1-1-1985

Squelching Vox Populi: Judicial Review of the Initiative in California

Howard Eastman

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

I. INTRODUCTION

Since its adoption in 1911, the initiative has provided California citizens with the means to formulate policy independently of the state legislature.1 Recently, however, the California Supreme Court has moved to limit the people's power of initiative. Last year, in AFL-CIO v.Eu,2 the state supreme court held that voters cannot use the initiative to propose an amendment to the United States Constitution. The preceding year, in Legislature of the State of California v. Deukmejian,3 the same court announced that voters cannot use the initiative to readjust election district boundaries. Each of the proposed initiatives were struck down prior to election day. These decisions suggest a new willingness on the part of the supreme court to neutralize the power of citizens to enact legislation, and a new unwillingness to defer review of ballot measures until after election.

This article will explore the value of the initiative as an instrument of "direct democracy" and will discuss the context in which judicial intervention is justified. Part II examines the theoretical background of the initiative and the mechanics of the initiative process in California. Part III reviews recent decisions affecting the electorate's power to legislate directly. Part IV weighs the relative merits of preelection and postelection initiative review. Finally, Part V advances a set of guidelines designed to prevent unwarranted judicial intrusion without sacrificing judicial control over improper use of the ballot measures.

II. AN OVERVIEW OF THE INITIATIVE

A. Theory of Direct Legislation

By allocating part of the legislative power to the people, the initiative process enables voters to enact statutes or to amend the state constitution without having to act through elected representatives. Created during the Progressive Era in reaction to unresponsive and sometimes corrupt state legislatures, the initiative was intended to promote "direct democracy"—a system of government in which the people possess a direct voice in the lawmaking process. Despite widespread acceptance today, direct legislation is still subject to a lively and lingering debate over its proper scope and application.

1. Arguments in Favor of the Initiative

The reasons most commonly advanced in support of direct legislation are: 1) the correction of representative deficiencies; 2) the encouragement of public participation in political affairs; and 3) the symbolic value of the initiative.

First, supporters of the initiative maintain that it corrects the various shortcomings and abuses of the representative system of government. For various reasons, legislatures are not always responsive to the needs and wishes of constituents. As one court remarked:

[It] takes outlandish financial resources to mount a campaign for office, lobbyists play no small part in controlling the destiny of legislative measures, and in election years our elected representatives procrastinate taking action even on urgent matters. One counter-balance to this trend is to give vitality to the initiative power.

5. L. Pitt, California Controversies 121 (1968). The initiative in California was instituted in order to "kick the railroad out of politics," namely the Southern Pacific Railroad. Id. at 120-21.
7. See Sirico, supra note 6, at 647.
9. See, e.g., Note, supra note 6, at 925.
By opening the legislative process to greater citizen participation, the initiative enables the popular majority to hold its own in the continuing contest with special interest groups, lobbyists, and political forces which are opposed to the majoritarian will. The initiative acts as a "gun behind the door" to remind legislators that a position adverse to majoritarian interests can be overturned by popular vote.

Political reformers have learned to overcome legislative inertia by "taking the issues to the people." In California alone, citizens have enacted a comprehensive political reform package, tax reform measures, antiwar resolutions, a statewide lottery, and energy and environmental proposals.

The second justification for direct legislation posits that the initiative fosters civic virtue by encouraging the people to participate in the electoral process and ongoing public debate. Propositions often receive widespread publicity. Newspaper, radio, and television editorials present the pros and cons of the initiatives, and the citizens become involved by writing letters to the editor, appearing on talk shows, or collecting signatures for ballot petitions. These efforts ultimately produce a more sophisticated and enlightened electorate. Public discussion of the issues also serves a first amendment function by providing citizens an avenue for political expression.

The final reason concerns the symbolic value of the initiative. The provisions for direct voting reaffirm that the power to govern is based on the consent of the people. In a political system that claims to derive its authority from the people, the initiative stands as the

\[\text{amento is host to more powerful and pervasive lobbies than any other state capitol. L. Pitt, \textit{California Controversies} 121 (1968).}\]

11. Sirico, supra note 6, at 653-54.
12. Note, supra note 6, at 939.
16. \textit{CAL. CONST.} art. IV, § 19(d).
19. \textit{See infra} notes 62-70 and accompanying text.
ultimate symbol of legitimacy, a testimony to the responsiveness of government to the concerns of its citizens. The power to legislate gives voters more than nominal control over their political destiny, and alleviates potential feelings of estrangement and alienation from the political process. The initiative can also be viewed as the product of an inexorable historical trend. Five of the last eleven amendments adopted in the last century to the United States Constitution have extended the vote to persons previously disenfranchised, thus increasing popular control over government. The initiative is the culmination of this movement toward grass-roots democracy.

2. Arguments Against the Initiative

Opponents of latitudinal use of the instruments of direct democracy cite four cardinal defects inherent in the initiative process: 1) majoritarian intemperance; 2) the absence of deliberation; 3) inadequate voter comprehension; and 4) dominance by special interest groups.

The first deficiency is the potential danger that the majority will abuse its untrammeled power to treat an insular minority differently without a rational reason closely related to a valid state interest. Minority groups without the resources to act as a bloc at the polls are susceptible to this majoritarian intemperance. Unlike elected representatives, voters have no political accountability; they operate in the absence of political forces and legal principles that ordinarily constrain elected officials. A majority is therefore capable of dealing itself benefits at the expense of the remaining minority even though no relevant differences exist between the two groups.

Minority groups are best insulated from the caprices of majority rule by a system of representative government. The purpose for having broadly based representative assemblies with small constituencies is to give minorities access to legislative deliberations. Fur-

22. Sirico, supra note 6, at 640.
23. U.S. CONST. amend XVII (direct senatorial elections); U.S. CONST. amend XIX (enfranchisement of women); U.S. CONST. amend. XXIII (rights of District of Columbia residents to vote); U.S. CONST. amend XXIV (elimination of poll tax); U.S. CONST. amend. XXVI (right of 18-year-olds to vote). See J. ELY, DEMOCRACY AND DISTRUST 7 (1980).
25. Note, supra note 6, at 942.
26. Seeley, supra note 24, at 902.
28. Seeley, supra note 24, at 905.
ther, the legislators’ reliance on pluralistic consensus formation prevents representative government from too readily violating equal protection norms. Representative action does not always mirror popular opinion; legislators are expected to vote to promote the long-term interest of the polity. The general good is therefore better served by a republican government in which elected representatives alone are charged with the formation of social policy, as opposed to a plebiscite that transforms the transient popular will directly into law.

