).

403. *Cf.* Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 736 (1994) (discussing need for independent state judiciary to enforce federal rights).

404. *See supra* Section I.C.

disfavored minorities.[405] Indeed, if the federal courts screen out or strictly scrutinize ordinary initiatives, as some commentators recommend, they will essentially subvert the people's ability to direct constitutional changes when they are dissatisfied with their representatives' efforts on their behalf.[406] Federal review cannot make the initiative process run as it was designed—by the people, for the people.[407] That is the responsibility of the state judiciary.[408] State judges' duties as guardians of the initiative process must be carried out vigorously before the elections for the initiative process to work properly.[409]

The state judiciary is charged with enforcing the important procedural and substantive limitations contained within the initiative process. Although the procedural requirements differ state by state, all require a significant demonstration of support for the initiative to proceed.[410] Most require the identification of sponsors and the clarification of the purpose of the initiative to render it comprehensible to the ordinary voter.[411] Many also limit the initiative to a single subject to ensure that the voters truly approve the entire proposal.[412] Others require financial and fiscal analyses.[413] The subject-matter limitations, which are less common but no less important when they are present, exclude matters that require legislative appropriations, reverse judicial decisions, or intrude on certain fundamental rights.[414] All of these exclusions and requirements should be enforced by the state judiciary before the election.[415]

Although substantive review is more controversial, pre-election review should screen out initiatives that clearly violate federal constitutional law as defined by United States Supreme Court precedent.[416] Such initiatives are pointless, expensive, and divisive.[417] They can also represent abuses of the initiative process by political parties or special interest groups seeking to influence other elections using unconstitutional proposals on hot-button issues.[418] Such a tactic relies on misleading voters into believing that initia-

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405. *See generally* Witte, *supra* note 48; *see, e.g.*, Romer v. Evans, 517 U.S. 620 (1996).

406. *See supra* notes 48–56, 175–76 and accompanying text. *Cf.* Charlow, *supra* note 42, at 527, 593-608, 625-30.

407. *See supra* notes 65–68 and accompanying text.

408. *See supra* notes 65–69 and accompanying text.

409. *See supra* notes 65–68 and accompanying text.

410. *See supra* notes 100–103, 110–11 and accompanying text.

411. *See supra* Subsections II.B.1–2.

412. *See supra* Section II.C.

413. *See supra* notes 89, 151–53, 177 and accompanying text.

414. *See supra* Part III.

415. *See supra* notes 65–69 and accompanying text.

416. *See supra* Part V.

417. *See supra* notes 342–46, 362–65 and accompanying text.

418. *Cf.* Kousser & McCubbins, *supra* note 36, at 969-80.

tives could be valid even though they contravene the paramount law. The integrity of the initiative is bolstered, not diminished, by striking these pointless propositions from the ballot.

These procedural and substantive limitations seek to correct or at least address weaknesses in the initiative amendment process itself: individual voters' limited attention spans and knowledge of government;[419] the financial and political power of advocacy groups; the dangers posed by factions in our society;[420] the initiative's dependence on simple up-or-down votes on unamendable propositions;[421] and the lack of formal deliberation or required prioritization in the initiative process.[422] Only through rigorous pre-election enforcement of those procedural and substantive requirements will the initiative process be kept within its constitutional bounds and in the service of the people, as opposed to the proponents of a particular amendment.

The state judiciary cannot just adopt a wait-and-see-what-happens-in-the-election approach, because non-enforcement of these requirements until after the election distorts the initiative process.[423] Well-funded proponents unchecked by the judiciary could push amendments onto the ballot without satisfying the necessary safeguards. Post-election review also pits the judiciary against the people's expressed constitutional choices, an unenviable position for a mostly elected judiciary. Pre-election review is different because the people as a whole have not spoken, and the judiciary is acting in defense of the initiative provisions and the right to informed decision making by the people.[424]

Of course, even this rigorous pre-election review by the state judiciary has its limitations. Poorly conceived and ill-considered constitutional initiatives will pass and cause lasting problems in the governance of our states. That being said, the people cannot be completely cut out of the process of initiating constitutional change in this country. In the immortal words of John Adams, who was certainly no lover of direct democracy, "[T]he people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter or totally change the same, when their protection, safety, prosperity and happiness require it."[425] At least in state government, through the initiative amendment process, and with the benefit of the careful review of the state as well as federal judiciary, that continues to be true.

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419. *See supra* notes 141–150, 227–230 and accompanying text.
420. *See supra* Section I.B.
421. *See supra* notes 225–233 and accompanying text.
422. *See supra* notes 62, 153, 261–62 and accompanying text.
423. *See* Michael, *supra* note 398, at 1231-33.
424. *See supra* Part VI.
425. MASS. CONST. art. VII, pt. I.