Judicial Review of Initiative Constitutional Amendments

The use of the initiative as a method of amending state constitutions has become quite popular in recent years. This comment reviews the various states' procedures for qualifying an initiative constitutional amendment on the ballot and examines judicial decisions involving challenges to compliance with the initiative process. It concludes by suggesting standards for courts to apply in such challenges to safeguard the people's right to initiate amendments while preserving the integrity of the initiative process.

INTRODUCTION

As a method of "popular lawmaking," the initiative power was first adopted in the United States in the early 1900's.[1] Today, a majority of states provide for some method of direct input by voters in the legislative process, by reserving to the people the power to propose and enact laws (initiative statutes) or the power to repeal laws (referenda).[2] But only a third of the states currently permit direct public alteration of the state constitution

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[1] The initiative, a result of the Progressive movement during the first two decades of this century, is not an instrument of representative government but rather a symbol of disillusionment with representative institutions. By the end of the nineteenth century the prestige of state governmental institutions reached the lowest point in their history. The people began seeking devices by which to bypass unrepresentative, irresponsive, and often corrupt legislatures. The initiative, for both constitutional and statutory matters, was one such device.

J. Wheeler, Jr., *Changing the Fundamental Law*, in SALIENT ISSUES OF CONSTITUTIONAL REVISION 56 (1961).

[2] In addition to the states listed in note 3 *infra*, Alaska, Delaware, Idaho, Maine, Utah, Washington and Wyoming all permit voters to enact statutes by initiative and to repeal statutes enacted by the legislature through referenda. Maryland and New Mexico permit referenda on legislation of all types. Kentucky restricts referenda to legislation which classifies property or provides for differential property taxation. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 1980-81, at 26-29 (1980).

through initiative constitutional amendments.[3]

The recent adoption of Proposition 13 in California[4] highlights the importance of this method of amendment. Sensing a lack of legislative response to important public issues, voters in many states are recognizing the significance of the "legislative bypass" that the initiative provides.[5] As a consequence, this method of amending state constitutions is increasing in popularity.[6]

Judicial review of the initiative process raises important and sensitive issues. Parties challenging a particular initiative may request a court to enjoin an upcoming election.[7] Although courts undoubtedly possess this power,[8] it is one which they are reluctant to exercise.[9] Constitutional amendment by voter initiative is an exercise of the people's "fundamental sovereign power."[10]

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[3] These states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon and South Dakota. *See* Appendix Table One *infra* for the relevant constitutional and statutory provisions.

[4] CAL. CONST. art. XIIIA. The amendment restricts taxes on real property to one percent of full cash value, as defined in the amendment. In addition, imposition of new taxes by the state requires a two-thirds vote in the legislature. Local governmental units may enact new taxes only with the approval of two-thirds of the electorate. *See generally* notes 110-123 and accompanying text *infra* for a discussion of the California Supreme Court's treatment of a challenge to the validity of Proposition 13.

[5] The initiative power, however, does not always constitute a complete "legislative bypass." Of the states that permit initiative lawmaking, several require that the measure first be submitted to the legislature before it is voted upon. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 1980-81, at 26 (1980). In Massachusetts, this requirement applies even to initiative constitutional amendments. MASS. CONST. amend. art. 48, Init., pt. 2, § 3.

[6] In 1968, Florida became the first state in nearly 50 years to adopt a provision for constitutional amendment by initiative, FLA. CONST. art. XI, § 3. Since then, three other states have also adopted such provisions: ILL. CONST. art. XIV, § 3 (1970), MONT. CONST. art. XIV, § 9 (1972), S.D. CONST. art. XXIII, § 1 (1972).

[7] *See, e.g.*, McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787, *cert. denied*, 336 U.S. 918 (1948); Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 69 N.E.2d 115 (1946); State *ex rel.* Carson v. Kozer, 105 Or. 486, 210 P. 179 (1922), and cases cited in note 8 *infra*.

[8] *See, e.g.*, Kerby v. Griffin, 48 Ariz. 434, 442, 62 P.2d 1131, 1136 (1936); Epperson v. Jordan, 12 Cal. 2d 61, 63-64, 82 P.2d 445, 446-47 (1934); Moore v. Brown, 350 Mo. 256, 268, 165 S.W.2d 657, 662 (1942); Lundberg v. Koontz, 82 Nev. 360, 418 P.2d 808 (1966).

[9] *See, e.g.*, Weber v. Smathers, 338 So.2d 819, 821 (Fla. 1976).

[10] As the California Supreme Court noted, "[I]t is a fundamental precept of our law that although the legislative power under our constitutional framework

As such, judicial interference with that power is not taken lightly.[11] And since initiative constitutional amendments typically involve issues of heightened public interest,[12] a court reviewing the initiative process may be called upon to make difficult decisions on sensitive issues.

This comment examines the initiative constitutional amendment process in the various states which allow it and analyzes the role of the courts in reviewing this process. Part I reviews the general procedures for qualifying an initiative on the ballot and for approving it at an election. Part II examines current standards of judicial review in both pre-election and post-election litigation. Part III then analyzes the appropriate role of the courts in reviewing the initiative process.

I. Review of State Initiative Procedures

There are generally four steps involved in amending a state constitution by voter initiative.[13] First, the proposal must be

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is firmly vested in the Legislature, 'the people reserve to themselves the power of initiative and referendum.' " Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 219, 583 P.2d 1281, 1283, 149 Cal. Rptr. 239, 241 (1978).

[11] *See, e.g.*, Kerby v. Griffin, 48 Ariz. 434, 62 P.2d 1131 (1936).

[12] Successful recent amendments include establishing a "merit" system for judges, Ariz. Const. art. VI, §§ 3, 4, 12, 20, 28, 30, 35, imposing taxation and spending limitations on state and local government, Cal. Const. arts. XIIIA, XIIIB, approving "anti-busing" provisions, Colo. Const. art. IX, § 8, and providing for increased funding of mass transit, Mass. Const. amend. art. 78. *See* Appendix Table Two *infra* for a list of all recently proposed initiative constitutional amendments.

[13] The steps listed in the text apply generally, though each state differs in its specific requirements. Two states, however, severely restrict the initiative power. Illinois permits amendment by initiative only to Article IV of its constitution, which specifies the composition, powers and duties of the legislature. Ill. Const. art. XIV, § 2. Massachusetts requires legislative approval of the initiative prior to submission to the voters and exempts several general subjects from initiative amendment. Mass. Const. amend. art. 48, Init., pt. 4, §§ 2-5. In addition, Massachusetts, North Dakota, Ohio and Oregon impose minimum signature requirements which must be met before a proposal may be submitted for title and summary preparation and before the petitions may be generally circulated. Mass. Const. amend. art. 48, Init., pt. 2, § 3 (10 signatures); N.D. Const. amend. 105, § 2 (25 signatures); Ohio Rev. Code Ann. § 3519.01 (Page Supp. 1980) (100 signatures); Or. Rev. Stat. § 250.045 (1979) (25 signatures). This practice differs from most states, which impose minimum signature requirements only for purposes of qualifying the initiative on the ballot.

submitted to a state official, who reviews its language and prepares a title and summary to be placed on the petitions.[14] Second, the initiative's proponents prepare and circulate petitions to obtain the necessary number of signatures.[15] Third, the completed petitions are submitted to a state official for validation and for certification of the proposed amendment on the bal-

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See notes 18-22 and accompanying text *infra*. Nebraska requires an initiative's proponents to file a list of all contributors to their campaign with the Secretary of State. NEB. REV. STAT. § 32-704 (1978). Florida requires the proponents of initiative measures to register as a political committee. FLA. STAT. ANN. §§ 100.371(3), 106.03 (West Cum. Supp. 1980).

[14] ARK. STAT. ANN. § 2-208 (Supp. 1979); CAL. ELEC. CODE § 3502 (West 1977); COLO. REV. STAT. § 1-40-101(2) (Supp. 1978); MASS. CONST. amend. art. 48, Init., pt. 2, § 3; MONT. CODE ANN. § 13-27-312 (1979); OHIO REV. CODE ANN. § 3519.01 (Page Supp. 1980); OR. REV. STAT. § 250.065 (1979). In addition, some states require pre-circulation submission to the Secretary of State for review of the form of the petition. ARIZ. REV. STAT. ANN. § 19-111 (1975); FLA. STAT. ANN. § 100.371(3) (West Supp. 1980); MONT. CODE ANN. § 13-27-202 (1979); N.D. CONST. amend. art. 105, § 2; OR. REV. STAT. § 250.045(3) (1979); S.D. CODIFIED LAWS § 2-1-6.1 (1980). Michigan, Missouri and Nevada impose no statutory or constitutional pre-circulation requirements. Language construed by the Michigan Supreme Court in Pillon v. Kavanagh, 345 Mich. 536, 77 N.W.2d 257 (1956), as placing a duty on state officials to approve petitions prior to circulation has since been removed from the constitution. *Compare* MICH. CONST. art. XII, § 2 *with* MICH. CONST. OF 1868, art. XVII, § 2 (1913). Pre-circulation submission for title and summary preparation is optional in Oklahoma. OKLA. STAT. ANN. tit. 34, § 9D (West 1976).

Preparation of a measure's title and summary usually takes place before petition circulation, but some states defer this until after the measure has qualified for the ballot. In the former case, the title and summary thus appear on both the petitions and the ballot; in the latter case, they appear only on the ballot. *See* ARIZ. REV. STAT. ANN. § 19-125D (Supp. 1980); MICH. COMP. LAWS ANN. § 168.474 (1967); MO. ANN. STAT. § 116.160 (Vernon Supp. 1980); NEB. REV. STAT. § 32-707 (1978); S.D. CODIFIED LAWS § 12-13-9 (Supp. 1980) (title and summary prepared after initiative qualifies for ballot in these states). Typically, the state attorney general prepares the title and summary. *But see* ARIZ. REV. STAT. ANN. § 19-125D (Supp. 1980) (Secretary of State); COLO. REV. STAT. § 1-40-101(2) (Supp. 1978) (Secretary of State, Attorney General, and director of Legislative Drafting Office); MICH. COMP. LAWS ANN. § 168.474 (1967) (Board of State Canvassers); S.D. CODIFIED LAWS § 12-13-8 (Supp. 1980) (State Board of Elections).