Because the initiative is antithetical to republicanism, its validity under the Constitution has been questioned. The Constitution “guarantee[s] to every State in this Union a Republican Form of Government.” The guaranty clause was designed to limit majority rule while at the same time ensuring that each state government possesses a representative character. The United States Supreme Court, however, has declined to rule on the constitutionality of the initiative, labelling the issue a nonjusticiable political question.

The second drawback of direct legislation is the absence of deliberation, negotiation, and compromise. There are no opportunities for public hearings or for interested parties to comment on the language of the proposal before it is placed on the ballot. Ballot mea-

30. Sirico, supra note 6, at 641.
31. See L. Tribe, supra note 21, at 773.

In Valtierra, California voters approved an initiative constitutional amendment prohibiting the development of low-rent housing projects without referendum approval. The U.S. Supreme Court, finding no racial classification, upheld the challenged constitutional provision. 402 U.S. at 143.

In Hunter, a municipal regulation prevented the implementation of any ordinance relating to racial housing discrimination unless approved by referendum. The U.S. Supreme Court found that the ordinance contained an impermissible racial classification in violation of the equal protection clause of the fourteenth amendment. 393 U.S. at 393.

In Mulkey, California voters approved a proposition that prevented the state from interfering with the right of property owners to refuse to sell, lease or rent to anyone they desired. The state supreme court declared the measure violative of the equal protection clause. 64 Cal. 2d at 545, 413 P.2d at 836, 50 Cal. Rptr. at 892. The Supreme Court affirmed. Reitman v. Mulkey, 387 U.S. at 373.
34. U.S. Const. art. IV, § 4.
35. Sirico, supra note 6, at 644-45.
37. Note, supra note 4, at 927.
SUREs are submitted in an extreme, final form to voters, who must approve or reject them on the terms offered. The end product may be poorly drafted, internally inconsistent, or may conflict with existing law. Furthermore, direct legislation is not subject to the executive veto power, which often curbs legislative excesses.

By contrast, when a bill is under consideration by the California Legislature, the drafters have the opportunity to consider the views of interested parties, or to form a committee to ascertain the facts and make a recommendation. If conflicts exist between the Senate and Assembly versions, the differences will be resolved by a joint committee. The final compromise, which must be sent to the Governor for either a signature or a veto, is more likely to reflect the concerns of the affected parties.

The third defect inherent in direct legislation is that certain issues are beyond the comprehension of the electors. The initiative process is predicated upon the idea that an informed and educated electorate exists. Generally, however, the public is unable to evaluate the impact of complex legislation. Despite "plain language" ballot requirements, the substance of a measure as well the sophistication of the language may frustrate responsible voting. In addition, electors are often vulnerable to misleading and deceptive campaign advertising practices, and may become distracted by the numerous

38. Id., at 930. An example is the ill-fated "Clean Environment Act." The wording of this 1972 proposition inadvertently contained a double negative, which reversed the intended meaning. While such drafting oversights can be corrected by judicial interpretation, the proponents of that measure were spared the embarrassment because the measure was defeated.

39. Note, supra note 32, at 1146-47. Direct legislation is immune from repeal by the legislature; repeal can be effected only by a subsequently approved ballot measure. See infra note 77.

40. CAL. CONST. art. IV, § 11.

41. A gubernatorial veto in California may be overridden by a two-thirds vote of each house. CAL. CONST art. IV, § 10.

42. Note, supra note 4, at 932.

43. Note, supra note 32, at 1151.

44. CAL. GOVT. CODE §§ 88001(e), 88003 (West 1976).

45. For example, some measures deal with questions of tax policy or acceptable levels of pollution. Note, supra note 4, at 934 n.64.

46. Note, supra note 6, at 941. Evidence exists that voter pamphlets are beyond the reading comprehension of most voters, even though they are prepared in accordance with plain language requirements. Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment, 29 U.C.L.A. L. Rev. 505, 505 n. 372 (1982).

47. For example, the campaign slogan for Proposition 22 in the 1972 general election was "FOR FARMWORKERS' RIGHTS . . . YES ON 22." Yet the measure was calculated to curb the power of farmworkers’ unions and was opposed by the United Farm Workers. Lowenstein, supra note 46, at 522-23.
and lengthy propositions placed on the ballot.\textsuperscript{48} Representatives, by contrast, have more expertise than the general public in the drafting of legislation.\textsuperscript{49} They are usually better educated, have better access to relevant information, and may consult advisors and staff.

The final shortcoming of direct democracy is that the initiative process is capable of being subverted by special interest groups. Unless a measure faces no substantial opposition, a ballot campaign soon becomes a costly undertaking. Voter preferences are influenced by the prevalence of the media, the stratagems of public relations firms, and the impact of political sloganeering.\textsuperscript{50} Because of their greater ability to purchase media time and space,\textsuperscript{51} well-organized and heavily-funded interest groups have a special advantage. Although empirical studies reveal that money is only one of many variables affecting election results,\textsuperscript{52} it is undeniable that the better-funded side holds the edge in a ballot contest, all things being equal.\textsuperscript{53}

