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THE JUDICIARY AND POPULAR DEMOCRACY: SHOULD COURTS REVIEW BALLOT MEASURES PRIOR TO ELECTIONS?

"[T]he attempt to . . . obstruct the freedom of elections . . . if successful, would result in the overthrow of all liberty regulated by law. . . . If the courts can [order that an election not be held] from fear of some imaginary wrong, then people . . . are entirely subservient to the courts, and the consequences are too fearful to contemplate."**

"[P]ossible results of an abuse of judicial power will not [provide] a reason for denial of court review . . . Powers of a court . . . are not measured by what might be done through an arrogant and high-handed abuse of its legitimate authority."**

INTRODUCTION

Twenty-three states and the District of Columbia have supplemented the powers of their legislatures with provisions for popular legislation, which permit voters either to enact or to repeal constitutional amendments or statutes, or both.¹ Popular legislation is recognized as a legiti-

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¹ Walton v. Develing, 61 Ill. 201, 205-06 (1871).

** State ex rel. Linde v. Hall, 35 N.D. 34, 40, 159 N.W. 281, 283 (1916).

1. Fifteen states permit use of popular legislation to enact both constitutional amendments and statutes. See Ariz. Const. art. IV, pt. 1, § 1 (1), (2); Ark. Const. amend. VII, § 1; Cal. Const. art. II, § 8(a) (1911, amended 1976); Colo. Const. art. V, § 1(1) (1910, amended 1980); Mass. Const. amend. XLVIII, Definition, pt. 1; Mich. Const. art. II, § 9 (statute); id. art. XII, § 2 (constitutional amendment); Mo. Const. art. III, § 49; Mont. Const. art. III, § 4(1) (statute); id. art. XIV, § 9(1) (constitutional amendment); Neb. Const. art. III, § 2; Nev. Const. art. XIX, § 2(1) (1912, amended 1972); N.D. Const. art. III, § 1; Ohio Const. art. II, § 1; Okla. Const. art. V, § 1; Or. Const. art. IV, §1(2)(a) (1902, amended 1968); S.D. Const. art. III, §1 (statute); id. art. XXIII, § 1 (constitutional amendment) (1898, amended 1972). Two states restrict use of the initiative to enactment of constitutional amendments. See Fla. Const. art. XI, § 3 (1968, amended 1972); III. Const. art. XIV, § 3. Six states and the District of Columbia restrict use of the initiative to enactment of statutes. See Alaska Const. art. XI, § 1; Idaho Const. art. III, § 1 (1912, amended 1980); Me. Const. art. IV, pt. 3, § 18 (1909, amended 1980); Utah Const. art. VI, § 1; Wash. Const. art. II, § 1 (1912, amended 1981); Wyo. Const. art. III, § 52(a); D.C. Code Ann. § 1-281(a) (1981). Common to all twenty-four of these political units is that at some stage in the process, voters can initiate and subsequently approve measures. In a few states, once voters initiate a proposal, it is first sent to the state legislature for approval. If the legislature declines such approval, the measure is certified to be voted on by the public. See, e.g., Me. Const. art. IV, pt. 3, § 18 (1909, amended 1981); Mass. Const. amend. XLVIII, Initiative, pt. 5, § 1 (1918, amended 1950); Nev. Const. art. XIX, § 2(3) (1912, amended 1972). In the majority of states, the proposal qualifies for the ballot without passing through the legislature. See, e.g., Cal. Const. art. II, § 8(b), (c) (1911, amended 1976). Regardless of the method, the emphasis is on popular control of the legislative machinery. In several states, the voters are empowered to enact constitutional amendments, but only after the legislature has placed them on the ballot. See, e.g., Ky. Const. § 256 (1891, amended 1979); La. Const. art. XIII, § 1(1)(a); Miss. Const. art. XV, § 273 (1890, amended 1958). Because the content of such measures is determined by the legislature and not the voters, the measures are not popular in nature and are therefore not within the scope of this Note.

Twenty-one states and the District of Columbia also provide for popular legislation in
mate law-enacting mechanism. The products of this process, whether constitutional amendments or statutes, are equally as valid as those of the state legislature.

States allowing for popular legislation attempt to check the process by mandating compliance with specific procedures, known as technical requirements, before a measure may be placed on the ballot. In addition,
proposals are subject to two types of content restrictions. The first type is imposed by the constitutional provision authorizing the popular legislation process and is specific to that process. For example, some states provide that popular legislation may not encompass more than one topic or be either local or special in character. Some states also provide that popular legislation may not apply to certain topics. Courts disagree on whether state law provides for pre-election review of a ballot proposal to determine if the content violates one of these specific restrictions. The critical inquiry is whether the restriction in question should be viewed as a threshold requirement that must be met if the election itself is to be valid or as a limitation on the process of popular legislation. A limitation, unlike a threshold requirement, has no effect on the election's validity, but rather determines whether the law-enacting body or mechanism has the authority to enact particular legislation. The answer to the in-


6. See, e.g., Alaska Const. art. XI, § 7 (statute, referendum); Mont. Const. art. III, § 4(1) (statute); Wyo. Const. art. III, § 52(g) (statute, referendum).

7. See, e.g., Alaska Const. art. XI, § 7 (initiative or referendum not to be used to dedicate revenue, make or repeal appropriations, create courts or define courts' jurisdiction); Ill. Const. art. XIV, § 3 (initiative limited to structural and procedural subjects contained in article IV of state constitution); Mass. Const. amend. XLVIII, Initiative, pt. 2, § 2 (initiative not to relate to religion, court system, search and seizure, martial law, freedom of speech, freedom of press, freedom of elections or right of peaceful assembly); id. Referendum, pt. 3, § 2 (referendum not to relate to religion or court system); Mo. Const. art. III, § 51 (initiative may not be used for appropriations); Nev. Const. art. XIX, § 6 (initiative may not propose expenditure without corresponding tax increase); Ohio Const. art. II, § 1c (initiative or referendum not to be used to classify property in order to tax at different rates); Wyo. Const. art. III, § 52(g) (initiative or referendum not to be used to dedicate revenue or make appropriations; initiative not to affect courts); D.C. Code Ann. § 1-281(a) (1981) (initiative not to be used to appropriate funds). In addition, many states and the District of Columbia provide that the referendum may not be used to repeal emergency laws, which are generally described as being necessary for the immediate health and safety of the public. See, e.g., Alaska Const. art. XI, § 7; Colo. Const. art. V, § 1(3) (1910, amended 1980); Mo. Const. art. III, § 52(a); Ohio Const. art. II, § 1d; Okla. Const. art. V, § 2; S.D. Const. art. III, § 1; Wash. Const. art. II, § 1(b) (1912, amended 1981); Wyo. Const. art. III, § 52(g); D.C. Code Ann. § 1-281(b) (1981).