[15] Several states have geographic distributional requirements to ensure that all signatures are not gathered from one or two populous areas in the state. *See* FLA. CONST. art. XI, § 3; MASS. CONST. amend. art. 48, Gen. Prov., pt. 2; MO. CONST. art. III, § 50; MONT. CONST. art. XIV, § 9(1); NEB. CONST. art. III, § 2, NEV. CONST. art. XIX, § 2, cl. 2; OHIO CONST. art. II, § 1g.

lot.[16] Finally, the required majority of voters must approve the proposal in an election.[17]

The number of petition signatures required for the measure to appear on the ballot is often expressed as a percentage of total votes cast for governor in the state's most recent gubernatorial election[18]—typically eight or ten percent for a proposed initiative constitutional amendment.[19] Some states, however, base the petition signature requirement on either a percentage of votes cast for a different office,[20] the number of legal voters in the state[21] or the state's population.[22]

Validation of the signatures thus collected is often an arduous process. Most states require the Secretary of State, with the assistance of local officials, to review the petitions and attest to their validity.[23] This may involve checking the individual names,

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[16] ARIZ. REV. STAT. ANN. § 19-121.04 (West Supp. 1980); ARK. STAT. ANN. § 2-210 (1976); CAL. ELEC. CODE §§ 3520-3521 (West 1977); FLA. STAT. ANN. § 99.097(1) (West Supp. 1980); ILL. ANN. STAT. ch. 46, § 10-8 (Smith-Hurd Supp. 1980); MASS. GEN. LAWS ANN. ch. 53, § 7 (West Cum. Supp. 1980); MICH. COMP. LAWS ANN. §§ 168.475-.476 (1967); MO. ANN. STAT. § 116.130 (Vernon Supp. 1980); MONT. CODE ANN. § 13-27-301 (1979); NEB. REV. STAT. § 32-704 (1978); N.D. CONST. amend. art. 105, § 6; OHIO REV. CODE ANN. § 3519.15 (Page Supp. 1979); OKLA. STAT. ANN. tit. 34, § 8 (West 1976); OR. REV. STAT. § 250.105 (1979).

[17] Most states require approval by a simple majority of those voting on the amendment. Exceptions are Illinois, ILL. CONST. art. XIV, § 3 (three-fifths of those voting on the amendment or a majority of those voting in the election), Massachusetts, MASS. CONST. amend. art. 48, Init., pt. 4, § 5 (majority of those voting on the amendment and 30% of those voting in the election), Nebraska, NEB. CONST. art. III, § 4 (majority of those voting on the amendment, and 35% of those voting in the election must vote on the amendment), and Nevada. NEV. CONST. art. XIX, § 2 (voters must approve amendment twice).

[18] *See, e.g.*, CAL. CONST. art. II, § 8 and note 19 *infra*.

[19] California, Illinois and Oregon require 8%, Michigan, Montana, Nebraska and South Dakota 10%, and Arizona 15%. Massachusetts, which requires submission to the legislature for approval, *see* note 13 *supra*, requires only three percent. *See generally* Appendix Table One *infra*.

[20] COLO. CONST. art. V, § 1 (Secretary of State); FLA. CONST. art. XI, § 3 (President); OKLA. CONST. art. V, § 2 (state office for which the most votes were cast).

[21] ARK. CONST. amend. 7 (10%); MO. CONST. art. III, § 49 (8%).

[22] N.D. CONST. amend. art. 105, § 9 (4%).

[23] *See* ARIZ. REV. STAT. ANN. § 19-121.02 (Supp. 1980); ARK. STAT. ANN. § 2-210 (1976); CAL. ELEC. CODE § 3520 (West 1977); FLA. STAT. ANN. § 100.371(4) (West Supp. 1980); ILL. ANN. STAT. ch. 46, § 10-8 (Smith-Hurd Supp. 1980); MASS. GEN. LAWS ANN. ch. 53, §§ 7, 22A (West Supp. 1980); MICH. COMP. LAWS

addresses or signatures on each petition.[24] Four states permit verification by allowing the state official to check a random sample of the signatures, names or addresses appearing on the petitions.[25] Others, either by statute[26] or judicial construction,[27] disallow such techniques and require individual verification. Almost all states require that the petitions be accompanied by an affidavit stating the circulator's belief that the names, addresses and signatures on each petition are genuine.[28] State offi-

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ANN. § 168.476 (1967); MONT. CODE ANN. § 13-27-303 (1979); NEB. REV. STAT. § 32-704 (1978); N.D. CENT. CODE § 16-01-11.1 (Supp. 1979); OHIO REV. CODE ANN. § 3519.15 (Page Supp. 1980); OR. REV. STAT. § 250.105 (1979). Two states simply require the state official to count the signatures and, if there are enough, to place the measure on the ballot. The sufficiency of the signatures only becomes an issue if someone challenges the petitions in litigation. OKLA. STAT. ANN. tit. 34, § 8 (West 1976); S.D. CODIFIED LAWS § 2-1-2.1 (1980).

[24] The statutory language is often unclear as to the meaning of the words "names" or "signatures." Presumably, the Secretary of State must determine if the names listed are those of persons eligible to sign the petition and if the signatures are genuine. Some statutes use the word "signatures" where the context indicates that both signatures and names are intended. *See, e.g.*, CAL. ELEC. CODE §§ 3520, 3521(b) (West 1977); MICH. COMP. LAWS ANN. § 168.476 (1967). Others use the words "names" and "signatures" interchangeably, *see* MASS. GEN. LAWS ANN. ch. 53, § 7 (West Supp. 1980), while still others clearly distinguish between "names" and "signatures." *See* MONT. CODE ANN. § 13-27-303 (1979); NEB. REV. STAT. § 32-704 (1978); OHIO REV. CODE ANN. § 3519.15 (Page Supp. 1980).

[25] CAL. ELEC. CODE §§ 3520-3521 (West 1977) (sample may be used if there are more than 500 signatures on a part petition, but if the total number of valid signatures thus computed statewide is between 90 and 110% of the required number, every signature must be checked); ILL. ANN. STAT. ch. 46, § 10-8 (Smith-Hurd Supp. 1980) (officials must sample 500 signatures or 10% of the signatures for each county, whichever is greater); MONT. CODE ANN. § 13-27-303 (1979) (each name must be individually checked, but signatures may be verified by random sample); OR. REV. STAT. § 250.105 (1979) (Secretary of State may use "appropriate" random sampling techniques).

[26] MASS. GEN. LAWS ANN. ch. 53, § 7 (West Supp. 1980); MONT. CODE ANN. § 13-27-303 (1979) (only for names); NEB. REV. STAT. § 32-704 (1978).

[27] The random-sampling provisions of FLA. STAT. ANN. § 99.097 (West Cum. Supp. 1980), which apply expressly to initiative statutes, were held inapplicable to initiative constitutional amendments in Let's Help Florida v. Smathers, 360 So.2d 494 (Fla. Dist. Ct. App. 1978).

[28] The circulator may also be required to affirm that all the signers were registered voters on the date of signing. *See* ARIZ. CONST. art. IV, pt. 1, § 1, cl. 9; ARIZ. REV. STAT. ANN. § 19-112 (Supp. 1980); ARK. STAT. ANN. § 2-207 (1976); COLO. CONST. art. V, § 1; COLO. REV. STAT. § 1-40-106(2) (Supp. 1978); ILL. ANN. STAT. ch. 46, § 28-3 (Smith-Hurd Supp. 1980); MICH. COMP. LAWS ANN. § 168.544c (Supp. 1980); MO. ANN. STAT. §§ 116.040, .080 (Vernon Supp.

cials must then review these affidavits as well.[29] State law also requires that the petitions be submitted to state officials by a certain date prior to the election.[30]

Once the proposal is properly certified, groups may campaign for or against its adoption.[31] Typically, the amendment must be

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1980); MONT. CODE ANN. § 13-27-302 (1979); NEB. REV. STAT. § 32-705 (1978); NEV. REV. STAT. § 295.055 (1979); OHIO REV. CODE ANN. § 3519.05 (Page Supp. 1980); OKLA. STAT. ANN. tit. 34, § 6 (West 1976); OR. REV. STAT. § 250.045(4) (1979). It is not clear from the language of the South Dakota statute whether this requirement pertains only to initiative statutes and referenda, or to initiative constitutional amendments as well.

[29] Most statutes do not explicitly so provide. *But see* OHIO REV. CODE ANN. § 3519.15 (Page Supp. 1980). Presumably, however, where the language requires verification of petition signatures, that includes the circulator's affidavit signature as well. The primary value of the affidavits is that they make the underlying petition signatures *prima facie* valid in any proceeding challenging the sufficiency of the petitions. *See, e.g.*, CAL. ELEC. CODE § 3519 (West 1977); COLO. REV. STAT. § 1-40-109(1) (Supp. 1978); COLO. CONST. art. V, § 1; ILL. ANN. STAT. ch. 46, § 10-10 (Smith-Hurd Supp. 1980); NEB. REV. STAT. § 32-705 (1978).

[30] ARIZ. CONST. art. IV, pt. 1, § 1(4) (four months); ARK. CONST. amend. 7, § 1 (four months); CAL. ELEC. CODE § 3514 (West 1977) (131 days); COLO. CONST. art. V, § 1 (four months); FLA. STAT. ANN. § 100.371(1) (West Supp. 1980) (90 days); ILL. CONST. art. XIV, § 3 (six months); MASS. CONST. amend. art. 48, Init., pt. 2, § 3 (by first Wednesday in September before the session of the legislature); MICH. CONST. art. XII, § 2 (120 days); MO. CONST. art. III, § 50 (four months); MONT. CODE ANN. § 13-27-104 (1979) (four months); NEB. CONST. art. III, § 2 (four months); NEV. CONST. art. XIX, § 2, cl. 4 (90 days); OR. CONST. art. IV, § 1(2)(e) (four months); S.D. CONST. art. XXIII, § 1 (one year). Oklahoma law, OKLA. STAT. ANN. tit. 34, § 8 (West 1976), simply provides that all the signatures must be collected within 90 days after a copy of the petition is filed with the Secretary of State.

[31] Certain provisions of the California Political Reform Act of 1974 limited the permissible expenditures of any group in circulating petitions or campaigning for or against an initiative amendment. These provisions were held unconstitutional in Hardie v. Fong Eu, 18 Cal. 3d 371, 378, 556 P.2d 301, 304, 134 Cal. Rptr. 201, 204 (1976), *cert. denied*, 430 U.S. 969 (1977). *See also* Citizens for Jobs & Energy v. Fair Political Practices Comm'n, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976); Pacific Gas & Elec. Co. v. City of Berkeley, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1st Dist. 1976). *But see* Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980) (contribution limitation on municipal initiative upheld). Courts in other states have also invalidated laws limiting campaign spending on initiative amendments. *See* Let's Help Florida v. Smathers, 453 F. Supp. 1003 (N.D. Fla. 1978), *aff'd. sub nom.* Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980); Colorado Project-Common Cause v. Anderson, 177 Colo. 402, 495 P.2d 218 (1972); Labor's Educational & Political Club-Independent v. Danforth, 561 S.W.2d 339, 345-46 (Mo. 1977). Most of these cases rely on the au-

approved by a simple majority of those voting on it in the election.[32] It becomes effective when the results of the election are proclaimed by the Governor or other designated state official.[33]

II. Judicial Review of the Initiative Process

In both pre-election and post-election litigation, the issues involved generally fall into three categories. First, a challenge may raise issues of procedural compliance, questioning whether or not the measure's proponents properly followed the steps required to invoke the initiative power. Second, suits may be brought to attack the scope and subject matter of the amendment, alleging that the proposed changes are too broad to be considered in one amendment or that the amendment addresses a subject that is excluded from the initiative amending process. Finally, attacks may be based upon general state or federal constitutional guarantees.

