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Pre-Election Judicial Review of Initiatives and Referendums

*James D. Gordon III**
and
*David B. Magleby***

A lawsuit to strike an initiative or referendum from a ballot is one of the deadliest weapons in the arsenal of the measure's political opponents. With increasing frequency, opponents of ballot proposals are finding the weapon irresistible and are suing to stop elections. The legal challenges basically fall into three categories: (1) the measure, if passed, would be substantively invalid because it conflicts with a federal or state constitutional or statutory provision; (2) the procedural requirements for placing the measure on the ballot have not been met; and (3) the subject matter is not proper for direct legislation.

This Article argues that it is generally improper for courts to adjudicate pre-election challenges to a measure's substantive validity. Such pre-election review involves issuing an advisory opinion, violates ripeness requirements, undermines the policy of avoiding unnecessary constitutional questions, and constitutes unwarranted judicial interference with a legislative process. By contrast, this Article argues that pre-election review of challenges based on noncompliance with procedural requirements or subject matter limitations is proper. Such claims do not implicate the same level of justiciability concerns; rather, they address the justiciable issue whether the measure's proponents are legally entitled to invoke the direct legislation process in the first instance.

I. Overview of Direct Legislation

The idea of popular consultation on major constitutional issues in the United States is as old as the Constitution itself, which Rhode Island submitted to a referendum.[1] Today, forty-nine of the fifty states require

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1 R. Rutland, The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787-1788 124 (1966).

changes in the state constitution to be submitted to a statewide vote.[2] Many states and local governments permit an even more extensive form of voter participation in drafting and enacting laws and constitutional amendments.[3] During the progressive era the idea of popular consultation was expanded to include direct legislation—the initiative and popular referendum.[4] Twenty-six (primarily western) states adopted provisions permitting voters to petition to place on the ballot statutes (the statutory initiative) or constitutional amendments (the constitutional initiative), or to refer to a vote of the people an action taken by the legislature (the popular referendum).[5] Today many states and localities also permit local governments to place advisory referendums and statutory changes on the ballot.[6] Only three states do not have one of these processes for at least some unit of local government.[7]

Access to the ballot for initiatives and popular referendums is conditioned upon the petitioners' gathering sufficient valid signatures within a specified time.[8] In most states, the measure is then certified to appear on the ballot in a special election or the next general election (the direct initiative).[9] In a few states, after meeting a signature threshold, the petitioners must submit the measure to the state legislature (the indirect initiative).[10] Only if the state legislature does not enact the initiative or otherwise satisfy the petitioners can the petitioners place their measure on the ballot by gathering additional signatures.[11] Five times as many states have the direct initiative as the indirect, and in states which permit both, proponents typically prefer to go directly to the ballot.[12] The popular referendum permits voters to petition to place a recently enacted statute before the voters. The period in which such a law can be challenged is typically 90-120 days. The initiative is more frequently used than the popular referendum, in part because petitioners can achieve the same ends with fewer constraints.

Direct legislation devices place substantial agenda-setting power in the hands of petitioners and have been used with growing frequency in the past decade.[13] In California, more initiative petitions have been in circulation in the 1980's than in any previous decade, and the number qualifying for the ballot—if present trends continue—will be larger than in any other decade since the 1930's.[14] Other states are also experienc-

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2 Delaware does not. D. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 36 (1984).

3 *Id.* at 35-47.

4 *Id.* at 20-25.

5 *Id.* at 35-36.

6 *Id.* at 33-40.

7 NATIONAL CENTER FOR INITIATIVE REVIEW, INITIATIVE PROVISIONS BY STATE (1983) (chart).

8 D. MAGLEBY, *supra* note 2, at 36-44.

9 *Id.* at 35, 38-40.

10 *Id.* at 35-36, 38-40.

11 *Id.*

12 Magleby, *Taking the Initiative: Direct Legislation and Direct Democracy in the 1980s*, POL. SCI. & POL. 600, 600-01 (Summer 1988).

13 D. MAGLEBY, *supra* note 2, at 66-67; Magleby, *supra* note 12, at 603.

14 Magleby, *supra* note 12, at 603.

ing renewed usage.[15] The resurgence of activity has included highly visible measures addressing such topics as tax reduction, a nuclear weapons freeze, and AIDS.[16]

Ballot propositions are important and visible also because the stakes are often high, and the affected parties are willing to spend large sums of money to persuade voters to reject or enact the proposed measure. In the 1984 Missouri general election, for instance, more money was spent on Proposition A, the Nuclear Power Plant proposition, than in the races for governor, lieutenant governor, secretary of state, and all state senate and house seats combined.[17] The 1988 California general election set new records for campaign spending on ballot propositions, with over $130 million raised before the election.[18] On an initiative to increase the state cigarette tax, opponents raised more than $19 million and supporters $1.7 million.[19] The combatants in the fight over five initiatives concerning insurance regulation spent a whopping $76 million.[20]

II. Judicial Involvement in Direct Legislation

Working largely in the first two decades of this century, the progressives sought to enlarge the role of citizens and voters.[21] They also sought to limit the powers of institutions like state legislatures, executives, and political parties.[22] Direct legislation was intentionally insulated from politicians and normal institutional constraints. For instance, no gubernatorial veto of initiatives is permitted.[23] The initiative process also avoids the checks resulting from bicameral legislative processes; the closest procedure is Nevada's, which requires constitutional initiatives to be approved in two consecutive elections, a procedure by which voters can check themselves.[24]

In general, courts have articulated a policy of deference toward direct legislation processes. For example, in an early case the United States Supreme Court declined to review a challenge asserting that the initiative is inconsistent with the federal constitutional guarantee of a republican form of government,[25] declaring the issue a nonjusticiable

15 *Id.* at 603.

16 *E.g.*, California Proposition 13 (1978) (tax limitation); California Proposition 12 (1982) (nuclear weapons freeze); California Propositions 96 and 102 (1988) (AIDS).

17 D. Magleby, Campaign Spending in Ballot Proposition and Candidate Elections: A Preliminary Assessment 6 (1986) (unpublished manuscript presented at the American Political Science Association's annual meeting, Aug. 28-31, 1986, Washington, D.C.).

18 California Fair Political Practices Comm'n, Press Release No. 88-35c (Nov. 3, 1988). *See also* Shuit & Reich, *Ballot Props Cost Tops $130 Million: $76 Million Contributed in Fight Over Five Insurance Initiatives Alone*, L.A. Times, Nov. 4, 1988, at 1, col. 5.

19 California Fair Political Practices Comm'n, Press Release No. 88-35c (Nov. 3, 1988).

20 *Id.*

21 D. MAGLEBY, *supra* note 2, at 21-25. *See generally* B. DEWITT, THE PROGRESSIVE MOVEMENT (1915); R. HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO FDR; G. MOWRY, THE CALIFORNIA PROGRESSIVES (1951).

22 D. MAGLEBY, *supra* note 2, at 21-22. *See generally* Bourne, *Functions of the Initiative, Referendum, and Recall*, ANNALS, Sept. 1912, at 3; D. WILCOX, GOVERNMENT BY ALL THE PEOPLE; OR THE INITIATIVE, THE REFERENDUM, AND THE RECALL AS INSTRUMENTS OF DEMOCRACY (1912).

23 D. MAGLEBY, *supra* note 2, at 47.

24 *Id.* at 38-40.

25 U.S. CONST. art. IV, § 4.

political question.[26] A well-known statement by the California Supreme Court also reflects judicial deference toward direct legislation:

> 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. Declaring it "the duty of the courts to jealously guard the right of the people," the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process." "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."[27]

While some courts recite a policy of deference to the *process* of direct legislation, some courts are anything but deferential when reviewing the *substantive* validity of successful measures. For instance, of the ten initiatives enacted by California voters between 1960 and 1980, four were struck down in whole or in part by state or federal courts.[28] The California Supreme Court struck down a fifth (death penalty) measure, but the United States Supreme Court reversed.[29] A sixth measure, the Jarvis-Gann property-tax initiative (Proposition 13), was significantly limited by the California Supreme Court.[30]

Judicial involvement with direct legislation is not limited to post-election adjudication, but also includes pre-election review.[31] Typically,

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26 Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150-51 (1912).

27 Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976) (citations and footnotes omitted).

28 Fair Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979) (political reform); Santa Barbara School Dist. v. Superior Court, 13 Cal. 3d 315, 530 P.2d 605, 118 Cal. Rptr. 637 (1975) (school busing limitation); Weaver v. Jordan, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966) (prohibition of pay TV); Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966) (repeal of open housing), *aff'd*, 387 U.S. 369 (1967).

29 People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), *rev'd*, 463 U.S. 992 (1983).

30 Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).

31 To study both the extent of judicial activity and the issues raised in cases in this area, we conducted an extensive search of state and local cases through the Westlaw computerized case retrieval system. More than 300 cases were identified and then coded for purposes of analysis. Extracted from the cases were the year, state, type of court, time of review, focus of review, remedy desired, results, and the most important arguments in the opinion. The sample of cases is not presumed to be representative of all cases in this area.