10. See, e.g., Cal. Const. art. IV, § 9 (1911, amended 1976) (single subject requirement); Ill. Const. art. IV, § 13 (prohibition on local or special legislation if general law can be passed). Missouri provides the best example of intent to make some restrictions threshold requirements and others only limitations. One section of its constitution provides that "[p]etitions for constitutional amendments shall not contain more than one amended and revised article . . . or one new article which shall not contain more than one subject. . . . Petitions for laws shall contain not more than one subject. . . ." Mo. Const. art. III, § 50. A different section provides that "[t]he initiative shall not be used
quiry lies in the relevant state constitutional provision.

In addition to these restrictions specifically applicable to popular legislation, the federal and state constitutions, as well as federal statutes, impose general substantive constraints on both popular legislation and the legislature. Most courts will not entertain a substantive challenge to a ballot proposal until it has been adopted. Other courts, however, undertake such review.

This Note analyzes pre-election judicial review with regard to the two types of content constraints on popular legislation. Part I illustrates that of the states that have placed content restrictions on the popular legislation process, some intend these restrictions to be threshold requirements. Pre-election review of a measure for compliance with such a restriction is appropriate because the validity of the election itself is in question. Other states intend only limitations on popular legislation in general. Pre-election review is therefore improper because no violation occurs until formal enactment. Part II demonstrates that courts should not review a measure for general substantive validity until the measure has been enacted. This Note concludes that before an election, the judiciary may review the procedure by which a measure has been proposed to ensure that it conforms to state threshold requirements. Unless there are explicit constitutional prohibitions on the content of measures proposed by popular legislation, however, the judiciary should defer to the system and not review the substance of a measure until it has been formally enacted.

I. CONTENT RESTRICTIONS SPECIFIC TO POPULAR LEGISLATION

Pre-election judicial review of a proposal for alleged violations of content restrictions specific to the popular legislation process is necessarily circumscribed by the language of the constitutional provision authorizing popular legislation and by the legislative intent underlying that provision. The question whether courts should exercise the power of review for the appropriation of money other than of new revenues created and provided for thereby. Id. § 51. The first provision relates to the sufficiency of the petition, while the other is a specific limitation on the power of the initiative.


in these cases, however, is more than merely semantic. It requires inquiry into the proper role of the judiciary within a system that provides for popular legislation.\textsuperscript{15}

The people of states that have placed restrictions on the content of a proposal while it is still at the proposal stage intend to prohibit any election on a proposal that does not comply.\textsuperscript{16} The Massachusetts Constitution, for example, provides that "[n]o proposition inconsistent with [the freedom of elections] shall be the subject of an initiative . . . petition."\textsuperscript{17} Because the constitution provides that the content of the petition itself, not simply the power of the people to enact it, is restricted, the Massachusetts Supreme Judicial Court properly conducted pre-election review of a proposal's content to determine whether it was inconsistent with this provision.\textsuperscript{18} Courts are derelict in performing their systemic duty when


\[\text{15. Although popular legislation embodies the salutary notion of giving the people some direct control over the laws by which they are governed, it does present the threat of majoritarian abuse. See infra note 35. Thus, some have argued that the judiciary should interpose itself as an active defender of minority interests. Sirico, supra note 2, at 647. The theoretical underpinnings of judicial deference to the legislature developed and reached crystalline form within a purely institutional framework: Courts, which were checked by legislatures and executives, acted in turn to check those institutions. Judicial ambivalence to the popular legislation process is well illustrated by the sharply differing attitudes of Justices Hugo Black and William Douglas. Compare James v. Valtierra, 402 U.S. 137, 141 (1971) (majority opinion by Black, J.) ("[p]rovisions for referendums demonstrate devotion to democracy") with Reitman v. Mulkey, 387 U.S. 369, 387 (1967) (Douglas, J., concurring) ("'the invasion of private rights is chiefly to be apprehended . . . from acts in which the Government is the mere instrument of the major number of the Constituents'") (quoting 5 Writings of James Madison 272 (Hunt ed. 1904) (emphasis in original)). The judiciary will generally adopt a deferential tone regarding popular legislation. See, e.g., McFadden v. Jordan, 32 Cal. 2d 330, 332, 196 P.2d 787, 788 (1948) (en banc), cert. denied, 336 U.S. 918 (1949); Oliver v. City of Tulsa, 654 P.2d 607, 613 (Okla. 1982).}\]

\[\text{16. See, e.g., Cal. Const. art. II, § 8(d) (1911, amended 1976) ("An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."); Mass. Const. amend. XLVIII, Initiative, pt. 2, § 2 ("No proposition inconsistent with any one of the following rights of the individual . . . shall be the subject of an initiative or referendum petition . . . "); Mo. Const. art. III, § 50 ("Petitions for constitutional amendments shall not contain more than one amended and revised article . . . or one new article which shall not contain more than one subject . . . Petitions for laws shall contain not more than one subject."); Nev. Const. art. XIX, § 6 (1912, amended 1972) ("[The constitution] does not permit the proposal of any statute or statutory amendment which makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax."); Or. Const. art. IV, § 1(2)(d) (1902, amended 1968) ("A proposed law or amendment . . . shall embrace one subject only."). Commentators have not recognized the difference between restrictions on petitions and limitations on the process of popular legislation. See, e.g., Comment, Pre-election Judicial Review: Taking the Initiative in Voter Protection, 71 Calif. L. Rev. 1216, 1228 (1983) [hereinafter cited as Taking the Initiative]; Comment, Judicial Review of Initiative Constitutional Amendments, 14 U.C.D. L. Rev. 461, 474-79 (1980).}\]


they decline to review such measures at the proposal stage. In Oregon, courts have misconstrued the one-topic restriction to be only a limitation. Although the state constitution provides that the "proposed law . . . shall embrace one subject only," the state court of appeals held that it does not have the authority to examine whether this provision has been violated until after the proposal has been adopted by the voters.

The people of other states also restrict the scope of popular legislation whether a proposal would amount to a law. See Paisner v. Attorney General, 390 Mass. 593, 597-98, 458 N.E.2d 734, 737-38 (1983). The extension is unwarranted, however. Bowe involved a state constitutional provision that specifically prohibited certain topics from appearing on petitions. See Bowe, 320 Mass. at 247-48, 69 N.E.2d at 128. The relevant constitutional provision in Paisner was not a restriction on the initiative itself. It simply defined the power of initiative as the power to enact laws. See Mass. Const. amend. XLVIII, Definition, pt. 1. The Paisner court held that it may review whether the proposal actually contemplated a law. See 390 Mass. at 598, 458 N.E.2d at 738. Lacking specific statutory authority to review whether the proposal would have amounted to a law, the Paisner court should have permitted the proposal to be placed before the voters.

