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Pre-Election Review of Voter Initiatives—American Federation of Labor-Congress of Industrial Organizations v. EU, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984)

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PRE-ELECTION REVIEW OF VOTER INITIATIVES—*AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS v. EU*, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984).

In *American Federation of Labor-Congress of Industrial Organizations v. Eu (AFL-CIO)*,[1] the California Supreme Court removed a proposed initiative[2] from the ballot prior to the election. The proposed initiative would have compelled the California legislature to apply to Congress for a limited constitutional convention.[3] The court recognized a general rule against pre-election review of initiatives, but nevertheless found pre-election review appropriate under an exception to the rule.[4] The exception invoked in *AFL-CIO* allows pre-election review where the challenger alleges that the proposed measure is "beyond the power of the people to enact."[5]

Despite increasing pre-election review of initiatives,[6] many courts still assert that postelection review is the rule.[7] As in *AFL-CIO*, courts find pre-election review justifiable only under exceptions to the rule.[8] By

1. 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984).

2. The initiative is a direct legislative device that allows the electorate to propose and enact laws independent of the legislature by placing measures on the ballot. *See Voter Initiative Constitutional Amendment: Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 284 (1977) [hereinafter cited as *Hearings*]. States use either the direct initiative, which bypasses the legislature entirely, or the indirect initiative, which requires submission to the legislature before placement on the ballot. *See* Comment, *The Scope of Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1719–20 (1966) [hereinafter cited as Comment, *The Scope of Initiative*]. Sixteen states have provisions for direct initiatives to enact statutes, and a total of 21 states provide for one or both methods. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1984–1985, 167 (1984). Most of these states also provide for initiative passage of state constitutional amendments; two states allow initiatives only for this purpose. Comment, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CALIF. L. REV. 1216, 1217–18 nn.6 & 9 (1983) [hereinafter cited as Comment, *Preelection Judicial Review*].

3. *AFL-CIO*, 686 P.2d at 611, 206 Cal. Rptr. at 91.

4. *Id.* at 614, 206 Cal. Rptr. at 94. *See infra* notes 21–22 and accompanying text.

5. *Id. See infra* note 21 and accompanying text for a description of this exception.

6. Comment, *Preelection Judicial Review, supra* note 2, at 1216; Comment, *Judicial Intervention in the Preelection Stage of the Initiative Process: A Change of Policy by the California Supreme Court*, 15 PAC. L.J. 1127 (1984); *State Courts Begin to Seize Initiative*, Wall St. J., Oct. 25, 1984, at 32, col. 5.

7. *See, e.g.*, Williams v. Parrack, 83 Ariz. 227, 319 P.2d 989 (1957); Brosnahan v. Eu, 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982); Billings v. Buchanan, 192 Colo. 32, 555 P.2d 176 (1976); State *ex rel.* Dahl v. Lange, 661 S.W.2d 7 (Mo. 1983); Anderson v. Bryne, 62 N.D. 218, 242 N.W. 687 (1932); State *ex rel.* Walter v. Edgar, 13 Ohio St. 3d 1, 469 N.E.2d 842 (1984); Johnson v. City of Astoria, 227 Or. 585, 363 P.2d 571 (1961); State *ex rel.* O'Connell v. Kramer, 73 Wn. 2d 85, 436 P.2d 786 (1968).

8. *See, e.g.*, City of Scottsdale v. Superior Ct., 103 Ariz. 204, 439 P.2d 290 (1968) (exception because zoning initiative would violate due process); Legislature of the State of California v. Deukmejian, 34 Cal.3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983) (exception because measure beyond power

articulating the rule while ignoring it in practice, however, these courts create an unnecessary conceptual roadblock to the exercise of pre-election review. Both analytical and policy arguments support treating pre-election review as the convention and not the exception. Pre-election review protects the effective use of the initiative process,[9] counteracts abuse of the process,[10] and prevents waste of public and private funds.[11] Courts should reject the postelection review rule and adopt pre-election review as the standard.

This Note analyzes the *AFL-CIO* court's exercise of pre-election review, and considers the role of pre-election review in promoting effective use of the initiative process. Part I reviews the factual context of *AFL-CIO* and describes the court's opinion. Part II first analyzes the weaknesses of the *AFL-CIO* court's conception of pre-election review as an exception to the rule. It then considers how pre-election judicial review can benefit the initiative process by counteracting procedural weaknesses and protecting against substantively invalid measures. The Note recommends overt abolition of the rule inhibiting pre-election review and acceptance of pre-election review as the convention.

I. THE *AFL-CIO* DECISION

In *AFL-CIO,* various organizations and taxpayers filed an original action in the California Supreme Court for a writ of mandamus to prevent March Fong Eu, the Secretary of State, from placing a proposed initiative measure on the ballot.[12] The proposed Balanced Federal Budget Statutory Initiative would have mandated the California legislature to adopt a resolution applying to Congress for a limited constitutional convention.[13] If the

of people to enact); Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 69 N.E.2d 115 (1946) (exception because proposed measure not in compliance with limits on initiative subject matter specified in Massachusetts constitution); State *ex rel.* Stadter v. Newbry, 189 Or. 691, 222 P.2d 737 (1950) (exception because of procedural deficiencies); Noble v. City of Lincoln, 158 Neb. 457, 63 N.W.2d 475 (1954) (exception because irreparable damage would occur); Seattle Bldg. & Constr. Trades Council v. City of Seattle, 94 Wn. 2d 740, 620 P.2d 82 (1980) (exception because initiative was beyond scope of initiative power; proposed city ordinance would have conflicted with state law).

