

No. 80430-3

SUPREME COURT OF THE STATE OF WASHINGTON

**FUTUREWISE and SERVICE EMPLOYEES INTERNATIONAL
UNION HEALTHCARE 775NW,**

Appellants,

v.

SAM REED,

Respondent.

APPELLANTS' OPENING BRIEF

Knoll D. Lowney, WSBA
No. 23457
Smith & Lowney, P.L.L.C.
2317 East John St.
Seattle, WA 98112
(206) 860-2883

Judith Krebs, WSBA
No. 31825
General Counsel for
SEIU Healthcare
775NW
33615 First Way
South
Federal Way, WA
98003
(253) 815-3700

Keith Scully,
WSBA No. 28677.
Legal Director for
Futurewise
814 Second Ave,
Suite 500
Seattle, WA 98104
(206) 343-0681

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2001 JUL 25 P 2:21
BY RONALD R. CARLSON
CLERK

TABLE OF CONTENTS

I.	ASSIGNMENT OF ERROR.....	2
II.	STATEMENT OF THE ISSUES.....	2
III.	STATEMENT OF THE CASE.....	3
IV.	INTRODUCTION AND SUMMARY OF ARGUMENT.....	7
V.	ARGUMENT.....	9
A.	Pre-Election Review of Appellants' Subject Matter Claim is Appropriate and Necessary.....	9
B.	A Measure is Beyond the Scope of the Initiative Power If It Seeks to Accomplish Something Beyond the Legislative Power of the People, Such as Attempting to Modify the State's Organic Laws.....	15
	1. The resolution of a "subject matter" challenge depends upon the purpose and effect of a measure, not its form....	16
	2. A measure is beyond the initiative power if it has the purpose or effect of amending the State Constitution, regardless of its form.....	18
C.	I-960 Exceeds the Scope of the People's Legislative Power by Altering the Constitution's Referendum Process.....	21
	1. This case is directly controlled by the Supreme Court's decision in Amalgamated Transit Union, which held that an initiative may not "alter the method by which the referendum power is exercised.".....	21
	2. Just like I-695, I-960 alters the referendum process by requiring universal referendum, bypassing the Constitution's petition requirements.....	22

3.	I-960 has the stated purpose and effect of circumventing the constitutionally-delineated exceptions to the referendum process.....	24
i.	I-960 requires referenda on emergency acts.....	26
ii.	I-960 promises referenda on exempt revenue acts.....	26
4.	I-960 alters the referendum process by creating a non-binding referendum process, even though the people reserved for themselves only the power to call binding referenda.....	28
D.	I-960 Exceeds the Scope of the People's Legislative Power by Altering the Constitution's Vote-Passage Provisions.....	30
1.	Washington's Constitution also operates as a constitutionally based subject matter restriction on laws that propose to modify the majority-vote standard.....	34
E.	The Validity of Initiative 601 and RCW 43.135.035 Is Not Before This Court; Nor Do These Laws Impact the Subject Matter Inquiry.....	36
F.	The Invalid Portions Are Not Severable and the Entire Measure Should be Removed From the Ballot And/Or Invalidated.....	41
VI.	CONCLUSION.....	45

TABLE OF AUTHORITIES

Cases

Amalgamated Transit Union (“ATU”) v. Washington,
142 Wn.2d 183, 198, 216; 11 P.3d 762, 776, 786 (2000).....passim

Farris v. Munro,
99 Wn.2d 326 (1983).....25, 27

Ford v. Logan,
79 Wn.2d 147, 155-156, 483 P.2d 1247 (1971).....7, 16, 17

Coppernoll v. Reed,
155 Wn.2d 290, 297, 119 P.3d 318 (2005).....9, 10, 11, 17

City of Sequim v. Malkasian,
157 Wn.2d 251, 260, 138 P.3d 943 (2006).....10, 17

Gerberding v. Munro,
134 Wn.2d 188, 210, 949 P.2d 1366 (1998).....15, 34

Philadelphia II v. Gregoire,
128 Wn.2d 707, 911 P.2d 389 (1996).....passim

Seattle v. Yes for Seattle,
122 Wn.App 382, 386 (2004), *rev. denied*, 153 Wn.2d 1020
(2005).....11, 12, 41, 42

Seattle Bldg. & Const. Trades Council v. Seattle,
94 Wn.2d 740, 748, 620 P.2d 82 (1980).....15, 19

Swedish Hospital of Seattle v. Department of Labor and Industries,
26 Wn.2d 819, 832, 176 P.2d 429, 436 (1947).....44, 45

Washington State Labor Council v. Reed,
149 Wn.2d 48, 56 (2003).....25

Out of State Cases

Accord Hempfield School District v. Election Board of Lancaster,

133 Pa.Cmwth: 85, 91, 574 A.2d 1190 (1990).....	12
<i>AFL-CIO v. Eu.</i> , 36 Cal.3d 687, 686 P.2d609, 206 Cal.Rptr. 89 (1984).....	20
<i>Alaskans for Efficient Government v. State of Alaska</i> , 153 P.3d 296 (2007).....	passim
<i>Barker v. Hazeltine</i> , 3 F.Supp.2d 1088 (D. S. Dak.1998).....	19, 20
<i>In re Initiative Petition No. 364</i> , 930 P.2d 186, 1996 OK 129 (Okla.1996).....	19
<i>Miller v. Moore</i> , 169 F.3d 1119 (8 th Cir. 1999).....	19
<i>State ex rel. Harper v. Waltermire</i> , 213 Mon. 425, 691 P.2d 826 (1984).....	19
<i>State v. Meier</i> , 231 N.W.2d 821 (N.Dak. 1975).....	20

Statutes

RCW 29A.72.250.....	23
RCW 43.135:.....	4, 18
RCW 43.135.05.....	36, 37, 38, 40
RCW 43.135.05(1).....	38
RCW 43.135.05(2).....	38
RCW 43.35.035(5).....	38

Constitutional Provisions

Wa. Const. Art. II, § 1.....	5, 9, 11, 31, 37
Wa. Const. Art. II, § 1(c).....	39, 40
Wa. Const. Art. II, § 41.....	39, 40
Wa. Const. Art. VIII, § 1(a).....	35
Wa. Const. Art. XXIII.....	6
Wa. Const. Art. XXIII, § 1.....	35
Wa. Const. Art. XXIII, § 22.....	34

Appellants Futurewise and Service Employees International Union Healthcare 775 NW (hereafter "Plaintiffs") respectfully submit this Opening Brief in support of their appeal of the King County Superior Court's order granting summary judgment to Secretary of State Sam Reed and dismissing Plaintiffs' action with prejudice.

I. ASSIGNMENT OF ERROR

1. The Superior Court erred in granting summary judgment for Secretary Reed, dismissing Plaintiffs' action, because Initiative Measure 960's subjects include altering the referendum process and imposing a legislative supermajority requirement, both of which are beyond the scope of the initiative process and therefore not proper for submission to the voters.

II. STATEMENT OF THE ISSUES.

1. Does I-960 exceed the scope of the initiative process by adopting an expanded definition of legislation that "increases taxes" and making such legislation subject to an alternative referendum process and a legislative supermajority requirement?
2. Does I-960 violate the prohibition of *Amalgamated Transit Union*¹ that "the State Constitution does not provide that the initiative power can be used to alter the method by which the referendum power is authorized" by (1) mandating universal referendum on all tax legislation; (2) circumventing the constitutionally-delineated exceptions to referendum; and (3) creating a non-binding referenda process.

¹ *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000).

3. Can the people by initiative modify the express legislative vote-passage requirements in the State Constitution, which specify that bills are to be passed by simple majority and set forth each instance in which a supermajority is required for bill passage?
4. Where a measure concerns subject matters beyond the legislative power of the People, and these subjects cannot be severed from the remainder of the measure, should the entire measure be removed from the ballot and/or invalidated?

III. STATEMENT OF THE CASE

This is an appeal from a decision of the King County Superior Court dismissing Plaintiffs' action asserting that Initiative Measure 960 ("I-960")² is beyond the scope of the initiative process and therefore should be prohibited from appearing on the November, 2007, general election ballot and/or invalidated.³

Without question, if I-960 were to become law, it would have immediate and profound impacts on the functioning of our State Government, including the State Legislature and state agencies, and their budgets and programs.

The core of I-960 is its broad new definition of legislative action that "raises taxes" in Section 5(6) and its imposition of new requirements for taking of such actions. I-960 defines a legislative action that "raises

² The full text of I-960 is attached as *Exhibit A*.

³ On July 19, 2007, Washington Secretary of State Sam Reed confirmed that the proponents of I-960 have submitted sufficient signatures to qualify

taxes” as “any action or combination of actions ... that *increase state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.*” I-960 § 5(6) (emphasis added). While this definition will certainly be subject to extensive litigation if I-960 were to become law, on its face it appears designed to expand the requirements of RCW 43.135 to non-general fund accounts and to the legislative budget making process. The following mandates apply to such legislative actions:

- Under I-960, any legislative action that “raises taxes” must be passed by a 2/3 majority of each house of the Legislature.⁴
- In addition, every action that “raises taxes” must automatically go to a statewide referendum.⁵
- I-960 removes flexibility from the process for setting the state expenditure limit⁶, and requires that an action that “raises taxes” and exceeds the expenditure limit will not take effect until it is approved by the voters.⁷

I-960 for the ballot, based upon the validation of a random sample of signatures. ***Exhibit B.***

⁴ I-960 § 5(1), (6).