We were surprised by the high volume of pre-election cases. In addition to the over 300 cases we analyzed, there appear to be many more which we could analyze with more time and resources. However, an analysis of the distribution of the cases over time and across states indicates that the cases in the sample comprise a broad cross section. The number of cases in the sample increases in each decade after the 1940s, perhaps partly because Westlaw's coverage of cases in general increases. Comparing the 1970s and 1980s, where the Westlaw case-entry bias can be held constant, we find significant growth over time in the number of pre-election cases. Projecting the same level of activity in the 1987-89 period as in 1980-86 reveals that the 1980s will have significantly more judicial activity in this area than the 1970s. This is consistent with Magleby's earlier research on the level of initiative and referendum activity generally.

In our sample, 39 states have reported pre-election cases. They range in activity from states like West Virginia or Kentucky, with only one case, to California, which has had 49. Besides California,

an initiative or referendum petition must be filed with the responsible government official before circulation. After the signatures are gathered, the petitions are submitted to the official for signature verification and certification to the ballot. Courts appear somewhat more likely to uphold the decisions of election officials in the pre-certification phase than they are after the signatures have been verified and the measure certified for the ballot. Generally, there does not appear to be a strong judicial bias either for keeping propositions on the ballot or for removing them.

The primary issues involved in the cases are the propriety of the subject matter of the proposals and, to a lesser extent, procedural issues. However, in at least one-fourth of the cases, substantive constitutional issues arise, sometimes as the primary issue, but more often as a secondary one. Most frequently, courts first determine whether the subject matter of the ballot proposal falls within the permitted scope of direct legislation. In cases primarily involving procedural requirements (petition form, signature verification, administrative deadlines, etc.), the courts tend to favor placing the measure on the ballot. When the primary focus of the case is subject matter, the courts are less likely to permit the measure to go on the ballot.

III. Categories of Pre-election Suits

As noted earlier, the challenges to initiatives and referendums generally fall into three categories, and courts are divided on the pre-election justiciability of cases in each of the three categories.[32] The first type of challenge alleges that the measure, if passed, would be substantively invalid because it conflicts with a paramount law: the federal or state constitution, a federal statute, or (in the case of a county or municipal proposal) a state statute.[33] Challenges in this category assert that the measure would be unenforceable and that holding an election on an invalid measure would be a waste of taxpayers' money.[34] Direct legislation can be very expensive. For example, in 1983 a special election on a California initiative was projected to cost taxpayers $15 million.[35]

The second type of challenge to ballot proposals alleges a failure to meet the procedural requirements to qualify the measure for an election.[36] These requirements, imposed by state constitutional provisions or statutes, include the minimum number of qualified signatures, the

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the states which appear to have the most pre-election judicial activity are Ohio, Florida, Colorado, and Oregon. Our sample reveals that cases are about evenly divided between statewide and local referendums.

32 A fourth category of challenges, alleging that the particular election laws themselves are unconstitutional (*e.g.*, as violative of the one-person, one-vote requirement), are beyond the scope of this Article because they are not challenges to particular ballot proposals. For discussion of some of these challenges, see D. MAGLEBY, *supra* note 2, at 49-51.

33 *See infra* notes 48-49.

34 *E.g.*, Otey v. Common Council, 281 F. Supp. 264, 276 (E.D. Wis. 1968); Harnett v. Sacramento County, 195 Cal. 676, 683, 235 P. 445, 448 (1925).

35 Legislature of Cal. v. Deukmejian, 34 Cal. 3d 658, 666, 669 P.2d 17, 20, 194 Cal. Rptr. 781, 784 (1983) (per curiam). Expenses include the costs of validating signatures, printing ballots, printing and distributing voter handbooks, staffing polling places, and counting votes.

36 *See infra* note 106.

form of the petition and its title and summary, and the timeliness of filing the petition with the government.[37]

The third type of challenge asserts that the ballot measure does not fall within a proper subject matter for direct legislation.[38] Restrictions on the scope of initiatives and referendums are common. Most states require that the measure must propose a constitutional amendment, statute, or ordinance, although some also permit advisory measures.[39] Many states require that a measure may not encompass more than a single subject,[40] which requirement helps avoid confusion and logrolling.[41] Many states also provide that a measure may not apply to certain topics, such as appropriations,[42] administrative matters,[43] the court system,[44] zoning,[45] and other subjects.[46]

Pre-election judicial review of ballot measures typically arises in one of two ways. First, a measure's opponents may sue for equitable or declaratory relief to prevent the election or remove the measure from the

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37 *E.g.*, CAL. ELEC. CODE §§ 3502-3533, 3701-3718, 4001-4011, 4050.1-4056 (West 1977 & Supp. 1989); UTAH CODE ANN. §§ 20-11-2 to -24 (1984 & Supp. 1988).

38 *See infra* note 107.

39 Some states and the District of Columbia permit legislative bodies or citizens to place advisory measures on the ballot. *E.g.*, CAL. ELEC. CODE § 5353 (West 1977 & Supp. 1989); D.C. CODE ANN. § 1-146 (Supp. VIII 1980); ILL. REV. STAT. ch. 46, ¶ 28-6 (1981); MASS. GEN. LAWS ANN. ch. 53, §§ 18A, 19 (West 1982-83); NEB. REV. STAT. § 32-714 (1978); N.J. REV. STAT. §§ 19:37-1, 19:37-1.1 (1964 & Supp. 1982-83); S.C. CODE ANN. § 4-9-30 (Law. Co-op. 1977); WIS. STAT. § 59.07(67) (1981).

40 *E.g.*, CAL. CONST. art. II, § 8(d); FLA. CONST. art. XI, § 3; MO. CONST. art. III, § 50; OR. CONST. art. IV, § 1(2)(d).

41 Comment, *Judicial Review of Inititiative Constitutional Amendments*, 14 U.C. DAVIS L. REV. 461, 476 (1980). *See generally* Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983).

42 *E.g.*, ALASKA CONST. art. XI, § 7; MO. CONST. art. III, § 51; WYO. CONST. art. III, § 52(g); D.C. CODE ANN. § 1-281(a) (1981).

43 *E.g.*, Simpson v. Hite, 36 Cal. 2d 125, 129, 222 P.2d 225, 228 (1950); Ruano v. Spellman, 81 Wash. 2d 820, 825, 505 P.2d 447, 450 (1973); Wilson v. Manning, 657 P.2d 251, 252 (Utah 1982); *see* Comment, *The Initiative and Referendum's Use in Zoning*, 64 CAL. L. REV. 74, 93-97 (1976).

44 *E.g.*, ALASKA CONST. art. XI, § 7; MASS. CONST. amend. XLVIII, pt. 2 § 2; WYO. CONST. art. III, § 52(g).

45 *See* Comment, *supra* note 43, at 96-106; Annotation, *Adoption of Zoning Ordinances or Amendment Thereto as Subject of Referendum*, 72 A.L.R.3d 1030, 1043-44 (1976); *see generally* Note, *The Proper Use of Referenda in Zoning Matters*, 29 STAN. L. REV. 819 (1977).

46 *E.g.*, ILL. CONST. art. XIV, § 3 (initiative limited to subjects in article IV of state constitution); NEV. CONST. art. XIX, § 6 (initiative cannot propose expenditure without corresponding tax increase); OHIO CONST. art. II, § 1(e) (initiative or referendum cannot be used to classify property in order to tax at different rates). In some states and the District of Columbia, referendums cannot be used to repeal urgency laws, which are laws necessary for the immediate health and safety of the public. *E.g.*, ALASKA CONST. art. IX, § 7; COLO. CONST. art. V, § 1(3); MO. CONST. art. III, § 52(a); OHIO CONST. art. II, § 1(d); OKLA. CONST. art. V, § 2; S.D. CONST. art. III, § 1; WASH. CONST. art. II, § 1(b); WYO. CONST. art. III, § 52(g); D.C. CODE ANN. § 1-281(b) (1981). Other states provide that a statewide measure cannot be local or special in character. *E.g.*, ALASKA CONST. art. XI, § 7; MONT. CONST. art. III, § 4(1); WYO. CONST. art. III, § 52(g).

Massachusetts, Nebraska, and Oklahoma bar resubmission of a defeated initiative proposal for three years. MASS. CONST. amend. art. 48, pt. 2, § 3; NEB. CONST. art. III, § 2; OKLA. CONST. art. V, § 6. Oklahoma provides that a measure may be resubmitted within three years if the petitions are signed by 25% of the state's legal voters. The purposes of this subject matter limitation are undoubtedly to avoid expense and voter frustration, and these purposes are not fulfilled if pre-election review is denied. Oklahoma has allowed pre-election review of a challenge asserting the violation of this limitation. *In re* Inititiative Petition No. 271, 373 P.2d 1017, 1019 (Okla. 1962), *cert. denied*, 371 U.S. 949 (1963).

ballot.[47] Depending on the remedies available in the particular forum, they might seek a declaratory judgment, an injunction, a writ of mandamus or mandate, or a writ of prohibition ordering the responsible government official not to submit the measure to a vote. Second, if the government official has refused to certify the proposal for the ballot because of a putative defect in the measure or its submission, the measure's supporters might sue for a writ of mandamus or mandate ordering the official to submit the measure to an election.