9. *See infra* notes 60–65 and accompanying text.

10. *See infra* notes 47–59 and accompanying text.

11. *See infra* notes 66–67 and accompanying text.

12. *AFL-CIO,* 686 P.2d at 613, 206 Cal. Rptr. at 93.

13. The initiative application would have called for a convention "for the sole purpose of proposing an amendment to the Constitution of the United States to require, with certain exceptions, that the federal budget be balanced . . . ." *Id.* at 612, 206 Cal. Rptr. at 92.

The procedure for calling a constitutional convention is governed by article V of the United States Constitution, which states in relevant part: "The Congress . . . on the Application of the Legislatures of two thirds of the Several States, shall call a Convention for proposing Amendments." U.S. CONST. art. V.

The movement to call a constitutional convention for a balanced budget amendment has received

legislature failed to adopt the resolution within twenty legislative days after the election, the initiative would have suspended all compensation to legislators until the legislature adopted the resolution.[14] If the legislature then failed to adopt the measure within forty legislative days after the election, the California Secretary of State was directed to consider the initiative itself a petition to Congress, and forward it to the United States Secretary of State.[15] The initiative received sufficient signatures to appear on the ballot for the November 1984 general election.[16]

The petitioners in *AFL-CIO* challenged the proposed measure on two grounds. First, they contended that an application by initiative for a constitutional convention offended article V of the United States Constitution.[17] Second, they contended that the initiative was a resolution, not a statute as required by article II of the state constitution.[18]

The court began by assessing the propriety of pre-election review, and held the challenges to the proposed initiative reviewable before the election.[19] The court recited the general rule that it is usually more appropriate to review initiative challenges after an election.[20] However, the court identified an ultra vires type exception to this rule: where the challenger

much scholarly attention. Many conclude that attempts to limit the subject matter of the convention to a specific topic would be ineffectual, and could not prevent the convention from creating its own agenda. Dellinger, *The Recurring Question of a "Limited" Constitutional Convention,* 88 YALE L.J. 1623 (1979); Goldberg, *The Proposed Constitutional Convention,* 11 HASTINGS CONST. L.Q. 1 (1983); Gunther, *Stumbling Toward a Convention,* CALIF. LAW., May 1984, at 10; Gunther, *The Convention Method of Amending the United States Constitution,* 14 GA. L. REV. 1 (1979); Mathias, *What's the Constitution among Friends,* 67 A.B.A. J. 861 (1981).

Some authors further contend that since the only type of convention possible is a general unlimited convention, a state application for a limited convention is invalid. Black, *Amending the Constitution: A Letter to a Congressman,* 82 YALE L.J. 189, 199–200 (1972); Dellinger, *supra,* at 1636–38. *But see* Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague,* 1978 DUKE L.J. 1295 (1979).

Other commentaries have focused upon the potential consequences of the balanced budget amendment itself. One commentator contends the amendment would result in both an inappropriate introduction of economic doctrine into a Constitution heretofore limited to structural and procedural provisions, and an inappropriate intrusion of the judiciary into the enforcement of fiscal policy. Note, *The Balanced Budget Amendment: An Inquiry into Appropriateness,* 96 HARV. L. REV. 1600 (1983). Another commentator asserts that suits brought under a balanced budget amendment should be declared nonjusticiable because any remedy would be incompatible with the constitutional separation of powers. Note, *Article III Problems in Enforcing the Balanced Budget Amendment,* 83 COLUM. L. REV. 1065 (1983) [hereinafter cited as Note, *Article III Problems*].

This Note does not focus on the *AFL-CIO* court's analysis of the merits of the initiative, but rather the court's decision to conduct that analysis prior to the election.

14. *AFL-CIO,* 686 P.2d at 612, 206 Cal. Rptr. at 92.
15. *Id.* at 613, 206 Cal. Rptr. at 93.
16. *Id.*
17. *Id.* at 614–15, 206 Cal. Rptr. at 94–95; *see supra* note 13.
18. *Id.*; CAL. CONST. art. II, § 8, subd. (a); *see infra* note 28.
19. *AFL-CIO,* 686 P.2d at 614, 206 Cal. Rptr. at 94.
20. *Id.*

alleges that the electorate lacks the power to adopt the measure, then pre-election review is proper.[21] The court found that the challenges petitioners brought fell within this exception, since a measure that did not comply with the federal or state constitution would exceed the power of the people to adopt.[22]

Turning to the merits of the allegations, the court first addressed the issues arising under the United States Constitution.[23] Article V authorizes the state "legislatures" to petition Congress for a constitutional convention.[24] The court held that this refers only to the representative body, and that the people themselves cannot petition for the convention through initiative.[25] The court then held that pro forma action by a state legislature, under compulsion by an initiative, also fails to comply with article V.[26]

The proposed initiative also failed under the California constitution.[27] The California constitution defines the initiative as the power to propose, adopt, or reject "statutes."[28] The court held that this initiative would enact a resolution, not a statute.[29] The initiative was therefore invalid because it was beyond the power of the people to enact.[30]

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21. The term "ultra vires" was applied to this type of review in Comment, *The Scope of Initiative*, *supra* note 2, at 1724–25. The term used in this context denotes "those situations in which an act is beyond the power of a legislative body because [the act is] not authorized by its organic law or in conflict with some paramount law." *Id.* at 1725. The term is convenient shorthand for the classification drawn by the *AFL-CIO* court.