⁵ I-960 §§ 5(2), 6-13.

⁶ I-960 § 5(5).

⁷ I-960 § 5(2).

- If the action does not cause the expenditure limit to be exceeded, the action is subject to non-binding referendum.⁸

The Attorney General has issued the following ballot title and ballot measure summary to I-960:

Ballot Title

Statement of Subject: Initiative Measure No. 960 concerns tax and fee increases imposed by state government.

Concise Description: This measure would require two-thirds legislative approval or voter approval for tax increases, legislative approval of fee increases, certain published information on tax-increasing bills, and advisory votes on taxes enacted without voter approval.

Ballot Measure Summary

This measure would require either a two-thirds vote in each house of the legislature or voter approval for all tax increases. New or increased fees would require prior legislative approval. An advisory vote would be required on any new or increased taxes enacted by the legislature without voter approval. The office of financial management would be required to publish cost information and information regarding legislators' voting records on bills imposing or increasing taxes or fees.

Compl. ¶ 8, CP __.

Plaintiffs filed the instant case because they contend that I-960 is beyond the scope of the People's legislative power under Article II, Section 1 of the Washington State Constitution. The majority of I-960 focuses on two subjects that are beyond the scope of the People's

⁸ I-960 §§ (6)-(13).

legislative power and can only be addressed through the constitutional amendment process set forth in Article XXIII of the State Constitution.

These subjects are:

- 1) Alteration of the constitutionally-prescribed referendum process.
- 2) Alternation of the constitutionally-prescribed requirements for passage of bills by the Legislature.

Plaintiffs filed their lawsuit on May 17, 2007. Plaintiffs and the Office of the Attorney General agreed to an expedited briefing schedule pursuant to which briefing was completed on July 12, 2007. King County Superior Court Judge Catherine Shaffer heard argument and ruled from the bench on July 13, 2007. She entered summary judgment in favor of Secretary Reed and dismissed Plaintiffs' action. Order and Transcript,

*Exhibit C.*⁹

⁹ CP __ - __. Judge Shaffer allowed the proponents of I-960 to submit an amicus brief and Plaintiffs to file a response. The Trial Judge also considered two declarations submitted by Plaintiffs relating to Plaintiffs' standing, an issue raised only by Amici. *See* Declarations of Aaron Ostrom and Adam Glickman, CP __ - __.

IV. INTRODUCTION AND SUMMARY OF ARGUMENT

Both Futurewise and SEIU 775 can trace their organization's existence to the successful use of the State Initiative Process.¹⁰ They enthusiastically support the right of direct democracy in our State.

Yet, the right to direct democracy in our State is a critical *constitutional right*, to be safeguarded by enforcing the Constitution.

Through the adoption of the state Constitution, the people of Washington adopted the fundamental, organic laws of the state. No mere statute can alter the fundamental constitutional framework that is expressed in the state Constitution. Yet, this is exactly what Initiative 960 seeks to do.

Washington law is clear that the initiative process cannot be used to amend the fundamental law of our State. The State acknowledges this point. Amending these fundamental laws is not a "legislative" function and therefore is outside of the scope of the initiative process. The deliberative constitutional amendment process safeguards the minority and stabilizes our form of government. *Ford v. Logan*, 79 Wn.2d 147, 155-156, 483 P.2d 1247 (1971).

¹⁰ One of Futurewise's primary missions is to protect Washington's Growth Management Act, which resulted from a citizen initiative campaign. State Initiative 775 gave individual home care providers who contract with the State the right to bargain collectively over wages, hours and working conditions. SEIU Healthcare 775NW is now the exclusive bargaining representative for these workers.

I-960 is beyond the scope of the initiative process because its core elements involve adopting a broad definition of legislation that “increases taxes” and altering/replacing explicit constitutional requirements applied to such legislation.

With regard to such legislation, I-960 alters the referendum process by (1) requiring universal (automatic) referendum, without the need to meet the Constitution’s petition requirements; (2) circumventing the two exceptions to the referendum process set forth in the Constitution; and (3) making certain of the referenda non-binding, even though the reserved referendum power is explicitly limited to binding referenda.

I-960 also replaces the Constitution’s legislative vote-passage provisions for such legislation. The Constitution requires a majority vote to pass legislation and specifies each instance in which a supermajority vote is required. I-960 would require a supermajority for all legislation that “increases taxes.”

These subject matters must be addressed by constitutional amendment and are therefore outside of the scope of the initiative process. Because the invalid portions of the initiative cannot be severed from the remainder, the entire measure should be removed from the ballot and/or invalidated.

If I-960 is beyond the scope of the initiative process, it serves the interest of the People, the initiative process and the judiciary to so rule before the election. Should the measure gain approval of a majority of voters, post-election invalidation would likely cause some voters to feel that their voice was ignored or overruled, when in fact the measure should never have been placed before them for consideration.

V. ARGUMENT

A. PRE-ELECTION REVIEW OF APPELLANTS' SUBJECT MATTER CLAIM IS APPROPRIATE AND NECESSARY.

In *Coppernoll v. Reed*, 155 Wn.2d 290, 299 119 P.3d 318 (2005), the Supreme Court confirmed that pre-election review of initiatives is proper “where the subject matter of the measure [is] not proper for direct legislation.” As the Court stated in *Coppernoll*, Courts “generally do not entertain preelection review of initiatives but *maintain a prudential exception for subject matter challenges.*” *Id.* at 301 (emphasis added).

“Subject matter” challenges necessarily involve constitutional questions, and could be seen as a type of constitutional challenge, but these constitutional questions are resolved pre-election. For example, resolving a subject matter challenge involves an analysis of the scope of the people’s legislative powers under Article II, Section 1 of the State Constitution. *Id.* at 301-304.

Unlike most constitutional challenges, however, the Court has deemed that the “subject matter challenges do not raise concerns regarding justiciability because postelection events will not further sharpen the issues (i.e., the subject of the proposed measure is either proper for direct legislation or it is not.)” *Id.* at 299. In *Coppernoll* and analogous cases, the Court has fully decided the “subject matter” challenge, but refrained from extending its pre-election review to other constitutional challenges. Thus, in *Coppernoll*, the Court defined the subject matter of Initiative 330 as regulating causes of actions and attorneys fees and allowed Initiative 330 to proceed to the ballot after concluding that the measure “is plainly legislative in nature and concerns a general *subject matter within the legislative authority of the people.*” *Id.* at 303 (emphasis added).

The Court has recently confirmed the propriety of pre-election review of subject matter challenges. See *City of Sequim v. Malkasian*, 157 Wn.2d 251, 260, 138 P.3d 943 (2006) (“Where the subject matter of an initiative is beyond the scope of the initiative power, *it is ‘not proper for direct legislation.’*” It is well-settled that it is proper to bring such

narrow challenges prior to an election.”) (emphasis added).¹¹ *See also Seattle v. Yes for Seattle*, 122 Wn.App. 382, 386 (2004), *rev. denied*, 153 Wn.2d 1020 (2005) (“an established exception to the general rule [that courts won’t review an initiative until it is adopted] is that a court will review an initiative to determine if it is within the scope of the initiative power. *The idea that the courts can review proposed initiatives to determine whether they are authorized by article II, section 1, of the state constitution is nearly as old as the amendment [establishing the initiative power] itself.*”) (emphasis added).

The seminal case on the issue is *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 911 P.2d 389 (1996), in which the Supreme Court removed a statewide initiative from the ballot because it was beyond the scope of the initiative process as contemplated by Article 2, Section 1 of the State Constitution. The Secretary of State has successfully relied on this precedent to prevent at least one other statewide initiative from being processed as a valid initiative.¹²

¹¹ Citing *Coppernoll v. Reed*, 155 Wn.2d 290, 119 P.3d 318 (2005), and *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718, 911 P.2d 389 (1996), *cert. denied*, 519 U.S. 862, 117 S. Ct. 167, 136 L. Ed. 2d 109 (1996).

¹² In *Goldstein v. Gregoire, Thurston County Sup. Ct.*, NO. 03-2-00221-3, then Attorney General Christine Gregoire successfully argued that a statewide initiative measure was beyond the scope of the initiative process and the Thurston County Superior Court enjoined the initiative proponent from submitting signatures on the invalid measure.

In its briefing below, the State acknowledged that if the initiative is found to exceed the scope of the initiative process, it “would not be qualified to appear on the ballot.” State’s Cross-Motion at p. 11; CP __.¹³

Courts have recognized the imperative to conduct pre-election review especially when post-election review would not provide an adequate remedy. *See Yes for Seattle*, 122 Wn.App. at 387 (pre-election review was proper where there would be insufficient time to conduct post-election review before the measure took effect). This factor also argues for conducting pre-election review in this case.