IV. Pre-election Review of Substantive Validity

Most courts will not entertain a challenge to a measure's substantive validity before the election.[48] A minority of courts, however, are willing to conduct such review.[49] Arguably, pre-election review of a measure's substantive validity involves issuing an advisory opinion, violates ripeness requirements and the policy of avoiding unnecessary constitutional questions, and is an unwarranted judicial intrusion into a legislative process.

A. *The Prohibition Against Advisory Opinions*

Some courts deny pre-election review of a measure's substantive validity on the ground that it would involve issuing an advisory opinion.[50] The paradigmatic advisory opinion is a judicial opinion on a bill pending

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47 Otey v. Common Council, 281 F. Supp. 264, 276-79 (E.D. Wis. 1968); Legislature of Cal. v. Deukmejian, 34 Cal. 3d 658, 663-65, 669 P.2d 17, 19-20, 194 Cal. Rptr. 781, 783-84 (1983) (per curiam).

48 *E.g.*, Diaz v. Board of County Comm'rs, 502 F. Supp. 190, 194 (S.D. Fla. 1980); Broucher v. Engstrom, 528 P.2d 456, 460 & n.13 (Alaska 1974), *overruled on other grounds by* McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988); Tilson v. Mofford, 153 Ariz. 468, 470, 737 P.2d 1367, 1369 (1987); Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 452, 501 P.2d 391, 393-94 (1972) (en banc); Iman v. Bolin, 98 Ariz. 358, 364-65, 404 P.2d 705, 709 (1965) (en banc); City of Rocky Ford v. Brown, 133 Colo. 262, 264-65, 293 P.2d 974, 976 (1956) (en banc); Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 247, 69 N.E.2d 115, 127 (1946); Leininger v. Alger, 316 Mich. 644, 654-55, 26 N.W.2d 348, 353 (1947); Anderson v. Byrne, 62 N.D. 218, 229, 242 N.W. 687, 692 (1932); State *ex rel.* Williams v. Brown, 52 Ohio St. 2d 13, 17-18, 368 N.E.2d 838, 841 (1977) (per curiam); State *ex rel.* Cramer v. Brown, 7 Ohio St. 3d 5, 6, 454 N.E.2d 1321, 1322 (1983) (per curiam); Oregon AFL-CIO v. Weldon, 256 Or. 307, 312, 473 P.2d 664, 667 (1970); State *ex rel.* O'Connell v. Kramer, 73 Wash. 2d 85, 86-87, 436 P.2d 786, 787 (1968) (en banc); State *ex rel.* Donahue v. Coe, 49 Wash. 2d 410, 418, 302 P.2d 202, 206-07 (1956) (en banc). *See* Grossman, *The Initiative and Referendum Process: The Michigan Experience*, 28 WAYNE L. REV. 77, 111 (1981); Note, *The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?*, 53 FORDHAM L. REV. 919, 922 (1985).

49 *E.g.*, Holmes v. Leadbetter, 294 F. Supp. 991, 996 (E.D. Mich. 1968); Otey v. Common Council, 281 F. Supp. 264, 279 (E.D. Wis. 1968); Fine v. Firestone, 443 So. 2d 253, 256 (Fla. Dist. Ct. App. 1983), *vacated on other grounds*, 448 So. 2d 984 (Fla. 1984); St. Paul Citizens for Human Rights v. City Council, 289 N.W.2d 402, 405-06 (Minn. 1979); State *ex rel.* Steen v. Murray, 144 Mont. 61, 66, 394 P.2d 761, 763-64 (1964) (per curiam); Javers v. Council of New Orleans, 351 So. 2d 247, 249-50 (La. App. 1977), *cert. denied*, 354 So. 2d 200 (1978); State *ex rel.* Voss v. Davis, 418 S.W.2d 163, 168 n.4 (Mo. 1967); State *ex rel.* Cranfill v. Smith, 330 Mo. 252, 255-57, 48 S.W.2d 891, 892-93 (1932). *See* Grossman, *supra* note 48, at 113.

50 *E.g.*, McKee v. City of Louisville, 200 Colo. 525, 531, 616 P.2d 969, 973 (1980) (en banc); City of Rocky Ford v. Brown, 133 Colo. 262, 266, 293 P.2d 974, 976 (1956) (en banc); Slack v. City of Salem, 31 Ill. 2d 174, 178, 201 N.E.2d 119, 121 (1964); State *ex rel.* Dahl v. Lange, 661 S.W.2d 7, 8 (Mo. 1983) (en banc); Anderson v. Byrne, 62 N.D. 218, 229, 242 N.W. 687, 692 (1932); Jones v. International Ass'n of Firefighters, 601 S.W.2d 454, 462 (Tex. Civ. App. 1980); State *ex rel.* O'Connell v. Kramer, 73 Wash. 2d 85, 86-87, 436 P.2d 786, 787 (1968) (en banc).

in the legislature. Advisory opinions are impermissible in federal courts[51] and most state courts. Although ten states permit advisory opinions, they do so only upon the request of the legislature or the governor.[52]

The ban on advisory opinions in federal courts is based on the separation of powers doctrine[53] and the case or controversy requirement. This requirement prohibits article III courts from deciding "abstract, hypothetical or contingent questions."[54]

In addition to its constitutional foundations, the prohibition is premised on institutional concerns relating to the nature of the judicial function. Advisory opinions lack a factual record,[55] concreteness,[56] and a clear focus on the precise issues believed necessary for careful adjudication.[57] The lack of a precise factual context can result in judicial pronouncements at abstract, general levels which overlook real-life problems and questions of degree.[58]

Another basis for the rule against advisory opinions is the doctrine of strict necessity, which states that federal courts should not adjudicate constitutional issues unless they are unavoidable.[59] While this notion may be grounded partly in considerations of judicial economy, it rests more firmly on the separation of powers doctrine and the idea that unelected judges with life tenure should show restraint in exercising power to invalidate legislation.[60]

The policy of judicial restraint reflected in the advisory opinion doctrine may also be related to institutional self-preservation. A court which exercises its power too early and too often may exhaust the good will it enjoys from the people and other branches of government.[61] As Justice Rutledge noted, "It is not without significance for the policy's validity that the periods when the power has been exercised most readily and broadly have been the ones in which this Court and the institution of

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51 Federal courts cannot "give opinions in the nature of advice concerning legislative action." Muskrat v. United States, 219 U.S. 346, 362 (1911).

52 Comment, *The State Advisory Opinion in Perspective*, 44 FORDHAM L. REV. 81, 81 (1975).

53 Correspondence of the Justices, Letters from Chief Justice John Jay and the Associate Justices to President George Washington (August 8, 1793); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 73 (2d ed. 1988).

54 Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945). *Accord*, United States v. Evans, 213 U.S. 297, 300 (1909). *See* O'Shea v. Littleton, 414 U.S. 488 (1974); Laird v. Tatum, 408 U.S. 1 (1972); United States v. Freuhauf, 365 U.S. 146 (1961); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), *overruled on other grounds by* Alder v. Board of Educ., 342 U.S. 485 (1952).

55 *See* Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

56 Some courts cite the lack of concreteness in denying pre-election review. *E.g.*, City of Rocky Ford v. Brown, 133 Colo. 262, 265-66, 293 P.2d 974, 976 (1956) (en banc); Slack v. City of Salem, 31 Ill. 2d 174, 178, 201 N.E.2d 119, 121 (1964); *cf.* Hamilton v. Vaughan, 212 Mich. 31, 36-37, 179 N.W. 553, 555 (1920) (Sharpe, J., concurring) (the court is deciding "an abstract legal question, not based on or arising out of any existing law or fact").

57 *See* United States v. Freuhauf, 365 U.S. 146, 157 (1961).

58 *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1538-39 (9th ed. 1975). *See generally* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980); Brilmayer, *A Reply*, 93 HARV. L. REV. 1727 (1980).

59 *See* Rescue Army v. Municipal Court, 331 U.S. 549, 570 n.34 (1947).

60 *See id.* at 571.

61 *See infra* note 69 and accompanying text.

judicial review have had their stormiest experiences."[62] Thus, the advisory opinion doctrine may also be based on "prudential decisions to conserve the energies (and the political capital) of federal courts for a limited number of truly important constitutional cases."[63]

Pre-emptive striking of ballot measures by courts on grounds of substantive invalidity could foster anti-judicial sentiment. The courts could be perceived, at least by the measure's supporters, as meddlers interfering with the process of popular legislation. Direct legislation is often anti-governmental by nature—it serves as an escape valve for people whose causes have been or probably will be unsuccessful in the ordinary processes of representative government.[64] The populist sentiments of frustration underlying direct legislation efforts will be exacerbated if a branch of the government, the judiciary, deprives the people of their right to vote. Direct legislation often involves hotly contested political matters,[65] and too frequent interference with the initiative process by courts could focus popular displeasure at the judiciary and undermine its public support.[66]

Pre-election lawsuits challenging initiatives could draw the courts unnecessarily into the middle of highly charged political fights. For example, in the 1982 California Republican gubernatorial primary campaign, Attorney General George Deukmejian made his sponsorship of an initiative called the Victims' Bill of Rights a centerpiece of his campaign. On the night of his nomination, Deukmejian announced that as attorney general he would press the California Supreme Court to rule before the election on a pending case challenging the constitutionality of the initiative.[67] The California Supreme Court did rule on the measure two months before the election, upholding it against substantive, procedural, and subject matter challenges.[68] As a second example, threats of recall and physical harm were directed at California Supreme Court justices as

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62 331 U.S. at 572 n.38.