The court gave three examples of cases that come under the ultra vires exception, all of which entail a determination that the initiative exceeds the scope of its permissible subject matter: (1) a law that is not legislative in character, (2) an initiative subject that is not a municipal affair, and (3) a proposal amounting to a revision of the state constitution rather than an amendment thereto. *AFL-CIO*, 686 P.2d at 614, 206 Cal. Rptr. at 94.

22. *AFL-CIO*, 686 P.2d at 615, 206 Cal. Rptr. at 95. The court in a footnote indicated that another exception to the postelection review rule may be invoked even if the measure does not exceed the scope of the initiative power. *Id.* at 615 n.11, 206 Cal. Rptr. at 95. The court stated that initiatives coming within this exception would be subject to pre-election examination only if "clearly invalid." *Id.* The court claimed this exception would permit review of even non-ultra vires substantive challenges prior to the election. However, the court stated it did not base its decision on this principle. *Id.* *See infra* note 31 for additional discussion.

23. *Id.* at 615–22, 206 Cal. Rptr. at 95–102.

24. U.S. CONST. art. V. *See supra* note 13 for a brief discussion of the procedure for calling conventions described in article V.

25. *AFL-CIO*, 686 P.2d at 620, 206 Cal. Rptr. at 100.

26. *Id.* at 622, 206 Cal. Rptr. at 102.

27. *Id.* at 622–29, 206 Cal. Rptr. at 102–09.

28. *Id.* at 623, 206 Cal. Rptr. at 103; CAL. CONST. art. II, § 8, subd.(a).

29. The court distinguished a resolution from a statute, stating that a resolution, unlike a statute, does not enact a law, but rather merely expresses the views or wishes of the enacting body. *AFL-CIO*, 686 P.2d at 623–25, 206 Cal. Rptr. at 103–05. The court held that the petition to call a constitutional convention did not of itself enact a law and hence was not a "statute" within the meaning of the California constitution. *Id.* at 628, 206 Cal. Rptr. at 108.

30. *Id.* at 628, 206 Cal. Rptr. at 108. The United States Supreme Court denied a petition for a stay of the *AFL-CIO* decision. Uhler v. AFL-CIO, 105 S. Ct. 5 (1984) (Rehnquist, J., sitting as Circuit

II. ANALYSIS

The court in *AFL-CIO* correctly held that pre-election review of the challenged initiative was proper. However, the court unnecessarily upheld the traditional rule against pre-election review when it treated its decision as an exception to that rule. Courts should review all pre-election challenges to proposed initiatives in order to promote effective use of the initiative process, counteract abuses, and prevent waste of resources. The *AFL-CIO* court erred in not adopting pre-election review as the standard.

A. Analytical Weaknesses of the AFL-CIO Opinion

The *AFL-CIO* opinion unnecessarily preserves the rule inhibiting pre-election review. The ultra vires "exception" the court developed actually completely erodes the rule. Although the court implied that the exception is limited, it failed to identify any case that could not be included in the exception.[31] No legitimate challenge to the substance of a proposed initiative would fail to come within the exception articulated by the court, since the essence of judicial review of any measure is to determine whether it is beyond the scope of the enactor's power.[32]

The court's determination of the substantive invalidity of this initiative required detailed analysis of case law, interpretation of the language of the

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Justice). In the six-paragraph opinion accompanying the denial, Justice Rehnquist wrote that the California Supreme Court decision rested on adequate and independent state grounds, and that the appeal on the political question issue, *see infra* note 72 and accompanying text, did not raise a substantial federal question. *Id.*

31. The court indicated in a footnote the presence of another exception in addition to the ultra vires exception. *See supra* note 22. Neither of the cases cited as authority in the footnote, however, supports the court's assertion that such cases would lie outside the court's ultra vires category. The first, Harnett v. County of Sacramento, 195 Cal. 676, 235 P. 445 (1925), concerned a proposed county initiative to change the boundaries of the county's supervisory districts. The court enjoined its submission because it would violate a state statute requiring districts to be equal in population as nearly as possible. The court held that the county electorate was not authorized to pass a measure contrary to state statute. 235 P. at 447. In the second case, Gayle v. Hamm, 25 Cal. App. 3d 250, 101 Cal. Rptr. 628 (1972), the allegations of invalidity also concerned whether a proposed county initiative was within its proper scope, as limited by the 14th amendment and various state laws. *Id.* at 101, 206 Cal. Rptr. 630–31. Thus, both cases would actually lie within the "beyond the power of the people to adopt" exception created by the *AFL-CIO* court.