Should I-960 proceed to the ballot and gain majority approval, it would take effect on Sunday, December 9th, 2007, leaving only one business day after the election results are certified to obtain judicial review.¹⁴ This is an insufficient amount of time to rely upon post-election judicial review to prevent the harm stemming from this invalid measure.

The placement of I-960 on the ballot and an election on the measure would cause immediate and significant harm to the State, and

¹³ Indeed, one of the purposes of allowing pre-election review on “scope” challenges is to “allow[] a court to prevent public expense on measures that are not authorized by the constitution”. *Philadelphia II*, 128 Wn.2d at 718. *Accord Hempfield School Dist. v. Election Board of Lancaster*, 133 Pa.Cmwlth. 85, 91, 574 A.2d 1190(1990) (placement of invalid measure on ballot “per se constitutes immediate and irreparable harm.”)

¹⁴ I-960 § 19, RCW 29A.60.260. In the case of a close election – which in Washington has been known to happen – recounts and/or election contests

interest groups such as Plaintiffs that rely upon the stability of and sufficiency of State revenue.¹⁵ Such harm is unwarranted if I-960 is beyond the scope of the initiative process.

For example, Section 14 of I-960 would prohibit all of the new and increased administrative fees scheduled to go into effect on January 1, 2008,¹⁶ even though these fees were set under lawfully delegated authority and the revenues from these fees are relied upon in adopted State and agency budgets. For example, pursuant to its delegated authority, General Administration ("GA") has announced that parking fees on the Capitol Campus will be increased as of January 1, 2008, to cover increased operating costs. Like many fees, this increase has been set and publicized for many months; in many cases the agencies also held public meetings

If I-960 were to pass, it would take effect in December, 2007, and prohibit all 2008 fee adjustments until they are specifically approved by the Legislature. I-960 § 14, 19. Each fee may require a 2/3 legislative

proceed after the election is certified. *See* RCW Chapters 29A.64 and 29A.68.

¹⁵ *See* Declarations of Adam Glickman and Aaron Ostrom, CP ___ - ___.

¹⁶ An internet search reveals that countless fees are scheduled to go into effect January 1. These fees include ferry tolls, contractors' registration, nursery inspection fees, orchard burning fees, vehicle weight fees, underground storage tank fees, testing fees, CPA examination section fees, etc. etc. Agencies scheduled to implement fees include the Departments of Agriculture, Ecology, Transportation, Health, Labor and Industries, and Licensing.

approval, depending upon a future court's interpretation of the term "raises taxes." I-960 § 5(6).

The postponement of hundreds of statewide fee increases will have a significant impact on duly enacted State and agency budgets. Most agencies would need several months to enact or suspend a statewide fee increase, likely causing some agencies to postpone scheduled 2008 fee adjustments if I-960 proceeds to a vote. Thus, post-election review cannot provide sufficient relief.

This is just one small example of the turmoil that I-960 will cause. Another example involves the ambiguities inherent in I-960's definition of "increases taxes." The plain language of I-960 suggests that a 2/3 legislative majority would be required for every budgeting decision. These issues would stymie the functioning of the Legislature upon the commencement of the 2008 legislative session. Moreover, the regular business of the Legislature will need to be set aside to approve the backlog of 2008 fee adjustments that require approval.

These burdens are unwarranted because I-960 is beyond the scope of the initiative process and this court should so hold before the election.

B. A MEASURE IS BEYOND THE SCOPE OF THE INITIATIVE POWER IF IT SEEKS TO ACCOMPLISH SOMETHING BEYOND THE LEGISLATIVE POWER OF THE PEOPLE, SUCH AS ATTEMPTING TO MODIFY THE STATE'S ORGANIC LAWS.

It is well settled in Washington that amendment of our State Constitution is beyond the scope of the initiative process. In *Gerberding v. Munro*, 134 Wn.2d 188, 210, 949 P.2d 1366 (1998), the Court wrote “We have often stated the initiative process, as a means by which the people can exercise directly the legislative authority to enact bills and laws, is limited in scope to subject matter which is legislative in nature. Thus, *the initiative power may not be used to amend the Constitution.*” 134 Wn.2d at 210 (emphasis added). The Court analogized this limitation to an initiative that attempts to do something that is beyond the lawmaking power of the jurisdiction, citing *Philadelphia II*, in which the overriding purpose of the state initiative was to change federal law. It also relied upon *Seattle Bldg. & Const. Trades Council v. Seattle*, 94 Wn.2d 740, 748, 620 P.2d 82 (1980), for the proposition that an “initiative *attempting to achieve something not within its power*” is invalid. 134 Wn.2d at 210 (emphasis added).¹⁷

¹⁷ The Court also relied upon an article written by the State's counsel in this case, Jefferey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum*, 32 Gonz. L. Rev. 247, 270 (1996-97), for the proposition that “the Washington initiative

In *Ford v. Logan*,¹⁸ the Court explained “*the act of amending or repealing the basic organic instrument of government is of a higher order than the mere enactment of laws within the framework of that organic structure. ...Amendment of our constitution is not a legislative act and thus is not within the initiative power reserved to the voters.*” 79 Wn.2d at 155-156 (emphasis added).

Ford recognized that our constitutional process for amending the State Constitution contains critical safeguards that are absent in the initiative process. “Under article 23, these safeguards consist of the deliberative nature of a legislative assembly, the public scrutiny and debate made possible during the legislative process, the requirement of a two-thirds vote in each independent house of a bicameral body, and the tempering element of time. *These safeguards are not to be lightly cast aside in an understandable zeal for the right of the people to act directly on matters of common legislation.*” *Id.* (emphasis added).

1. The resolution of a “subject matter” challenge depends upon the purpose and effect of a measure, not its form.

In analyzing whether I-960 is within the scope of the initiative process, this Court is to look to the measure’s “overall purpose,” “its

process is limited to legislative acts and does not include constitutional amendments.” 134 Wn.2d at 210.

nature” and its “subject matter.” It is irrelevant that the I-960 is written in legislative form.

A proposed measure exceeds the scope of the initiative process “if, by *its nature*, it is not the type of measure that the voters of the jurisdiction are empowered to enact.” *Sequim*, 157 Wn.2d at 261 (emphasis added). As Secretary Reed acknowledged below, the inquiry “depends upon the *nature of the measure and the scope of legislative authority*.” State’s Cross-Motion at p. 12 (emphasis added). In *Coppernoll*, the Court recalled approvingly that in *Philadelphia II* the court “looked to the ‘fundamental and overriding purpose’ of the initiative, rather than mere ‘incidental[s]’ to the overriding purpose. We concluded that, although some of the incidentals were legislative in nature, the overriding purpose was to enact federal law.” 155 Wn.2d at 304.

Thus, the challenge in *Coppernoll* was dismissed because the measure was “legislative and concerns a general *subject matter within the legislative authority of the people*.” 155 Wn.2d at 303 (emphasis added).

The Court considered the general subject matters of the measure (regulating damages and regulating contingency fees) and determined

¹⁸ This holding in *Ford* has been relied upon in numerous cases, including *Philadelphia II*, 128 Wn.2d at 718, and *Coppernoll*, 155 Wn.2d at 302.

they were within the legislative authority of the people. *Id* at 303-304.

That is not so in the instant case.

2. A measure is beyond the initiative power if it has the purpose or effect of amending the State Constitution, regardless of its form.

In *Amalgamated Transit Union 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000), the Court analyzed Initiative 695 (“I-695”), which, like I-960, was written as a statute to be codified at RCW Chapter 43.135 but would have altered the referendum process. The Court looked beyond form to determine that Section 2 of I-695 “*effectively* authorizes mandatory referendum elections” and therefore the initiative “*has the effect*” of replacing the constitutional referendum requirements. 142 Wn.2d at 232 (emphasis added). Because the legislation would have *effectively* amended the constitution, it was beyond the scope of the people’s initiative power.

As discussed in detail below, the Alaska Supreme Court adopted the same analysis in *Alaskans for Efficient Government v. State of Alaska* (“AEG”), 153 P.3d 296 (2007). It agreed with the State of Alaska that “approval of the supermajority requirement *would effectively amend the constitution*” and therefore was outside of the scope of the initiative process. 153 P.3d at 297 (emphasis added).

These decisions are consistent with cases from Washington and throughout the country that reject initiatives seeking to achieve something that is beyond the legislative authority of the people, regardless of whether they were in legislative form. *See Philadelphia II and Seattle Bldg. & Const. Trades Council, supra.*

There is a long line of cases dealing with this issue in the context of *state initiatives* that sought to promote a *federal constitutional amendment*.¹⁹ Even though most of these initiatives were in proper form, they were consistently struck down and kept from the ballot because their purpose – enacting a federal constitutional amendment – was beyond the legislative power of the state electorate. *See e.g., In re Initiative Petition No. 364*, 930 P.2d 186, 1996 OK 129 (Okla.1996); *Barker v. Hazeltine*, 3 F.Supp.2d 1088 (D. S. Dak.1998); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999); *State ex rel. Harper v. Waltermire*, 213 Mon. 425, 691 P.2d

¹⁹ These initiatives used various strategies to promote federal constitutional amendments imposing congressional term limits or balanced budget amendments. For example, after the United States Supreme Court struck down congressional term limits in *United States Term Limits v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, (1995), congressional term limits supporters began a campaign to get two-thirds of the states to apply to Congress to call a federal constitutional convention on the question. These campaigns sought to use state initiative processes where available to gain support for the federal constitutional amendment. These measures attempted to enact statutes or state constitutional amendments expressing support for the federal constitutional amendment, enact laws requiring the congressional delegation to support the amendments, or label ballots to show candidates who did not support the amendment.