63 G. GUNTHER, *supra* note 58, at 1581.

64 Rooted in the progressive movement of the early 1900's, the initiative and referendum were designed to

> deprive machine government of the advantages it had in checkmating popular control, and make government accessible to the superior disinterestedness and honesty of the average citizen. Then, with the power of the bosses broken or crippled, it would be possible to check the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government.

R. HOFSTADTER, THE AGE OF REFORM 255 (1955). Whether the initiative and referendum have accomplished their objectives is a subject of much debate. *See, e.g.*, W. CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 21-25 (1950); H. CROLY, PROGRESSIVE DEMOCRACY 306 (1914); D. MAGLEBY, *supra* note 2, at 21-27; W. MUNRO, THE GOVERNMENT OF AMERICAN CITIES 238-53 (4th ed. 1926).

65 Boalt Hall Professor Preble Stolz said, "It seems that we have come to expect at least one politically explosive measure on the ballot for each statewide election." Kirsch, *Initiatives—Cutting Up the Constitution*, CAL. LAW., Nov. 1984, at 35, 39. *See* Comment, *supra* note 41, at 463 n.12; Note, *The Proposed National Initiative Amendment: A Participatory Perspective on Substantive Restrictions and Procedural Requirements*, 18 HARV. J. ON LEGIS. 429, 429 (1981).

66 Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 89 (1983).

67 Hager, *Justices Asked to Rule Quickly on Proposition 8*, L.A. Times, June 15, 1982, § I, at 3, col. 2.

68 Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

they prepared to hear arguments on the validity of Proposition 13 (the tax limitation initiative) after its passage.[69]

Because only a minority of ballot measures are successful,[70] courts will invoke their power much less frequently if they review ballot measures on substantive grounds only after the election. In the majority of cases, the election itself will spare the court the political consequences of having to invalidate the measure. This is significant because some courts have found a high proportion of initiative measures to be substantively unconstitutional.[71] The reasons for this phenomenon are not completely identifiable, but one reason may be that the legislature's procedures are more cautious and deliberative. Legislative proceedings typically involve committee study, hearings, floor debate, passage by two legislative bodies, and assent by the executive.[72] Direct legislation lacks these procedural safeguards. Another reason may be that ballot measures are sometimes majoritarian responses which tend to conflict with anti-majoritarian constitutional protections.[73]

An additional problem with pre-election review of substantive validity is that the time pressure created by the pending election can cause the hasty adjudication of constitutional issues.[74] The time pressure increases as the case passes through successive levels of appeal and the date of the election approaches. Justice Douglas complained, "We are plagued with election cases coming here on the eve of election, with the remaining time so short we do not have the days needed for oral argument and for reflection on the serious problems that are usually presented."[75] To alleviate this problem, some states require that suits challenging ballot proposals must be filed a certain time before the election.[76] This re-

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69 Comment, *The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced Its Future?*, 27 UCLA L. REV. 433, 435 n.13 (1979).

70 In states with signature thresholds of 8% or below, only 35% of statewide initiatives that have appeared on the ballot since 1950 have passed. In states with higher signature thresholds, 47% of statewide initiatives appearing on the ballot have passed. D. MAGLEBY, *supra* note 2, at 44. Of course, most initiatives never even qualify for the ballot. For example, between 1970 and 1976, 104 initiatives were officially submitted to the attorney general prior to circulation. Of these, only 17 qualified for the ballot, and only four passed. Lee, *California*, in REFERENDUMS 91 (D. Butler & A. Ranney ed. 1978).

71 *See supra* notes 28-30 and accompanying text.

72 *See* G. Baker, Judicial Review of Statewide Initiatives in California: Proposition 13 in Recent Historical Perspective 2-3 (unpublished manuscript presented at the American Political Science Association's annual meeting, Aug. 31-Sept. 3, 1978, New York, N.Y.); Grossman, *supra* note 48, at 108.

73 *See generally* Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135 (1981); Olson, *Limitations and Litigation Approaches: The Local Power of Referendum in Federal and State Courts—A Michigan Model*, 50 J. URB. L. 209 (1972); Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978); Sirico, *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637 (1980). One writer contends that the direct legislation process is more likely to overlook minority interests because it lacks the legislature's reliance on pluralistic consensus formation. Bell, *supra*, at 13-14 n.53.

74 *See* Thomas v. Bailey, 595 P.2d 1, 2 (Alaska 1979); AFL-CIO v. Eu, 36 Cal. 3d 687, 718, 686 P.2d 609, 630, 206 Cal. Rptr. 89, 110 (en banc) (Lucas, J., dissenting), *stay denied sub nom.* Uhler v. AFL-CIO, 468 U.S. 1310 (Rehnquist, Circuit Justice, 1984); Note, *supra* note 48, at 931.

75 Ely v. Klahr, 403 U.S. 108, 120-21 (1971) (Douglas, J., concurring).

76 For example, the Ohio Constitution requires suits involving procedural issues to be brought at least 40 days before the election. OHIO CONST. art. II, § 1(g). This restriction has been held to

quirement mitigates the problem but does not solve it, since the case may have to pass through multiple levels of appellate review, with the last court receiving the case only days before the scheduled election.

Pre-election review of the substantive validity of a ballot measure is similar to judicial review of a bill in the legislature prior to passage. It is generally an improper intrusion on the legislative function and a premature and unnecessary exercise of judicial power. It has been argued that pre-emptive review is more appropriate for popular legislation because a bill in the legislature may still be amended before passage, whereas a ballot proposal is in its final form for submission to the voters.[77] However, the advisory opinion doctrine prohibits review of a legislative bill even in its final form, after passage by the legislature but before the governor signs it. The fact that a legislative bill can be amended merely adds another contingency which makes ultimate enforcement of the challenged version of the bill even more speculative. The passage of an initiative measure is already sufficiently speculative to render pre-election review of its substantive validity an unnecessary ruling on a hypothetical (and improbable) question.

It could also be argued that greater judicial interference is justified because the public and private expense of an initiative or referendum election is likely greater than the expense of processing a bill in the legislature. However, protracted legislative hearings can be very expensive, and they invite private lobbying expenses just as direct elections invite private campaign expenses. Saving money would never be a legitimate reason to enjoin a state legislature from conducting hearings on an unconstitutional bill. The reasons supporting the advisory opinion ban simply outweigh any potential savings. Moreover, the legislature decides how much to spend on its proceedings, and its decision is a nonjusticiable political question.[78]

The same arguments apply to direct legislation.[79] Public and private expenses vary with the frequency of elections and the number of proposals that qualify for the ballot, which in turn are affected by the restrictiveness of the threshold requirements for qualifying measures for elections.[80] For example, high signature thresholds generally limit the number of initiatives and popular referendums qualifying for the ballot,

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apply to subject matter limitations as well. State *ex rel.* Schwartz v. Brown, 32 Ohio St. 2d 4, 10, 288 N.E.2d 821, 825-26 (1972).

77 *See* Whitson v. Anchorage, 608 P.2d 759, 762 n.5 (Alaska 1980); Note, *supra* note 48, at 931 n.52.

78 *See* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622-23 (1976). *See generally* Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

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> [Expenditures for elections on invalid measures are] no more useless than the time and money expended on other legislative proceedings that may ultimately produce an infirm law. Democracy, whether direct or indirect, necessarily involves procedural inefficiencies that may require significant spending of public monies. Inefficiencies and cost alone do not justify enjoining popularly mandated legislative processes.

Note, *supra* note 48, at 932 (footnotes omitted). *See* Legislature of Cal. v. Deukmejian, 34 Cal. 3d 658, 682, 669 P.2d 17, 34, 194 Cal. Rptr. 781, 798 (1983) (per curiam) (Richardson, J., dissenting); Threadgill v. Cross, 26 Okla. 403, 414-15, 109 P. 558, 562-63 (1910); State *ex rel.* Evans v. Riiff, 73 S.D. 348, 352, 42 N.W.2d 887, 889 (1950).

80 There is a strong correlation between the stringency of states' signature requirements and the number of measures that qualify for the ballot. D. MAGLEBY, *supra* note 2, at 42-43.

and low thresholds lead to more qualifying initiatives and referendums.[81] The states decide what level of direct legislation costs they are willing to bear by establishing ballot access requirements and by deciding whether to permit special elections. These decisions by the states are nonjusticiable political questions,[82] and the states can change these requirements whenever they deem it desireable to do so.