Further, the court erred in citing Comment, *The Scope of Initiative*, *supra* note 2, at 1725–29, to support its proposition that there are other doctrines besides the ultra vires exception which would allow pre-election review. *AFL-CIO*, 686 P.2d at 615 n.11, 206 Cal. Rptr. at 95. The Comment does not uphold the court's proposition, but rather indicates that the ultra vires doctrine would govern all determinations of validity.

32. *See* Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 62 (1980) ("Chief Justice Marshall ruled [in *Marbury*] that the Supreme Court possessed the power to declare at least certain acts of its coordinate branches in the national government *ultra vires* . . . .")(emphasis added).

Constitution and the intent of its framers,[33] and resolution of a question of first impression.[34] Since the court fully decided these complex issues of constitutionality under the rubric of ultra vires, it is difficult to imagine any question of substantive validity that would not also fit within the ultra vires exception.[35] Ultimately, this ultra vires exception must include all challenges to the substance of an initiative, since the people have no power to enact any invalid law. The court's characterization of the ultra vires exception as limited is conceptually unworkable. The court erred in failing to realize that its "exception" fully eroded the rule inhibiting pre-election review.

B. Pre-election Review as a Safeguard to Protect Effective Use of the Initiative Process

In addition to its awkward use of an exception to the postelection review rule to allow review in *AFL-CIO,* the court erred in assuming that the rule should be upheld at all. The court should have abolished the rule directly rather than allowing it to remain as a mirage. In order to protect the effective use of the initiative process and prevent waste, courts should adopt a standard accepting legitimate challenges to initiatives before the election. The initiative process would benefit by pre-election judicial review for conformity with the procedural and substantive restrictions upon the initiative power.

1. The Need for Pre-election Review

Numerous requirements restrict the initiative power. All states that employ the initiative impose procedural requirements for ballot qualification, such as a minimum number of signatures,[36] compliance with filing deadlines, and adherence to format restrictions.[37] States also impose restrictions on the substance of the initiative:[38] that it address only a single subject,[39] that it not address administrative matters,[40] and other similar

33. *AFL-CIO,* 686 P.2d at 615–22, 206 Cal. Rptr. at 95–102. *See* text accompanying notes 23–30.

34. The question of first impression was whether pro forma action by a state legislature under an initiative would satisfy article V. *Id.* at 620, 206 Cal. Rptr. at 100.

35. Other courts have also applied the ultra vires exception to wide ranging issues of substantive validity, belying assertions that the exception is a limited one. *See* cases cited *supra* note 8.

36. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon,* 28 W. POL. Q. 243, 248-49 (1975) (table of signature requirements to qualify for state ballots).

37. *See Hearings, supra* note 2, at 286–351 (summary of states' procedural requirements regarding such matters as how to file initiatives, filing deadlines, number of votes required for passage, and various substantive restrictions); H. BONE, THE INITIATIVE AND THE REFERENDUM, 19–53 (1975).

38. *Hearings, supra* note 2, at 286–351.

39. Lowenstein, *California Initiatives and the Single-Subject Rule,* 30 UCLA L. REV. 936 (1983); Comment, *The California Initiative Process: The Demise of the Single-Subject Rule,* 14 PAC. L.J. 1095 (1983).

40. Where a particular decision of an administrative nature has been expressly delegated to a

limitations.[41] Finally, the constitutional restraints upon subject matter that apply to traditional legislation also apply to initiatives.[42]

However, there are few provisions for pre-election supervision of the initiative process to enforce these restrictions. The initiative process differs markedly from the legislative process in this respect.[43] The enactment of a bill by the legislature involves many formal stages of supervision, review, and modification. A sponsor of a bill in the legislature has extensive resources, including research staffs, hearings, debate with other legislators and interested parties, and personal expertise with which to assess the effectiveness and validity of the measure.[44]

An initiative measure, however, can be written in complete isolation[45] and may be introduced by any voter. The proponent is not an elected representative, and is therefore unrestrained by political considerations such as the diverse interests of a constituency, or the need to seek reelection. The initiative process allows no opportunity for public hearings or voter input, except to approve or reject the entire proposition.[46]

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particular administrative body, courts have held that such decisions may not be subjects of initiatives. For example, in Simpson v. Hite, 36 Cal. 2d 125, 222 P.2d 225, 228 (1950), state law had delegated the decision regarding the site of court buildings to the county board of supervisors. The court held that such an administrative decision could not be the subject of a proposed initiative city ordinance. *See also* Ruano v. Spellman, 81 Wn. 2d 820, 505 P.2d 447 (1973); Amalgamated Transit Union-Div. 757 v. Yerkovich, 24 Or. App. 221, 545 P.2d 1401 (1976); Trautman, *Initiative and Referendum in Washington,* 49 WASH. L. REV. 55, 84–87 (1973).

41. *See, e.g.,* ALASKA CONST. art. XI, § 7 (no revenue or appropriation measures, or acts affecting the judiciary, or local or special legislation); MASS. CONST. amend. art. 48, init., pt. 2, § 2 (no measures relating to religion, the judiciary and the judicial system, local legislation, or specific appropriations); WYOMING CONST. art. 3, § 52(g) (no appropriations, local legislation, or creation of courts). *See also supra* notes 27–30 and accompanying text (California constitution limits initiatives to statutes).