A. Pre-Election Challenges

Prior to voter approval or rejection of an initiative constitutional amendment, a party may seek judicial review to determine whether or not the initiative may legally appear on the ballot at all. Many states have statutory or constitutional provisions which expressly provide for judicial review of decisions by state officials.[34] Moreover, in some states a petition for mandamus or prohibition may be sought to compel or bar certification of the initiative on the ballot.[35]

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thority of Buckley v. Valeo, 424 U.S. 1 (1976), in which the Supreme Court struck down certain provisions of the Federal Election Campaign Act of 1971 under the first amendment. *See generally* Comment, *The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns*, 13 U.S.F.L. Rev. 145 (1978).

[32] *See* note 17 *supra*.

[33] *E.g.*, Mo. Ann. Stat § 116.330 (Vernon Supp. 1980); Neb. Const. art. III, § 4.

[34] Ark. Stat. Ann. § 2-208 (Supp. 1979); Colo. Rev. Stat. §§ 1-40-102(3), -109(2) (Supp. 1978); Ill. Ann. Stat. ch. 46, § 10-10.1 (Smith-Hurd Supp. 1980); Mass. Gen. Laws Ann. tit. 30A, § 14 (West 1979); Mich. Comp. Laws Ann. § 168.479 (1967); Mont. Code Ann. § 13-27-316(1) (1979); N.D. Const. amend. art. 105, §§ 6-7; Ohio Rev. Code Ann. § 3519.16 (Page 1972); Okla. Stat. Ann. tit. 34, §§ 8, 10 (West 1976); Or. Rev. Stat. § 250.085 (1979).

[35] Ariz. Rev. Stat. Ann. §§ 19-121.03, -122 (West 1975 & Supp. 1980); Ark. Stat. Ann. § 2-211 (1976); Cal. Civ. Proc. Code § 1085 (West 1980); Neb. Rev.

1. Procedural Requirements

The procedural rules governing initiative constitutional amendments may be either statutorily or constitutionally imposed.[36] A challenge to a petition's validity typically centers on one or more of the following grounds: the form of the petition,[37] the validity of its signatures,[38] the sufficiency of the circulators' affidavits,[39] or the propriety of action taken by state officials in either reviewing a petition's sufficiency[40] or preparing a title and summary.[41]

If a state statute is the source of a procedural requirement, the statute itself may become an issue. When the constitutional provisions regulating the initiative process are determined to be "self-executing,"[42] supporting statutes enacted to aid such provi-

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STAT. § 32-706 (1978); OKLA. STAT. ANN. tit. 34, § 18 (West 1976). In addition to these procedures and those listed in note 34 *supra*, pre-election cases have been held to be within the original jurisdiction of the state supreme court. *See, e.g.*, Mason v. Jernigan, 260 Ark. 385, 540 S.W.2d 851 (1976); Perry v. Jordan, 34 Cal. 2d 87, 207 P.2d 47 (1949); Coalition for Political Honesty v. State Bd. of Elections, 65 Ill. 2d 453, 359 N.E.2d 138 (1976); Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 69 N.E.2d 115 (1946); Council About Parochiaid v. Secretary of State, 403 Mich. 396, 270 N.W.2d 1 (1978); State *ex rel.* Williams v. Brown, 52 Ohio St. 2d 13, 368 N.E.2d 838 (1977).

[36] *See* Appendix Table One *infra* for a list of each state's statutory and constitutional provisions.

[37] Some states prescribe quite specifically the headings to be placed on the petitions, the language to be used, the number of lines for signatures, information to be supplied by the signers, and other details of form. *See, e.g.*, CAL. ELEC. CODE § 3501 (West 1977); MICH. COMP. LAWS ANN. § 168.482 (1967); MO. ANN. STAT. § 116.040 (Vernon Supp. 1980); NEB. REV. STAT. § 32-703 (1978); OKLA. STAT. ANN. tit. 34, § 2 (West 1976).

[38] *See* notes 23-24 and accompanying text *supra*.

[39] *See* notes 28-29 and accompanying text *supra*.

[40] Usually the Secretary of State certifies the measure for the ballot. In some states, other officials are charged with these duties. *See* COLO. REV. STAT. § 1-40-101 (Supp. 1978) (board composed of Secretary of State, Attorney General and director of the Legislative Drafting Office); ILL. ANN. STAT. ch. 46, § 10-8 (Smith-Hurd Supp. 1980) (State Board of Elections); MICH. COMP. LAWS ANN. § 168.476 (1967) (Board of State Canvassers); OKLA. STAT. ANN. tit. 34, § 8 (West 1976) (Supreme Court).

[41] *See* note 14 *supra*.

[42] Most state constitutional provisions for initiative lawmaking expressly state that they are self-executing. *See* ARIZ. CONST. art. IV, pt. 1, § 1, cl. 15; ARK. CONST. amend. 7; COLO. CONST. art. V, § 1; MASS. CONST. amend. art. 48, Gen. Prov., pt. 7; NEB. CONST. art. III, § 4; NEV. CONST. art. XIX, § 5; N.D. CONST. amend. art. 105, § 1; OHIO CONST. art. II, § 1g; OR. CONST. art. IV, §

sions may be invalid if they unreasonably restrict or alter the constitutionally mandated procedures.[43] Thus, while most cases dealing with procedural requirements involve the question of compliance with such procedures, challenges may also be made to the validity of statutorily imposed requirements under the "self-executing" doctrine.

Where the form of initiative petitions is prescribed by law,[44] courts will generally uphold the validity of petitions that contain only minor violations. This is because "the initiative power should not be hamstrung by technical petition requirements which have no bearing on the informatory purpose of the petition."[45] Thus, for example, courts have upheld petitions which had improperly placed headings,[46] improperly attached descriptive material[47] or inaccurate copies of the constitutional language to be amended.[48] Indeed, one court even upheld the valid-

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1(4)(b). Even when they do not, constitutional provisions may be held to be self-executing if they are sufficiently definite to be judicially enforceable. Wolverine Golf Club v. Hare, 24 Mich. App. 711, 180 N.W.2d 820 (1970), *aff'd*, 384 Mich. 461, 185 N.W.2d 392 (1971).

In Oklahoma, the constitutional provisions may not be self-executing, for OKLA. CONST. art. V, § 3 provides in part that "[t]he Legislature shall make suitable provisions for carrying into effect the operations of this article." In Yenter v. Baker, 126 Colo. 232, 239, 248 P.2d 311, 315 (1952), a similar provision was held to mean that the constitutional provisions were not self-executing, and the Oklahoma Supreme Court has referred to the statutes enacted as "vitalizing and implementing the article." Allen v. Burkhart, 377 P.2d 821, 824 (Okla. 1962).

[43] For example, statutes requiring submission of initiative petitions to state officials for certification at an earlier date than that specified in the constitution were held unconstitutional in Turley v. Bolin, 27 Ariz. App. 345, 554 P.2d 1288 (1976), Yenter v. Baker, 126 Colo. 232, 248 P.2d 311 (1952), and Wolverine Golf Club v. Hare, 24 Mich. App. 711, 180 N.W.2d 820 (1970), *aff'd*, 384 Mich. 461, 185 N.W.2d 392 (1971). If the constitutional provisions for amendment by initiative are held to be self-executing, the legislature may regulate the initiative process only to "prevent fraud or to render intelligible the purpose of the proposed law or amendment." State *ex rel.* Winter v. Swanson, 138 Neb. 597, 599, 294 N.W. 200, 201 (1940).

[44] *See* note 37 *supra*.

[45] Newsome v. Riley, 69 Mich. App. 725, 245 N.W.2d 374, 376 (1976).

[46] *Id.* at ___, 245 N.W.2d at 375-76; Council About Parochiaid v. Secretary of State, 403 Mich. 396, 397, 270 N.W.2d 1, 2 (1978).

[47] Council About Parochiaid v. Secretary of State, 403 Mich. 396, 397, 270 N.W.2d 1, 2 (1978).

[48] *Id.* The opinion did not specify the inaccuracy but concluded that the petition was sufficient "considering the nature of the omission and the full text

ity of petitions prepared from fragments of newspaper advertisements.[49] In each instance, the reviewing court emphasized that the procedural rules should be liberally construed[50] and that a petition which is "sufficiently accurate" should be upheld.[51]

State laws may also specify the manner of signing petitions,[52] but minor deviations do not invalidate the signatures. Thus, where a signator failed to sign his full Christian name,[53] used abbreviations in stating his address[54] or omitted the date of signature,[55] the signatures were nonetheless held valid. And when an individual signature was disqualified because the signator omitted his entire address, this did not invalidate other signatures or the petition as a whole.[56]

Most states require affidavits signed by the petition's circulators to be attached to the petitions.[57] Such affidavits often give presumptive validity to the other signatures on the petition.[58] Where a petition circulator has signed the petition twice[59] or was not registered to vote,[60] it has been held that this does not affect the presumed validity of the other signatures, absent proof of

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of the petition. . . ." *Id.*

[49] Billings v. Buchanan, 192 Colo. 32, 35-36, 555 P.2d 176, 179 (1976).

[50] *E.g., id.* at 35, 555 P.2d at 178.

[51] *E.g.*, Council About Parochiaid v. Secretary of State, 403 Mich. 396, 270 N.W.2d 1 (1978). The Missouri Supreme Court, however, held that an initiative petition without an enacting clause is void. State *ex rel.* Scott v. Kirkpatrick, 484 S.W.2d 161 (Mo. 1972). The total absence of the enacting clause was held not to be substantial compliance, because signers were not made aware that they were proposing a change in the constitution. *Id.* at 164.

[52] *See* note 37 *supra.*

[53] State *ex rel.* Morris v. Marsh, 183 Neb. 521, 532, 162 N.W.2d 262, 269 (1968).

[54] Oklahomans for Modern Alcoholic Beverage Controls v. Shelton, 501 P.2d 1089 (Okla. 1972); Hernett v. Meier, 173 N.W.2d 907, 913 (N.D. 1970). *See also* McCarney v. Meier, 286 N.W.2d 780 (N.D. 1979) (referendum petition).

[55] State *ex rel.* Morris v. Marsh, 183 Neb. 521, 532, 162 N.W.2d 262, 269 (1968).

[56] Oklahomans for Modern Alcoholic Beverage Controls v. Shelton, 501 P.2d 1089, 1092-94 (Okla. 1972).

[57] *See* notes 28 & 29 *supra.*

[58] *See* note 29 *supra.*

[59] State *ex rel.* Morris v. Marsh, 183 Neb. 521, 529-30, 162 N.W.2d 262, 268 (1968).

[60] Oklahomans for Modern Alcoholic Beverage Controls v. Shelton, 501 P.2d 1089, 1094 (Okla. 1972).

intentional fraud, willful misconduct or guilty knowledge on the part of the circulator.[61] However, if the affidavit is signed by someone other than the circulator or is not notarized when signed, the validity of the underlying signatures is no longer presumed, and the initiative's proponents must then prove that each challenged signature is valid.[62] Petitions returned with the affidavits unsigned altogether are invalid.[63]

Action by state officials involved in the certification process may also affect a petition's validity. If a state official certifies signatures without following one of the state's verification methods,[64] the petition signatures lose the presumed validity that certification would otherwise supply.[65] However, the challenging party must plead and prove with particularity the facts that make the signatures invalid.[66]

When the prepared ballot title or summary is challenged, courts will not alter the wording in response to trifling objections.[67] The role of the courts is not to find the best possible title

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[61] *See, e.g., In re* Initiative Petition No. 272, 388 P.2d 290, 293 (Okla. 1963). *See also* Dawson v. Meier, 78 N.W.2d 420, 425 (N.D. 1956), where technical failings in the notarization of the affidavit were disregarded.