826 (1984), and *AFL-CIO. v. Eu.*, 36 Cal.3d 687, 686 P.2d 609, 206 Cal.Rptr. 89 (1984) (*en banc*); *State v. Meier*, 231 N.W.2d 821 (N.Dak. 1975).

Supreme Courts and federal courts across the nation repeatedly noted that Article V of the U.S. Constitution provides a specific process for adoption of a constitutional amendment, which does not include the state initiative process. Thus, these initiatives were invalid because they would “allow[] the citizens to do indirectly what they may not do directly and thereby destroys the constitutional amendment process created by the Framers.” *Barker* 3 F.Supp.2d at 1094. “The Framers intended for the amendment process ‘to be a deliberate and often difficult task.’ *Id.* at 1092.

These cases, like *ATU* and *Alaskans for Efficient Government*, instruct the Court to look at the purpose and effect of I-960, not its form. Because the purpose and effect of I-960 is to do indirectly what the people cannot do directly – alter the state Constitution’s referendum process and majority vote provisions – it is beyond the initiative power

C. I-960 EXCEEDS THE SCOPE OF THE PEOPLE'S LEGISLATIVE POWER BY ALTERING THE CONSTITUTION'S REFERENDUM PROCESS.

- 1. This case is directly controlled by the Supreme Court's decision in *Amalgamated Transit Union*, which held that an initiative may not "alter the method by which the referendum power is exercised."**

This case is directly controlled by *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000) ("ATU"). There, the Court held that the initiative power does not extend to measures that effectively replace parts of the State Constitution with alternative procedures. This is true even where the initiative in question is written as a legislative act, and does not purport to be a constitutional amendment.

Section 2(1) of I-695 provided that "[a]ny tax increase imposed by the state shall require voter approval." Like I-960, this provision was to be codified in RCW Chapter 43.135. The Court held that

Section 2 of I-695 effectively authorizes mandatory referendum elections on all future tax legislation passed by the Legislature where the Legislature has not referred the legislation and where four percent of the registered voters have not signed petitions for referendum on the particular legislation passed by the Legislature. ... As did the trial court, we conclude that section 2 calls for universal referenda on all legislation that would impose increased taxes without regard to whether a particular piece of legislation would engender enough interest or opposition for four percent of the voters to petition for referendum.

ATU, 142 Wn.2d at 232 (emphasis added).

In addition to being unconstitutional, the Court held that this provision was beyond the scope of the initiative process:

Not only does section 2 [of Initiative 695] fail to comply with the article II, section 1(b) procedures for referenda, *it also was adopted in an improper way. The state constitution does not provide that the initiative power can be used to alter the method by which the referendum power is exercised.* The people in exercising their reserved powers must conform to the constitution, just as the Legislature must do when enacting legislation. Here, *exercise of the initiative power to enact section 2 has the effect of replacing the referendum petition process for any future state taxing legislation. The initiative process cannot be used to amend the constitution.* Article XXIII sets forth the method by which the constitution may be amended and requires that amendments be proposed by the Legislature.

ATU, 142 Wn.2d at 232 (emphasis added; citations omitted).

The Court held that Section 2(1) of I-695 was an invalid exercise of the initiative process even though it only required mandatory referendum on a certain class of legislation, noting “If carried to its logical conclusion, it would mean that the voters could pass several initiatives each requiring every measure of a certain class passed by the Legislature to be submitted to the voters for approval.” *ATU*, 142 Wn.2d at 242.

2. Just like I-695, I-960 alters the referendum process by requiring universal referendum, bypassing the Constitution’s petition requirements.

Like I-695, I-960 seeks to “alter the method by which the referendum power is exercised.” *ATU*, 142 Wn.2d at 232. I-960 also “has

the effect of replacing the referendum petition process for any future state taxing legislation.” *Id.*

Subsection (b) of Article II, Section 1 states that a referendum may be ordered “either by petition signed by the required percentage of legal voters, or by the legislature as other bills are enacted. ... The number of valid signatures of registered voters required on a petition for referendum of an act of the legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election”.

Under I-960, any action(s) by the Legislature that “raise taxes” (as defined by I-960) and that will result in expenditures in excess of the state expenditure limit “shall not take effect until approved by a vote of the people at a November general election.” I-960 § 5.

Section 6 of I-960 specifically requires a referendum every time tax legislation is “not referred to the people by a referendum petition found to be sufficient under RCW 29A.72.250.” This is true even where the objectors to the bill try to collect signatures to call a referendum and fail to find any support for their cause.

Through these provisions, I-960 “has the effect of replacing the referendum petition process” for this class of legislation since a statewide

vote would be required “without regard to whether a particular piece of legislation would engender enough interest or opposition for four percent of voters to petition for referendum.” *ATU*, 142 Wn.2d at 232. Some of the votes would be binding, while others would be non-binding, but objectors will never need to collect signatures as the Constitution requires.

As a practical matter, with these universal referendum provisions in place, there would be no reason for a referendum proponent to ever try to collect signatures. It just wouldn’t be worth the work.

The universal referendum provisions exceed the scope of the initiative process because, like I-695, “it effectively establishes a referendum procedure ... without regard to the four percent signature requirement. *ATU*, 142 Wn.2d at 244. “The state constitution does not provide that the initiative power can be used to alter the method by which the referendum power is exercised.” *ATU*, 142 Wn.2d at 232.

3. I-960 has the stated purpose and effect of circumventing the constitutionally-delineated exceptions to the referendum process.

I-960 admits that it is intended to fix a problem in the constitutional referendum process. That problem is the Constitution’s express exemptions. The Statement of Intent for I-960 states:

Our state constitution guarantees to the people the right of referendum. In recent years, however, the legislature has thwarted

the people's constitutional right to referendum by excessive use of the emergency clause. ... If the legislature blocks a citizen referendum through the use of an emergency clause or a citizen referendum on the tax increase is not certified for the next general election ballot, then an advisory vote on the tax increase is required.

I-960 § 1.

Article II, Section 1(b) states "The second power reserved by the people is, the referendum, and it may be ordered on any act, bill, law or any part thereof passed by the legislature, *except such laws as may be necessary for the immediate preservation of the public peace, health or safety [or] support of the state government and its existing public institutions*". (emphasis added). *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 56 (2003) explained "Article II, Section 1(b) places two separate and distinct limitations on the people's power of referendum. *Farris v. Munro*, 99 Wn.2d 326 (1983). ...An act which falls into either of these exceptions is not subject to referendum." (some citations omitted).

As its Statement of Intent acknowledges, I-960 is written for the purpose of calling a statewide vote on all measures that are not otherwise subject to binding referendum, thereby circumventing these exemptions from the referendum process. I-960 § 1.

i. I-960 requires referenda on emergency acts.

I-960 is written to require statewide votes on emergency measures. It requires a vote on all tax legislation that is “blocked from a public vote.” I-960, § 6(1). “[B]locked from a public vote’ includes adding an emergency clause to a bill increasing taxes, bonding or contractually obligating taxes, or otherwise preventing a referendum on a bill increasing taxes.” *Id.*

ii. I-960 promises referenda on exempt revenue acts.

After expanding the legislative supermajority requirement to every measure that “increases taxes,” I-960 states “Pursuant to the referendum power set forth in Article II, section 1(b) of the State Constitution, tax increases may be referred to the voters for their approval or rejection at an election.” I-960 5(1). The Attorney General read this provision as enabling alternative methods for approving tax measures, and so stated in the ballot title that will be relied upon by voters: “This measure would require two-thirds legislative approval *or voter approval* for tax increases”.

By promising a public vote on tax increases, I-960 seeks to circumvent the second constitutional exceptions to the referendum process. Under a long line of cases, legislation that raises taxes for the

State is exempt from referendum under the “support for state institutions” exception. *See e.g., Farris v. Munro*, 99 Wn.2d 326, 336, 662 P.2d 821 (1983) (“if it generates revenue for the state it is deemed support.”)

It appears that the initiative proponents duped the Attorney General’s office into writing a misleading and false ballot title. Only the *non-binding* statements of I-960 promise a public vote as an alternative to the daunting supermajority requirement.²⁰ However, neither the *effective* statutory language nor the constitution would allow this public vote alternative. *See* I-960 § 5(1). Whether or not the Attorney General’s ballot title is constitutionally defective is not justiciable at this time, but the false title does threaten to mislead significant numbers of voters into supporting I-960 and increasing the possibility of passage.²¹

By seeking to reform the referendum process to circumvent the Constitution’s express exemptions from that process, I-960 exceeds the scope of the initiative power.