Whether widespread use of the initiative is boon or bane seems to elude analysis. It is ultimately a subjective question, depending on whether one is generally in favor of or opposed to the outcomes of the kinds of measures proposed by ballot.\textsuperscript{54} But the incidents of popular legislation that actually discriminate against insular minorities are quite few,\textsuperscript{55} and the Constitution is always available as a bulwark against such violations when they do occur. This article views voters as generally informed and responsible citizens, possessed of

\begin{itemize}
    \item \textsuperscript{48} Note, \textit{ supra} note 4, at 934-35.
    \item \textsuperscript{49} Note, \textit{ supra} note 6, at 940.
    \item \textsuperscript{50} "The slogan is the epitome of the initiative campaign. Campaign managers realize that they must, for the sake of impact, reduce an initiative to a short slogan that will fit a billboard or keynote a short radio or television advertisement." Note, \textit{ supra} note 4, at 937.
    \item \textsuperscript{52} Lowenstein, \textit{ supra} note 46, at 505; Allen, \textit{ supra} note 29, at 1028-38. Studies reveal that one-sided "affirmative" spending, i.e., spending calculated to enact legislation through ballot voting, usually is not a critical factor in the election. Lowenstein, \textit{ supra} note 46, at 545. However, one-sided "negative" spending, i.e., spending intended to defeat a given ballot measure, is "generally effective" and frequently decisive. \textit{Id.} at n.164. The latter finding, however, may be due to the natural predisposition of voters to vote "no," especially when confused or ambivalent about the issues. Allen, \textit{ supra} note 29. at 1036; \textit{see infra} note 134.
    \item \textsuperscript{53} Allen, \textit{ supra} note 29, at 1036.
    \item \textsuperscript{54} \textit{Id.} at 1008.
    \item \textsuperscript{55} \textit{Id.} at 1010-16.
\end{itemize}
rational judgment, and committed to employing the instruments of
direct democracy for the realization of the common good. 56

B. The Mechanics of the Initiative Process in California

The basic law governing the initiative process in California is
found in article II of the state constitution. Article II proclaims that
"[a]ll political power is inherent in the people. Government is insti-
tuted for their protection, security, and benefit, and they have the
right to alter or reform it when the public good may require." 57 Al-
though the legislative power is vested in the California Legislature,
the "people reserve to themselves the powers of initiative and refer-
endum." 58 The initiative is "the power of electors to propose statutes
and amendments to the Constitution and to adopt or reject them." 59
The referendum is "the power of electors to approve or reject stat-
utes or parts of statutes" already enacted by the legislature. 60

The steps required to place an initiative on the ballot in Cali-
ifornia are fairly typical of the procedures followed in most states. 61
Before circulating the initiative petitions for signatures, proponents
of the measure must submit a copy to the California Attorney Gen-
eral, 62 who reviews its form and prepares a title and summary "of

56. One of the most remarkable findings that emerges from an examination of
the various studies of the initiative is that they consistently conclude that the
initiative process has, on balance, performed in most respects as well as the
legislative process. To be sure, there are studies critical of the process, but they
are limited in scope. Id. at 1009-10.

While the initiative and referendum may not fit into a given philosopher's
democratic model, and while these powers may, like any others, be misused
from time to time, one would hope the courts will not fall prey to the elitist
argument that the people do not know what is best for them and therefore need
someone else to tell them. Pragmatically, the institutions work; like their repre-
sentatives, the people may sometimes approve mischievous or unconstitutional
measures, but by and large, as studies show, they are good legislators.

Comment, supra note 8, at 1747-48.
58. Id.
60. Cal. Const. art. II, § 9. The California Constitution also provides for the "recall,"
which is the power of the people to remove an elected official from office. Cal. Const. art. II,
§ 13. The term "initiative" as used in this article includes the referendum, unless otherwise
noted. The terms "measure," "proposal," and "proposition," with or without the preceding
term "ballot," all refer to the initiative. For a detailed discussion of the various instruments of
direct democracy, see Comment, supra note 8, at 1719-21.
61. Comment, Preelection Judicial Review: Taking the Initiative in Voter Protection,
the chief purposes and points of the proposed measure." The title and summary are placed on the petitions and in the ballot pamphlets. After the Attorney General returns the petitions, the proponents have 150 days to gather signatures.

The number of signatures required to place a proposal on the ballot varies. Initiative amendments to the constitution require a number of signatures equal to eight percent of the total votes cast in the most recent gubernatorial election. In the case of an initiative statute, the number of signatures required is five percent of the total votes cast. Only registered voters of a given county are entitled to sign a petition circulated in that county. If the proponents manage to collect the required number of valid signatures within the allotted time, the California Secretary of State will qualify the measure to appear on the ballot.

Before election, each voter receives a ballot pamphlet prepared by the Secretary of State. The ballot pamphlet contains a copy of the full text of the proposed law as well as the text of any specific constitutional or statutory provisions that the initiative measure proposes to repeal or to revise. In addition, the ballot pamphlet must include the title and summary prepared by the Attorney General, any pro and con arguments and rebuttals submitted by interested parties, and a detailed analysis of the measure prepared by the

---

63. CAL. ELEC. CODE § 3503 (West 1977). See also CAL. CONST. art. II, § 10(d).
64. CAL. ELEC. CODE §§ 3507-3508, 3571(a) (West 1977 & Supp. 1985); CAL. GOV'T CODE § 88002(a) (West 1976).
66. CAL. CONST. art. II, § 8(b); CAL. ELEC. CODE § 3524 (West Supp. 1985).
67. Id.
68. CAL. ELEC. CODE § 3517 (West 1977).
69. The Clerk or Registrar of voters of each county determines the number of valid signatures and transmits those findings to the Secretary of State. CAL. ELEC. CODE § 3520 (West Supp. 1985).
70. CAL. CONST. art. II, § 8(b)-(c). The petitions must be submitted to the Secretary of State no later than 131 days prior to election. CAL. CONST. art. II, § 8(c); CAL. ELEC. CODE § 3514 (West 1977).
71. CAL. ELEC. CODE § 3568 (West 1977); CAL. GOV'T CODE § 88000 (West 1976).
72. CAL. ELEC. CODE § 3570(a) (West 1977); CAL. GOV'T CODE § 88001(a) (West 1976).
74. CAL. ELEC. CODE § 3571(a) (West 1977); CAL. GOV'T CODE § 88002(a) (West 1976).
75. CAL. ELEC. CODE § 3570(c) (West Supp. 1985); CAL. GOV'T CODE § 88001(c) (West 1976). If no pro or con arguments are submitted by interested parties, the Secretary of State must request that voters submit arguments. CAL. ELEC. CODE § 3559 (West 1977).
Legislative Analyst. The proposal will become law if approved by a simple majority of the voters.

III. JUDICIAL INVALIDATION OF INITIATIVE MEASURES:

A. Legislature of the State of California v. Deukmejian and AFL-CIO v. Eu

Until recently, California courts would not invalidate a ballot proposition prior to election “absent a clear showing of invalidity.” The supreme court’s decisions in Legislature of the State of California v. Deukmejian and AFL-CIO v. Eu, however, signaled the demise of this rule. Deukmejian and AFL-CIO v. Eu are the first decisions in thirty-five years to order that a qualified initiative proposal be stricken from the ballot.