[62] United Labor Comm. v. Kirkpatrick, 572 S.W.2d 449, 452 (Mo. 1978). *But see* Hebert v. State Ballot Law Comm'n, 406 N.E.2d 1047 (Mass. App. 1980), in which the court held that the affiant need not be an "eyewitness" to every signature.

[63] Wood v. Byrne, 60 N.D. 1, 232 N.W. 303 (1930).

[64] *See* notes 24-27 and accompanying text *supra*.

[65] State *ex rel.* Carson v. Kozer, 105 Or. 486, 501-02, 210 P. 179, 184 (1922). The validity supplied by the certificates signed by a county or state official is distinct from that supplied by the petition circulator's affidavit. The former verifies that the signators are registered voters, whereas the latter certifies that each is believed by the circulator to be a registered voter and that each person listed on the petition actually signed it. *See* State *ex rel.* Trindle v. Snell, 155 Or. 300, 305-07, 60 P.2d 964, 966-67 (1936).

[66] State *ex rel.* Carson v. Kozer, 105 Or. 486, 501-02, 210 P. 179, 184 (1922).

[67] For example, where a challenger alleged that a summary was too lengthy and did not contain the legally required wording, the California Supreme Court noted:

> The requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the initiative petitions. If that be accomplished in any given case, little more can be asked than that substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law.

California Teachers Ass'n v. Collins, 1 Cal. 2d 202, 204, 34 P.2d 134, 134

or summary, but rather to eliminate insufficient ones.[68] A leading California case[69] articulates the generally accepted standard:

> All legitimate presumptions should be indulged in favor of the propriety of the [state official's] actions. Only in a clear case should a title so prepared be held insufficient. . . . [I]f reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient. These rules of construction are in accord with the fundamental concept that provisions relating to the initiative should be liberally construed to permit, if possible, the exercise by the electors of this most important privilege.[70]

The summary may be held invalid, however, if it lacks objectivity. It must be "free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must not be tinged with partisan coloring."[71] In addition, if the summary proposes something that no rational voter would find objectionable, it will be invalidated.[72] In most cases, however, the courts will defer to the state official's judgment.[73]

(1934).

[68] Say v. Baker, 137 Colo. 155, 158-60, 322 P.2d 317, 319-20 (1958).

[69] Epperson v. Jordan, 12 Cal. 2d 61, 82 P.2d 445 (1938).

[70] *Id.* at 66, 82 P.2d at 448. *See also* Fletcher v. Bryant, 243 Ark. 864, 422 S.W.2d 698 (1968); *In re* Second Initiated Constitutional Amendment Respecting the Rights of the Public to Uninterrupted Service by Public Employees of 1980, 613 P.2d 867, 869 (Colo. 1980).

[71] Mason v. Jernigan, 260 Ark. 385, 540 S.W.2d 851, 853 (1976). The quoted language stems from an older Massachusetts opinion. *See* Opinion of the Justices, 271 Mass. 582, 171 N.E. 294 (1930). *See also* State *ex rel.* Williams v. Brown, 52 Ohio St. 2d 13, 19-20, 368 N.E.2d 838, 842-43 (1977). In one case, the popular name "Freedom to Hire" was disapproved when the actual purpose of the proposed amendment was to "restrict and curtail the number and hiring of employees." The title and summary, when construed along with the popular name, were held to "mislead and color the merit" of the amendment. Moore v. Hall, 229 Ark. 411, 415, 316 S.W.2d 207, 209 (1958).

[72] At issue in two Arkansas cases were titles which read: "An amendment prohibiting the operation of trains with unsafe and inadequate crews" and "An amendment to require adequate safety devices at all public railroad crossings." Both were held invalid. Johnson v. Hall, 229 Ark. 404, 316 S.W.2d 197 (1958); Johnson v. Hall, 229 Ark. 400, 316 S.W.2d 194 (1956).

[73] In Oregon, there is statutory review of the Attorney General's title and summary preparation in the state supreme court. OR. REV. STAT. § 250.085 (1979). In recent cases, that court has repeatedly noted that what is important is not whether the initiative's proponents or the court could draft a better title, but whether the statement is concise and impartial. *See* Kenney v. Paulus, 288 Or. 245, 604 P.2d 405 (1979); Priestly v. Paulus, 287 Or. 141, 597 P.2d 829 (1979); Oregon Initiative Fund v. Paulus, 287 Or. 125, 597 P.2d 829 (1979); Kegg v. Paulus, 282 Or. 47, 576 P.2d 827 (1979); Pacific Power & Light Co. v.

Some states do not permit challenges to procedural compliance once the proposal is certified to appear on the ballot.[74] The rationale behind such refusal is that the matter of procedural sufficiency becomes a political question.[75] Where this rule obtains, it is absolute, even if there is conclusive evidence of fraud in obtaining the signatures.[76]

2. Scope and Subject-Matter Requirements

In addition to prescribing the procedure for proposal and adoption of initiative constitutional amendments, state law may

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Paulus, 282 Or. 41, 576 P.2d 1252 (1978). There is at least implicit authority in OR. REV. STAT. § 250.085(3) (1979) for the court to draft its own title, but the court has not brought about sweeping changes in the cases before it. The section reads, in part: "The court shall review the title and measure to be initiated or referred, hear arguments, if any, and certify to the Secretary of State a title for the measure. . . ." *Id.* In Oklahoma, however, the supreme court is explicitly empowered by statute freely to revise the title and summary. *See* OKLA. STAT. ANN. tit. 34, § 10 (West 1976).

In addition to the actual language, the length of the summary may be an issue. It must be concise and not overly detailed, for if it were "cluttered with detailed explanation and discussion . . . it might fail of careful reading as a whole, and voters might not consider it of paramount importance." Opinion of the Justices, 357 Mass. 787, 800, 256 N.E.2d 420, 428 (1970). Many state statutes place a limit on the length of a summary. *See* ARIZ. REV. STAT. ANN. § 19-125D (Supp. 1980) (50 words); CAL. ELEC. CODE § 3502 (West 1977) (100 words); COLO. REV. STAT. § 1-40-101(1) (Supp. 1978) (summary must be "brief"); MICH. CONST. art. XII, § 2 (100 words); MO. ANN. STAT. §§ 116.160-.170 (Vernon Supp. 1980) (35-word title, 35-word summary of fiscal effects, if any); MONT. CODE ANN. § 13-27-312 (1979) (100 words); NEB. REV. STAT. § 32-707 (1978) (100 words); OKLA. STAT. ANN. tit. 34, § 9 (West 1976) (150 words); OR. REV. STAT. § 250.035 (1979) (10-word caption, 20-word statement of question proposed, 75-word statement of chief purpose); S.D. CODIFIED LAWS § 12-13-9 (Supp. 1980) (200 words).

[74] Renck v. Superior Court, 66 Ariz. 320, 187 P.2d 656 (1947); Moore v. Brown, 350 Mo. 256, 165 S.W.2d 657 (1942). *See also* Beebe v. Koontz, 72 Nev. 247, 253-54, 302 P.2d 486, 489-90 (1956), which held that the case had been brought too late to permit full resolution of the issues before the election, and no relief was granted.

[75] Renck v. Superior Court, 66 Ariz. 320, 327, 187 P.2d 656, 661 (1947).

[76] As one court noted: "In this proceeding, the exhibits, beyond any doubt, establish gross and extensive fraud. . . . This lamentable proof of venality on the part of a petition circulator, if circulator be the right word, can not justify ignoring the clear mandate of the Constitution." Shore v. Meier, 122 N.W.2d 566, 568 (N.D. 1963). The evidence indicated that forged signatures and purported signatures of deceased persons appeared on referendum petitions. *Id.* at 567.

also restrict what may be accomplished through the amending process. Almost all state constitutions[77] impose two requirements on any amendment, initiative or otherwise: it must be restricted to one subject, and it must only amend, not revise, the constitution. In addition, some states exempt certain parts of the state constitution from amendment by initiative.

The "single-subject" requirement derives from a specific clause found in the constitutions of most states.[78] In one Arizona case,[79] the proposed constitutional amendment in question would have affected taxation of copper and copper ore, provided for the assessment of property owned by public corporations and enlarged the powers of the state tax commission. The single-subject test articulated by the reviewing court was as follows:

> If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in the part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But, if any one of the propositions, although not directly contradicting the others, does not refer to such matters, or if it is not such that the voter supporting it would be reasonably expected to support the principle of the others, then there are in reality two or more amendments to be submitted, and the proposed amendment falls within the Constitutional prohibition.[80]

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[77] *See* Appendix Table One *infra* for state constitutional provisions.

[78] Usually such clauses require that if more than one amendment is submitted to the electors, each must be voted on separately. A petition that embraces more than one subject is therefore considered to be two amendments in violation of this provision. *See* ARIZ. CONST. art. XXI, § 1; ARK. CONST. art. XIX, § 22; COLO. CONST. art. XIX, § 2; FLA. CONST. art. XI, § 3; MASS. CONST. amend. art. 48, Init., pt. 2, § 3; MO. CONST. art. III, § 50; MONT. CONST. art. XIV, § 11; NEB. CONST. art. XVI, § 1. Three states explicitly require that each amendment must contain only one subject. *See* CAL. CONST. art. II, § 8(d); OKLA. CONST. art. XXIV, § 1; OR. CONST. art. IV, § 1(2)(a).

In Ohio, one petition may encompass several subjects, so long as each is voted on separately. State *ex rel.* O'Grady v. Brown, 47 Ohio St. 2d 265, 354 N.E.2d 690 (1976); State *ex rel.* Hubbell v. Bettman, 124 Ohio St. 24, 176 N.E. 664 (1931). In South Dakota, the constitution apparently permits multi-subject amendments. S.D. CONST. art. XXIII, § 1 states: "A proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment." Adopted in 1972, this provision has not yet been before a South Dakota court.

[79] Kerby v. Luhrs, 44 Ariz. 208, 36 P.2d 549 (1934).

[80] *Id.* at 221, 36 P.2d at 554.

The court recognized that the purpose of the single-subject requirement is to prevent "logrolling"[81] and characterized the proposed amendment as "logrolling of the worst type."[82]

The "non-revision" requirement stems from constitutional language which requires the calling of a constitutional convention to revise the state's constitution.[83] Since the amending process lacks the safeguards of a constitutional convention,[84] courts have held that it is impermissible for an amendment, whether proposed by the legislature or by voter initiative, to effect a revi-

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[81] The court defined logrolling as follows:

> The original framers of . . . three propositions . . . place them all in one measure, so that a legislator must vote either yes or no on the measure as a whole. He is thus forced, in order to secure the enactment of the proposition which he considers the most important, to vote for others of which he disapproves.

Id. at 214-15, 36 P.2d at 552. This refers to logrolling in the legislature, but the electorate would face an analogous problem when voting on a multi-subject amendment.