²⁰ I-960 § 1 (“This measure would ... allow either two-thirds legislative approval or voter approval for tax increases.”); § 5 (“Protecting taxpayers by allowing either two-thirds legislative approval or voter approval for tax increases”).

²¹ In the Associated Press article published July 7, 2007, Curt Woodward noted that “If lawmakers can’t get that supermajority, they’d have to submit taxes for approval by a simple majority of voters.” *Eyman Has New Washington Initiative*, *Spokesman Review*, July 7, 2007.

4. I-960 alters the referendum process by creating a non-binding referendum process, even though the people reserved for themselves only the power to call binding referenda.

Through adoption of the Seventh Amendment, the People reserved for themselves *only* the right to call binding referendum. The Constitution is explicit in this regard. Article 1 Section II states the “The legislative authority of the state of Washington shall be vested in the legislature, ... *but the people reserve to themselves the power... at their own option, to approve or reject at the polls* any act, item, section, or part of any bill, act, or law passed by the legislature.” Article II, Section 1 (emphasis added). Subsection (c) confirms “Any measure ... referred to the people as herein provided *shall take effect and become the law if it is approved* by a majority of the votes cast thereon”. (emphasis added).

The People cannot use the initiative process to expand this right to add a non-binding referendum process, especially true where the explicit intention of the new process is to circumvent express limits on the power of direct democracy enacted by the people in our State Constitution. *See* I-960 § 1 (stating intent to require statewide votes on measures exempt from referendum).

Referenda can by definition be binding or non-binding.²² In enacting the Seventh Amendment, the people could have reserved for themselves the right to consultative or non-binding referendum, or have been silent on the subject, but instead they expressly limited the reservation of power to binding referenda.

By limiting the referendum process to binding referendum, our Constitution protects our ballot from overcrowding and conserves public resources. Indeed, by requiring non-binding referendum on every minor tax (and perhaps fee) increase, without regard to public interest or opposition, I-960 would actually thwart the policies of voter participation and direct democracy. It would take an act of endurance to get through the extended ballots and reach the key issues of the day – electing candidates and acting on binding referenda and initiatives.

²² In the United States, no state constitutions provide for nonbinding referendum, also known as facultative or consultative referendum. However, this was a decision made by the people in drafting state constitutions. In contrast, many countries provide for non-binding referenda in their federal constitutions. Article 121 of the Paraguay Constitution, for example, provides that “A legislative referendum, approved by law, can be either binding or nonbinding. A law will regulate this institution.” Paraguay Constitution, Art. 121. Similarly, Spain allows for binding and nonbinding referenda. Spanish Constitution, Part 3, Ch. 2, Sec. 92. The constitution of Sweden allows only nonbinding, “consultative referendum.” Swedish Constitution, Ch. 8, Art. 4. There are many other nations that provide nonbinding referendum or a combination of binding and nonbinding referendum.

The Trial Court below suggested that the People's constitutional right to referenda impliedly includes the right to call a non-binding referendum. This ignores the plain language of the State Constitution, quoted above. However, even if the people did have such an implied right, they could call a non-binding referendum only by collecting the requisite number of signatures. Article II, Section 1(b). The people could not use an initiative to create a non-binding referendum process to circumvent the constitutional limitations on their powers of direct democracy.

As the Court noted in *ATU*, "When the people adopted the constitution, they vested legislative power in the Legislature under article II, section 1. Later, when the Seventh Amendment was adopted, the people reserved for themselves the initiative and referendum powers, specifically setting forth the manner in which those powers may be exercised." *ATU*, 142 Wn.2d at 238.

D. I-960 EXCEEDS THE SCOPE OF THE PEOPLE'S LEGISLATIVE POWER BY ALTERING THE CONSTITUTION'S VOTE-PASSAGE PROVISIONS.

Just as the initiative process cannot be used to modify the method by which the referendum process is exercised, it also cannot be used to modify the constitutionally prescribed method for enacting legislation. Article II, Section 22 states that "*No bill shall become law unless ... a*

majority of the members elected to each house be recorded thereon as voting in its favor.” (emphasis added). I-960 would modify this standard, by mandating that “any legislative action that ‘raises taxes’ *may be taken only if approved by a two-thirds vote* of each house of the legislature.” I-960 § 5(1) (emphasis added).

If initiative 960 were to pass, it would bind the State Legislature for two years. Washington Constitution, Article II, Section 1. Thus, for at least two years, the initiative’s 2/3 majority requirement would effectively replace the constitutionally-mandated lawmaking process.

If adopting this 2/3 vote requirements were a valid exercise of the initiative process, then an initiative could similarly be used to require a 2/3 majority for all legislation, or to require a unanimity requirement for some or all classes of legislation. In other words, the initiative process could be used to fundamentally restructure government in our state.

Earlier this year, the Alaska Supreme Court held that the people cannot use the initiative process to enact a supermajority requirement like that contained in I-960. *Alaskans for Efficient Government v. State of Alaska* (“AEG”), 153 P.3d 296 (2007). This case is directly on point,

evaluating an analogous supermajority initiative in Alaska's materially-identical legal framework.²³

Pre-election judicial review in *AEG* was limited to evaluating whether the measure was within the scope of the initiative process, and did not consider the constitutionality of the measure, *AEG*, 153 P.3d at 298. Like in Washington, the law in Alaska is that: (1) the initiative process cannot be used to amend the state constitution, *AEG*, 153 P.3d at 298-299, and (2) Alaska's constitution provides that "no bill may become law without an affirmative vote of a majority," but requires supermajorities in numerous specific circumstances, *AEG*, 153 P.3d at 300-301.

Although the initiative proponent in *AEG* argued that the objection was a premature constitutional challenge, the Alaska Supreme Court accepted the State of Alaska's explanation that the challenge was "not because it might be unconstitutional, but rather because enacting an initiative on a subject that can only be changed by constitutional

²³ The differences between the legal frameworks of Washington and Alaska are not relevant to the holding in this case. For example, in Alaska the Lieutenant Governor is the first to determine whether an initiative is within the scope of the initiative power. However, once an appeal is filed, as in *AEG*, the legal issues are identical. Also, in Alaska a Court *could* consider whether an initiative is "clearly unconstitutional," but the Court in *AEG* did not conduct this analysis. It limited its analysis to evaluating the scope of the initiative process.

amendment fails to comply with the constitutional provisions regarding the initiative process.” *AEG*, 153 P.3d at 298.

In a holding that is directly applicable to Washington’s Constitution, the Alaska Supreme Court held:

Alaska’s constitutional framers, well aware of their ability to require more stringent voting requirements, include such requirements in the Alaska Constitution for laws dealing with various subjects. Examples can be found in the three-readings clause of article II, section 14; the veto-override clause of article II, section 16; the effective-date provisions of article II, section 18; the impeachment standard ... In our view, the superior court correctly recognized these examples as convincing evidence of the framers’ intent to include provisions in the Alaska Constitution describing all instances in which supermajority votes could be required to enact a bill.

AEG, 153 P.3d at 301 (emphasis added). The Court concluded:

[T]he majority-vote requirement operates as a constitutionally based subject-matter restriction, prohibiting the enactment of any law that proposes to modify the majority-vote standard. Because the legislature itself cannot change this constitutional standard by enacting a law, and an initiative cannot enact a law that the legislature has no authority to enact, it follows that article II, section 14 prevents an initiative from addressing the subject of the number of votes needed to enact a bill into law. Accordingly, we conclude that the lieutenant governor correctly reviewed the proposed initiative before it appeared on the ballot and properly rejected it at that stage for failing to comply with constitutional provisions regulating initiatives.

AEG, 153 P.3d at 302 (emphasis added).

1. Washington's Constitution also operates as a constitutionally based subject matter restriction on laws that propose to modify the majority-vote standard.

This Court should adopt the analysis of *AEG* in holding that the majority-vote standards set forth in the Constitution may only be modified by constitutional amendment. As quoted above, Article II, Section 22 of our Constitution requires a simple majority to pass legislation. Despite using negative language, this provision operates as a floor and a ceiling for the votes necessary for passage of legislation. *Gerberding v. Munro*, 134 Wn.3d 188, 949 P.2d 1366, 1372-73 (1998) (despite negative phrasing, constitutional provision set exclusive criteria, not just a minimum standard); *Accord AEG*, 153 P.3d at 298.

Like the Alaskan framers, the framers of Washington's Constitution knew how to require a super-majority and set forth the full list of circumstances where a supermajority is required. Attached as ***Exhibit D*** is an excerpt of the Washington Constitution highlighting the fifteen places where the Constitution requires a supermajority vote of the Legislature. These are similar to those in the Alaska Constitution pointed out in *AEG*, notably including:

- Article II, Section 1(c) and Section 41. 2/3 vote required to amend an initiative in the first two years after passage.

- Article II, Section 24. 60% vote required to create lottery.
- Article III, Section 12. 2/3 vote required to override governor's veto.
- Article XXIII, Section 1. 2/3 vote required to propose constitutional amendment.