42. *See* Trautman, *supra* note 40, at 70–71. *See also* C. SHELDON & F. WEAVER, POLITICIANS, JUDGES, AND THE PEOPLE 13 (1980) ("Constitutions are documents that spell out the powers of government and, at the same time, place limits on that government . . . . Even the people, . . . under their 'reserved powers,' must exercise restraint.").

43. Note, *The California Initiative Process: A Suggestion for Reform,* 48 S. CAL. L. REV. 922, 930–34 (1975) (detailing the procedural differences between the initiative and the legislative processes, particularly the lack of textual review of initiatives); Comment, *Judicial Review of Laws Enacted by Popular Vote,* 55 WASH. L. REV. 175, 178 (1979).

44. *See generally* E. WILLETT, JR., HOW OUR LAWS ARE MADE, H.R. DOC. NO. 120, 97th Cong., 1st Sess. 4–5, 9–19 (1981); H. READ, J. MACDONALD, J. FORDHAM, & W. PIERCE, MATERIALS ON LEGISLATION 460–82 (3d ed. 1973).

45. Some states do allow the code reviser to review the proposal for matters of form, style, and substance, and make recommendations for revisions. *See, e.g.,* WASH. REV. CODE § 29.79.015 (1983). The recommendations, however, are only advisory, and the proponent of the initiative may accept them only in part or reject them entirely. *Id.*

46. *See generally* V. KEY & W. CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 568 (1938); Comment, *supra* note 43, at 188.

Further, legislators take an oath to preserve and protect the constitution, and presumably review proposed measures for constitutionality. Proponents of an initiative, however, have no obligation even to consider constitutionality.

These shortcomings in pre-enactment safeguards make the initiative process peculiarly susceptible to many types of abuse. First, the initiative may be used as a tool of majoritarianism to derogate the interests of minority groups. The initiative and other forms of direct democracy have long been used to further discrimination against racial minorities.[47] Such use has expanded in recent decades,[48] and initiatives have also served to subordinate the interests of other minority groups.[49]

Although legislatures are not immune from the pressures of majoritarianism since they are composed of democratically elected members, the procedural restraints[50] that distinguish the legislature from the initiative process serve to check those influences. One of the prominent virtues of representative government is its consideration and protection of minority views.[51] Elected officials are more responsive to minority interests because

47. The use of direct democracy to subordinate the rights and interests of racial minorities has a lengthy history. In the mid-nineteenth century, the Oregon territory considered barring blacks from the territory. The legislature refused to approve such a measure because each political party feared its opponents would be able to exploit the issue. When the proposal was finally submitted to a popular vote, however, the voters approved the measure by a margin of 8 to 1. Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 16–17 (1978). Several other states at that time also passed laws by popular vote that barred black immigration. *Id.*

48. *See, e.g.*, Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (initiative banning racial busing found to constitute illegal racial discrimination); Hunter v. Erickson, 393 U.S. 385 (1969) (initiative city charter amendment requiring automatic referendum of housing ordinances found to discriminate against minorities). Bell, *supra* note 47, at 15 n.54, observed that out of 10 open housing referenda held during the years 1963–1968, nine were successful. *See also* Reitman v. Mulkey, 387 U.S. 369 (1967) (initiative amendment repealing the state's law barring racial discrimination in sale of property found to constitute illegal racial discrimination).

49. *See* Comment, *supra* note 43, at 182 n.45 (citing uses of direct democracy to disfavor homosexuals). For an account of the threats to racial and other minority interests through direct democracy, see *id.* at 181–82. The Comment notes that even facially neutral measures that reduce government spending, such as the California Proposition 13, can serve to disadvantage the poor and minorities that rely on government services. *Id.* The balanced budget amendment at issue in *AFL-CIO* could be considered one such measure. *See also* Sager, *Insular Majorities Unabated;* Warth v. Seldin and City of Eastlake v. Forest City Enterprises, 91 HARV. L. REV. 1373 (1978); Note, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URBAN L. ANN. 135 (1981).

50. *See supra* note 44 and accompanying text.

51. James Madison recognized the potential for abuse of direct democracy by tyrannous majorities: "[A] pure democracy . . . can admit of no cure for the mischiefs of faction . . . . [T]here is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies . . . have ever been found incompatible with personal security." *Id.* at 81. Madison concluded that the remedy for these weaknesses was the creation of "[a] republic, by which I mean a government in which a scheme of representation takes place." THE FEDERALIST PAPERS No. 10, at 77–84 (J. Madison)(C. Rossiter ed. 1961). *See also* Comment, *supra* note 43, at 184–89.

of their duty to represent all of their constituents,[52] the need to negotiate and compromise with diverse interests in the individual districts and in the legislature as a whole, and their public accountability.[53] Direct democracy, operating without the opportunity for deliberation or compromise, and in the privacy of the voting booth with no political accountability to the anonymous voters, has far greater susceptibility to the pressures of majoritarianism.[54]

Another source of abuse of the initiative process is control through the financing of initiative campaigns. Initiative contests are increasingly the targets of organized funding on both sides and outcomes frequently depend on financing and advertising strategy.[55] The absence of deliberative

52. *See* Comment, *supra* note 43, at 205.

53. *Id.;* Bell, *supra* note 47, at 13–15.