19. In California, the state constitution clearly imposes a single subject restriction at the proposal stage. See Cal. Const. art. II, § 8(d) (1911, amended 1976). See supra note 16. The state supreme court will not review for compliance until after the election unless the restriction has clearly been violated. See Brosnahan v. Eu, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982) (per curiam). The dissent in the case pointed out that the constitutional provision should authorize review at the pre-election stage. See id. at 6, 641 P.2d at 202, 181 Cal. Rptr. at 102 (Mosk, J., dissenting). The California position is especially difficult to understand because the court has reviewed constitutional amendment proposals before elections to test their substantive validity. The state constitution provides specific procedures for constitutional revisions, as opposed to amendments. See Cal. Const. art. XVIII, § 2. Revisions are wider in scope than amendments because they may be used to alter the state constitution in any way that does not affront the federal Constitution. McFadden v. Jordan, 32 Cal. 2d 330, 333, 196 P.2d 787, 789 (1948) (en banc), cert. denied, 336 U.S. 918 (1949). Amendments are intended only to improve the existing state constitution. Id. Although these provisions do not authorize popular legislation, neither do they specifically forbid application of the initiative. See Cal. Const. art. II, § 8 (1911, amended 1966). Nevertheless, the state supreme court has held that it may examine a proposed constitutional amendment before an election and bar its submission to the voters if it actually proposes a constitutional revision. See McFadden, 32 Cal. 2d at 332, 196 P.2d at 788. McFadden and Brosnahan may be harmonized if one takes the position that the court will strike down only proposals that are clearly invalid. Compare Brosnahan, 31 Cal. 3d at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101 with McFadden, 32 Cal. 2d at 332, 196 P.2d at 788-89.


22. See Barnes v. Paulus, 36 Or. App. 327, 336, 588 P.2d 1120, 1125, appeal denied per curiam, 284 Or. 81, 588 P.2d 1084 (1978) (en banc). The court based its decision on an earlier case in which the supreme court held that it would not examine a statute for validity prior to an election. See id. (citing State ex rel. Stadter v. Newbry, 189 Or. 691, 697, 222 P.2d 737, 740 (1950)). The Stadter holding, however, was based on the fact that the state constitution did not authorize content review at the pre-election stage: "Neither the constitution nor any statute gave power to the courts to declare a proposed law, previous to its enactment, to be either constitutional or unconstitutional." Id. Subsequent to Stadter, a single topic restriction was placed in the state constitution. See Or. Const. art. IV, § 1(2)(d) (1968), amending Or. Const. art IV, § 1. The Barnes court's reliance on Stadter is, therefore, misplaced.
but do not authorize judicial review of content at the pre-election stage. Yet some courts have incorrectly held such restrictions to be threshold requirements when they actually amount only to limitations. For courts to assert power of review at this stage presents both conceptual and policy problems.

The first problem is ripeness. In states that have limited the scope of enacted initiatives, pre-election challenges require a court to examine the initiative as if it has been enacted. Because there is no guarantee that the initiative will be enacted, however, any alleged abuse of the initiative power is only hypothetical, and judicial inquiry is therefore premature.

For example, although Illinois law mandates that "[a]mendments shall be limited to structural and procedural subjects" contained in a specific article of the state constitution, the Illinois Supreme Court interpreted this restriction to be one of the "requirements for . . . proposing" an amendment. It then went on to review whether the subject matter of the proposal met the threshold requirement. Similarly, Alaska law provides that the initiative "shall not be used to . . . enact local or special legislation." The state supreme court held that a proposal may be examined before an election to determine whether its enactment is inconsistent with this restriction. The restriction does not make the election

23. In contrast to the restrictions listed supra at note 27, these are limitations on the power of popular legislation in general. See, e.g., Alaska Const. art. XI, § 7 ("[t]he initiative shall not be used to . . ."); Fla. Const. art. XI, § 3 (1968, amended 1972) ("The power to propose the revision or amendment . . . of [the state] constitution . . . is reserved to the people, provided that, any such revision or amendment shall embrace but one subject."); Ill. Const. art. XIV, § 3 ("Amendments shall be limited to structural and procedural subjects."); Mo. Const. art. III, § 51 ("[t]he initiative shall not be used for . . ."); Mont. Const. art. III, § 4(1) ("[t]he people may enact laws by initiative on all matters except . . ."); Ohio Const. art. II, § 1e ("[t]he powers [of] 'initiative' and 'referendum' shall not be used . . ."); Wyo. Const. art. III, § 52(g) ("[t]he initiative shall not be used to . . .").

24. See infra notes 26-31 and accompanying text.

25. See infra notes 47, 52 and accompanying text.

26. See Ill. Const. art. XIV, § 3. The specific article is article IV. See id. Article IV governs the structure and procedure of the state legislature. See id. art. IV.

27. Coalition for Political Honesty v. State Bd. of Elections, 65 Ill. 2d 453, 460, 359 N.E.2d 138, 141 (1976) (per curiam). The court perfunctorily dismissed prior case law forbidding review until after enactment as applying only to proposed statutory enactments and not to the proposed constitutional amendment. See id. The court found this distinction and its holding to be "obvious" but did not provide specific authority for its position. See id.

28. Id. at 463-72, 359 N.E.2d at 143-47. The court enjoined submission of the proposal to the voters after engaging in a lengthy determination of the meaning of "structural and procedural" subjects. See id. at 472, 359 N.E.2d at 147. See supra note 26.


30. Boucher v. Engstrom, 528 P.2d 456, 460-61 (Alaska 1974). Boucher is interesting because it involved constitutional and statutory restrictions. See id. at 460. Although the constitutional restriction was framed as a limitation, see Alaska Const. art. XI, § 7 ("the initiative shall not be used to . . . enact local or special legislation"), the statute created a threshold requirement, see Alaska Stat. § 15.45.010 (1960) ("no initiative may be proposed . . . to enact local or special legislation"). The court was unable to distinguish the two, stating that the statutory restriction "embodied" the constitutional limitation. See
illegal, however; it simply makes void the proposal's contents, if approved.31

Because the people of the state have established popular legislation as a legitimate law-enacting process, the judiciary should accord the process the same degree of deference that is accorded the legislative branch, unless there is specific statutory jurisdiction to review the content of proposals before elections.32 Many states have placed restrictions on the lawmaking authority of local government units.33 Courts, however, consistently hold that they are without authority to enjoin these legislative bodies from considering proposals that may be beyond their authority to enact.34 Similarly, courts should not stop the voters from considering

528 P.2d at 460 n.13. The court then proceeded to examine the proposal's content. See id. at 460. Boucher poses another problem. The statutory threshold requirement was passed by the legislature. Id. at 460. The court assumed that it is within the legislature's power to authorize judicial intervention into the process of a coordinate legislative actor. In a subsequent case, the supreme court used Boucher to justify pre-election review of general substantive validity. See Whitson v. Anchorage, 608 P.2d 759, 762 (Alaska 1980).