In Deukmejian, the governor called a special election in order to submit a statutory initiative measure that would readjust state legislative and congressional election districts. The state legislature sought to restrain the Governor and election officials from holding the special election.

The California Supreme Court, in a per curiam opinion, first recited the general rule that postelection review of challenges to ballot propositions is preferable to preelection review, which “disrupt[s] the electoral process by preventing the exercise of the people’s franchise . . . .” The general rule, however, is subject to exceptions if “serious consequences will result if consideration of the valid-

76. CAL. ELEC. CODE § 3572 (West 1977); CAL. GOV’T CODE § 88002(b) (West 1976). The Legislative Analyst prepares an impartial description of the measure and a fiscal analysis of the measure that projects the amount of any increase or decrease in revenue or cost to state or local governments. CAL. GOV’T CODE § 88003 (West 1976). In addition, the Attorney General must include in the title the estimated financial impact, if any, of the proposal. CAL. ELEC. CODE § 3504 (West 1977).

77. CAL. CONST. art. II, § 10(a). Once enacted, a ballot measure can be amended only by subsequent approval of the electors unless amendment by the legislature is expressly authorized in the initiative statute. CAL. CONST. art. II, § 10(c).


82. State law vests the Governor with the power to order a special election. CAL. CONST. art. II, § 8(c); CAL. ELEC. CODE § 2651 (West Supp. 1985).

83. Joining the court’s opinion were Chief Justice Bird and Justices Mosk, Kaus, Broussard, Reynoso, and Grodin. Justice Richardson dissented.

84. 34 Cal. 3d at 665, 669 P.2d at 20, 194 Cal. Rptr. at 784.
ity of a measure is delayed until after an election" or upon "a clear showing of invalidity." The majority explained that these exceptions were met in the present case. The "high costs" of holding the special election and the impossibility of conducting the primary election in an orderly fashion were the "serious consequences" that would result from postelection review.

The majority also discerned a clear showing of invalidity. Article XXI of the California Constitution directs the legislature to redraw district lines only in the year following the national census. The court reasoned that because "the reserved power to enact statutes by initiative is a legislative power," a statutory initiative is subject to the same limitations as legislative action. The court concluded that just as the legislature is powerless to realign voting boundaries more than once per decade, so are the people powerless to accomplish the same by initiative.

After objecting to the grant of preelection review because of the absence of "clear invalidity," Justice Richardson, in dissent, reminded the majority that the power of initiative was not a right granted the people, but a power reserved by them. Because the language of the constitution does not prohibit reapportionment by initiative, the people should retain "their constitutional initiative power over reapportionment, even if both a legislative and an initiative plan have been adopted in the same census period." In any event, the dissent urged, the court should not fashion a remedy because the "makeup and apportionment of the Legislature involved peculiarly political questions that are not appropriate for this court to decide. They are far better entrusted to the collective political wisdom of the Legislature subject to the power of initiative and referendum re-

85. Id. at 666, 669 P.2d at 20, 194 Cal. Rptr. at 784.
86. Id. State and local governments would have had to spend an estimated $15,000,000 in order to conduct the special election.
87. In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary line of the Senatorial, Assembly, Congressional, and Board of Equalization districts . . . .

CAL. CONST. art. XXI.

Under article XXI's predecessor article, the legislature could not alter election district boundaries more that once per decade. Wheeler v. Herbert, 152 Cal. 224, 92 P. 353 (1907). The court in Deukmejian reasoned that "absent evidence that the people intended a different interpretation, it must be inferred that in the drafting and adopting of article XXI, the prior judicial interpretation of that language was considered and a similar interpretation of that [predecessor] article was intended." 34 Cal. 3d at 672, 669 P.2d at 25, 194 Cal. Rptr. at 789.
88. 34 Cal. 3d. at 673, 669 P.2d at 26, 194 Cal. Rptr. at 790.
89. 34 Cal. 3d at 683, 669 P.2d at 35, 194 Cal. Rptr. at 799. (Richardson, J., dissenting).
served to the people."

AFL-CIO v. Eu, decided the year after Deukmejian, is the most recent decision leading to the invalidation of a qualified initiative measure in California. The AFL-CIO sought to enjoin the Secretary of State of California from placing an initiative on the November 1984 general election ballot. The purpose of the initiative was to order the state legislature, on penalty of loss of salary, to apply to Congress to convene a constitutional convention. The purpose of the convention was to propose an amendment to the United States Constitution that would require a balanced federal budget. In the event that the state legislature failed to act, the proposed measure instructed the Secretary of State to apply directly to Congress on behalf of the people.

90. Id. at 685, 669 P.2d at 36, 194 Cal. Rptr. at 800 (emphasis in original) (quoting Sliver v. Brown, 63 Cal. 2d 270, 280, 405 P.2d 132, 139, 46 Cal. Rptr. 308, 315 (1905)).

91. The U.S. Senate had approved a constitutional amendment to balance the federal budget, but the amendment failed to garner the necessary two-thirds vote in the House of Representatives. Balanced budget advocates were therefore forced to resort to the alternative method of proposing an amendment by calling a constitutional convention. AFL-CIO v. Eu, 36 Cal. 3d at 691-92, 686 P.2d at 611-12, 206 Cal. Rptr. at 91-92. See also Note, The Balanced Budget Amendment: An Inquiry Into Appropriateness, 96 Harv. L. Rev. 1600, 1600-01 (1983).

92. The proposed measure provided:

Section One. (a) The People of the State of California hereby mandate that the California Legislature adopt the following resolution and submit the same to the Congress of the United States under the provisions of Article V of the Constitution of the United States:

That the Congress of the United States is urged to propose and submit to the several states an amendment to the Constitution of the United States to require, with certain exceptions, that the federal budget be balanced; and

That application is hereby made to the Congress of the United States, pursuant to Article V of the Constitution of the United States, to call 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; and

This application constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the several states have made similar applications pursuant to Article V of the United States Constitution;

(b) The Secretary of the Senate is hereby directed to transmit copies of this application, upon its adoption by the California Legislature, to the President and Secretary of the United States Senate and the Speaker and Clerk of the House of Representatives of the Congress of the United States.