Indeed, the Washington Constitution even specifies the instances where supermajority approval is required to pass acts relating to government finance – a subject close to “raising taxes.” The Constitution requires a 3/5 majority vote to enact bills relating to non-recourse revenue bonds, Article XXXII, Section 1, and bills relating to contracting, funding or refunding debt, Article VIII, Section 1(i).

I-960 supermajority requirement would be inconsistent with and hostile to the existing constitutional scheme. For example, such a modification would effectively nullify the Governor's veto power. The framers' clearly intended that the 2/3 majority required to override a veto would be greater than the vote necessary for initial bill passage. *Cf.*, Article II, Section 22 and Article III, Section 12. I-960 would make a 2/3 vote necessary in both instances. The same can be said for all of the Constitution's supermajority requirements.

If by initiative a simple majority of voters could adopt a 2/3 vote requirement for tax legislation, then a simple majority could adopt a supermajority requirement – or a unanimous vote requirement – for any legislation that was currently unpopular. The initiative power could be used to thwart minority protections or effectively remove the lawmaking role from the Legislature altogether. Such changes require a constitutional amendment

Under the reasoning of *ATU*, such a measure is not merely unconstitutional; it is beyond the scope of the initiative process. It “has the effect of replacing” the constitutionally prescribed legislative process for “any future state taxing legislation. The initiative cannot be used to amend the constitution.” *ATU*, 142 Wn.2d 232.

E. THE VALIDITY OF INITIATIVE 601 AND RCW 43.135.035 IS NOT BEFORE THIS COURT; NOR DO THESE LAWS IMPACT THE SUBJECT MATTER INQUIRY.

The King County Superior Court refused to even consider whether I-960’s supermajority and voter approval requirements were within the scope of the initiative process. The Court erroneously reasoned that these requirements were not before the court because they were contained in RCW 43.135.035, adopted in 1993 with the passage of I-601. This reasoning was erroneous for the multiple reasons.

First, the question raised by this case involves the scope of the people's legislative power under Article II, Section 1 of the State Constitution. No piece of legislation, whether enacted by initiative or by the Legislature, can expand or restrict this scope of legislative authority. Thus, the existence of RCW 43.135.035 on the books can have no relevance to this lawsuit. This is especially true here because no court has ruled on the validity of RCW 43.135.035.²⁴

Second, the ballot title that has been relied upon by initiative signers and would be relied upon by voters confirms that the measure's subject includes the supermajority and voter approval requirement. The first thing the voters see is that "This measure would require two-thirds legislative approval or voter approval for tax increases..."

Third, it is beyond question that the intent and effect of I-960 is to dramatically expand the scope of the supermajority and the voter approval provisions codified in RCW 43.143.035. Under I-960, both the supermajority provisions of Section 5(1) and the voter approval requirements of Section 5(2) will apply to legislation that "raises taxes."

²⁴ Washington Courts have never ruled upon the validity of I-601 or the supermajority or voter approval requirements of RCW 43.135.035. The validity of the voter approval requirement of RCW 43.135.035 is currently before the Court in the *United Farm Bureau* matter and the State has taken the position that this provision is unconstitutional under the Court's *ATU* decision.

By adopting this broad definition, I-960 dramatically expands the supermajority and voter approval requirements to apply inside and outside of the general fund, and likely to also apply to budget measures. This is confirmed by the statement of intent, which states: "This measure would ... allow either two-thirds legislative approval or voter approval for tax increases ... Intent of Section 5 of this act: ...The people want ... it to be clear that tax increases inside and outside the general fund are subject to the two-thirds threshold."

I-960 also expands the voter approval requirement in RCW 43.135.035(2) by removing flexibility from the state's expenditure limit. Thus, the voter approval requirement will be triggered much more often. This is clear from I-960's amendment of RCW 43.135.035(5), which cannot be ignored. The Statement of Intent acknowledges that "RCW 43.135.035(5) is intended to clarify the law so that the effective taxpayer protection of requiring voter approval for tax increases exceeding the state expenditure limit is not circumvented." I-960 § 1.

Finally, passage of these requirements as an initiative would raise them to a higher order than the existing statutory requirements. Although supermajority and voter approval requirements have been on the books since 1993, they have never been used. As mere statutory law, they do not

“bind” the Legislature, since the Legislature remains free to suspend or amend the laws at any time. In several instances over the past years, the Legislature did just that. For example, by passage of SB 6819 in 2002 and SSB 6078 in 2005, a *simple majority* of the Legislature temporarily put on hold the supermajority requirement of RCW 43.135.035(1). Similarly, the Legislature has by simple majority modified the expenditure limits in ways that arguably avoided the need for a statewide vote. One such action is the subject of *Washington Farm Bureau et al v. Christine Gregoire, No. 78637-2*.

In contrast, if I-960 were to reenact and expand the scope of these supermajority and voter approval requirements, they would become legally binding upon the Legislature for at least two years, much like a provision of the State Constitution. Article II, Sections 1(c) and 41.

While the people’s power to enact the supermajority and voter approval requirements of I-960 is squarely before the court, this case will not address the validity of Initiative 601 or the existing RCW 43.135.035. As the Supreme Court heard in argument in the *Washington Farm Bureau* case, the requirements that originated in I-601 have been reenacted by the Legislature. Therefore, any constitutional or subject matter challenges to the I-601 are moot.

Moreover, this case does not raise a question of the *Legislature's* scope of authority or the validity of *its* past action adopting the requirements of RCW 43.135.035. With regard to the issues in this case, the authority of the Legislature and the People are sufficiently distinct for this court to limit its discussion to a question of the *People's* legislative power to enact Initiative 960.

An example of this distinction, mentioned above, is the fact that the Legislature can pass legislative procedures (like a supermajority requirement) in the form of a law but may amend or suspend it at its will, whereas the same procedure enacted as an initiative binds the Legislature pursuant to State Constitution Article II, Sections 1(c) and 41.

Distinctions also exist with regard to the referendum process. For example, the Legislature can call a referendum at any time under Article II, Section 1, and arguably could call a non-binding referendum at any time or do so routinely. In contrast, Article II, Section 1 limits the People's reserved power of referendum to calling only binding votes and only through collecting the requisite number of signatures. Thus, the instant challenge does not extend to a review of I-601 or the existing RCW 43.135.035.

F. THE INVALID PORTIONS ARE NOT SEVERABLE AND THE ENTIRE MEASURE SHOULD BE REMOVED FROM THE BALLOT AND/OR INVALIDATED.

The provisions of I-960 which exceed the scope of the initiative process are at the heart of the measure, and central to voters' intentions in signing I-960 to qualify it for the ballot. The Court should take judicial notice of the fact that the campaigns for and against I-960 and the press coverage of the measure are focused squarely on the subjects that Plaintiffs challenge in this suit.²⁵ Moreover, the improper provisions are so intertwined with the remainder of the measure that they cannot be severed.

In *Seattle v. Yes for Seattle*, the Court of Appeals set forth a standard for severability in the context of pre-election review. It held "Generally, if portions of an initiative are valid, the valid portions must be put on the ballot. The initiative may not be severed, however, if the valid and invalid portions are so connected that the valid portions would be 'useless to accomplish the legislative purpose.'" *YFS*, 122 Wn.App. at 393. The court specifically rejected the contention that the validity of one portion of the measure required the entire measure to be placed on the ballot. *Id.*

²⁵ See attached newspaper articles and website communication of I-960 proponents, *Exhibit E*.

The measure at issue in *Yes for Seattle*, like I-960, contained a severability clause. The Court held that “Severability clauses, however, are not dispositive.” Looking by analogy to severability analyses in the context of a partially unconstitutional statute, the court held “[t]he unconstitutional and constitutional portions may be so interrelated that, despite the presence of the severability clause, it cannot reasonably be believed that the legislative body would have passed the latter without the former.” *YFS*, 122 Wn.App. at 394.

“Under this test, ‘the invalid provision[s] must be grammatically, functionally and volitionally severable.’ *Id.* The Court may also look to the voters’ intent as indicated in the ballot title to determine whether the invalid provisions are severable. *Id.* The invalid portions of I-960 are not severable under these tests.

Here, the core of I-960 is the newly expanded definition of legislation that “increases taxes,” set forth in Section 5(6), and a series of additional requirements applicable to such legislation.

- I-960 §§ 2 – 4. Mandates certain fiscal analysis and publicity for legislation that “raises taxes” as defined in Section 5(6). I-960 § 2(1)-(3). Requirements of Sections 2 through 4 are designed to complement the supermajority

requirements in Section 5(1). Section 2 is also incorporated and referenced into Section 13, which involves the new, universal referendum process.