31. Like Alaska's, Ohio's restriction is framed as a limitation. See Ohio Const. art. II, § 1e. The state supreme court has treated it as such. See State ex rel. Cramer v. Brown, 7 Ohio St. 3d 5, 6, 454 N.E.2d 1321, 1321-22 (1983) (per curiam). However, it justified nonreview by relying on cases in which Ohio courts had refused to review for general substantive validity. See id. at 6, 454 N.E.2d at 1322 (citing State ex rel. Marcolin v. Smith, 105 Ohio St. 570, 572, 138 N.E. 881, 881 (1922) (per curiam)) (court may not decide whether proposed law violates federal Constitution or law enacted thereunder until initiative process is complete) and Weinland v. Fulton, 99 Ohio St. 10, 10, 121 N.E. 816, 816 (1918) (per curiam) (court may not decide whether proposed law conflicts with federal Constitution).

The Florida one-subject restriction is framed as a limitation. See Fla. Const. art. XI, § 3 (1968, amended 1972). The state supreme court, however, has elected to review the restriction at the pre-election phase, although with a strong presumption of the proposal's validity. See Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 339 (Fla. 1978) (per curiam). Perhaps the best way to account for this position is to realize that Florida courts also undertake cursory reviews of proposals for general substantive validity. See Fine v. Firestone, 443 So. 2d 253, 257 (Fla. Dist. Ct. App. 1983) (single subject requirement violated if "clearly and conclusively defective"; general substantive invalidity exists only if proposal patently unconstitutional in entirety), vacated on other grounds, 448 So. 2d 984 (Fla. 1984).

33. See, e.g., Ala. Const. art. XII, § 223 (local government may not make property assessments for drainage or pavement construction in excess of rise in property value); Ark. Const. art. XII, § 5 (local government may not purchase stock of, or make loan to, corporation or association); Wyo. Const. art. XIII, § 3 (municipal government may not tax or borrow except to pursue public purpose as specified by law).
34. See, e.g., Real Estate Dev. Co. v. City of Florence, 327 F. Supp. 513, 514-15 (E.D. Ky. 1971); City of Phoenix v. Superior Court, 65 Ariz. 139, 144-45, 175 P.2d 811, 814-15 (1946) (per curiam); Ringwood Solid Waste Management Auth. v. Borough of Ringwood, 131 N.J. Super. 61, 66, 328 A.2d 258, 260-61 (1974); Rheinhardt v. Yancey, 241 N.C. 184, 188, 84 S.E.2d 635, 658 (1954). In Rheinhardt, the court held that it would not enjoin the legislative process when the challenge was directed only at the content of a proposal, but that an injunction could issue if the process itself would be harmful to individuals and the ordinance itself would be invalid anyway. See id. A federal court has used this rationale to bar submission to voters of a referendum on an open housing ordinance. See Otey v. Common Council, 281 F. Supp. 264, 279 (E.D. Wis. 1968) (black plaintiff class and city would suffer great irreparable injury if referendum were held).
proposals that may be beyond the lawmaking authority of the popular legislation process.

One commentator argues that popular legislation is subject to fewer checks and balances than is the legislature and that courts should therefore subject ballot proposals to review before they are voted on.\textsuperscript{35} States have subjected the popular legislation process to checks, however, by establishing technical threshold requirements to weed out defective proposals. Typically, before a measure may be placed on the ballot, its proponents must collect a sufficient number of valid signatures endorsing it.\textsuperscript{36} In many states, the sponsors of a measure must demonstrate that its

\textsuperscript{35} See Taking the Initiative, supra note 27, at 1233-34 (advocating pre-election review to ensure compliance as to form, scope and subject matter). In many ways, popular legislation is antithetical to values held by the Founding Fathers. Madison believed that pure democracies are inherently unstable and permit the majority interest to oppress minorities. \textit{See} The Federalist No. 10, at 59-60 (J. Madison) (P. Ford ed. 1898). Republican government was designed to remedy this. Inherent in Madison's espousal of republicanism over popular democracy was a belief that public officials are better able than private citizens to submerge partisan interests to the general public good. \textit{See id.} at 60. What Madison could not have foreseen was that by 1900, political machines would take over legislative institutions and wield public power in favor of special interests. \textit{See} R. Hofstadter, The Age of Reform 255 (1955). The Progressive Movement, which developed partly in response to machine politics, naturally believed that the average citizen was more virtuous than the public official. \textit{See id.} The Progressives therefore left a legacy of electoral reforms, among them the initiative and referendum, which greatly increased popular participation in government. \textit{See id.} Progressives did not concern themselves with Madison's fear of majoritarian excesses, believing that the average citizen made rational, intellectual choices that were devoid of self-interest. \textit{See id.} at 257-59. Modern commentators, however, have resurrected the Madisonian concerns. \textit{See} Sirico, \textit{supra} note 2, at 647; Note, \textit{Constitutional Constraints on Initiative and Referendum}, 32 Vand. L. Rev. 1143, 1143 (1979) [hereinafter cited as \textit{Constitutional Constraints}]; Comment, \textit{Judicial Review of Laws Enacted by Popular Vote}, 55 Wash. L. Rev. 175, 189 (1979) [hereinafter cited as \textit{Judicial Review}]. These commentators, however, have focused on the judicial role once legislation has been enacted, advocating stricter judicial scrutiny of popular legislation than of traditional legislation. \textit{See} Grossman, \textit{supra} note 12, at 108; Sirico, \textit{supra}, at 648; \textit{Constitutional Constraints, supra}, at 1151-52; \textit{Judicial Review, supra}, at 204-07.