Section Three. (a) The people of the State of California hereby adopt the resolution set forth in Section One of this initiative measure; and (b) If the California Legislature fails to adopt the resolution set forth in Section One of the initiative measure within forty (40) legislative days of the approval of this
In an opinion by Justice Broussard, the California Supreme Court first dismissed the objection to its exercise of preelection review. Adopting the position of Justice Mosk's separate opinion in Brosnahan v. Eu, the majority stated that the rule against preelection review "applies only the contention that an initiative is unconstitutional because of its substance," and not when "the challenge goes to the power of the electorate to adopt the proposal in the first instance . . . ." Inasmuch as the opponents of this initiative challenged the constitutional power of the people to adopt such a measure, the court concluded that preelection review was appropriate.

Next, the majority examined the language of article V of the United States Constitution, which provides for a constitutional convention upon "Application of the Legislatures of two-thirds of the several States." The court interpreted "Legislatures" as referring only to the representative lawmaking bodies of the several states, and not the "whole of the state legislative power, including the reserved power of initiative." Consequently, only the legislature acting in its representative capacity has the power to call a constitutional convention. Because a state may not, through the process of initiative, compel its legislators to apply for a constitutional convention, the proposed initiative violated article V.

The court also determined that the proposed initiative violated the state constitution. Article II of the state constitution limits the initiative to the proposal of statutes or amendments to the state con-

---

96. Id. at 696, 686 P.2d at 614, 206 Cal. Rptr. at 94 (quoting Deukmejian, 34 Cal. 3d at 667, 669 P.2d at 21, 194 Cal. Rptr. at 785)
97. U.S. CONST. art. V (emphasis added). Article V states: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."
98. 36 Cal. 3d at 697, 686 P.2d at 615, 206 Cal. Rptr. at 95. No previous decision in any court had addressed the question of whether the term "Legislatures" in article V embraces the reserved power of initiative. Id. at 699, 686 P.2d at 617, 206 Cal. Rptr. at 97.
The balanced budget measure violated the state constitution because it was neither a statute nor an amendment, but merely a resolution, defined by the majority as "an enactment which only declares a public purpose and does not establish means to accomplish that purpose."100

In dissent, Justice Lucas lamented the "disturbing trend" toward deciding issues that might have been rendered moot by the election, and that in any event could be addressed after election.101 That the initiative was challenged on nonsubstantive grounds was no justification for this "rush to judgment." Because a jurisdictional challenge can be made in every case, a measure must be clearly invalid before it merits accelerated review. The dissent also remarked that state courts should not decide the political question of the validity of applications for a constitutional convention. The sole arbiter of such questions should be Congress, "the body alone entrusted by the federal Constitution with the responsibility to receive and review such applications."102

Brosnahan v. Eu,103 decided only a year before Deukmejian, stands in bold contrast to the approach taken by AFL-CIO v. Eu and Deukmejian. In Brosnahan, opponents of Proposition 8, the "Victims’ Bill of Rights,"104 asserted that the measure violated the state constitution, and could not be placed on the ballot, because it revised rather than amended the state constitution,105 and contained more than one subject.106 Opponents of Proposition 8 also asserted that the proponents failed to obtain the requisite number of valid signatures.

Speaking through Justice Richardson,107 the supreme court

99. Article II decrees that "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." CAL. CONST. art. II, § 8(a).
100. 36 Cal. 3d at 712 n.23, 686 P.2d at 626 n.23, 206 Cal. Rptr. at 106 n.23.
101. Id. at 717-18, 686 P.2d at 630, 206 Cal. Rptr. at 110 (Lucas, J., dissenting).
102. Id. at 718-19, 686 P.2d at 631, 206 Cal. Rptr. at 111 (Lucas, J., dissenting).
103. 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982).
105. Voters may only amend, and not substantially revise, the state constitution by way of initiative. CAL. CONST. art. XVIII, § 3. The theory is that a constitution is an instrument of permanent and abiding nature. Comprehensive changes to the fundamental charter, therefore, must be accomplished through the elaborate procedures of convening a constitutional convention and the subsequent popular ratification, and not through the less solemn, less deliberative process of initiative. Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 221-22, 583 P.2d 1281, 1284-85, 149 Cal. Rptr. 239, 242-43 (1978).
106. CAL. CONST. art II, § 8(d) (West 1983). See infra notes 155-58 and accompanying text.
107. Joining the court’s opinion were Justices Richardson, Kaus and Reynoso. Justice Broussard concurred. Justice Mosk concurred in part and dissented in part. Chief Justice Bird
summarily refused to reach the constitutional issues. The court stated that "in the absence of some clear showing of invalidity," challenges to ballot propositions should be reviewed "after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise." The court also found no violation of the statutory signature requirements because the Legislature had adopted an urgency measure deeming the measure qualified.

IV. JUDICIAL REVIEW OF THE INITIATIVE PROCESS

A paradox in American political theory is why unelected, politically unaccountable judges possess the power to declare acts by popularly elected officials unconstitutional. The apparent illogic of this notion also applies to direct legislation. Initiatives, after all, embody the direct will of the people, whereas the legality of legislative enactments rests on the authority delegated to representatives by constituents. Concerns about the legitimacy of judicial review, therefore, should apply with equal force when a direct act of the people is held to judicial scrutiny. As explained below, whether review occurs before or after election has a bearing on the legitimacy of judicial review of the initiative.

A. Preelection and Postelection Review

1. Preelection Review

The central question in preelection or accelerated review is whether a given proposition is qualified to appear on the ballot. The advantages to preelection review are that an early invalidation spares the proponents of the measure the cost of processing a void petition, and relieves both proponents and opponents of the expenses

---


108. 31 Cal. 3d at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101. Opponents of Proposition 8 did, in fact, mount a challenge to the Victim's Bill of Rights following the election. Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982). A sharply divided court concluded that the measure was constitutional.

109. 31 Cal. 3d at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101.