[82] *Id.* at 215, 36 P.2d at 555. A recent Florida case held that the single-subject clause in that state requires that the amendment be functionally unitary. *See* Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978). The court rejected an alternative test which would determine the number of subjects on the basis of the physical location of the articles amended. Under that test, an amendment of two articles would imply the existence of two subjects. This locational rule applies in Missouri. *See* MO. CONST. art. III, § 50.

[83] ARIZ. CONST. art. XXI, § 2; CAL. CONST. art. XVIII, § 2; COLO. CONST. art. XIX, § 1; ILL. CONST. art. XIV, § 1; MICH. CONST. art. XII, § 3; MO. CONST. art. III, § 50; MONT. CONST. art. XIV, §§ 1-7; NEB. CONST. art. XVI, § 2; NEV. CONST. art. XVI, § 2; OHIO CONST. art. XVI, §§ 2-3; OKLA. CONST. art. XXIV, § 2; OR. CONST. art. XVII, § 2(1); S.D. CONST. art. XXIII, § 2.

[84] *See, e.g.*, CAL. CONST. art. XVIII, § 2. Before a constitutional convention can be held, the legislature must call for a convention with a two-thirds majority in each house, and a majority of the electorate must approve. Only then may the legislature provide for the convention itself, and it must do so within six months of the electorate's approval.

The Florida Supreme Court distinguished amendment from revision, noting that

> revision contemplates deliberative action of either the legislature or a convention duly assembled in order to accomplish harmony in language and purpose between articles and to produce as nearly as possible a document free of doubts and inconsistencies. Deliberation, discussion, and drafting is a part of the scene of parliamentary procedures and essential when [revising the constitution].

Adams v. Gunter, 238 So.2d 824, 829 (Fla. 1970).

sion of the constitution.[85]

The leading case to invalidate a proposed initiative amendment in pre-election litigation based on a non-revision violation[86] involved a measure which would have repealed fifteen of the existing twenty-five articles of the California Constitution and created five new provisions. According to the court, the purpose of the measure was to aggregate "the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder."[87] Although noting that this might be appropriate at a constitutional convention, the court held it impermissible in a constitutional amendment.[88]

In addition to these requirements concerning the permissible scope of an amendment, some states also limit the permissible subject matter of an amendment. Both Illinois[89] and Massachu-

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[85] McFadden v. Jordan, 32 Cal. 2d 330, 346, 196 P.2d 787, 797, *cert. denied*, 336 U.S. 918 (1948); Adams v. Gunter, 238 So. 2d 824, 830-31 (Fla. 1970). In 1972, Florida adopted an amendment to FLA. CONST. art. XI, § 3 effectively overruling *Adams* and removing the non-revision requirement. It provides that "[t]he power to propose the *revision or amendment* of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith." (emphasis added).

[86] McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787, *cert. denied*, 336 U.S. 918 (1948). The proposed amendment in Kerby v. Luhrs, 44 Ariz. 208, 36 P.2d 549 (1934), *see* notes 79-82 and accompanying text *supra*, was invalidated because it violated the single-subject requirement, though the reasoning in the two cases is similar. *Compare* note 81 *supra with* text accompanying note 87 *infra*. Although the single-subject and non-revision requirements have in common the purpose of preventing "logrolling," they evolve from different constitutional language, *see* notes 78 & 83 *supra*, and remain two separate requirements with distinct judicial "tests." Post-election cases have more clearly distinguished between the two requirements. *See* notes 114-123 and accompanying text *infra*.

[87] McFadden v. Jordan, 32 Cal. 2d 330, 346, 196 P.2d 787, 797, *cert. denied*, 336 U.S. 918 (1948).

[88] The court stated that "[s]uch an appeal might well be proper in voting on a *revised* constitution, proposed under the safeguards provided for such a procedure, but it goes beyond the legitimate scope of a single amendatory article." *Id.* (citations omitted; emphasis in original).

[89] Illinois restricts initiative amendments to article IV of the constitution, which specifies the composition, duties and powers of the legislature. ILL. CONST. art. XIV, § 3. In reviewing the proceedings of the 1970 Constitutional Convention which adopted the provision, the Illinois Supreme Court noted that "[t]he committee's report [to the convention] indicated that it considered

setts[90] place significant restrictions of this type on a proposed amendment. The highest courts of both states have held that compliance with such restrictions will be considered in pre-election litigation and, if violated, the election enjoined.[91] Massachusetts,[92] Nebraska[93] and Oklahoma[94] bar resubmission of any defeated initiative proposal for three years. This requirement has also been challenged in pre-election litigation and held satisfied if the measure "differs substantially as to form and purpose" from the previously submitted initiative proposal.[95] Other states impose limitations that are not as far-reaching in scope.[96]

A minority of jurisdictions restrict their review of scope and subject-matter issues in pre-election litigation. In Ohio, for example, the constitution requires suits involving procedural issues

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that a general initiative was unnecessary, since the other procedures for amending the Constitution were to be liberalized, including the automatic, periodic submission to the electorate of the question of calling a constitutional convention." Coalition for Political Honesty v. State Bd. of Elections, 65 Ill.2d 453, 467, 359 N.E.2d 138, 145 (1976). The delegate proposing the current initiative provision to the convention explained its rationale as follows:

> [It] has been structured to apply only to the legislative article and to be limited to the area of government which it is most likely will not be changed in the constitution by [legislative] amendment. The Legislature, being composed of human beings, will be reluctant to change the provisions of the constitution that govern its structure and makeup, the number of its members and those sort of provisions.

Id. at 470, 359 N.E.2d at 146.

[90] Excluded subjects are religion and religious institutions, appointment and removal of judges, the reversal of a judicial decision, creation or abolition of courts, matters particular to a political division of the state, appropriations of money, and the guarantees in the constitution's declaration of rights, *i.e.*, compensation for the taking of private property, access to the courts, trial by jury, protection from unreasonable search or bail, and freedom of speech, press and assembly. MASS. CONST. amend. art. 48, Init., pt. 2, § 2.

[91] *See* Coalition for Political Honesty v. State Bd. of Elections, 65 Ill. 2d 453, 359 N.E.2d 138 (1976); Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 69 N.E.2d 115 (1946).

[92] MASS. CONST. amend. art. 48, Init., pt. 2, § 3.

[93] NEB. CONST. art. III, § 2.

[94] OKLA. CONST. art. V, § 6 requires that any measure resubmitted within three years must bear petitions signed by 25% of the state's legal voters.

[95] *In re* Initiative Petition No. 271, 373 P.2d 1017, 1019 (Okla. 1962), *cert. denied*, 371 U.S. 949 (1963).

[96] One such restriction is that no appropriations may be made by initiative. *See* MO. CONST. art. III, § 51; NEB. REV. STAT. § 32-704.1 (1978).

to be brought at least forty days prior to the election,[97] but this language has been held to apply to scope and subject-matter restrictions as well.[98] The Missouri Supreme Court has held that violation of the single-subject or non-revision requirements renders an initiative void *ab initio*, so that pre-election relief is unnecessary.[99] The court therefore held that only procedural requirements—those affecting the rights of the petition signers, not the electorate—should be considered in pre-election litigation.[100]

3. General Constitutional Prohibitions

An initiative amendment may also be challenged prior to an election on the basis of the merits of the proposal. Typically such challenges involve alleged violations of the Federal Constitution.[101] The overwhelming majority of courts have held that such issues are unripe and hence are not reviewable in pre-election litigation, since to hold otherwise would require courts unnecessarily to decide constitutional questions.[102]

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[97] OHIO CONST. art. II, § 1g provides, in part:

> The petition and signatures upon such petitions shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall otherwise be proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition. . . .

[98] The court in State *ex rel.* Schwartz v. Brown, 32 Ohio St. 2d 4, 288 N.E.2d 821 (1972), concluded that "the 40-day provision is not limited to signatory insufficiency but extends to any defect of the petition of such character as would render it insufficient to require submission to a vote of the electorate. . . ." *Id.* at 10, 288 N.E.2d at 825-26.

[99] Moore v. Brown, 350 Mo. 256, 267, 165 S.W.2d 657, 662 (1942).

[100] *Id.* at 268, 165 S.W.2d at 662-63.

[101] Standard federal constitutional challenges to initiative constitutional amendments include alleged violations of equal protection, impairment of contracts or vagueness of language in violation of due process. *See, e.g.*, Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 232-42, 244-48, 583 P.2d 1281, 1292-97, 1299-1300, 149 Cal. Rptr. 239, 250-55, 257-58 (1978). In addition, recent cases have unsuccessfully challenged the initiative process itself as violative of the equal protection clause of the 14th amendment. *See* Massachusetts Pub. Interest Research Group v. Secretary of the Commonwealth, 375 N.E.2d 1175 (Mass. 1978); Felix v. Milliken, 463 F. Supp. 1360, 1387-88 (E.D. Mich. 1978).

[102] "To exercise the power of judicial veto against the constitutionality of an amendment before its adoption . . . finds no justification in necessity, and is an unwarranted assumption by the Courts of the power reserved to the people

B. Post-Election Challenges

Voter approval of an initiative constitutional amendment may dramatically alter judicial review of challenges to a particular proposal. This is especially true when compliance with procedural requirements or the constitutionality of the proposal's merits are at issue.

1. Procedural Requirements

In post-election review of alleged procedural violations, the majority of courts restrict their review in one of two ways. Some courts adhere to the "election cures all" doctrine, which precludes review of procedural challenges in post-election litigation altogether. Alternatively, some courts will review such challenges, but only if the party attacking compliance with pre-election procedures sustains a high burden of proof.

The theory that an election cures procedural defects in initiative petitions derives from both express constitutional language[103] and judicial construction. An example of the latter oc-

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in the Constitution. . . ." Hamilton v. Vaughan, 212 Mich. 31, 38, 179 N.W. 553, 556 (1920) (Sharpe, J., concurring). *See also* Answer of the Justices, 377 N.E.2d 915, 917 (Mass. 1978). *But see* Gayle v. Hamm, 25 Cal. App. 3d 250, 101 Cal. Rptr. 628 (2d Dist. 1972), in which the court held that pre-election equitable jurisdiction would permit, but not require, the court to consider not only procedural and scope and subject-matter requirements, but also constitutional issues as well. *Id.* at 257, 101 Cal. Rptr. at 634.

[103] N.D. CONST. amend. art. 105, § 6 provides, in part:

> If the sufficiency of such petition is being reviewed at the time the ballot is prepared, the secretary of state shall place the measure on the ballot and no subsequent decision shall invalidate such measure if it is at such election approved by a majority of the votes cast thereon.

OHIO CONST. art. II, § 1g provides, in part:

> No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured. . . .