\textsuperscript{36} Generally, states require that proposed constitutional amendments receive more support than proposed statutes, and that proposed statutes receive more support than proposed referenda. Intuitively, it makes sense to require less support for proposals that would engender less sweeping results. The base total from which the percentage of required signatures is calculated is the total number of votes cast for all gubernatorial candidates at the most recent general election, unless otherwise indicated. \textit{See} Alaska Const. art. XI, § 3 (1959, amended 1970) (10%—statute, 10%—referendum; based on total vote in preceding general election); Ariz. Const. art. IV, pt. 1, § 1(2) (15%—amendment, 10%—statute); \textit{id.} § 1(3) (5%—referendum); Ark. Const. amend. VII, § 1 (10%—amendment, 8%—statute, 6%—referendum); Cal. Const. art. II, § 8(b) (1911, amended 1976) (8%—amendment, 5%—statute); \textit{id.} § 9(b) (1911, amended 1966) (5%—referendum); Colo. Const. art. V, § 1(2) (1910, amended 1980) (5%—amendment, 5%—statute; based on total vote for office of secretary of state at last election); \textit{id.} § 1(3) (5%—referendum; based on total vote for office of secretary of state at last election); Fla. Const. art. XI, § 3 (1968, amended 1972) (8%—amendment; based on total vote in last presidential election); Ill. Const. art. XIV, § 3 (8%—amendment); Me. Const. art. IV, pt. 3, § 18(2) (1909, amended 1981) (10%—statute); \textit{id.} § 17 (10%—referendum); Mass. Const. amend. XLVIII, Initiative, pt. 4, § 2 (1918, amended 1950) (3%—amendment); \textit{id.} pt. 5,
support is geographically diverse within the state. As a final check, completed forms must be submitted to designated authorities within a specified period before the scheduled election. These technical require-

§ 1 (3%—statute); id. Referendum, pt. 3, § 3 (2%—referendum); Mich. Const. art. XII, § 2 (10%—amendment); id. art. II, § 9 (8%—statute, 5%—referendum); Mont. Const. art. III, § 4(2) (5%—statute); id. art. XIV, § 9(1) (10%—amendment); id. art. III, § 5(1) (5%—referendum); Neb. Const. art. III, § 2 (10%—amendment, 7%—statute); id. § 3 (5%—referendum); Nev. Const. art. XIX, § 2(2) (1912, amended 1972) (10%—amendment, 10%—statute; based on total vote in last preceding general election); id. § 1 (10%—referendum; based on total vote in last preceding general election); N.D. Const. art III, § 9 (4%—amendment; based on population at last decennial census); id. § 4 (2%—statute, 2%—referendum; based on population at last decennial census); Ohio Const. art. II, § 1a (10%—amendment); id. § 1b (3%—statute); id. § 1c (6%—referendum); Okla. Const. art. V, § 2 (15%—amendment, 8%—statute, 5%—referendum; based on total vote cast for state office receiving highest vote in previous general election); Or. Const. art. IV, § 1(2)(c) (8%—amendment); id. § 1(2)(b) (6%—statute); id. § 1(3)(b) (4%—referendum); S.D. Const. art. III, § 1 (5%—statute, 5%—referendum; based on number of qualified electors); id. art. XXIII, § 1 (1898, amended 1972) (10%—amendment); Wash. Const. art. II, § 1(a) (1912, amended 1981) (8%—statute, 4%—referendum); Wyo. Const. art. III, § 52(c) (15%—statute, 15%—referendum; based on number of those who voted in previous general election); D.C. Code Ann. § 1-282(a) (5%—statute, 5%—referendum; based on number of registered voters). Idaho and Utah do not prescribe a required number of signatures in their constitutions; rather, the number is to be prescribed by statute. See Idaho Const. art. III, § 1 (1912, amended 1980) (statute, referendum); Utah Const. art. VI, § 1(2) (statute). Missouri does not impose a state-wide signature requirement but instead mandates support in two-thirds of the state's congressional districts. See Mo. Const. art. III, § 50. For a discussion of the signature technical requirement's effect on the content of initiative proposals, see infra note 39.

37. Constitutional provisions are anything but uniform in this area, but all, to some degree, ensure that a measure's proponents must expend at least minimal effort throughout the state at the initiation stage. See, e.g., Alaska Const. art. XI, § 3 (1959, amended 1970) (statute and referendum signatures must reside in at least two-thirds of state's election districts); Fla. Const. art. XI, § 3 (1968, amended 1972) (amendment must meet 8% signature requirement in one-half or more of congressional districts); Mass. Const. amend. XLVIII, Gen., pt. 2 (no more than 25% of signatures may be from any one county); Mo. Const. art. III, § 50 (amendment must be supported in two-thirds of congressional districts by 8% of registered voters; statute must receive 5% support); id. § 52(a) (referendum must receive 5% support in two-thirds of congressional districts); Mont. Const. art. III, § 4(2) (statute must receive 5% support in at least one-third of state legislative districts); id. § 5(1) (same requirement for referendum); Mont. Const. art. XIV, § 9(1) (amendment must receive 10% support in at least 40% of state legislative districts); Neb. Const. art. III, § 2 (amendment, statute or referendum must receive 5% support from 40% of counties); Nev. Const. art. XIX, § 2(2) (1912, amended 1972) (amendment and statute must receive 10% support from at least 75% of counties); Ohio Const. art. II, § 1g (1912, amended 1978) (amendment, statute or referendum must receive support of at least one-half of required electors from one-half of counties); Wyo. Const. art. III, § 52(c) (signatories must reside in at least two-thirds of state's counties); D.C. Code Ann. § 1-282(a) (1981) (statute or referendum must meet 5% signature requirement in five or more city wards).

38. States that have established constitutional guidelines all require initiative sponsors to file forms at least three months before the election. See, e.g., Ariz. Const. art. IV, pt. 1, § 1(4) (four months); Ark. Const. amend. VII, § 1 (same); Cal. Const. art. II, § 8(c) (1911, amended 1976) (131 days); Colo. Const. art. V, § 1(2) (1910, amended 1980) (three months); III. Const. art. XIV, § 3 (six months); Mich. Const. art. XII, § 2 (120 days); Mo. Const. art. III, § 50 (four months); Mont. Const. art. III, § 4(2) (three months); Nev. Const. art. XIX, § 2(4) (1912, amended 1972) (90 days); N.D. Const. art.
ments ensure that frivolous measures will not appear on the ballot and that voters will be able to make informed decisions regarding the content of proposals.\textsuperscript{39} Even if a substantively defective measure is placed before the voters, however, the judiciary may always examine it after approval,\textsuperscript{40} in the same way that it may examine a law after enactment by the state legislature.\textsuperscript{41} Courts will defer to the legislature partly because the legislature is interested in preserving its institutional autonomy and has the resources to do so successfully.\textsuperscript{42} Because popular legislation is only a process, however, it lacks an established, organized support structure to defend it from judicial encroachment.\textsuperscript{43} Therefore, popular legislation is far more vulnerable to judicial usurpation than is the legislature. Because popular legislation is checked by technical requirements and because the content of ballot measures is subject to post-election review, there is no reason for judicial intervention unless the state has explicitly granted the judiciary such power.