- I-960 § 3, 4. Mandates for bills increasing taxes “or fees” are designed in part to implement Section 14, which requires all fee increases to be approved by the Legislature.
- I-960 § 5. Requires 2/3 majority to pass legislation that “raises taxes.” Tightens state expenditure limit and requires binding referendum when act that “raises taxes” also exceeds such limit.
- I-960 §§ 6-13. Non-binding referendum process applies to legislation that “raises taxes” as defined in Section 5(6). Provisions are functionally related to Section 5 because the new referendum process is predicated on supermajority approval of legislative action that “raises taxes.” I-960, § 6.
- I-960 § 14. Requires any new or increased fees to obtain prior legislative approval before taking effect and requires such legislation to go through the procedures required by Section 2. I-960, § 14. To the extent that Section 2 is not severable, Section 14 also cannot be severed.

Thus, none of these sections are “grammatically, functionally and volitionally severable.”

The ballot title assigned by the Attorney General also suggests that the invalid sections of the initiative are at the center of I-960’s purpose. Approximately sixty percent of the concise description is devoted to describing the invalid sections of I-960. It states “*This measure would require two-thirds legislative approval or voter approval for tax increases, legislative approval of fee increases, certain published information on tax-increasing bills, and advisory votes on taxes enacted without voter approval.*” (emphasis added). There is no reason to believe that the requirement of legislative approval of fee increases and additional financial analyses would independently satisfy the objectives of the legislation.

For example, in *Swedish Hospital of Seattle v. Department of Labor and Industries*, 26 Wn.2d 819, 832, 176 P.2d 429, 436 (1947), the Court invalidated a law wherein the title referred to employees of charitable institutions, but the body of the bill expanded the scope of the law to employees of charitable institutions and nonprofit organizations. *Id.* at 819. The Court noted that it was impossible to determine if the

Legislature would have passed the law had it only applied to charitable institutions. *Id.* at 832-33.

Here, the provisions of I-960 that do not seek to modify the referendum or lawmaking process - legislative approval of fee increases, and certain published information on tax-increasing bills - are secondary in both the title and in effect, and, like *Swedish Hospital*, there is no way to determine if the signers of the initiative would have done so for these minor provisions, rather than the advertised 2/3 supermajority or voter approval of taxes. With those substantive provisions stricken, there is no way for the Secretary of State to determine which signatures remain valid expressions of intent on the part of the signers. Therefore, the Court should hold I-960 invalid in its entirety.

VI. CONCLUSION

For the reasons stated herein, the Court should reverse the decision of the Trial Court and hold that I-960 concerns subject matters beyond the scope of the People's legislative power, which subjects cannot be severed from the remainder, and therefore the measure should be prohibited from placement on the ballot and/or invalidated.

Respectfully submitted this 24th day of July, 2007

SMITH & LOWNEY PLLC

By 
Knoll Lowney, WSBA No. 23457

Keith Scully, WSBA No. 28677.
Legal Director for Futurewise
814 Second Ave, Suite 500
Seattle, WA 98104
(206) 343-0681

Judith Krebs, WSBA No. 31825
General Counsel for SEIU 775
33615 First Way South
Federal Way, WA 98003
(253) 815-3700

DECLARATION OF SERVICE

I, Lonnie Lopez, hereby declare that on I caused/will cause this document to be delivered on the respondent in this matter as follows:

- 1) By e-mail on July 23, 2007.
- 2) By e-mail in finalized form with tables on July 24, 2007.
- 3) Delivered by messenger on July 25, 2007.

Stated under oath this 24th day of July, 2007, in Seattle Washington.

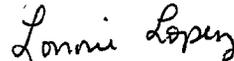


Exhibit A

The text of this document is an accurate copy of what was filed by the initiative proponent with the Secretary of State for assignment of a serial number. The accuracy of code in amendatory sections has not been verified.

INITIATIVE 960

I, Sam Reed, Secretary of State of the State of Washington and custodian of its seal hereby certify that, according to the records on file in my office, the attached copy of Initiative Measure No. 960 to the People is a true and correct copy as it was received by this office.

AN ACT Relating to tax and fee increases imposed by state government; amending RCW 43.88A.020, 43.88A.030, 43.135.035, 29A.72.040, 29A.72.250, 29A.72.290, 29A.32.031, 29A.32.070, and 43.135.055; adding a new section to chapter 43.135 RCW; adding new sections to chapter 29A.72 RCW; creating new sections; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

INTENT

NEW SECTION. **Sec. 1.** Washington has a long history of public interest in tax increases. The people have clearly and consistently illustrated their ongoing and passionate desire to ensure that taxpayers are protected. The people find that even without raising taxes, the government consistently receives revenue growth many times higher than the rate of inflation every year. With this measure, the people intend to protect taxpayers by creating a series of accountability procedures to ensure greater legislative transparency, broader public participation, and wider agreement before state government takes more of the people's money. This measure protects

taxpayers and relates to tax and fee increases imposed by state government. This measure would require publication of cost projections, information on public hearings, and legislators' sponsorship and voting records on bills increasing taxes and fees, allow either two-thirds legislative approval or voter approval for tax increases, and require advisory votes on tax increases blocked from citizen referendum.

The intent of sections 2, 3, and 4 of this act: The people want a thorough, independent analysis of any proposed increase in taxes and fees. The people find that legislators too often do not know the costs to the taxpayers for their tax and fee increases and this fiscal analysis by the office of financial management will provide better, more accessible information. The people want a user-friendly method to track the progress of bills increasing taxes and fees, finding that transparency and openness leads to more public involvement and better understanding. The people want information on public hearings and legislators' sponsorship and voting records on bills increasing taxes and fees and want easy access to contact information of legislators so the people's voice can be heard. Section 2(5) and (6) of this act are intended to provide active, engaged citizens with the opportunity to be notified of the status of bills increasing taxes and fees. Such a notification system is already being provided by the state supreme court with regard to judicial rulings. Intent of RCW 43.88A.020: The cost projection reports required by section 2 of this act will simplify and facilitate the creation of fiscal notes. The people want the office of financial management to fully comply with the cost projections and other requirements of section 2 on bills increasing taxes or fees before fiscal notes. Cost projections and the other information required by section 2 are critically important for the Legislature, the media, and the public to receive before fiscal notes.

The intent of section 5 of this act: The two-thirds requirement for raising taxes has been on the books since 1993 and the people find that this policy has provided the legislature with a much stronger incentive to use existing revenues more cost effectively rather than reflexively raising taxes. The people want this policy continued and want it to be clear that tax increases inside and outside the general fund are subject to the two-thirds threshold. If the legislature cannot receive a two-thirds vote in the house of representatives and senate to raise taxes, the Constitution provides the legislature with

the option of referring the tax increase to the voters for their approval or rejection at an election using a referendum bill. The people expect the legislature to respect, follow, and abide by the law, on the books for 13 years, to not raise taxes in excess of the state expenditure limit without two-thirds legislative approval and a vote of the people. Intent of RCW 43.135.035(5): When it comes to enactment of tax increases exceeding the state expenditure limit, the legislature has, in recent years, shifted money between funds to get around the voter approval requirement for tax increases above the state expenditure limit as occurred in 2005 with sections 1607 and 1701 of ESSB 6090. RCW 43.135.035(5) is intended to clarify the law so that the effective taxpayer protection of requiring voter approval for tax increases exceeding the state expenditure limit is not circumvented.

The intent of sections 6 through 13 of this act: Our state constitution guarantees to the people the right of referendum. In recent years, however, the legislature has thwarted the people's constitutional right to referendum by excessive use of the emergency clause. In 2005, for example, the legislature approved five hundred twenty-three bills and declared ninety-eight of them, nearly twenty percent, "emergencies," insulating them all from the constitution's guaranteed right to referendum. The Courts' reviews of emergency clauses have resulted in inconsistent decisions regarding the legality of them in individual cases. The people find that, if they are not allowed to vote on a tax increase, good public policy demands that at least the legislature should be aware of the voters' view of individual tax increases. An advisory vote of the people at least gives the legislature the views of the voters and gives the voters information about the bill increasing taxes and provides the voters with legislators' names and contact information and how they voted on the bill. The people have a right to know what's happening in Olympia. Intent of section 6(1) of this act: If the legislature blocks a citizen referendum through the use of an emergency clause or a citizen referendum on the tax increase is not certified for the next general election ballot, then an advisory vote on the tax increase is required. Intent of section 6(4) of this act: If there's a binding vote on the ballot, there's no need for a non-binding vote.

The intent of section 14 of this act: The people want to return the authority to impose or increase fees from unelected officials at state agencies to the duly elected representatives of the legislature

or to the people. The people find that fee increases should be debated openly and transparently and up-or-down votes taken by our elected representatives so the people are given the opportunity to hold them accountable at the next election.

**PROTECTING TAXPAYERS BY REQUIRING PUBLICATION OF COST PROJECTIONS,
INFORMATION ON PUBLIC HEARINGS, AND LEGISLATORS' SPONSORSHIP AND
VOTING RECORDS ON BILLS INCREASING TAXES AND FEES**

NEW SECTION. **Sec. 2.** A new section is added to chapter 43.135 RCW and reads as follows:

(1) For any bill introduced in either the house of representatives or the senate that raises taxes as defined by RCW 43.135.035 or increases fees, the office of financial management must expeditiously determine its cost to the taxpayers in its first ten years of imposition, must promptly and without delay report the results of its analysis by public press release via email to each member of the house of representatives, each member of the senate, the news media, and the public, and must post and maintain these releases on its web site. Any ten-year cost projection must include a year-by-year breakdown. For any bill containing more than one revenue source, a ten-year cost projection for each revenue source will be included along with the bill's total ten-year cost projection. The press release shall include the names of the legislators, and their contact information, who are sponsors and co-sponsors of the bill so they can provide information to, and answer questions from, the public.