ARK. CONST. amend. 7 provides, in part:

> [T]he failure of the courts to decide prior to the election as to the sufficiency of any . . . petition shall not prevent the question from being placed upon the ballot at the election named in such petition, nor militate against the validity of such measure, if it shall have been approved by a vote of the people.

curred in Arizona, where the supreme court held that procedural compliance becomes a political question, and hence non-reviewable, after the election.[104] The Missouri Supreme Court reached the same conclusion.[105]

Those jurisdictions that permit post-election review of procedural compliance do so on a very restricted basis. Courts in such jurisdictions presume that voters were fully aware of all the issues involved in the election. Consequently, as a prerequisite to relief, these courts require proof that the alleged procedural violations misled a substantial portion of the electorate.[106] Moreover, the party attacking the measure must show good cause for failure to challenge the initiative prior to the election.[107] The Michigan Supreme Court noted in this context "that to now declare the amendment a nullity would thwart the expressed will of the voters. We are also conscious of the fact that these objections might have been raised in advance of submission. . . ."[108] In sum, most courts ignore procedural violations in post-election litigation and instead defer to the electorate's decision, absent compelling proof that the alleged violations misled the voters.[109]

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[104] Renck v. Superior Court, 66 Ariz. 320, 187 P.2d 656 (1947). This same rationale is used in Arizona and other states to preclude pre-election review once the measure has been certified on the ballot. *See* notes 74-76 and accompanying text *supra*.

[105] Moore v. Brown, 350 Mo. 256, 268, 165 S.W.2d 657, 662 (1942).

[106] *See, e.g.*, City of Glendale v. Buchanan, 195 Colo. 267, 272, 578 P.2d 221, 224 (1978).

[107] *Id.* at 274, 578 P.2d at 225-26.

[108] City of Jackson v. Nims, 316 Mich. 694, 711, 26 N.W.2d 569, 575-76 (1947). The standard applied by the court was that post-election attacks on pre-election procedures will be allowed only if it is shown that the omitted or incorrect procedures either (1) obstructed vote-casting at the election, (2) affected an "essential element" of the election, or (3) are declared by statute to be "essential." *Id.* at 713, 26 N.W.2d at 578.

[109] Concerning the requirements in City of Jackson v. Nims, 316 Mich. 694, 26 N.W.2d 569 (1947), it is difficult to envision such violations physically obstructing the casting of votes. This test, presumably, is essentially the same as that of "misleading the voters" discussed in the text accompanying note 106 *supra*.

A different standard of review obtains in California, as courts there freely review challenges to compliance with procedural requirements. Although no California courts have actually invalidated an amendment in post-election litigation for noncompliance with pre-election procedures, they have heard such arguments in post-election litigation and ruled on them without suggesting that a different standard of review applies. *See, e.g.*, Amador Valley Joint

2. Scope and Subject-Matter Requirements

Only in California have the single-subject and non-revision requirements received extensive post-election review. *Amador Valley Joint Union High School District v. State Board of Equalization*[110] involved numerous challenges to Proposition 13,[111] an initiative constitutional amendment which substantially reduced California property taxes[112] and imposed restrictions on the enactment of new taxes.[113]

With respect to allegations that Proposition 13 related to more than one subject, the court noted that the various provisions of the amendment had to be "reasonably germane" to a single subject.[114] In addition, the court stated that the provisions had to be "reasonably interdependent and functionally related," to avoid potential logrolling by "combining in a single measure provisions which might not have commanded majority support if considered separately."[115] The court held that the initiative's provisions were both reasonably germane and functionally re-

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Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 243, 583 P.2d 1281, 1298, 149 Cal. Rptr. 239, 256 (1978). Compliance with pre-election procedures has even been examined in cases brought years after the amendment in question was adopted. *See* People v. Frierson, 25 Cal. 3d 142, 187, 599 P.2d 587, 614, 158 Cal. Rptr. 281, 308 (1979) (challenging a 1972 initiative); Wright v. Jordan, 192 Cal. 704, 221 P. 915 (1923) (challenging a 1914 amendment); Fair Political Practices Comm'n v. California State Personnel Bd., 77 Cal. App. 3d 52, 143 Cal. Rptr. 393 (3d Dist. 1978) (challenging a 1934 initiative).

[110] 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

[111] CAL. CONST. art. XIIIA.

[112] The tax rate is limited to one percent of full cash value, and the assessed value of property is limited to the 1975-76 assessed value plus a maximum increase of two percent per year. CAL. CONST. art. XIIIA, §§ 1-2.

[113] The amendment requires extraordinary majority approval in the legislature to enact new state taxes and voter approval of any new taxes levied by local governmental units. CAL. CONST. art. XIIIA, § 3-4.

[114] Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 229-31, 583 P.2d 1281, 1290-91, 149 Cal. Rptr. 239, 248-49 (1978).

[115] The court took judicial notice of the extensive pre-election publicity surrounding Proposition 13, which indicated that there was little risk of voter confusion. The court also upheld the amendment's provisions against allegations that they promoted logrolling. The court noted: "We avoid an overly strict judicial application of the single-subject requirement, for to do so could well frustrate legitimate efforts by the people to accomplish integrated reform measures." *Id.* at 231-32, 583 P.2d at 1291, 149 Cal. Rptr. at 249.

lated to furtherance of real property tax relief.[116]

In considering the non-revision attack on Proposition 13, the court in *Amador Valley* looked at both the quantitative and qualitative effects of the amendment.[117] The quantitative analysis focused on both the amendment's length and the number of articles in the constitution that it would affect.[118] The court held that the measure had no impermissible quantitative effect, since its provisions were relatively brief and its effects were primarily limited to one article of the California Constitution.[119] As to impermissible qualitative effects, the petitioners in *Amador Valley* alleged that Proposition 13 had two: loss of home rule[120] and loss of a republican form of government. In rejecting these challenges, the court stated that tax limitations do not abrogate home rule powers[121] nor result in a loss of republican govern-

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[116] *Id.* at 230, 583 P.2d at 1290, 149 Cal. Rptr. at 248.

[117] Our analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature. For example, an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.

Id. at 223, 583 P.2d at 1286, 149 Cal. Rptr. at 244.

[118] *See* McFadden v. Jordan, 32 Cal. 2d 330, 346, 196 P.2d 787, 797, *cert. denied,* 336 U.S. 918 (1948), and discussion in text accompanying notes 86-88 *supra.* Although a pre-election case, it was discussed by the court in *Amador Valley* as an example of an amendment with impermissible quantitative effects. Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 222-23, 583 P.2d 1281, 1285-86, 149 Cal. Rptr. 239, 243-44 (1978).

[119] Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 224, 583 P.2d 1281, 1286, 149 Cal. Rptr. 239, 244 (1978).

[120] The term "home rule" was defined by the court as "the ability of local government . . . to control and finance local affairs without undue interference by the Legislature." *Id.* at 224-25, 583 P.2d at 1287, 149 Cal. Rptr. at 245.

[121] Petitioners argued that the power of local governments was lost by the operation of CAL. CONST. art. XIIIA, § 1(a), which provides that the proceeds from the property tax shall be "apportioned according to law," thus vesting in the legislature the ability to arbitrarily increase or decrease funds allocated to local agencies. The court rejected this argument for four reasons. First, similar language already exists in the constitution, *see* CAL. CONST. art. XIII, §§ 4, 20-21, and thus the new amendment could be no more threatening to home rule than the currently existing provisions. Second, the amendment does not de-

ment, since both state and local governments would continue to function through elected representatives.[122] The court therefore concluded that the amendment had no qualitative effects that amounted to a revision of the constitution.[123]

Thus, in contrast to challenges to either procedural compliance[124] or to the constitutionality of a proposal's merits,[125] the post-election standard of review applied to scope and subject-matter restrictions does not appreciably differ from that applied in pre-election litigation.[126] In California, the rules concerning scope and subject-matter restrictions are the same in both pre- and post-election cases.[127] And although no other jurisdiction has refined its tests to the degree that California has, dicta from cases in other states suggest that the standards of review applied to scope and subject-matter restrictions would be substantially identical in both pre- and post-election litigation.[128]

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stroy the taxing power of local agencies, because they may levy new or increased taxes with a two-thirds majority approval by the electorate. Third, the amendment does not empower the legislature to "direct or control local budgetary decisions or program service priorities." Finally, laws enacted after the passage of Proposition 13 indicate that the legislature intends to preserve the home rule powers, and thus the loss of these powers does not necessarily result from the passage of the amendment. *Id.* at 224-27, 583 P.2d at 1287-88, 149 Cal. Rptr. at 245-46.

[122] *Id.* at 227, 583 P.2d at 1288, 149 Cal. Rptr. at 246.

[123] *Id.* at 229, 583 P.2d at 1289, 149 Cal. Rptr. at 247.

[124] *Compare* notes 36-76 and accompanying text *supra with* notes 103-109 and accompanying text *supra.*

[125] *Compare* notes 101 & 102 and accompanying text *supra with* notes 129-136 and accompanying text *infra.*

[126] In some states, review of scope and subject-matter requirements is restricted in pre-election litigation, but the requirements themselves are not interpreted differently. *See* text accompanying notes 97-100 *supra.*

[127] *See* Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978), discussed in text accompanying notes 110-123 *supra.* Although *Amador Valley* was a post-election case, the California Supreme Court derived its standards for single-subject and non-revision requirements directly from three pre-election cases: Perry v. Jordan, 34 Cal. 2d 87, 207 P.2d 47 (1949), McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787, *cert. denied,* 336 U.S. 918 (1948), and Livermore v. Waite, 102 Cal. 113, 36 P. 424 (1894). The rules concerning single-subject and non-revision requirements were announced in *Amador Valley* without restriction to pre- or post-election litigation. 22 Cal. 3d at 224-25, 583 P.2d at 1286-87, 149 Cal. Rptr. at 244-45.

[128] *See, e.g.,* Moore v. Brown, 350 Mo. 256, 165 S.W.2d 657 (1942), a pre-election case, in which the court stated:

3. General Constitutional Prohibitions

Only in post-election litigation will courts entertain challenges to the actual merits of an amendment.[129] While such challenges are usually based upon the Federal Constitution,[130] challenges have also been made on state constitutional grounds.

The most common ground for attacking an initiative amendment under the state constitution is that its language conflicts with the state constitution itself.[131] Recent decisions, however, have dismissed this claim as frivolous. The Massachusetts Supreme Judicial Court, for example, noted simply that "it is difficult to comprehend how [a] proposed constitutional amendment can be 'unconstitutional' under our constitution."[132] While a

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> The general rule is that one constitutional amendment may change several articles or sections of a Constitution if all these changes are germane to a single controlling purpose. In such case it does not contain two amendments or two subjects, and cannot be said to violate [the constitution] for that reason. . . . Furthermore, if the amendment be double or multifarious the defect is *substantive,* and the measure will be void even if adopted. . . .