It might also be argued that the advisory opinion doctrine applies with less force in direct legislation because the doctrine rests partly on the separation of powers and the courts' respect for the legislature as a coequal branch of government. However, in a representative democracy the legislature's lawmaking powers are delegated to it by the people.[83] In direct legislation the people are acting as the legislature themselves, and the courts should show appropriate deference to that ultimate lawmaking body. Indeed, many courts analogize to judicial noninterference with legislative proceedings in declining pre-election review.[84]

When pre-election relief is sought in federal court, the issue is not the separation of powers but rather federalism. Initiatives and referendums are state and local legislative processes. Federal courts should refrain from interfering with those legislative processes and refuse to review the substantive validity of measures before the election,[85] just as federal courts should not interfere with lawmaking processes in state and local legislatures until after a challenged law is passed and enforcement becomes a realistic threat.

B. *Ripeness*

Many courts refuse to conduct pre-election review of substantive validity because of the lack of ripeness.[86] The ripeness requirement prevents judicial review when future events may affect a case, thus making

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81 *Id.* at 42.

82 *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (state's decision whether to permit direct legislation is a political question).

83 Some constitutional provisions authorizing popular legislation expressly state that it is a power reserved to the people. *E.g.*, ARIZ. CONST. art. IV, pt. 1, § 1(1); ARK. CONST. amend. VII, § 1; COLO. CONST. art. V, § 1(1); FLA. CONST. art. XI, § 3; IDAHO CONST. art. III, § 1; MICH. CONST. art. II, § 9; MO. CONST. art. III, § 49; NEB. CONST. art. III, §§ 2, 3; NEV. CONST. art. XIX, § 2(1); N.D. CONST. art. III, § 1; OHIO CONST. art. II, § 1; OKLA. CONST. art. V, § 1; OR. CONST. art. IV, § 1(2)(a); S.D. CONST. art. III, § 1; WASH. CONST. art. II, § 1. *See also* City of Eastlake v. Forest City Enters., 426 U.S. 668, 672 (1976); Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976).

84 *E.g.*, Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 451, 501 P.2d 391, 393-94 (1972) (en banc); People *ex rel.* O'Reilly v. Mills, 30 Colo. 262, 264, 70 P.2d 322, 333 (1902); Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 247-48, 69 N.E.2d 115, 127-28 (1946); State *ex rel.* Stokes v. Roach, 190 S.W. 277, 280 (Mo. 1916) (en banc); Anderson v. Byrne, 62 N.D. 218, 229, 242 N.W. 687, 692 (1932); Threadgill v. Cross, 26 Okla. 403, 412-13, 109 P. 558, 561-62 (1910); State *ex rel.* Carson v. Kozer, 126 Or. 641, 647, 270 P. 513, 515 (1928) (en banc).

85 Ranjel v. City of Lansing, 417 F.2d 321, 324 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970); Spaulding v. Blair, 403 F.2d 862, 865 (4th Cir. 1968).

86 *E.g.*, Diaz v. Board of County Comm'rs, 502 F. Supp. 190, 193 (S.D. Fla. 1980); City of Rocky Ford v. Brown, 133 Colo. 262, 265-66, 293 P.2d 974, 976 (1956) (en banc); Slack v. City of Salem, 31 Ill. 2d 174, 178, 201 N.E.2d 119, 121 (1964); State *ex rel.* Dahl v. Lange, 661 S.W.2d 7, 8 (Mo. 1983) (en banc); Anderson v. Byrne, 62 N.D. 218, 229, 242 N.W. 687, 692 (1932); State *ex rel.* O'Connell v. Kramer, 73 Wash. 2d 85, 86-87, 436 P.2d 786, 787 (1968) (en banc).

later adjudication more appropriate.[87] Under the doctrine, "[t]he danger that supposedly motivates [the plaintiff] must be real and immediate, rather than distant and speculative. There must be a concrete demonstration that some harm will really occur . . . ."[88] The ripeness doctrine is justified by constitutional and institutional considerations similar to some of those justifying the ban on advisory opinions: the lack of a concrete situation and a clear factual record to assure informed and narrow adjudication,[89] the desire to avoid making unnecessary decisions about difficult constitutional issues, and the need to conserve judicial resources by deciding only those questions necessary to resolve real controversies.[90]

Suits attacking the substantive validity of ballot measures involve a double contingency which renders any injury speculative and uncertain. First, the measure may not pass; only a minority do.[91] Even if public opinion polls report that a particular measure enjoys majority support, polls are sometimes flawed, and passage will depend on such variables as campaign strategies, spending, and voter turnout. In many contested initiatives a significant opinion change occurs during the campaign.[92] Second, even if the measure passes, there may be no threat of enforcement. Prosecutors and other government officials often exercise their discretion not to enforce a law because of their doubts about its constitutionality, their perception of its social disutility, or their allocation of resources to other tasks. Also, there is often the possibility that if enacted, the law may be applied in a constitutional manner.[93] Therefore, the uncertainty about the measure's passage and the government's implementation of it creates a double contingency which makes suits attacking the substantive constitutionality of ballot measures unripe for review.[94]

In *Poe v. Ullman,* [95] the Supreme Court held nonjusticiable a declaratory judgment action challenging the constitutionality of a Connecticut anti-birth control law which, except for a test case, had not been enforced

87 L. TRIBE, *supra* note 53, at 77. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 294-97 (1981); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Poe v. Ullman, 367 U.S. 497 (1961); International Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222, 224 (1954); United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947).

88 Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 299 (1979). *But cf.* Doe v. Bolton, 410 U.S. 179, 188 (1973) (physicians challenging a state criminal abortion statute presented a justiciable controversy despite the lack of any evidence of prosecution or threatened prosecution); Roe v. Wade, 410 U.S. 113 (1973); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (Black, J., concurring) (case ripe although there had never been a single attempt to enforce statute).

89 "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222, 224 (1954).

90 *See* L. TRIBE, *supra* note 53, at 77-82.

91 *See supra* note 70.

92 Magleby, *Opinion Formation and Opinion Change on Statewide Ballot Propositions*, in M. MARGOLIS & G. MAUSER, MANIPULATING PUBLIC OPINION (forthcoming).

93 Diaz v. Board of County Comm'rs, 502 F. Supp. 190 (S.D. Fla. 1980); Grossman, *supra* note 48, at 112.

94 *Cf.* L. TRIBE, *supra* note 53, at 75 (In cases of double contingency—referring to the threat of enforcement and the law's applicability to the litigant's conduct—article III justiciability is lacking.).

95 367 U.S. 497 (1961).

for more than 75 years.[96] Just as no threat was presented by the statute in that case, no justiciable threat is posed by a statute which may never be enacted. Pre-election review of a ballot proposal's substantive validity merely addresses hypothetical legal questions not involving any existing law or threat of enforcement, and therefore should be impermissible.

C. *The Courts as Budget Cutters*

A powerful argument against the "waste of taxpayer money" basis for substantive review is that no constitutional or statutory provision authorizes courts to cancel elections simply because they are wasteful. The constitutional provisions and statutes governing initiatives and referendums in effect provide that measures *shall* be submitted to a vote when the specified procedural and subject matter requirements are met. If the process adopted by the drafters is wasteful at times, the state can change the process. The decision of how much money to spend on direct legislation is a political question. The court is not a super budget cutter authorized to prevent government officials from performing their mandatory constitutional duties simply because it concludes that the performance of those duties will waste the taxpayers' money. Government officials violate no constitutional provision or statute by submitting the measure to a vote, and therefore the court is not authorized to stop them.[97]

When government officials refuse to submit the measure to a vote, the analysis is a little more complicated. It could be argued that before the court orders affirmative equitable relief, it has the discretion to consider whether it would be ordering someone to do a futile or meaningless act. Therefore, some courts will review a measure's substantive validity before granting a writ of mandamus directing the officials to hold an election.[98]

Ultimately, however, the question is one of the intent of the drafters. The governing constitutional provisions and statutes require government officials to submit a measure to a vote if the procedural and subject matter limitations are met. They do not expressly authorize them to refuse whenever they believe that the measure conflicts with some paramount law,[99] and there is no evidence of legislative intent that they be so authorized. It is more likely that the drafters intended that the determination of substantive validity should be reserved for the courts—if and

96 *Id.* at 501.

97 *See* Sartor v. City of Huron, 16 Ohio Misc. 127, 129, 241 N.E.2d 177, 178 (1968) ("For this court to place any limitation on the power of the electors to initiate . . . legislation other than what is expressly provided for in the Constitution and the Revised Code would amount to an invasion of legislative power by the judicial branch of government."); Note, *supra* note 48, at 922.

98 *E.g.*, State *ex rel.* Cranfill v. Smith, 330 Mo. 252, 48 S.W.2d 891 (1932) (en banc); White v. Welling, 89 Utah 335, 340-41, 57 P.2d 703, 705 (1936); Javers v. Council of New Orleans, 351 So. 2d 247 (La. Ct. App. 1977).

99 *See* Coleman v. Bench, 96 Utah 143, 147, 84 P.2d 412, 413 (1938); White v. Welling, 89 Utah 335, 340-41, 57 P.2d 703, 705 (1936).

when the measure passes—just as it is for other legislation. Therefore, the government officials should be ordered to hold the election.[100]

Moreover, the time pressure and the lack of a concrete factual record or specific application make for just as poor an adjudication of substantive validity in a mandamus action as in an injunctive suit. Therefore, pre-election review of substantive validity should not depend on the particular remedy sought.