110. J. ELY, supra note 23, at 4-5. In California, however, state judges are elected officials. CAL. CONST. art. VI, § 16. But because strict rules of election conduct are imposed on state judges, e.g., CAL. R. CT. app., division II (CODE OF JUD. CONDUCT CANON 7) (1974), it is doubtful whether state judges are as politically accountable as elected representatives. Perhaps elected judges are most appropriately labeled "quasi-accountable."

incurred by advocating the passage or defeat of a void measure.\textsuperscript{112} More significantly, preelection invalidation affords the proponents a second chance to qualify the proposal for the ballot, providing the defect is curable prior to election.\textsuperscript{113}

There are also institutional benefits to accelerated review. Preelection litigation generates less publicity or controversy than its postelection counterpart because the people, not having voted on the measure, are usually unaware of its existence. This allows courts to decide the merits of the case in the relative obscurity surrounding most judicial decisions, without the fear of becoming embroiled in a political controversy.\textsuperscript{114} However, because of this less politically constrained environment, preelection review tempts courts to invalidate proposals as merely unacceptable rather than as unconstitutional.\textsuperscript{115}

Preelection review poses severe time limitations because courts strive to decide preelection challenges before impending election deadlines.\textsuperscript{116} At the state supreme court level, a special hearing must be scheduled, and the usual procedures for briefing, oral argument, and internal conference meetings must be expedited. Often the litigants themselves have inadequate time to prepare their briefs. This "rush to judgment" has two consequences. First, the court's attention and resources are diverted from its regular business, which generally consists of a backlog of several hundred pending cases.\textsuperscript{117} Second, the court is left with insufficient time to give the issues careful consideration and to reach a reasoned determination.\textsuperscript{118} Although initiative issues are usually complex and presented under adverse circumstances,\textsuperscript{119} it is not unusual for the court to file its opinion several days after oral argument.\textsuperscript{120} The court is frequently forced to work from an incomplete record.\textsuperscript{121} Also, a decision to strike a measure from the ballot is irrevocable, and if incorrect, deprives the people of

\textsuperscript{113} For example, if the measure is defective because an insufficient number of qualified signatures have been collected, the proponents can obtain the requisite signatures by way of a supplemental petition. \textit{Id.}
\textsuperscript{114} Comment, \textit{supra} note 61, at 1233-34.
\textsuperscript{115} See J. ELY, \textit{supra} note 23, at 44.
\textsuperscript{116} See AFL-CIO v. Eu, 36 Cal. 3d at 694, 686 P.2d at 613, 206 Cal. Rptr. at 93.
\textsuperscript{117} \textit{Id.} at 719, 686 P.2d at 630, 206 Cal. Rptr. at 110 (Lucas, J., dissenting). The rush to judgment before election day prevented Justice Lucas from developing some of his dissenting arguments. \textit{Id.} at 724, 686 P.2d at 634, 206 Cal. Rptr. at 114 (Lucas, J., dissenting).
\textsuperscript{118} \textit{Id.} at 697 n.10, 686 P.2d at 615 n.10, 206 Cal. Rptr. at 95 n.10.
\textsuperscript{119} \textit{Id.} at 719, 686 P.2d at 630, 206 Cal. Rptr. at 110 (Lucas, J., dissenting).
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} Comment, \textit{supra} note 61, at 1230.
a constitutional right of political participation.

Finally, a court engaging in preelection review runs the risk of deciding a controversy that will become moot if the measure is defeated at polls. "[T]he normal arguments in favor of the passive virtues suggest that a court not adjudicate an issue until it is clearly required to do so. If the measure passes, there will be ample time to rule on its validity. If the measure fails, judicial action will not be required." Because courts must not decide constitutional questions unnecessarily, courts in a majority of states hold that preelection challenges involving constitutional issues are unripe, and hence are not justiciable.

2. Postelection Review

On the whole, postelection challenges are more justiciable than preelection challenges. An approved measure usually takes effect the day after election, which means that a challenge to it cannot be dismissed as unripe for adjudication. Deciding the propriety of an initiative after election provides the court with ample time for careful deliberation, reasoning, and drafting of the opinion; the court is not pressed to render its decision before election, nor is it required to expedite internal procedures for briefing, oral argument, and conference meetings.

By deferring trial until after election, however, postelection review leading to an invalidation means that persons and organizations will have devoted time and resources to support a void measure. Such waste could be avoided by enjoining the measure from appearing on the ballot in the first place. Interested parties and state and local governments will have to incur further expenses if the measure is placed before voters a second time. And an initiative overturned after election is apt to confuse voters and to frustrate the will of those who approved it by denying them the beneficial effects of the law they enacted.

Postelection review can also have adverse institutional consequences for the judiciary if the courts are forced to upset a hotly-contested political measure. Alternatively, the higher visibility of postelection litigation may influence tribunals to uphold a measure

122. Deukmejian, 34 Cal. 3d at 666, 669 P.2d at 20, 194 Cal. Rptr. at 784-85.
124. CAL. CONST. art. II, § 10(a).
125. Comment, supra note 61, at 1231.
126. See id. at 1231-32.
that deserves to be invalidated and that would otherwise have been pronounced unconstitutional if litigation had been instituted at the preelection phase.

B. A Question of Legitimacy: Deukmejian and AFL-CIO v. Eu Revisited

Prior to Deukmejian, state courts generally refrained from entertaining preelection challenges to initiative measures "in the absence of some clear showing of invalidity." Deukmejian did not jettison the "clear invalidity" rule, but added that accelerated review is appropriate whenever: 1) "serious consequences will result if consideration of the validity of a measure is delayed until after an election," or 2) "the challenge goes to the power of the electorate to adopt the proposal in the first instance."

Despite this expansion of the clear invalidity rule, the proposal at issue in Deukmejian still satisfied the earlier clear invalidity standard. Article XXI of the state constitution decrees that election district boundary lines shall be adjusted in the year following the national decennial census. From that provision it easily follows that redistricting may occur only in the year following the census, i.e., once per decade, as under federal law.

The preelection invalidation in Deukmejian had the additional virtue of preventing substantial public and private waste. The initiative in that case was slated for a special election. The costs of holding that special election were estimated at $15,000,000, an expenditure that would have been needlessly incurred by deferring litigation until after election.