Id. at 267, 165 S.W.2d at 662 (citations omitted; emphasis in original). *See also* text accompanying note 80 *supra.*

[129] For a discussion of why courts refuse to hear such challenges in pre-election litigation, see notes 101 & 102 and accompanying text *supra.*

[130] *See* note 101 *supra.*

[131] A second argument, accepted only in older cases, is that the amendment's language is not of "constitutional stature" and that it concerns matters that are fundamentally statutory in nature. The California Supreme Court, in striking down a conditional amendment, noted that the constitution should be of a "permanent and abiding nature." Livermore v. Waite, 102 Cal. 113, 118, 36 P. 424, 426 (1894) (legislatively submitted constitutional amendment). The Missouri Supreme Court subsequently applied this analysis in State *ex rel.* Halliburton v. Roach, 230 Mo. 408, 130 S.W. 689 (1910), when it held unconstitutional an initiative amendment that would expire in 10 years. The *Halliburton* case would today be doubtful authority for such an argument, *see* Moore v. Brown, 350 Mo. 256, 265, 165 S.W.2d 657, 661 (1942), and it has not been accepted in subsequent cases. *See* City of Jackson v. Nims, 316 Mich. 694, 710, 26 N.W.2d 569, 575 (1947); State v. Burns, 351 Mo. 163, 174-75, 172 S.W.2d 259, 265-66 (1943); *In re* Initiative Petition No. 259, 316 P.2d 139, 142-44 (Okla. 1957). The current rationale is that "whether an initiated proposal belongs in the state's constitution or statutory law is a question for the citizens alone to decide; no branch of government, not even the courts, should intervene." Note, *Initiative and Referendum—Do They Encourage or Impair Better State Government?,* 5 FLA. ST. U. L. REV. 925, 944 (1977).

[132] Answer of the Justices, 377 N.E.2d 915, 916 n.2 (Mass. 1978). Although this is a pre-election case, the court was requested to rule on possible constitu-

conflict may arise when a newly adopted amendment fails to repeal contrary language in the constitution, a recent Florida decision[133] suggests that this is a matter for judicial interpretation and does not render an amendment defective:

> "Conflict" with existing articles or sections of the Constitution can afford no logical basis for invalidating an initiative proposal. When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions. Otherwise, an amendment could no longer alter existing constitutional provisions.[134]

In the event that voters approve two conflicting amendments at the same election, most state constitutions provide that the one with the higher number of affirmative votes prevails.[135]

III. The Role of the Courts in Reviewing Initiative Constitutional Amendments

When reviewing challenges to initiative constitutional amendments, courts must harmonize two fundamental precepts underlying the initiative process. On one hand, courts must safeguard the exercise of the electorate's reserved initiative power from unwarranted interference, because that process rests on "the theory that all power of government ultimately resides in the people."[136] Whenever possible, therefore, courts should uphold the people's right to exercise this power.[137] At the same time, courts

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tional conflicts if the measure were adopted. The court declined to do so because the question propounded did not specify whether the "conflict" was with the state or federal constitution. *Id.* at 916-17. *See also* Baum v. Newbry, 200 Or. 576, 581-82, 267 P.2d 220, 223 (1954).

[133] Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978).

[134] *Id.* at 341. Although this issue was raised in a pre-election case, the strong language of the Florida court here, and of the Massachusetts court in a similar case, *see* text accompanying note 132 *supra*, indicates that such allegations would also be rejected in post-election litigation.

[135] *See, e.g.*, Cal. Const. arts. II, § 10(b), XVIII, § 1; Mich. Const. art. XII, § 2; Mo. Const. art. III, § 51. Similar language is found in Colo. Rev. Stat. § 1-40-113 (1974), but the Colorado Supreme Court noted that it would have so ruled in the absence of the statute in order to carry out the "meaning and purpose" of the constitution. *In re* Interrogatories Propounded by the Senate, 189 Colo. 1, 9, 536 P.2d 308, 315 (1975).

[136] Fair Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 41, 599 P.2d 46, 50, 157 Cal. Rptr. 855, 859 (1978), *cert. denied*, 444 U.S. 1049 (1980).

[137] "It has long been our judicial policy to apply a liberal construction to this

must also give effect to the constitutional and supporting statutory provisions that regulate the initiative power in order to maintain the integrity of the process.[138]

In pre-election challenges, courts should require only substantial compliance with procedural regulations. Only when there is clear and convincing proof of a violation should the presumptive validity of certified signatures or the sufficiency of a title and summary preparation be questioned.[139] Invoking the doctrine of substantial compliance will facilitate the people's use of their power of initiative, while ensuring that that power is used properly.

However, courts should closely examine any statutory regulations that restrict the initiative process to assure that it is not unreasonably hampered.[140] Courts should employ the "self-executing" doctrine[141] in evaluating statutes which impose obligations on an initiative's proponents prior to the circulation of petitions. Since legislatures often delegate substantial discretion to executive officials to evaluate the sufficiency of proposed initiatives before voters have had an opportunity to become familiar with them,[142] there is a real danger that this discretion might be

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initiative power whenever 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." *Id.*

[138] "It should not be presumed that electors were empowered to set in motion the legal machinery for the enactment by the people of a measure wholly void under the Constitution, with its consequent injury to the taxpayers." Caine v. Robbins, 61 Nev. 416, 426, 131 P.2d 516, 520 (1942).

[139] Some courts already apply the "substantial compliance" test. *See* text accompanying notes 45-51 *supra.*

[140] *See* Turley v. Bolin, 27 Ariz. App. 345, 554 P.2d 1288 (1976); Wolverine Golf Club v. Hare, 24 Mich. App. 711, 180 N.W.2d 820 (1970), *aff'd,* 384 Mich. 461, 185 N.W.2d 392 (1971), in which such statutory regulations were invalidated.

[141] *See* notes 42 & 43 and accompanying text *supra.*

[142] *See, e.g.,* FLA. STAT. ANN. § 100.371(3) (West Cum. Supp. 1980); MONT. CODE ANN. § 13-27-202 (1979); OHIO REV. CODE ANN. § 3519.01 (Page Supp. 1980). These statutes permit officials to disallow petitions which are defective in form. Courts have held that officials may not refuse to allow a petition to be circulated or refuse to certify a circulated petition for the ballot based on constitutional or scope and subject-matter requirements. *See* Schmitz v. Younger, 21 Cal. 3d 90, 93, 577 P.2d 652, 653, 145 Cal. Rptr. 517, 518 (1978); City of Rocky Ford v. Brown, 133 Colo. 262, 265, 293 P.2d 974, 976 (1956); Hamilton v. Vaughan, 212 Mich. 31, 38, 179 N.W. 553, 556 (1920).

abused so as to interfere with the initiative power.[143] Given that the purpose of the initiative is to bypass the legislature altogether,[144] courts must assure that this bypass is not rendered less effective by statutory provisions that confer unnecessary discretion on state officials. This would be best accomplished if courts construed the constitutional provisions regulating the initiative process as "self-executing."[145]

When scope and subject-matter requirements are at issue in pre-election litigation, according liberal review of such challenges is unnecessary. Put to the test of an election, the voters may reject the initiative,[146] and the question of compliance will become moot. On the other hand, it is undesirable to submit a proposal to the electorate which will subsequently be invalidated in post-election litigation.[147] Preferably then, courts should only grant pre-election relief to remedy alleged scope and subject-matter violations if the challenger is able to show that the amendment is "clearly and conclusively defective."[148] In most cases, application of such a standard would avoid the problem of deciding issues that may become moot, while at the same time preclude the placement of patently defective measures on the

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[143] Some of these statutory provisions purport to allow state officials to alter the form or language of the proposed amendment before the petitions are generally circulated. *See* note 14 *supra*.

[144] *See* note 1 *supra*. The initiative power was more bluntly characterized by the California Supreme Court as a "legislative battering ram." Amador Valley Joint High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 232, 583 P.2d 1281, 1292, 149 Cal. Rptr. 239, 250 (1978).

[145] In applying the "self-executing" doctrine, the Nebraska Supreme Court established standards for evaluating legislation enacted pursuant to constitutional provisions regulating initiative amendments. The legislature may only "enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed . . . constitutional amendment." State *ex rel.* Winter v. Swanson, 138 Neb. 597, 599, 294 N.W. 200, 201 (1940). It may not enact laws which impose "absurdity and hardship" on the public nor which "unnecessarily obstruct or impede the operation of the [self-executing] law." State *ex rel.* Morris v. Marsh, 183 Neb. 521, 525, 162 N.W.2d 262, 266 (1968).

[146] *See* note 157 *infra*.

[147] Preventing waste of public money has been cited by courts as a valid ground for affording pre-election relief. *See, e.g.*, Coalition for Political Honesty v. State Bd. of Elections, 65 Ill. 2d 453, 460, 359 N.E.2d 138, 142 (1976); Caine v. Robbins, 61 Nev. 416, 426, 131 P.2d 516, 520 (1942).

[148] *See* Gayle v. Hamm, 25 Cal. App. 3d 250, 257, 101 Cal. Rptr. 628, 633-34 (2d Dist. 1972); Weber v. Smathers, 338 So. 2d 819, 821 (Fla. 1976).

ballot.[149] This would give effect to constitutional limitations on scope and subject matter, while at the time permitting the electorate to vote on initiative amendments in all instances where they would be upheld anyway.

In post-election litigation, courts should altogether reject challenges to the procedural sufficiency of petitions under the "election cures all" doctrine.[150] Since courts construe an initiative constitutional amendment in light of its pre-election publicity and the "popular" meaning of its language,[151] there is little danger that a procedurally insufficient petition would cause voters to adopt something that they would otherwise have rejected. Of course, fraudulent circulation of petitions should not be permitted, but such behavior is already punished.[152] Such criminal sanctions adequately protect the integrity of the initiative process without restricting the rights of the entire electorate be-

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[149] As in jurisdictions which altogether preclude pre-election review of scope and subject-matter restrictions, *see* notes 97-100 and accompanying text *supra*, the suggested standard will substantially prevent courts from deciding issues that may become moot. However, the suggested standard is preferable to total preclusion of pre-election review in that the latter rule permits clearly and conclusively defective measures to be placed on the ballot. For a similar discussion of these policies in regard to statutory initiatives and referenda, see Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1725-29 (1966).

[150] *See* notes 103-105 and accompanying text *supra*.

[151] *See, e.g.*, Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 245-46, 583 P.2d 1281, 1300, 149 Cal. Rptr. 239, 258 (1978); Traverse City School Dist. v. Attorney General, 384 Mich. 390, 406-09, 185 N.W.2d 9, 15-17 (1971). The California Supreme Court has noted in a more recent case that it cannot rely on "popular meaning" to supply provisions that are wholly missing from the original enactment. Board of Supervisors v. Lonergan, 27 Cal. 3d 855, 865-66, 616 P.2d 802, 808, 167 Cal. Rptr. 820, 826 (1980).

[152] *See* ARIZ. REV. STAT. ANN. §§ 19-114.01, -115, -116, -129 (1975 & Supp. 1980); ARK. STAT. ANN. § 2-202 (1976); CAL. ELEC. CODE §§ 29710-29795 (West 1977 & Cum. Supp. 1980); COLO. REV. STAT. § 1-40-118 (1974); FLA. STAT. ANN. § 104.185 (West Cum. Supp. 1980); ILL. ANN. STAT. ch. 46, § 29-12 (Smith-Hurd Supp. 1980); MASS. GEN. LAWS ANN. ch. 56, §§ 6-7, 11 (West 1975); MICH. COMP. LAWS ANN. § 168.544c (Supp. 1980); MO. ANN. STAT. § 116.090 (Vernon Supp. 1980); MONT. CODE ANN. § 13-27-106 (1979); NEB. REV. STAT. § 32-713 (1978); NEV. REV. STAT. § 205.125 (1979); N.D. CENT. CODE § 16-01-11 (Supp. 1977); OHIO REV. CODE ANN. §§ 3519.14-.15 (Page 1972 & Supp. 1980); OKLA. STAT. ANN. tit. 34, §§ 3.1, 23 (West 1976); OR. REV. STAT. §§ 260.555-.575 (1979); S.D. CODIFIED LAWS § 12-26-28 (1975).

cause of the misconduct of petition circulators.[153]

Post-election review of compliance with scope and subject-matter requirements should be substantially the same as in pre-election challenges.[154] Since these requirements stem from state constitutional language,[155] the degree of compliance required should not depend upon the timing of the challenge. However, in post-election litigation the courts need not require the challenger to meet exceptional standards of proof, since the enjoining of an election is not at issue. Because the amendment will already have been approved by the people, a court need not concern itself with safeguarding the electorate's right to initiate amendments.