D. *Free Speech Values*

Another argument against pre-election review of the substantive validity of ballot measures is that initiatives and referendums serve a secondary purpose of expressing popular will and sending messages to government.[101] This purpose is fulfilled even when a measure is ultimately held unenforceable after the election. An overwhelming vote on an issue may persuade legislators to consider changing the applicable constitutional provision or statute, or to enact legislation which accomplishes some of the same results sought by the ballot measure without offending constitutional or statutory constraints. Plebiscites are a form of political speech near the very center of democratic values.[102] Free speech values should lead to the conclusion that if a measure's proponents have properly qualified the measure for a plebiscite, they are entitled to have one, even if the measure will never be enforced.

E. *The "Rights" Analysis*

It might be argued that the electorate has no "right" to enact unconstitutional measures, and therefore no right to vote on them. However, the significance of unconstitutionality is not that the electorate does not have the right to vote on a measure, but that the government does not have the right to enforce it. By analogy, although it might theoretically be said that a state legislature does not have the "right" to enact unconstitutional legislation, it does not follow that the courts can preclude the legislature from voting on unconstitutional bills.

F. *The "Clear Invalidity" Test*

Some courts will strike a measure from the ballot if it is "clearly" unconstitutional[103] or unconstitutional on its face.[104] They reason that it

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100 *See* Union Elec. Co. v. Kirkpatrick, 678 S.W.2d 402, 405 (Mo. 1984) (en banc); Jones v. International Assoc. of Firefighters, 601 S.W.2d 454, 455-56 (Tex. Civ. App. 1980); Edwards v. Murphy, 256 S.W.2d 470, 477 (Tex. Civ. App. 1953). *But see* Nebraska *ex rel.* Brant, 217 Neb. 632, 636, 350 N.W.2d 18, 21 (1984) (dicta) (secretary of state may refuse to hold election if proposal is unconstitutional on its face).

101 *See* Note, *The Election Ballot as a Forum for the Expression of Ideas*—Georges v. Carney, 32 DE PAUL L. REV. 901 (1983). *Cf.* Diaz v. Board of County Commr's, 502 F. Supp. 190, 193 (S.D. Fla. 1980) (initiative and referendum are means of preserving right to petition government for redress).

102 *But see* Georges v. Carney, 691 F.2d 297, 300-02 (7th Cir. 1982) (initiative is not a form of speech protected by the first amendment).

103 *E.g.*, Legislature of Cal. v. Deukmejian, 34 Cal. 3d 658, 665, 669 P.2d 17, 20, 194 Cal. Rptr. 781, 784 (1983) (per curiam); Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 342 (Fla. 1978) (per curiam); Fine v. Firestone, 443 So. 2d 253, 256 (Fla. Dist. Ct. App. 1983), *vacated on other grounds*, 448 So. 2d 984 (Fla. 1984).

makes little sense to waste taxpayer money on an election that would be clearly futile. Moreover, the need for a factual record is less if the measure is invalid on its face. However, the clear invalidity test has a number of problems. First, mere waste in a procedure mandated by the drafters of the state constitution does not authorize judicial intervention. Second, except for the need for a factual record, the test ignores the rest of the advisory opinion and ripeness concerns. Lastly, it creates a system of double judicial review.[105] Before the election the courts must decide whether the clear invalidity test is met. If it is not, and the measure succeeds at the polls, the courts will then likely have to review the measure again under the standards of plenary review.

V. Failure to Meet Procedural or Subject Matter Requirements

Courts generally permit pre-election review of challenges based on procedural[106] or subject matter limitations.[107] However, a minority of courts deny pre-election review of some of these requirements.[108] Regarding procedural defects such as form, signature, and title and summary requirements, most states either prohibit post-election review

104 State *ex rel.* Dahl v. Lange, 661 S.W.2d 7, 8 (Mo. 1983) (en banc); State *ex rel.* Samuelson v. Conrad, 25 Ohio Misc. 13, 15, 265 N.E.2d 803, 807 (1968); Coleman v. Bench, 96 Utah 143, 147, 84 P.2d 412, 413 (1938); White v. Welling, 89 Utah 335, 340-41, 57 P.2d 703, 705 (1936).

105 *See* Brosnahan v. Brown, 32 Cal. 3d 236, 240-41, 651 P.2d 274, 276, 186 Cal. Rptr. 30, 32 (1982) (en banc); Hawn v. County of Ventura, 73 Cal. App. 3d 1009, 1012, 141 Cal. Rptr. 111, 112 (1977), *cert. denied*, 436 U.S. 917 (1978); Note, *supra* note 48, at 932.

106 Comment, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CAL. L. REV. 1216, 1226 (1983). *E.g.*, Tilson v. Mofford, 153 Ariz. 468, 470, 737 P.2d 1367, 1369-70 (1987); Iman v. Bolin, 98 Ariz. 358, 364-65, 404 P.2d 705, 709 (1965) (en banc); Unlimited Progress v. Portland, 213 Or. 193, 195, 324 P.2d 239, 240 (1958); Barnes v. Paulus, 36 Or. App. 327, 332, 588 P.2d 1120, 1123 (1978). In practice, courts follow the doctrine of substantial compliance and overlook technical but harmless procedural violations. Comment, *supra*, at 1219; Comment, *supra* note 41, at 470-71. *E.g.*, Assembly of Cal. v. Deukmejian, 30 Cal. 3d 638, 652-53, 639 P.2d 939, 948, 180 Cal. Rptr. 297, 306, *application for stay denied sub nom.* Republican Nat'l Comm. v. Burton, 455 U.S. 1301, *cert. denied*, 456 U.S. 941 (1982); California Teachers Ass'n v. Collins, 1 Cal. 2d 202, 204, 34 P.2d 134, 134 (1934); State *ex rel.* Morris v. Marsh, 183 Neb. 521, 529-32, 162 N.W.2d 262, 268-69 (1968); Oklahomans for Modern Alcoholic Beverage Controls, Inc. v. Shelton, 501 P.2d 1089, 1092-94 (Okla. 1972).

107 *E.g.*, Boucher v. Engstrom, 528 P.2d 456, 460 (Alaska 1974); Kerby v. Luhrs, 44 Ariz. 208, 36 P.2d 549 (1934); AFL-CIO v. Eu, 36 Cal. 3d 687, 696, 686 P.2d 609, 614, 206 Cal. Rptr. 89, 94 (en banc), *stay denied sub nom.* Uhler v. AFL-CIO, 468 U.S. 1310 (Rehnquist, Circuit Justice 1984); Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 339-40 (Fla. 1978) (per curiam); Coalition for Political Honesty v. State Bd. of Elections, 83 Ill. 2d 236, 253-60, 415 N.E.2d 368, 378-82 (1980); Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 247-48, 69 N.E.2d 115, 127-28 (1946); Ferency v. Secretary of State, 409 Mich. 569, 297 N.W.2d 544 (1980); County Rd. Ass'n v. Board of State Canvassers, 407 Mich. 101, 282 N.W.2d 774 (1979); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Board of County Rd. Comm'rs v. Riley, 391 Mich. 666, 218 N.W.2d 144 (1974); Kuhn v. Department of Treasury, 384 Mich. 378, 183 N.W. 2d 796 (1971); City of Detroit v. City Clerk, 98 Mich. App. 136, 139, 296 N.W.2d 207, 208, *leave to appeal denied*, 408 Mich. 956 (1980); *In re* Initiative Petition No. 314, 625 P.2d 595 (Okla. 1980); Seattle Bldg. & Constr. Trades Council v. Seattle, 94 Wash. 2d 740, 746, 620 P.2d 82, 86 (1980).

108 *E.g.*, Beechnau v. Austin, 42 Mich. App. 328, 331, 201 N.W.2d 699, 701 (1972) (single subject); Barnes v. Paulus, 36 Or. App. 327, 332, 588 P.2d 1120, 1125 (1978) (single subject); Kolsti v. Guest, 565 S.W.2d 556, 557 (Tex. Civ. App. 1978) (numerical signature requirement).

under the "election cures all" doctrine[109] or place a higher burden of proof on challengers.[110]

In states with taxpayer or other broad standing grounds,[111] pre-election challenges based on alleged failures to meet procedural or subject matter requirements should be adjudicated because they do not involve the same level of justiciability issues discussed in Part IV above. Procedural and subject matter requirements could be viewed as jurisdictional limitations;[112] government officials do not have jurisdiction to conduct an election on a measure if these requirements have not been met, and this issue is immediately justiciable.

For example, suppose a pre-election suit challenges the validity of the signatures qualifying the measure for the ballot. The issue raised is not the hypothetical question whether the law, if passed, would be constitutionally defective; rather, it is the present and ripe question whether the measure's proponents are entitled to invoke the direct legislation process at all. The case is concrete and specific, and the record will not be improved by waiting until after the election to see how the law is applied in a specific case. For both procedural and subject matter requirements, the factual controversy—whether these requirements are met—exists before the election.[113] In general, post-election events will not sharpen the issues, and no additional facts are needed for the decision.[114] No contingencies make the issue speculative, hypothetical, or abstract, and no advisory opinion on the substantive validity of the measure is involved. Furthermore, the doctrine of avoiding constitutional questions unless necessary is not violated: the only constitutional issues involved are those specifically governing the proponents' right to invoke the direct legislation process. Determination of those questions before the election is necessary because the basis of the challenge is that the proponents are not entitled to invoke the process and thereby cause the expenditure of public funds. If the election is permitted, the very injury complained of will occur.