54. One commentator noted that:

> Legislation by plebiscite is not and cannot be a deliberative process. We expect and presumably derive from an initiative or referendum an expression of the aggregate will of the majority, or the majority of those who vote. But there is no genuine debate or discussion, no individual record or accountability, no occasion for individual commitment to a consistent or fair course of conduct.

Sager, *supra* note 49, at 1414–15. *See also* Comment, *supra* note 49, at 176, 205; Bell, *supra* note 47, at 14–15.

55. Perhaps the most egregious and dramatic example of abuse of the initiative process by financing and an intentionally deceptive advertising campaign is quoted in Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment,* 29 UCLA L. REV. 505, 507 (1982):

> My next move was to place an initiative proposal on the ballot to give the bus and truck industry . . . the right to pay 4 per cent tax in lieu of any and all other taxes. We had a fight with that one.
>
> I tried to educate the voting public on the need for standard taxation for buses, pointing out that 1,700 small communities had no other public transportation besides buses. But the railroads wanted to crush the competition of the bus lines, and they campaigned against the initiative with propaganda and advertising. The measure was defeated by 70,000 votes.
>
> Next time it was different.
>
> I was going to beat the railroads at their own game. I convinced the bus owners to put up enough money for a first-class campaign. I hired a well-known cartoonist named Johnny Argens to draw a picture of a big, fat, ugly pig. Then I splashed that picture on billboards throughout the state with the slogan:
>
> DRIVE THE HOG FROM THE ROAD!
>
> VOTE YES ON PROPOSITION NUMBER 2
>
> I also had millions of handbills printed with the same picture and message. During the last weeks of the campaign they were placed in automobiles in every city and town . . . .
>
> The campaign worked. Boy, did it work! Nobody likes a roadhog, and the voters flocked to the polls and passed the constitutional amendment by 700,000! . . . All because the voters thought they were voting against roadhogs. That had nothing to do with it.

(quoting from A. SAMISH & B. THOMAS, THE SECRET BOSS OF CALIFORNIA 37–38 (1971)).

See also S. LYDENBERG, BANKROLLING BALLOTS UPDATE 1980: THE ROLE OF BUSINESS IN FINANCING BALLOT QUESTION CAMPAIGNS 2–3 (1981) (financial dominance in an initiative campaign appears to give a clear advantage); Comment, *supra* note 43, at 180 n.131 (quoting a California bureaucrat asserting he could put any measure on the ballot for $325,000); W. CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 31–32 (1950) (expenditures higher for initiative measures than for measures submitted to legislature; for initiatives, "the old adage of politics that 'the side that spends the most wins' has been

procedures allows the initiative campaign to become an occasion for emotional appeals, misinformation, and oversimplification of issues.[56] The initiative process is inevitably more responsive to these media-oriented campaign tactics than is the legislature. While the legislator generally has extensive and diverse resources of information available, the voter is more dependent on sources supplied through the media.[57]

Finally, the initiative is susceptible to misuse as a public opinion poll. Proponents of a broad use of the initiative process assert that measures should be placed on the ballot solely to gauge public opinion, regardless of their ultimate validity.[58] Despite the superficial appeal of this view, the initiative is not designed for this purpose, but rather to enact effective legislation.[59] The ballot should be used only to pass measures which will have actual binding effect. Placing a measure on the ballot which the voters believe to have a binding effect when enacted works a deception on the voters if it is later invalidated and treated only as a public opinion poll.

The susceptibility of the initiative process to these abuses leads to a greater likelihood of enactment of invalid statutes. Those who seek to enact invalid statutes, or who are unconcerned with the validity of proposed measures, may be drawn to use the initiative process in part because they are able to place measures before the entire electorate absent any prior consideration of constitutionality.

2. *The Benefits of Pre-election Review*

Judicial pre-election review should be made available to counteract the weaknesses in the initiative process and provide a safeguard against substantively invalid measures. Pre-election review adds to the initiative process an important feature of the traditional legislative process: an

proven true"); Lowenstein, *supra*, at 508 ("[T]he ability of some interest groups to spend enormous amounts of money in ballot measure campaigns has rendered the initiative and referendum ineffective or even counterproductive in achieving their original goal of neutralizing the power of well-financed interest groups.").

56. Bell, *supra* note 47, at 18, 19 n.73 (giving as examples three initiative campaigns, one for electric rate reform, one for handgun prohibition, and one to ban no-return beverage containers all marked by industry-sponsored ads opposing the initiatives by "suggesting that enactment of the measures would result in the loss of jobs, manhood, and the opportunity to grab gusto").

57. *See supra* note 54.

58. *See, e.g., AFL-CIO*, 686 P.2d at 628, 206 Cal. Rptr. at 108; *Id.* at 630, 206 Cal. Rptr. at 110 (Lucas, J., dissenting); *see also* Note, *The Election Ballot as a Forum for the Expression of Ideas*, 32 DEPAUL L. REV. 901 (1983).

59. *AFL-CIO*, 686 P.2d at 623, 206 Cal. Rptr. at 103; *see supra* text accompanying note 28; *see also* Georges v. Carney, 691 F.2d 297 (7th Cir. 1982) (states have no constitutional obligation to make the election ballot available to citizens as a public forum for first amendment expression).

effective forum for consideration of the validity of a proposed measure.[60] The availability of pre-election review would allow those who object to a measure, or who might be injured if it were enacted, an opportunity to have their concerns heard and considered.