By contrast, AFL-CIO v. Eu involved neither a clear showing of invalidity nor the diversion of substantial waste. The balanced budget amendment was not "clearly invalid" because whether the people can directly call a constitutional convention was a question of

128. 34 Cal. 3d at 666, 669 P.2d at 20, 194 Cal. Rptr. at 784. See supra note 85 and accompanying text.
129. 34 Cal. 3d at 667, 669 P.2d at 21, 194 Cal. Rptr. at 784.
130. See supra note 87 and accompanying text.
132. 34 Cal. 3d at 666, 669 P.2d at 785, 194 Cal. Rptr. at 21. When then Governor Reagan called a special election for a tax reform initiative, the election costs to the state exceeded $20,000,000. Note, supra note 4, at 941 n.91.
first impression, and one not easily resolved by resorting to the text of the federal Constitution. And inasmuch as the balanced budget initiative was scheduled for a general election, no substantial governmental expenditures or waste would have been incurred by placing the measure on the ballot.

As with the vast majority of propositions, the ballot measure at issue in *AFL-CIO v. Eu* was probably destined to die at the polls, thus eliminating the necessity for judicial review. It is true that some quarters supported the elimination of the federal deficit. But if the proposal had been placed on the ballot, the ensuing public debate might have led to the consensus that although a reduced deficit may be desirable, the federal government cannot operate effectively without incurring a budget deficit from time to time.

Of course, one can never be too certain how citizens will respond to a given measure. But even if the citizens had approved the balanced budget amendment initiative, the question presented in *AFL-CIO v. Eu* still may have been rendered moot. Congress might have concluded, as did the California Supreme Court, that the people's application to convene a constitutional convention was void under Article V of the United States Constitution. That provision provides for a constitutional convention upon "Application of the Legislatures of two-thirds of the several States," rather than upon direct application by the people through their power of initiative.

Disposing of the case before election also had the effect of denying the electorate an opportunity to express its views on the desirability of a balanced budget, and of preventing representatives from

---

134. Defeat at the polls is the fate of the vast majority of ballot measures. The electorate is naturally predisposed to voting "no" on initiatives; nearly 75% of the proposals presented to the public have been defeated. Note, *supra* note 4, at 927.

135. President Reagan promised to balance the federal budget in his 1980 and 1984 presidential campaigns. Presidents since Franklin D. Roosevelt have also promised to do the same. At the time *AFL-CIO v. Eu* was decided, 32 states had formally applied to Congress to call a constitutional convention to balance the budget. *AFL-CIO v. Eu*, 36 Cal.3d at 692, 686 P.2d at 611-12, 206 Cal. Rptr. at 91-92. See also Note, *The Balanced Budget Amendment: An Inquiry Into Appropriateness*, 96 HARV. L. REV. 1600 (1983). This article expresses no opinion as to the merits or desirability of a balanced federal budget or a reduced federal budget deficit.

136. The projected federal budget deficit for 1985 is $222 billion, the largest in history. 1985 FACTS ON FILE 2307, at 74.

137. The U.S. government has never operated without incurring a budget deficit at the end of each fiscal year, including the first year of nationhood.


taking account of those views. The court responded that this “argument misunderstands the purpose of the initiative in California. It is not a public opinion poll. It is a method of enacting legislation, and if the proposed measure does not enact legislation . . . it should not be on the ballot.” This language, however, is contrary to Farley v. Healy, in which Justice Traynor led the court to uphold an initiative measure urging the withdrawal of American troops from Vietnam.

None of the objections raised in this article conflicts with the substance of AFL-CIO v. Eu, for the court probably arrived at the correct result. The reason the Constitution has endured for two centuries, according to John Hart Ely, is that it generally does not embrace substantive values, but establishes rights of procedural fairness and political participation. If the people are permitted to propose a constitutional amendment directly, there is the risk that they will enshrine transitory but deeply felt substantive values, such as prohibition, rather than addressing more lasting concerns of process and structure.

The objections presented in this article are concerned solely with the timing of review. The power of judicial review carries a concomitant limitation: the power may be exercised only in a case or controversy. The justifications for this restriction are twofold. First, experience teaches that “the hard, confining and yet enlarging context of a real controversy leads to sounder and more enduring judgments.” Second, limiting jurisdiction to cases or controversies ensures that courts will not intrude into areas committed to the coordinate branches. Judicial independence is predicated on judicial self-restraint; courts will be rebuked by the other branches if they extend their jurisdiction beyond concrete questions presented in an

140. 36 Cal. 3d at 695, 686 P.2d at 613-14, 206 Cal. Rptr. at 93-94.
141. 67 Cal. 2d 325, 62 Cal. Rptr. 16 (1967).
143. U.S. CONST. amend. XVIII (prohibiting manufacture, sale or transportation of liquor) (repealed by U.S. Const. amend. XXI).
adversarial context.\textsuperscript{147}

As a result of the case or controversy doctrine, no court will entertain a constitutional challenge before the statute in dispute is approved by the legislature.\textsuperscript{148} Yet this is analogous to what happens when an initiative is reviewed prior to voter approval. Such review raises questions of legitimacy for two reasons. First, judicial review that does not rest on a case or controversy is \textit{ultra vires}, as it invades the spheres of influence reserved to the political branches or to the people. Second, the power of initiative amounts to a right of political participation. That vital right should be scrutinized only under conditions most conducive to a correct judicial determination. Courts should not close a channel of political change without, in the words of Felix Frankfurter, "that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faceted situation."\textsuperscript{149} Although questions of legitimacy can be raised any time the judiciary upsets a law enacted by the people, judicial invalidations of ballot measures lack legitimacy when they are not tied to the flesh-and-blood facts of an actual, postelection case.

\section*{V. Proposed Guidelines for Judicial Review of Initiatives}

The proper role for the judiciary in reviewing initiative measures is difficult to define. A judicial body that upholds an initiative may contribute to the impairment of the rights of insular minorities; a judicial body that strikes down an initiative runs the risk of imposing its own values on a majority that does not share those values. Courts must harmonize these two conflicting principles when reviewing challenges to initiative measures. As posited in the preceding section, the malleable standards of review prescribed in \textit{Deukmejian} and endorsed in \textit{AFL-CIO v. Eu} are conducive to premature judicial interposition. The following guidelines are submitted as a means of preventing the courts from running aground upon either the rocks of indulging majoritarian intemperance or the shoals of judicial usurpation.

\begin{flushleft}
\textsuperscript{148} A. Bickel, \textit{The Least Dangerous Branch} 115-16 (1962).
\end{flushleft}
A. Preelection Review

Preelection invalidation of an initiative proposal should be limited to cases in which there is a clear showing of invalidity or a showing that postelection review would be futile or would cause substantial waste. The advantages of preelection abstention are increasingly diminished if a proposal is patently invalid. An invalid measure steals time and attention from the legitimate propositions on the ballot and depletes the resources of interested persons and organizations, as well as state and local governments. These costs are a small price to pay for the benefits of direct democracy when the proposal is marginally invalid, and has a chance of being saved after election by a narrowing interpretation or a creative construction. However, the public cannot be expected to subsidize a proposal in which prospective disqualification is an inevitability.