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109 *E.g.*, ALASKA STAT. § 15.45.230 (1982); N.D. CONST. art III, § 6; Renck v. Superior Court, 66 Ariz. 320, 187 P.2d 656 (1947); Moore v. Brown, 350 Mo. 256, 268, 165 S.W.2d 657, 662 (1942).

110 Comment, *supra* note 106, at 1227; Comment, *supra* note 41, at 481 (some states require a showing that the violations misled a substantial number of voters). *E.g.*, City of Glendale v. Buchanan, 195 Colo. 267, 272, 578 P.2d 221, 224 (1978) (plaintiff must show good cause for failure to challenge the measure before the election); City of Jackson v. Nims, 316 Mich. 694, 713, 26 N.W.2d 569, 578 (1947).

111 *E.g.*, Legislature of Cal. v. Deukmejian, 34 Cal. 3d 658, 666, 669 P.2d 17, 19, 194 Cal. Rptr. 781, 785 (1983) (per curiam) (plaintiffs were taxpayers, electors, and legislators); Committee for New Cobb County Revenue v. Brown, 228 Ga. 364, 368, 185 S.E.2d 534, 537 (1971) (plaintiffs were county citizens and taxpayers); Slama v. Attorney General, 384 Mass. 620, 622, 428 N.E.2d 134, 136 (1981) (plaintiffs were voters and signers of the initiative petition); McCaffrey v. Gartley, 377 A.2d 1367, 1370 (Me. 1977) (plaintiffs were voters, property taxpayers, and signers of the initiative petition); State *ex rel.* Wenzel v. Murray, 178 Mont. 441, 448, 585 P.2d 633, 638 (1978) (plaintiff was taxpayer, property owner, and elector); Columbia River Salmon & Tuna Packers Ass'n v. Appling, 232 Or. 230, 234, 375 P.2d 71, 73 (1962) (plaintiff was person adversely affected by an act of election officials).

112 *See* Sirico, *supra* note 73, at 663 (subject matter limitations are jurisdictional).

113 Grossman, *supra* note 48, at 116.

114 *Id.* A full factual record is not as critical for subject matter challenges because the violation is generally discernible from the language of the proposal itself. *See* Comment, *supra* note 106, at 1230.

The constitutional provisions and statutes governing direct legislation generally provide that measures shall be submitted to a vote if the procedural and subject matter limitations are met. If government officials refuse to certify a qualified measure for the ballot, they should be subject to the same judicial remedies available against any government official who refuses to perform statutorily mandated duties. If there is no judicial review, government officials could completely nullify the initiative and referendum processes, subject to control only by impeachment. Also, by providing that qualified measures shall be submitted to a vote, the governing provisions imply that nonqualifying measures shall not be submitted to a vote. A government official who spends taxpayer money for an unauthorized election is violating the law and should be subject to the same judicial review as other officials.

It could be argued that no pre-election review of procedural or subject matter challenges should be permitted since, by analogy, courts cannot adjudicate procedural or subject matter limitations on bills in the legislature. However, the analogy to the state legislature is not a perfect one. Because of separation of powers concerns, the legislature is seen as the sole guardian and enforcer of its internal rules. However, the procedural and subject matter limitations which apply in direct legislation are state constitutional provisions and statutes, not internal rules of the legislature. Also, since the electorate has much less ability than the legislature to make sure that the legislative rules are followed, the courts properly have the role of policing the integrity of the process,[115] just as they do in other elections. As they are the guardians of other constitutional rights, they should also be the guardians of the people's right to procedural fairness in initiative and referendum elections.[116] The alternative is to vest all pre-election protective power in the official who certifies measures for election. Since this official may be a part of the political establishment that the initiative and referendum processes are designed to circumvent, vesting the official with unreviewable power is inconsistent with the very notion of popular legislation.

Pre-election review of jurisdictional defects may also give the measure's proponents time to cure the defects before the election, thus saving time and money.[117] When the alleged defect is in the title or summary placed by the government official or in the manner of certification, the official may be able to cure the defect before the election.[118]

It is true that judicial resources and political capital would be conserved if courts waited until after the election and addressed procedural and subject matter issues only for successful measures. However, the basis of taxpayer standing is that the expenditure of public funds on the election is illegal. If the election is permitted, the very injury complained

115 Pre-election review of jurisdictional requirements "promotes the voter protection intended by the restrictions on the initiative process." Comment, *supra* note 106, at 1217.

116 *See* Dust v. Reviere, 277 Ark. 1, 4, 638 S.W.2d 663, 665 (1982); Metropolitan Dade County v. Shriver, 365 So. 2d 210, 212 (Fla. Dist. Ct. App. 1978); Coleman v. Bench, 96 Utah 143, 147, 84 P.2d 412, 413 (1938).

117 Comment, *supra* note 106, at 1217, 1231.

118 *Id.* at 1231.

of will occur. In addition, the signature requirement is designed to avoid the cost of elections on issues with little public support, to insure that frivolous or unreasonably narrow issues do not frustrate the voters, and to keep the ballot manageable.[119] Unlimited access to the ballot for proposals could undermine the direct legislation process, since the presence of too many proposals might frustrate or overwhelm voters. Voter falloff is already a problem; sometimes as many as twenty-five percent of those who turn out to vote for candidates in statewide elections do not vote on state propositions.[120] Moreover, voters may be less able or willing to inform themselves about a large number of measures. Postponing judicial review of the signature requirement until after the election therefore fails to afford the protections the signature requirement was designed to provide.

Accelerated review also can be a problem in procedural and subject matter cases. However, the consequences are less severe when procedural or subject matter limitations are adjudicated than when fundamental constitutional questions which can affect the basic political and legal framework of society are subjected to hyper-accelerated review. In any event, the courts have equitable discretion to deny relief when the challenge is brought too late to allow suffiicent time for review.[121] Also, a partial solution sometimes used by the United States Supreme Court in election cases is to issue the decision quickly and to issue the opinion later.[122]

Sometimes it is difficult to tell whether a particular restriction is a subject matter limitation or a general substantive prohibition. Subject matter restrictions that appear in the constitutional provision or statutory section that authorizes direct legislation are usually easily identifiable.[123] However, subject matter limitations need not appear in the authorizing section, since that requirement would elevate form over substance. For example, some courts hold that zoning is not a proper subject matter for initiatives because the initiative process does not provide for notice and

119 *See* Magleby, *Ballot Access for Initiatives and Popular Referendums: The Importance of Petition Circulation and Signature Validation Procedures*, 2 J. L. & POL. 287, 288 (1985).

120 D. MAGLEBY, *supra* note 2, at 46.

121 Thomas v. Bailey, 595 P.2d 1, 2 (Alaska 1979) (dictum); Brown v. McDaniel, 244 Ark. 362, 366, 427 S.W.2d 193, 195 (1968); Anne Arundel County v. McDonough, 277 Md. 271, 354 A.2d 788 (1976); Maginnis v. Childs, 284 Or. 337, 340, 587 P.2d 460, 461 (1978) (en banc).

122 For example, in Ray v. Blair, 343 U.S. 154 (1952) (per curiam), the case was argued March 31, 1952 and decided April 3, 1952 (mandate issued forthwith). The primary election was scheduled for May 6, 1952. The court filed its opinion April 15, 1952, 12 days after issuing its decision. 343 U.S. 214, 216 (1952).

123 However, some restrictions which appear in or near the authorizing section are really substantive restrictions. For example, MASS. CONST. amend. art. 48, pt. 2, § 2 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.

These are substantive rather than subject matter restrictions because they inquire whether proposed measures have a specified effect, not whether they address a particular subject matter.

hearing as required by other constitutional provisions.[124] Also, in some states initiatives may be used to amend but not to revise the state constitution, *i.e.*, they may add a provision to the constitution but not change an existing provision. This is because the state constitution explicitly provides special requirements for revising the constitution, and the initiative process does not satisfy these requirements.[125] Such restrictions are genuine subject matter limitations because they simply exclude initiatives from certain subject matters.[126] On the other hand, general constitutional or statutory restrictions that ban all laws which have a specified effect (such as laws abridging the freedom of speech) are general substantive prohibitions, not subject matter limitations. Challenges based on them should be reviewed only after the election.

Some restrictions are substantive prohibitions rather than subject matter limitations even though they apply only to direct legislation. For example, the Massachusetts 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.[127]

These are substantive prohibitions rather than subject matter restrictions because they inquire whether proposed measures have a specified effect, not whether they address a particular subject matter. A second example is the California Supreme Court's holding that a direct legislation measure may not impair essential governmental services.[128] While this restriction applies only to direct legislation and not to all laws, it is so amorphous that it does not really identify a particular topic.[129] Rather, the restriction provides that direct legislation measures cannot have a specified effect, and it is therefore a substantive restriction.