\textsuperscript{39} The signature requirement acts as a quality check on proposal content because it assures that only issues that arouse the public interest will be voted on. See Sirico, supra note 3, at 659-60; Note, \textit{Initiative and Referendum—Do They Encourage or Impair Better State Government?}, 5 Fla. St. U.L. Rev. 925, 948-49 (1977) [hereinafter cited as \textit{Initiative and Referendum}]; Note, \textit{The California Initiative Process: A Suggestion for Reform}, 48 S. Cal. L. Rev. 922, 924 (1975) [hereinafter cited as \textit{California Initiative Process}]. The time limit for submission ensures that voters will have sufficient time to consider the merits of a proposal and will not vote impulsively. See Sirico, supra note 2, at 670. Additionally, the geographic diversity requirement may prevent one section of a state from proposing and passing laws for its own benefit at the expense of others in the state.


\textsuperscript{42} State legislatures currently command tremendous personal and financial resources. There are 7438 state legislators in the United States. The Book of the States 1984-85, at 85 Table 2 (J. Gardner & L. Purcell 25th ed. 1984) [hereinafter cited as \textit{Book of States}]. Annual compensation reaches $48,000 per legislator in Alaska. \textit{Id.} at 92-93 Table 6. In addition, all legislators have a personal staff, \textit{id.} at 124 Table 21, and many legislative committees are staffed, \textit{id.} at 121 Table 19.

\textsuperscript{43} Popular legislation was originally intended to rectify problems caused by the intrusion of political machines into political institutions. See R. Hofstadter, supra note 35, at 255. Thus, no institutional framework exists for the process. Typically, a proposal is certified by the secretary of state, a member of the executive department. See, e.g., Cal. Const. art II, § 8(c) (1911, amended 1976); Mont. Const. art. III, §§ 4-5; Nev. Const. art. XIX, § 2(3),(4) (1912, amended 1972). Only the sponsors of a proposal, however, have sufficient interest and expertise to defend the proposal against judicial encroachment.
II. GENERAL SUBSTANTIVE LIMITATIONS ON THE INITIATIVE PROCESS

Whether laws are enacted by the legislature or by the voters, they are subject to general substantive restrictions imposed by the federal and state constitutions and federal statutes. Most courts refuse to conduct pre-election review of initiative proposals for general substantive validity. The reasons for nonreview, however, are not uniform. Some courts hold that they do not possess jurisdiction to decide the issue. Others view the problem as one of ripeness, holding that they will not issue advisory opinions. Still others analogize to judicial noninterference with legislative proceedings and thus refuse to interfere with popular legislation.

Regardless of the reasoning employed, the nonreview position has several advantages. It recognizes that measures enacted by popular legislation are as valid as those enacted by the legislature. Nonreview also promotes judicial efficiency. Over fifty percent of ballot proposals are rejected at the polls. Courts that do not review beforehand therefore save the time and expense involved in reviewing proposals that may ultimately be rejected by the voters. Nonreview also allows courts to avoid

44. See supra note 11.
47. See, e.g., City of Rocky Ford v. Brown, 133 Colo. 262, 266, 293 P.2d 974, 976 (1956) (en banc); Slack v. City of Salem, 31 Ill. 2d 174, 178, 201 N.E.2d 119, 121 (1964); State ex rel. Dahl v. Lange, 661 S.W.2d 7, 8 (Mo. 1983) (en banc); Anderson v. Byrne, 62 N.D. 218, 229, 242 N.W. 687, 692 (1932); State ex rel. O'Connell v. Kramer, 73 Wash. 2d 85, 86-87, 436 P.2d 786, 787 (1968) (en banc).
50. From 1980 to 1983, there were 23 popular proposals to amend state constitutions. Only eight were approved at the polls. Book of the States, supra note 42, at 212 Table A; see California Initiative Process, supra note 39, at 927 (in 63 years, nearly 75% of ballot initiatives in California have been defeated).
51. See Slack v. City of Salem, 31 Ill. 2d 174, 178, 201 N.E.2d 119, 121 (1964) (issues raised may never progress beyond realm of hypothetical); Hamilton v. Secretary of State,
deciding issues that lack concrete adverseness. Finally, this posture permits higher quality judicial decisionmaking if and when the measure is placed before the court for post-election review because the court may have more time to consider it.

Despite the conceptual and policy reasons calling for pre-election deference, several state courts review the general substantive content of proposals. The Montana Supreme Court, for example, enjoined an election, holding that the content of an initiative proposal violated the state constitution. In Florida, the court has held that it will enjoin elections when the challenged proposal is "clearly and conclusively defective." Both

227 Mich. 111, 122-23, 198 N.W. 843, 847 (1924) (if proposal is not approved, court need not pass on validity). One might make the same argument regarding review for technical compliance of the petition; however, the issue in such a case is the validity of the election itself, not its possible results.

52. See City of Rocky Ford v. Brown, 133 Colo. 262, 265-66, 293 P.2d 974, 976 (1956) (en banc); Slack v. City of Salem, 31 Ill. 2d 174, 178, 201 N.E.2d 119, 121 (1964); Hamilton v. Secretary of State, 212 Mich. 31, 36-37, 179 N.W. 553, 555 (1920) (Sharpe, J., concurring). This point is admittedly not a strong one because the proposal, unlike a legislative proposal that is subject to modification, will appear on the ballot exactly as it appeared on the petition. A pre-election examination is arguably hypothetical, yet it is distinguishable from a post-election examination only with regard to timing, not with regard to the judiciary's ability to review the initiative thoroughly. See Whitson v. Anchorage, 608 P.2d 759, 762 n.5 (Alaska 1980). The closely related advisory opinion rationale is also suspect for the same reasons.


54. State ex rel. Steen v. Murray, 144 Mont. 61, 66, 394 P.2d 761, 763-64 (1964) (per curiam). The state constitution contained a general prohibition against lotteries. See Mont. Const. of 1889, art. XIX, § 2, superseded by Mont. Const. of 1972, art. III, § 9. The court held that the initiative proposal contemplated a lottery and so was "clearly and palpably unconstitutional." 144 Mont. at 66, 394 P.2d at 764.