Without exception, courts should only entertain state or federal constitutional challenges to the merits of an amendment in post-election litigation. Such issues become ripe for decision only after the electorate approves the amendment in question.[156] In addition, since the likelihood that the electorate will adopt an initiative has historically been quite low,[157] the alleged deficiency may become moot. Deciding such issues in pre-election litigation is thus both unwise and unnecessary. After the election, however, courts must actively assure that constitutional rights have not been vitiated through the initiative process.[158]

CONCLUSION

Amendment of state constitutions by voter initiative is an important and increasingly significant right possessed by many American citizens. When exercising that right, the people act directly in their sovereign capacity. Government interference with

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[153] In a pre-election case, the existence of criminal sanctions led one court to conclude that "presumptions must be in favor of legality rather than illegality" of the petition signatures. State *ex rel.* Morris v. Marsh, 183 Neb. 521, 528, 162 N.W.2d 262, 267 (1968).

[154] *See* notes 146-149 and accompanying text *supra*.

[155] *See* notes 78 & 83 and accompanying text *supra*.

[156] *See* text accompanying note 102 *supra*.

[157] From 1966 to 1979, voters approved only 28.21% of the initiative amendments that have appeared on the ballot. *See* sources cited in Appendix Table Two *infra*.

[158] Since the initiative process is government by "democratic" rather than by "republican" methods, courts must protect constitutional liberties against derogation by majority rule. *See* Note, *Constitutional Constraints on Initiative and Referendum*, 32 VAND. L. REV. 1143 (1979).

the initiative process should thus be kept to a minimum.

For the courts, this means that legislative regulation of the initiative process must receive careful scrutiny to ensure that the electorate's initiative power is not unduly restricted. However, courts should reject pre-election challenges to compliance with procedure regulating the initiative process if the initiative's proponents have substantially complied with all reasonable regulations. In addition, courts should permit pre-election review of scope and subject-matter restrictions only if there is compelling proof of noncompliance. In post-election cases, on the other hand, courts should limit their review to state and federal constitutional challenges and challenges to compliance with scope and subject-matter requirements.

Application of these standards will permit the electorate to exercise its reserved power of initiative unhampered by technicalities while preserving the integrity of the process. Increasing use of the initative power to amend state constitutions demonstrates that citizens attach high value to the exercise of their sovereign rights. That lesson should not be lost upon the courts.

Douglas Michael

APPENDIX

Table One: Summary of State Provisions

State	Year Adopted	Constitutional Provisions	Primary Statutory Provisions	Signature Necessary
Arizona	1910	art. IV, pt. 1, § 1	ARIZ. REV. STAT. ANN. §§ 19-101 to 19-129 (1975 & Supp. 1980)	15% PGE[1]
Arkansas	1920	amend. 7	ARK. STAT. ANN. §§ 2-201 to 2-227 (1976) & Supp. 1979)	10% LV[2]
California	1911	art. II, §§ 8 & 10	CAL. ELEC. CODE §§ 3500-3533 (West 1977)	8% PGE
Colorado	1910	art. V, § 1	COLO. REV. STAT. §§ 1-40-101 to 1-40-119 (1974 & Supp. 1978)	8% PSE[3]
Florida	1968	art. XI, § 3	FLA. STAT. ANN. § 100.371 (West Cum. Supp. 1980)	8% PPE[4]
Illinois	1970	art. XIV, § 3	ILL. ANN. STAT. ch. 46, §§ 10-8 to 10-10.1, 16-6, 28-1 to 28-3 (Smith-Hurd Supp. 1980)	8% PGE
Massachusetts	1918	amend. art. 48	MASS. GEN. LAWS ANN. ch. 53, §§ 22A-22B, ch. 55B, §§ 4, 8-10 (West 1975 & Supp. 1980)	3% PGE
Michigan	1908	art. XII, § 2	MICH. COMP. LAWS ANN. §§ 168.471-.486 (1967 & Supp. 1980)	10% PGE
Missouri	1908	art. III, §§ 49-51	MO. ANN. STAT. §§ 116.010-.340 (Vernon Supp. 1980)	8% LV
Montana	1972	art. XIV, § 9	MONT. CODE ANN. §§ 13-27-101 to 13-27-316 (1979)	10% PGE

Nebraska	1912	art. III, § 2	NEB. REV. STAT. §§ 32-702 to 32-713.01 (1978)	10% PGE
Nevada	1912	art. XIX, § 1	NEV. REV. STAT. §§ 295.015-.055 (1979)	10% PGenE[5]
North Dakota	1914	amend. art. 105	N.D. CENT. CODE, §§ 16-01-11 to 16-01-11.2 (Supp. 1977)	4% of pop.
Ohio	1912	art. II, §§ 1a,1g	OHIO REV. CODE ANN. §§ 3519.01-.22 (Page 1972 & Supp. 1980)	10% PGE
Oklahoma	1907	art. V, § 2	OKLA. STAT. ANN. tit. 34, §§ 2-25 (West 1976 & Supp. 1979)	15% PGenE[6]
Oregon	1902	art. IV, § 1	OR. REV. STAT. §§ 250.005-.135 (1979)	8% PGE
South Dakota	1972	art. XXIII, § 1	S.D. CODIFIED LAWS §§ 2-1-2.1 to 2-1-11, 12-13-8, 12-13-9 (1975, 1980 & Supp. 1980)	10% PGE

1. Percentage of votes cast for governor in last election.
2. Percentage of the state's legal voters.
3. Percentages of votes cast for secretary of state in last election.
4. Percentage of votes cast for President in last election.
5. Percentage of all votes cast in last general election.
6. Percentage of votes cast for state office for which the highest total number of votes was cast.

Table Two: Proposed Initiative Constitutional Amendments

State	Year	Approved	Subject
Arizona	1974	Yes	Established commission for judicial appointments, merit system of elections, mandatory retirement age.
Arkansas	1978	No	Exempt food and drugs from state sales tax.
	1976	No	Continue the state's "open shop" laws.
California	1980	No	Limit state income tax.
	1979	Yes	Limit annual appropriations of state and local governmental units.
	1978	Yes	Limit property taxes.

	1973	No	Limit state revenues, expenditures, and state and local taxes.
Colorado	1978	No	Impose spending limitation on state and its political subdivisions.
	1976	No	Repeal the state equal rights amendment.
	1976	No	Require legislative hearings and a two-thirds legislative approval for construction of nuclear power plants.
	1976	No	Require referenda on all legislative acts resulting in new or increased taxes.
	1974	Yes	Prohibit annexation of territory without consent of residents in territory to be annexed.
	1974	Yes	Anti-busing amendment.
	1974	Yes	Create mandatory procedures to be followed prior to the explosion of any nuclear device.
Florida	1978	No	Create state-regulated gambling casinos in specified areas of the state.
	1976	Yes	Require financial interest and campaign finance disclosure of public officials and candidates; create independent commission to investigate complaints.
Illinois[1]	--	--	
Massachusetts	1974	Yes	Permit highway funds to be used for mass transit.
Michigan	1978	Yes	Raise minimum drinking age to 21.
	1978	Yes	Limit taxes, with increases tied to personal income to the state; permit no new taxes without voter approval.
	1978	Yes	Establish collective bargaining, binding arbitration, and merit promotions for state highway patrol.
	1978	No	Establish voucher system to finance public education.
	1978	No	Reduce property taxes; limit income taxes.
	1976	No	Provide for state graduated income tax.
	1976	No	Limit state taxes and spending.
	1974	Yes	Exempt food and drugs from state sales tax.
Missouri	1978	No	"Open shop" provision.

	1978	No	Increase motor vehicle fuel tax and counties' shares of the revenues.
	1976	Yes	Increase sales tax 1/8%, for use of the Missouri Conservation Commission.
	1976	No	Exempt food and drugs from state sales tax.
	1976	No	Authorize provision of handicapped services, transportation and textbooks to public and non-public schools.
Montana	1978	No	Return a portion of property tax assessment to counties, establish a commission for that purpose.
	1976	No	Restrict state spending and amount of federal funds that the state may accept.
	1974	Yes	Provide for biennial rather than annual sessions of the legislature.
Nebraska	1978	No	Limit increase in spending of local governmental units to 5% annually.
Nevada	1978	Yes	Limit property taxes.
North Dakota	1973	No	Establish single-member legislative districts and create reapportionment commission.
Ohio	1977	Yes	Require 30-day residency for voting, revise re-registration procedures.
	1977	No	Prohibit use of "leghold" animal traps.
	1976	No	Limit rates charged by public utilities.
	1976	No	Provide for representation of residential utility customers in regulatory matters affecting them.
	1976	No	Establish procedures for legislative approval of nuclear power plants and establish an accident compensation system.
	1976	No	Simplify initiative and referendum procedures.
	1975	No	Provide tax incentives for construction and utilization of industrial plants.
	1975	No	Authorize $1.75 billion in highway and transportation bonds.
	1975	No	Authorize state and local governments to provide health care (housing, nursing and extended care).

	1975	No	Authorize $2.75 billion in bonds for municipalities, energy facilities and heart and cancer facilities.
Oklahoma	1976	No	Permit sale of liquor by the drink for consumption on the premises.
Oregon	1978	No	Limit property taxes.
	1978	No	Restrict state land-use planning; require certain procedures and referenda on decisions.
South Dakota	1980	No	Limit property taxes.
	1980	No	Prohibit legislative amendment or repeal of initiated laws or legislative reenactment of laws repealed at referendum elections without voter approval.

1. Illinois has had no initiative constitutional amendments submitted to a vote of the electorate since that procedure was authorized there in 1970.

Sources: COUNCIL OF STATE GOVERNMENTS, MODERNIZING STATE CONSTITUTIONS 1966-1972, at 6 (1973).

Sturm, *Survey of State Constitutional Developments*, 69 NAT'L CIVIC REV. 38-39 (1980); 68 NAT'L CIVIC REV. 28-42 (1979); 67 NAT'L CIVIC REV. 33-35 (1978); 66 NAT'L CIVIC REV. 79-89 (1977); 65 NAT'L CIVIC REV. 27-29 (1976); 64 NAT'L CIVIC REV. 24-29 (1975); 63 NAT'L CIVIC REV. 84-86 (1974).

Letter from Alice Kundert, Secretary of State, South Dakota (Dec. 9, 1980) (on file at the U.C. Davis Law Review office).