Deferral of the issues until after the election is a less effective control than pre-election review. The presumption of validity that courts generally afford to enacted statutes is undeserved by initiatives enacted in the absence of the safeguards upon which that presumption is based.[61] In a pre-election context, a court would be less influenced by this presumption.[62] After the election, however, courts often allow a pragmatic reluctance to defy popular sentiment to discourage them from giving a postelection challenge adequate consideration.[63]

A standard of pre-election review would promote effective use of the initiative process. The electorate would benefit from a policy that protected against placement of invalid measures on the ballot. Pre-election review would help convince voters of the efficacy and potency of their initiative mandates. Postelection determinations of invalidity tend to discourage confidence in the initiative process by creating a sense of futility among the frustrated majority. Further, they tend to denigrate legitimate uses of the initiative process, by allowing invalid measures equal standing on the ballot with valid ones.[64]

The initiative process would also benefit from pre-election removal of invalid measures because their presence on the ballot serves only to confuse voters and distract attention from measures which will truly be effective.[65] Voters consider initiative proposals only once a year, unlike legislators who

60. *See supra* note 43 and accompanying text.

61. Comment, *supra* note 43, at 202–05, argues that the general presumption of constitutionality granted to both traditional legislation and enacted initiatives is inadequate to counteract the weaknesses of the initiative process, and recommends that courts subject enacted initiatives to a higher level of scrutiny.

62. Comment, *Preelection Judicial Review, supra* note 2, at 1233–34.

63. The pressure upon judges not to defy public sentiment can be overwhelming. In Yelle v. Kramer, 83 Wn. 2d 464, 520 P.2d 927 (1974), the court in a postelection review held valid an initiative limiting the salaries of most state elected officials, including the judiciary. One observer noted the court "faced an awesome decision: to override a polling booth decision by some 80 percent of the voters surely would risk a crisis of confidence in the judicial system and the electorate process itself." Seattle Times, Feb. 24, 1974, at A10, col. 1, *quoted in* C. SHELDON & F. WEAVER, *supra* note 42, at 114.

64. The *AFL-CIO* court acknowledged the general needs for pre-election removal of invalid measures: they steal attention, time, and money from valid measures; confuse and frustrate voters, and denigrate legitimate uses of the initiative procedure. *AFL-CIO*, 686 P.2d at 615, 206 Cal. Rptr. at 95.

65. *See id.; see also* Comment, *The Future of Initiative and Referendum in Missouri*, 48 MO. L. REV. 991, 1003–04 (1983), arguing that a multiplicity of issues leads to voter fatigue, causing voters to be unable to prepare for and vote upon all issues presented. The Comment also cites survey results indicating a majority would prefer that the number of issues on the ballot be limited. *Id.*

consider numerous measures over the course of each session. Pre-election review helps ensure that proposals considered during the voters' necessarily brief "legislative session" are valid, and prevents unnecessary distraction by the presence of invalid proposals.

Pre-election review also prevents waste of public and private funds. The cost to taxpayers of submitting measures to a vote,[66] as well as the costs of mounting media campaigns for both proponents and opponents, can be substantial.[67] It is unjust to force opponents of an invalid initiative to prepare an expensive campaign rather than adjudicate their charges of invalidity prior to the election.

Some opponents of pre-election review argue that despite its utility, pre-election review is not an appropriate exercise of judicial authority. One such argument is that the issues are not ripe for decision and pre-election review would constitute an advisory opinion by the court.[68] However, the purpose of pre-election review is to protect the ballot and prevent the harm that can be caused by passage of invalid measures.[69] Courts are unwise to postpone review until after the election where such injuries or difficulties could be avoided by pre-election review. Traditional doctrines of injunctive remedies treat issues as ripe for purposes of adjudication where needed to prevent future harm.[70] Pre-election review, acting as an injunctive remedy, similarly prevents future harm.[71]

The passage of invalid initiatives can create immediate harmful consequences without pre-election review. The *AFL-CIO* case presented a compelling example of the need to act before the election to prevent irreversible postelection consequences. The validity of the measure could have become a nonjusticiable political question immediately after the election.[72] Further, effective petitions from California and only one other

66. In Legislature v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 21, 194 Cal. Rptr. 781 (1983), an extreme case was presented. The submission of the measure would have required a special election and would have cost $15 million.

67. *See* S. Lydenberg, *supra* note 55, at 39–41 for a summary of major expenditures in recent initiative campaigns. Examples of major contributions include: $1.15 million by a public utility in Missouri opposing an initiative to delay the opening of a nuclear power plant; $6.8 million by real estate owners in a campaign in California for an anti-rent control initiative. *Id.* at 2–4.

68. *E.g.*, State *ex rel.* O'Connell v. Kramer, 73 Wn. 2d 85, 436 P.2d 786 (1968).

69. *See supra* text accompanying notes 72–80.

70. *See generally* D. DOBBS, REMEDIES 108–11 (1973).