55. E.g., Fine v. Firestone, 443 So. 2d 253, 256 (Fla. Dist. Ct. App. 1983), vacated on other grounds, 448 So. 2d 984 (Fla. 1984); Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 342 ( Fla. 1978) (per curiam). The standard is based on earlier case law holding that popular voting on a constitutional amendment drafted by the legislature can be enjoined if it "plainly, palpably and inevitably" violated the federal Constitution. Gray v. Moss, 115 Fla. 701, 707, 156 So. 262, 264 (1934) (en banc). Other courts have also held that although they will not examine content at the pre-election stage, proposals that are patently defective may be removed from the ballot. See, e.g., State ex rel. Dahl v. Lange, 661 S.W.2d 7, 8 (Mo. 1983) (en banc) (unless amendment is unconstitutional on face, court will allow submission to voters); State ex rel. Samuelson v. Conrad, 25 Ohio Misc. 13, 15, 265 N.E.2d 803, 807 (few courts would not enjoin submission of proposal that is facially, unquestionably and palpably unconstitutional) (citing State ex rel. Marcolin v. Smith, 105 Ohio St. 570, 601-02, 138 N.E. 881, 890-91 (1922) (per curiam) (Marshall, C.J., dissenting)), aff'd mem., 265 N.E.2d at 803 n.1 (Ohio Ct. App.),
courts reason that pre-election review protects taxpayers from the "useless" public expenditures necessary to fund an election.\textsuperscript{56} This expenditure, however, is no more useless than the time and money expended on other legislative proceedings that may ultimately produce an infirm law. Democracy, whether direct or indirect, necessarily involves procedural inefficiencies that may require significant spending of public monies.\textsuperscript{57} Inefficiency and cost alone do not justify enjoining popularly mandated legislative processes.\textsuperscript{58}

There are additional problems presented by those courts that will strike only proposals that are clearly or palpably invalid. Courts reviewing under this standard often certify the proposal for election only to have it challenged again soon after approval at the polls.\textsuperscript{59} The judicial system may therefore be twice burdened with determining the validity of a single proposal. Certainly courts conducting such a cursory review at the pre-election stage will not deny that they possess the raw power to conduct a full-fledged pre-election review. Under a cost-benefit analysis, it seems anomalous to perform a less stringent review in the first instance, only to encourage opponents of the measure to challenge it again, forcing additional expenditures.

Finally, judicial review shortly before an election may prevent voters from being properly educated about the proposal's contents.\textsuperscript{60} Neither

\textit{appeal dismissed}, 265 N.E.2d at 803 n.1 (Ohio 1968); White v. Welling, 89 Utah 335, 340-41, 57 P.2d 703, 705 (1936) (per curiam) (court will not compel secretary of state to place facially unconstitutional proposal on ballot).

\textsuperscript{56} West Palm Beach Ass'n of Firefighters v. Board of City Comm'rs, 448 So. 2d 1212, 1214 (Fla. Dist. Ct. App. 1984) (city ordinance); State \textit{ex rel.} Steen v. Murray, 144 Mont. 61, 67, 394 P.2d 761, 764 (1964) (per curiam) (state statute). Other states also use the rationale of limiting public expenditures in order to conduct a pre-election review. \textit{See}, e.g., Coalition for Political Honesty v. State Bd. of Elections, 65 Ill. 2d 453, 461, 359 N.E.2d 138, 142 (1976) (per curiam); \textit{In re} Initiative Petition No. 314, 625 P.2d 595, 607 (Okla. 1980). The courts do not weigh relative costs in their calculations. Apparently they believe that public funding in itself justifies the power of review.

\textsuperscript{57} \textit{See} Threadgill v. Cross, 26 Okla. 403, 414-15, 109 P. 558, 562-63 (1910).

\textsuperscript{58} \textit{See} Legislature of Cal. v. Deukmejian, 34 Cal. 3d 658, 682, 669 P.2d 17, 34, 194 Cal. Rptr. 781, 798 (1983) (en banc) (per curiam) (Richardson, J., dissenting); State \textit{ex rel.} Evans v. Riiff, 73 S.D. 348, 352, 42 N.W.2d 887, 889 (1950). Courts that conduct review based on the cost of what would allegedly be a useless election may be simply attempting to expand judicial power without providing a theoretical underpinning of support. It is notable that courts justifying such review assert that they are not in fact conducting it. \textit{See Deukmejian}, 34 Cal. 3d at 667, 669 P.2d at 21, 194 Cal. Rptr. at 785 (holding that not even cursory substantive examination needed, and then proceeding to analyze validity thoroughly); \textit{cf.} White v. Welling, 89 Utah 335, 340-41, 57 P.2d 703, 705-06 (1936) (per curiam) (secretary of state may not judge validity of proposal but may examine proposal to see if it actually proposes law).


\textsuperscript{60} All proposal petitions must be submitted at least three months prior to the election. \textit{See supra} note 53. Thus, sufficient time is provided for voters to analyze the proposal and make an informed decision regarding its merits. \textit{See supra} note 39. Ironically, by reviewing measures so close in time to an election, courts neutralize this technical re-
proponents nor opponents of a measure are likely to expend effort concerning its passage while the measure is before the court. As a result, public exposure to both views of the initiative will be limited, thus depriving voters of information they will need should an election occur.

These factors have not dissuaded the California Supreme Court from adopting a unique position that amounts to pre-election substantive review. In *Legislature of California v. Deukmejian*, proponents of a proposal that called for redrawing the state's legislative and congressional boundary lines asserted that the proposal violated a state constitutional provision that permitted such legislation only one time within a decade. The court held that the challenge did not "require even a cursory examination of the substance of the initiative" because the constitution did not permit either the legislature or the voters to enact such legislation. The court ordered that the proposal not be placed before the voters.

requirement, thereby allowing the proposal to be submitted to fewer procedural checks than the framers of the state constitution intended. See *In re Initiative Petition No. 314*, 625 P.2d 595, 613-14 (Okla. 1980) (Opala, J., concurring).

61. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983) (en banc) (per curiam).

62. *See id.* at 663, 669 P.2d at 18, 194 Cal. Rptr. at 782. In 1981, the state legislature had reapportioned congressional and state legislative boundary lines, pursuant to 1980 census data. In a statewide referendum in 1982, the voters struck down the reapportionment plan. In early 1983, the legislature established new boundaries for districts. Opponents of the congressional reapportionment plan did not file referendum papers in time to challenge it. The state legislative reapportionment plan was passed as an urgency statute and therefore was not subject to referendum. *See id.* at 667-68, 669 P.2d at 21-22, 194 Cal. Rptr. at 785-86. Opponents of the reapportionment plans used the initiative process to attempt once again to redraw congressional and state boundary lines. They fulfilled state technical requirements for getting the initiative on the ballot for a special election in December 1983. *See id.* at 663-64, 669 P.2d at 19, 194 Cal. Rptr. at 783. Opponents challenged the measure's validity, arguing, among other things, that it would violate a provision of the state constitution, providing for only one redistricting after each census, *id.* at 664-65, 669 P.2d at 20, 194 Cal. Rptr. at 784, that it would violate federal and state guarantees of equal protection, *id.*, 669 P.2d at 20, 194 Cal. Rptr. at 784, and that it would violate the state's initiative-specific one-topic restriction because the proposal would redraw both federal congressional boundaries and state legislative boundaries, *id.*, 669 P.2d at 20, 194 Cal. Rptr. at 784.