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124 *See* Comment, *supra* note 43, at 97-106. *But see* Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (zoning ordinances are a proper subject matter for initiatives despite the absence of notice and hearing); San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).

125 *E.g.*, McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787 (1948).

126 We have categorized the single subject rule as a subject matter restriction because it inquires whether a measure addresses more than one subject. While it might be argued that the single subject rule is a procedural requirement pertaining to the form of the ballot measure, the rule really requires inquiry into what subject matters the measure addresses, which is not simply a question of form. In any event, since we argue that the same rule should apply to both categories, the classification makes no difference for purposes of our analysis.

127 MASS. CONST. amend. art. 48, pt. 2, § 2.

128 Brosnahan v. Brown, 32 Cal. 3d 236, 258, 651 P.2d 274, 287, 186 Cal. Rptr. 30, 43-45 (1982); Simpson v. Hite, 36 Cal. 2d 125, 134, 222 P.2d 225, 230 (1950).

129 *Cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (test inquiring whether federal statutes impair "integral" or "traditional" governmental functions is uncertain and unworkable). For criticism of *Brosnahan*, see Fischer, *supra* note 66, at 55-59.

VI. A "Circuit Breaker" Exception

This Article has argued that pre-election review of a measure's substantive validity should generally be denied, but that pre-election review of procedural and subject matter challenges should be permitted. Although this model works almost all the time, there are extreme cases in which pre-election review of substantive validity should also be allowed. While the values which argue against pre-election review are very important, they are not absolute, and in special circumstances they can be outweighed by serious injury to other fundamental public values. Therefore, there should be a limited "circuit breaker" exception to the general principle of judicial nonintervention. In cases involving a present, significant, irreparable injury to a fundamental public interest, the court should be able to review pre-election challenges to substantive validity.[130] The exception should be as limited as possible to reflect an appropriate deference for the legislative process, and should not be invoked if less onerous alternatives are available to avoid or mitigate the injury.[131]

For example, in *Legislature of California v. Deukmejian*,[132] the California Supreme Court cancelled the special election on the Sebastiani reapportionment initiative because it found the measure clearly unconstitutional. The court cited two facts to justify its pre-election review.[133] First, the projected cost to the taxpayers of the special election was $15 million.[134] As argued earlier, the cost of direct legislation is a political question and does not justify judicial intervention.[135] Second, the implementation of changes in district boundaries so close to the June 1984 primary election would make orderly conduct of that election impossible.[136] The timing of the initiative election significantly injured the fundamental public interest in the June 1984 election. Before reviewing the measure's substantive validity, however, the court should have considered less onerous alternatives. For example, the court could have solved the problem by merely delaying the initiative until the June 1984 election, which would

130 *See* Comment, *Judicial Intervention in the Preelection Stage of the Initiative Process: A Change of Policy by the California Supreme Court*, 15 PAC. L.J. 1127, 1147-48 (1984) (advocating a limited exception when there are serious consequences and no alternatives to avoid them.)

131 *See id.* at 1147-49.

132 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983) (per curiam).

133 The court also treated the case as one involving a prohibited subject matter. The California Constitution provides that in the year following each national census, the state legislature shall reapportion the districts. CAL. CONST. art. XXI, § 1. The court interpreted this provision to mean that redistricting could not occur more than once per decade, whether by the legislature or by initiative. 34 Cal. 3d at 671-74, 669 P.2d at 25-26, 194 Cal. Rptr. at 789-90. Since the legislature had passed redistricting legislation in 1982, the court issued a writ of mandate preventing the special election on the initiative. The court referred to prior cases involving pre-election review of subject matter limitations, and then stated: "Here, as in those cases, the challenge goes to the power of the electorate to adopt the proposal in the first instance. The challenge does not require even a cursory glance at the substance of the initiative itself. The question is, in a sense, jurisdictional." 34 Cal. 3d at 667, 669 P.2d at 21, 194 Cal. Rptr. at 785.

134 34 Cal. 3d at 666, 669 P.2d at 21, 194 Cal. Rptr. at 785.

135 *See supra* notes 78-82 and accompanying text.

136 34 Cal. 3d at 666, 669 P.2d at 21, 194 Cal. Rptr. at 785.

have meant that the existing districting plan would be used for that election.[137]

The alternative of delaying the election would have been preferable to denying the electorate the right to vote and would have reduced judicial interference with the initiative process. Since pre-election review of a ballot proposition generally involves a suit in equity, the court has equitable discretion to fashion a remedy which will accomodate the interests of the parties. Therefore, courts should not be limited to the two alternatives of striking or not striking the ballot proposal, but should also have the power to delay the election when absolutely necessary.

The circuit breaker exception might also apply when the election causes widespread uncontrollable violence. In *Holmes v. Leadbetter*[138] and *Otey v. Common Council*,[139] federal district courts enjoined elections on anti-open housing initiatives because the courts considered the measures clearly unconstitutional and because of threatened race riots.[140] However, the Sixth Circuit may have overruled *Holmes* in *Ranjel v. City of Lansing*.[141] The court stated that citizens should not be deprived of their right to vote merely because a riot threatens, and that it is more appropriate to enjoin the unlawful acts of rioters than to deprive the electorate of its right to vote.[142] However, since no riot was threatened in *Ranjel*,[143] the language might be dicta.

Threats of violence should not per se justify pre-election review, since such threats (and even acts) are not infrequent in elections,[144] and since such a rule might encourage those seeking pre-election review themselves to use threats or acts of violence. If violent civil strife appears imminent, the court should consider the government's ability to quell the violence. If the government appears incapable of controlling the violence, the court should have the authority to delay the election until tensions subside—an alternative less onerous than cancellation. If delaying the election is not a viable option (e.g., if it would moot the election), the court should be able to invoke the circuit breaker exception and review the measure's substantive validity. In most cases, either the government will be able to control the violence or delaying the election will be a viable option. Therefore, invocation of the circuit breaker exception would be extremely rare.

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137 *See* Comment, *supra* note 130, at 1147.

138 294 F. Supp. 991 (E.D. Mich. 1968).

139 281 F. Supp. 264 (E.D. Wis. 1968).

140 Although in Holmes v. Leadbetter the court said it did not base its decision on "what is conceded to be the substantial exacerbation of public and private emotion" which would be caused by the election, 294 F. Supp. at 996, it referred to the riots repeatedly in the opinion, *id.* at 993, 995. Moreover, the same court later said that the case must be viewed in light of the 1968 Detroit riots. Yarborough v. City of Warren, 383 F. Supp. 676, 685 (E.D. Mich. 1974) (addressing issue of denial of constitutional rights based on theory of psychological impact).

141 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970). Also, the Wisconsin Supreme Court subsequently described *Otey* as contradictory to the "general tenor of Wisconsin law." State *ex rel.* Althouse v. City of Madison, 79 Wis. 2d 97, 112, 255 N.W.2d 449, 456 (1977). Of course, since *Otey* applied federal and not state law, this case did not overrule *Otey*.

142 417 F.2d at 324.

143 *Id.*

144 For example, candidates are often targets of assassination attempts, but this fact does not justify the cancellation of elections.

The circuit breaker exception is not an exception to the doctrine of ripeness, because ripeness is satisfied when a significant *present* injury is produced by contemplation of a future event.[145] Nor is it an exception to the argument that state statutes do not authorize pre-election substantive review, since statutes do authorize the granting of injunctions to prevent irreparable injury.[146]

Although the circuit breaker exception does involve advisory opinions and interference with legislative processes, these values must be weighed against the gravity of the threatened injury. Indeed, this kind of weighing occupies a historically established place in the discretion inherent in equitable remedies. Among other things, the court should consider whether the measure is unconstitutional on its face or whether a factual record is needed for adjudication.

The need for a limited circuit breaker exception should not be seen as a defect in the symmetry of the law. Formal logic and abstract theory must be tempered by pragmatic realities; otherwise the law is unreflective of real world conditions and unresponsive to real human needs.[147]

VII. Conclusion

With increasing frequency, courts are being asked to engage in pre-election review of initiatives and referendums. In general, courts should not conduct pre-election review of a measure's substantive validity because it involves issuing an advisory opinion, violates ripeness requirements and the policy of avoiding unnecessary constitutional questions, and interferes with a legislative process. Because submitting a substantively invalid measure to an election violates no constitutional or statutory provision, courts should generally have no authority to prevent the election. The amount of taxpayer money to be spent on direct legislation involves a political question and varies with the restrictiveness of the ballot access requirements adopted by each state. While there should be a circuit breaker exception when the election causes a present, significant, irreparable injury to a fundamental public interest, this exception should be extremely limited.

On the other hand, challenges alleging failure to comply with procedural requirements or subject matter limitations should be reviewable before the election in states with taxpayer or other broad standing grounds. This review does not involve an advisory opinion or violate the ripeness doctrine; rather, it addresses the present and justiciable issue of whether a government official should conduct, and whether taxpayer money should finance, an unauthorized election.

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145 L. TRIBE, *supra* note 53, at 80.

146 *E.g.*, UTAH R. CIV. P. 65A(b), (e).

147 *Cf.* O. HOLMES, JR., THE COMMON LAW 1, 1 (1881):

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.