71. *See* Otey v. City of Milwaukee, 281 F. Supp. 264 (E.D. Wis. 1968), and Holmes v. Leadbetter, 294 F. Supp. 991 (E.D. Mich. 1968), both holding that the court could enjoin election on an initiative where the measure would violate the federal Constitution or a federal statute. The courts held that harm would result from the election itself, apart from the harm that would occur if the measure were enacted. *See also* Legislature v. Deukmejian, 34 Cal.3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983), and Noble v. City of Lincoln, 158 Neb. 457, 63 N.W.2d 475 (1954), both allowing pre-election review because the proposed initiative could have created immediate harmful consequences if enacted.

72. *AFL-CIO*, 686 P.2d at 615 n.10, 206 Cal. Rptr. at 95. The court's interpretation of United States

state could have been sufficient to call for an unprecedented federal constitutional convention under article V.[73]

Another argument advanced against pre-election review is that courts do not enjoin legislative actions prior to enactment, and that this rule should be applied by analogy to the initiative process.[74] However, the doctrine of legislative immunity arose from two separate considerations,[75] neither of which applies to the initiative process. First, injunctions are not issued against legislatures because there is no proper party for a court to enjoin.[76] However, a court is able to prevent action on an initiative by issuing an enforceable order against the secretary of state to prevent submission to the voters.[77] Second, in refraining from enjoining the legislature, courts have been motivated in part by deference to the internal procedures of the representative process.[78] Such respect is unjustified in the initiative process where those procedures are absent.[79] These arguments do not present compelling reasons to prevent the exercise of pre-election review.

Supreme Court decisions led it to conclude that the validity of the measure was justiciable before the election but not afterward. Coleman v. Miller, 307 U.S. 433 (1939), and Dillon v. Gloss, 256 U.S. 368 (1921), implied that the initiative process would not be justiciable as a political question. *AFL-CIO,* 686 P.2d at 615–16, 206 Cal. Rptr. at 95–96. However, the *AFL-CIO* court found that the current significance of those cases was in question. *Id.* at 616, 206 Cal. Rptr. at 96. Further, the court relied on Hawke v. Smith, 253 U.S. 221 (1920), as "direct authority for the proposition that a court can remove a proposal from a state election ballot on the ground that it does not conform to article V, and by necessary inference that a court has authority to adjudicate that question." *AFL-CIO,* 686 P.2d at 616, 206 Cal. Rptr. at 96. *See also* Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* 97 HARV. L. REV 386 (1983) (arguing that the article V amendment process should be amenable to judicial review).

73. *AFL-CIO,* 686 P.2d at 612 nn.5–6, 206 Cal. Rptr. at 92; *see supra* note 13.

74. *E.g.,* Williams v. Parrack, 83 Ariz. 227, 319 P.2d 989 (1957); Pfeifer v. Graves, 88 Ohio St. 473, 104 N.E. 529, 532 (1913).

75. For a general discussion of the origins of the rule of legislative immunity, see Tenney v. Bradhove, 341 U.S. 367, 372 (1951) and United States v. Gillock, 455 U.S. 360, 369 (1980).

76. Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (state legislators are protected from suit by legislative immunity); Consumers Union v. FTC, 691 F.2d 575, 577 (D.C. Cir. 1982), (citing with approval S. Res. 421, 97th Cong., 2d Sess. (1982), 128 CONG. REC. 7613 (daily ed. 29 June 1982), which stated, "ordinarily [a chamber of Congress] may not be named as a party defendant in litigation, *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983).

77. The immunity created by the separation of powers doctrine does not apply to secretaries of state, or other officials in the executive branch. Tenney v. Brandhove, *supra,* at 382 (Douglas, J., dissenting) ("No other public official [besides a legislator] has complete immunity for his actions."); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* Note, *Article III Problems, supra* note 13, at 1101 (stating that Powell v. McCormack, 395 U.S. 486 (1969), and U.S. v. Nixon, 418 U.S. 683 (1974), allow exercise of judicial power over a coequal branch where necessary to strengthen the integrity of the other branch).

78. Comment, *supra* note 43, at 202.

79. *Id.*

III. CONCLUSION

The *AFL-CIO* decision reflects an unnecessary preservation of the rule inhibiting pre-election review. The court identified many of the reasons for pre-election review, yet inexplicably claimed its exercise of that review only qualified under an exception to the rule.

The more reasonable approach would be to adopt pre-election review as a convention, acknowledging the need to promote effective use of the initiative process and protect it against abuse. The structural weaknesses of the initiative process have led to a susceptibility to abuse by majoritarian interests, campaign financing, and other influences which may lead to the passage of invalid measures. Pre-election review serves to counteract these weaknesses by providing a pre-election forum for consideration of the validity of proposed measures. Pre-election review would improve the effectiveness of the initiative process by promoting voter confidence and preventing the distraction and waste caused by the placement of invalid measures on the ballot.

Despite the compelling policy reasons for use of pre-election review, courts generally still uphold the postelection review rule. Many courts adopt a position similar to California's, espousing the rule yet allowing numerous exceptions to it, based upon the type of challenge brought.

Courts should abandon the traditional rule and adopt a consistent policy authorizing pre-election review. Pre-election review should not be considered a discretionary power only for unusual circumstances. Rather, when an initiative is challenged, pre-election review should be recognized as an affirmative duty mandated by the need to enforce restrictions on the initiative, and to promote careful and effective use of the initiative process.

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