It might be noted that the court elected to review an alleged substantive defect—the violation of article XXI of the state constitution—rather than the alleged violation of the one-topic restriction. *See id.* at 673-80 & n.19, 669 P.2d at 25-30 & n.19, 194 Cal. Rptr. at 789-94 & n.19. Perhaps this is not surprising given California's misinterpretation of its one-topic requirement. See *supra* note 19.

63. *Deukmejian*, 34 Cal. 3d at 667, 669 P.2d at 21, 194 Cal. Rptr. at 785.


In a vigorous dissent, Justice Richardson argued that the projected high cost of the forthcoming election did not justify pre-election review and that the proposal, far from being clearly invalid, was "plainly constitutional and valid." *Deukmejian*, 34 Cal. 3d at 681, 669 P.2d at 34, 194 Cal. Rptr. at 798 (Richardson, J., dissenting). It may be argued, therefore, that the court chose to review the measure in as thorough a manner as if the measure had been adopted. If so, California is the first and thus far the only state to set a single standard for pre-election and post-election review of initiative measures.

65. *See Deukmejian*, 34 Cal. 3d at 681, 669 P.2d at 31, 194 Cal. Rptr. at 795.
Regardless of the court's holding, its examination was substantive. Strictly speaking, neither voters nor legislatures have the "power" to enact unconstitutional legislation. The legislation, however, offended the constitution only because of its content. An examination into the constitutionality of a proposal or enactment, therefore, necessarily involves evaluation of content. Nevertheless, in *AFL-CIO v. Eu*, the California court recently sanctioned pre-election review of a measure that proposed compelling the state legislature to petition Congress for a Constitutional Convention at which a balanced budget amendment to the federal Constitution would be debated. Finding that the voters did not possess the "power" to force the legislature to draft such a petition, the court enjoined its submission to the voters. In both *Deukmejian* and *AFL-CIO*, the court held that either the federal or state constitution does not grant

holding that the proposal was beyond the power of voters to initiate and approve, the supreme court also held that the state legislature could not adopt similar legislation. See *id.* at 680, 669 P.2d at 30, 194 Cal. Rptr. at 794. Because the court based its authority to decide the case on whether the electorate had the "jurisdiction" to enact such legislation, see *id.* at 667, 669 P.2d at 21, 194 Cal. Rptr. at 785, it would appear that the court could also enjoin the legislature from approving similar legislation. The high cost of conducting an election, however, may explain the court's examination into whether the proposal was valid. See *id.* at 666, 669 P.2d at 21, 194 Cal. Rptr. at 785. But see *supra* note 58.


67. *See id.* at 696-97, 686 P.2d at 614-15, 206 Cal. Rptr. at 94-95. The proposal gave the state legislature the option either to petition Congress for a Constitutional Convention to debate the adoption of a balanced budget amendment, or to forfeit the compensation and perquisites of all members of the legislature. See *id.* at 694, 686 P.2d at 612, 206 Cal. Rptr. at 92.

68. *See id.* at 697, 686 P.2d at 615, 206 Cal. Rptr. at 95.

69. *See id.* at 716, 686 P.2d at 629, 206 Cal. Rptr. at 109. The court based its authority to review on the *Deukmejian* decision. *See AFL-CIO*, 36 Cal. 3d at 696, 686 P.2d at 614, 206 Cal. Rptr. at 94. The proposals were held to be invalid, however, for dissimilar reasons. In *Deukmejian*, the proposal was held to be substantively defective because it exceeded general legislative powers. Neither the voters nor the legislature could have validly enacted it. *See Legislature of Cal. v. Deukmejian*, 34 Cal. 3d 658, 680, 669 P.2d 17, 30, 194 Cal. Rptr. 781, 794 (1983) (en banc) (per curiam). See *supra* note 65. In *AFL-CIO*, however, the proposal was held to be defective because if enacted, it could not have been a statute, and it thus was beyond the initiative power reserved to the voters. * See 36 Cal. 3d at 715, 686 P.2d at 628, 206 Cal. Rptr. at 108; *see also* Cal. Const. art. II, § 8(a) (1911, amended 1976) ("The initiative is the power . . . to propose statutes . . . and to adopt or reject them.").

Thus, the California position is almost completely incongruous. The court will not examine a measure before an election for an alleged violation of an initiative-specific restriction, *see* Brosnahan v. Eu, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982) (per curiam) (it is more appropriate to review allegation that proposal embraces more than one topic after election), yet it will undertake an exhaustive examination if the proposal would amount to action not specifically reserved to the people, *see AFL-CIO*, 36 Cal. 3d at 697-715, 686 P.2d at 615-28, 206 Cal. Rptr. at 95-108 (attempt to compel legislators to petition Congress for constitutional amendment amounts to resolution that is not within initiative power).
such power to the voters. In effect, the state supreme court treated substantive validity as a threshold requirement, and then proceeded to examine content thoroughly. As previously discussed, however, there is no constitutional authority and little conceptual justification for treating general substantive validity as a threshold requirement.

**CONCLUSION**

There is a natural and intended tension between the judicial and legislative branches of government. Should courts attempt to encroach on the prerogatives of the state legislature, members of that institution have not only the resources to resist, but also a self-interested goal of preserving institutional autonomy. Popular legislation, in contrast, is only a process, not an institution. The danger of judicial usurpation of that process is therefore ever present.

Courts must recognize that unless state law provides otherwise, the degree of judicial deference to the popular legislation process should be no less than the degree of deference accorded the legislature. Though popular democracy is not without faults, states that have adopted it to supplement the powers of the legislative body have recognized it as a legitimate law-enacting process. Its products, whether constitutional amendments or statutes, are of course subject to the same judicial scrutiny as are laws passed by the legislature. Courts that take it upon themselves to restrict the operation of the process before it has run its course only derogate its validity and utility. As a result, popular respect for the judiciary declines and public frustration with government institutions increases. Because courts can review the content of ballot proposals after enactment, they should not review proposals substantively at any earlier time, unless the people of the state, through specific provisions of state laws, have granted courts this power.

Michael J. Farrell

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70. See AFL-CIO, 36 Cal. 3d at 715, 686 P.2d at 628, 206 Cal. Rptr. at 108; Deukmejian, 34 Cal. 3d at 667, 669 P.2d at 21, 194 Cal. Rptr. at 785.

The "power" in both cases referred to general substantive power. See supra notes 61-69 and accompanying text.