Most preelection challenges assert that the proponents failed to follow statutory procedures. It is essential for any ballot campaign that prescribed procedures be followed. Procedural compliance maintains the order and integrity of the initiative process and minimizes electoral disruption. Typical procedural challenges center on the form of the petition, the validity of the signatures, and the propriety of action taken by state officials in either reviewing the petition’s sufficiency or in preparing a title and summary for the ballot. In order to resolve all doubts in favor of upholding the initiative power, California courts require only substantial compliance with procedural regulations.

Other common preelection challenges are quasi-procedural in nature, such as the single-subject matter requirement. The single-subject matter requirement, imposed by the state constitution, commands that “an initiative measure embracing more than one subject may not be submitted to the electors or have any effect.” The
purposes behind this limitation are to minimize voter confusion\textsuperscript{157} and to prevent "logrolling"—the combining of provisions that lack genuine popular support with a popular but severable provision, in an attempt to obtain majority approval for the unpopular provisions.\textsuperscript{158} A proposal that flouts this requirement by subsuming more than one subject matter under a single proposition is prima facie invalid; nothing is gained by deferring review until after election, because at that point the measure must be invalidated anyway.

Some courts have expressed doubts as whether they retain the equitable discretion to examine a measure before election if there is a compelling showing that the substantive provisions of the initiative are invalid.\textsuperscript{159} Courts should possess this discretion, but must proceed with caution before pronouncing the substantive provisions clearly invalid. The substantive provisions of a \textit{statutory} initiative can be clearly invalid if there is a conflict with state constitutional law or federal law. But the substantive provisions of a \textit{constitutional amendment} initiative cannot conflict with state law, and thus cannot be clearly invalid, unless there is a conflict with federal law. As one court explained:

[C]onflict with existing articles or sections of the Constitution can afford no logical basis for invalidating an initiative proposal. When a newly adopted amendment does conflict with pre-existing constitutional provisions, the new amendment necessarily supersedes the previous provisions. Otherwise, an amendment could no longer alter existing constitutional provisions, and the amendment process might, in every case, be frustrated by the judicial determination that a given proposal conflicts with other provisions.\textsuperscript{160}

\subsection*{B. Postelection Review}

The proposed rule for postelection procedural review is the con-

\begin{itemize}
\item containing such disparate subjects as gambling, civic centers, mining, fishing, city budgets, liquor control, senate reapportionment, and oleomargarine.
\item Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337, 341-42 (Fla. 1978). See also Answer of the Justices, 377 N.E. 2d 915, 916 n.2 (Mass. 1978). In the event voters approve two conflicting amendments in the same election, the amendment receiving the highest number of votes prevails. \textit{Cal. Const.} art. II, § 10(b).
\end{itemize}
verse of the proposed rule for preelection review. Contrary to current California law, which allows review of any kind of challenge after election, postelection procedural review should not be allowed in the absence of a showing that a preelection challenge was impossible, impracticable, or otherwise futile. Although the integrity of the initiative process is enhanced when procedural objections are raised prior to election, once a measure is approved, any procedural deficiencies should be treated as a *fait accompli*. Postelection invalidation of an initiated measure cannot retroactively purge a procedural deficiency existing at the time it was presented to the electorate. Because courts construe the language of an initiative in light of its preelection publicity and its popular meaning, little danger exists that a procedurally deficient petition would cause citizens to adopt something they would otherwise have rejected. Consequently, voter approval of a measure should not be upset for procedural irregularity when the opportunity existed to contest a lack of compliance before election.

This proposed rule is designed to bring California in line with the rule in most states. Courts in most states subscribe to the "election cures all" doctrine, and prohibit postelection procedural attacks. A minority of states will entertain a postelection challenge, but place a much higher burden of proof on the challenger. California, however, does not prohibit any kind of postelection challenge, and uses the same unrestricted standards in the review of a postelection procedural challenge as in a preelection procedural challenge. This is unfair to proponents who have the right to know as soon as possible whether the formal requisites have been met.

The bulk of substantive review should occur after election. Once the electorate approves a measure, all substantive issues become justiciable, because the issues are no longer unripe or in danger of becoming moot. Measures that are clearly invalid, as well as those that are not, can be reviewed at this point. The failure to contest a clearly

invalid measure prior to election should not bar a postelection substantive challenge; unlike procedural compliance, voter approval does not purge a substantively invalid measure of its infirmities.

The fact that review occurs after election does not, of course, provide the judiciary with a roving commission to strike down measures that it deems unwise. It merely authorizes judicial scrutiny "in the light of established constitutional standards."

1

The record of the supreme court in upholding approved measures is mixed. The court seldom finds a proposition unconstitutional, but it does not shrink from diluting the intended effect through interpretation. For example, the court upheld the property tax reforms of Proposition 13, but severely limited the impact of that measure through a narrow construction of key language.

168

The court also upheld the right of the people to institute capital punishment, but has refused to allow a single execution to proceed. The publicity surrounding postelection litigation has probably constrained the court from nullifying the effect of more propositions. The recent shift toward pre-election review suggests that the court plans to play a more active role in the initiative process by taking advantage of the minimal public awareness and controversy such review offers.

VI. Conclusion

The initiative is a less than ideal device for enacting legislation. Voters have been known to misuse their powers from time to time. But by and large, citizens have proved to be responsible lawmakers. And the people, no less than the legislatures, are entitled to experiment. The initiative is the best instrument available for ascertaining the popular will and for translating that will directly into law. As such, direct legislation is entitled to the highest respect and deference. California courts should take this into account by refusing to invalidate a qualified ballot measure until after election, absent a clear showing of invalidity. Deferring review until after election will not only ensure that judicial resources are not squandered on propos-


als that might die of their own weight, but also will inhibit the judiciary from stilling the waters of self-governance.