(2) Any time any legislative committee schedules a public hearing on a bill that raises taxes as defined by RCW 43.135.035 or increases fees, the office of financial management must promptly and without delay report the results of its most up-to-date analysis of the bill required by subsection (1) of this section and the date, time, and location of the hearing by public press release via email to each member of the house of representatives, each member of the senate, the news media, and the public, and must post and maintain these releases on its web site. The press release required by this subsection must include all the information required by subsection (1) of this section and the names of the legislators, and their contact information, who are members of the legislative committee conducting the hearing so they can provide information to, and answer questions from, the public.

(3) Each time a bill that raises taxes as defined by RCW 43.135.035 or increases fees is approved by any legislative committee or by at least a simple majority in either the house of representatives or the senate, the office of financial management must expeditiously re-examine and re-determine its ten-year cost projection due to amendment or other changes during the legislative process, must promptly and without delay report the results of its most up-to-date analysis by public press release via email to each member of the house of representatives, each member of the senate, the news media, and the public, and must post and maintain these releases on its web site. Any ten-year cost projection must include a year-by-year breakdown. For any bill containing more than one revenue source, a ten-year cost projection for each revenue source will be included along with the bill's total ten-year cost projection. The press release shall include the names of the legislators, and their contact information, and how they voted on the bill so they can provide information to, and answer questions from, the public.

(4) For the purposes of this section, "names of legislators, and their contact information" includes each legislator's position (Senator or Representative), first name, last name, party affiliation (for example, Democrat or Republican), city or town they live in, office phone number, and office email address.

(5) For the purposes of this section, "news media" means any member of the press or media organization, including newspapers, radio, and television, that signs up with the office of financial management to receive the public press releases by email.

(6) For the purposes of this section, "the public" means any person, group, or organization that signs up with the office of financial management to receive the public press releases by email.

Sec. 3. RCW 43.88A.020 and 1994 c 219 s 3 are each amended to read as follows:

The office of financial management shall, in cooperation with appropriate legislative committees and legislative staff, establish a procedure for the provision of fiscal notes on the expected impact of bills and resolutions which increase or decrease or tend to increase or decrease state government revenues or expenditures. Such fiscal notes shall indicate by fiscal year the impact for the remainder of the biennium in which the bill or resolution will first take effect as well

as a cumulative forecast of the fiscal impact for the succeeding four fiscal years. Fiscal notes shall separately identify the fiscal impacts on the operating and capital budgets. Estimates of fiscal impacts shall be calculated using the procedures contained in the fiscal note instructions issued by the office of financial management.

In establishing the fiscal impact called for pursuant to this chapter, the office of financial management shall coordinate the development of fiscal notes with all state agencies affected.

The preparation and dissemination of the ongoing cost projections and other requirements of section 2 of this act for bills increasing taxes or fees shall take precedence over fiscal notes.

Sec. 4. RCW 43.88A.030 and 1986 c 158 s 16 are each amended to read as follows:

When a fiscal note is prepared and approved as to form, accuracy, and completeness by the office of financial management, which depicts the expected fiscal impact of a bill or resolution, copies shall be filed immediately with:

- (1) The chairperson of the committee to which the bill or resolution was referred upon introduction in the house of origin;
- (2) The senate committee on ways and means, or its successor; and
- (3) The house committees on revenue and appropriations, or their successors.

Whenever possible, such fiscal note and, in the case of a bill increasing taxes or fees, the cost projection and other information required under section 2 of this act shall be provided prior to or at the time the bill or resolution is first heard by the committee of reference in the house of origin.

When a fiscal note has been prepared for a bill or resolution, a copy of the fiscal note shall be placed in the bill books or otherwise attached to the bill or resolution and shall remain with the bill or resolution throughout the legislative process insofar as possible. For bills increasing taxes or fees, the cost projection and other information required by section 2 of this act shall be placed in the bill books or otherwise attached to the bill or resolution and shall remain with the bill or resolution throughout the legislative process insofar as possible.

PROTECTING TAXPAYERS BY ALLOWING EITHER TWO-THIRDS LEGISLATIVE

APPROVAL OR VOTER APPROVAL FOR TAX INCREASES

Sec. 5. RCW 43.135.035 and 2005 c 72 s 5 are each amended to read as follows:

(1) After July 1, 1995, any action or combination of actions by the legislature that (~~raises state revenue or requires revenue-neutral tax shifts~~) raises taxes may be taken only if approved by a two-thirds vote of each house of the legislature, and then only if state expenditures in any fiscal year, including the new revenue, will not exceed the state expenditure limits established under this chapter. Pursuant to the referendum power set forth in Article II, section 1(b) of the state Constitution, tax increases may be referred to the voters for their approval or rejection at an election.

(2)(a) If the legislative action under subsection (1) of this section will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people at a November general election. The state expenditure limit committee shall adjust the state expenditure limit by the amount of additional revenue approved by the voters under this section. This adjustment shall not exceed the amount of revenue generated by the legislative action during the first full fiscal year in which it is in effect. The state expenditure limit shall be adjusted downward upon expiration or repeal of the legislative action.

(b) The ballot title for any vote of the people required under this section shall be substantially as follows:

"Shall taxes be imposed on in order to allow a spending increase above last year's authorized spending adjusted for inflation and population increases?"

(3)(a) The state expenditure limit may be exceeded upon declaration of an emergency for a period not to exceed twenty-four months by a law approved by a two-thirds vote of each house of the legislature and signed by the governor. The law shall set forth the nature of the emergency, which is limited to natural disasters that require immediate government action to alleviate human suffering and provide humanitarian assistance. The state expenditure limit may be exceeded for no more than twenty-four months following the declaration of the emergency and only for the purposes contained in the emergency declaration.

(b) Additional taxes required for an emergency under this section may be imposed only until thirty days following the next general election, unless an extension is approved at that general election. The additional taxes shall expire upon expiration of the declaration of emergency. The legislature shall not impose additional taxes for emergency purposes under this subsection unless funds in the education construction fund have been exhausted.

(c) The state or any political subdivision of the state shall not impose any tax on intangible property listed in RCW 84.36.070 as that statute exists on January 1, 1993.

(4) If the cost of any state program or function is shifted from the state general fund or a related fund to another source of funding; or if moneys are transferred from the state general fund or a related fund to another fund or account, the state expenditure limit committee, acting pursuant to RCW 43.135.025(5), shall lower the state expenditure limit to reflect the shift. For the purposes of this section, a transfer of money from the state general fund or a related fund to another fund or account includes any state legislative action taken that has the effect of reducing revenues from a particular source, where such revenues would otherwise be deposited into the state general fund or a related fund, while increasing the revenues from that particular source to another state or local government account. This subsection does not apply to the dedication or use of lottery revenues under RCW 67.70.240(3) or property taxes under RCW 84.52.068, in support of education or education expenditures.

(5) If the cost of any state program or function and the ongoing revenue necessary to fund the program or function are shifted to the state general fund or a related fund on or after January 1, 2007, the state expenditure limit committee, acting pursuant to RCW 43.135.025(5), shall increase the state expenditure limit to reflect the shift unless the shifted revenue had previously been shifted from the general fund or a related fund.

(6) For the purposes of this act, "raises taxes" means any action or combination of actions by the legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.

**PROTECTING TAXPAYERS BY REQUIRING AN ADVISORY VOTE OF THE PEOPLE
WHEN THE LEGISLATURE BLOCKS A TAX INCREASE FROM A PUBLIC VOTE**

NEW SECTION. **Sec. 6.** A new section is added to chapter 43.135 RCW and reads as follows:

(1) If legislative action raising taxes as defined by RCW 43.135.035 is blocked from a public vote or is not referred to the people by a referendum petition found to be sufficient under RCW 29A.72.250, a measure for an advisory vote of the people is required and shall be placed on the next general election ballot under this act.

(a) If legislative action raising taxes involves more than one revenue source, each tax being increased shall be subject to a separate measure for an advisory vote of the people under the requirements of this act.

(2) No later than the first of August, the attorney general will send written notice to the secretary of state of any tax increase that is subject to an advisory vote of the people, under the provisions and exceptions provided by this act. Within five days of receiving such written notice from the attorney general, the secretary of state will assign a serial number for a measure for an advisory vote of the people and transmit one copy of the measure bearing its serial number to the attorney general as required by RCW 29A.72.040, for any tax increase identified by the attorney general as needing an advisory vote of the people for that year's general election ballot. Saturdays, Sundays, and legal holidays are not counted in calculating the time limits in this subsection.

(3) For the purposes of this section, "blocked from a public vote" includes adding an emergency clause to a bill increasing taxes, bonding or contractually obligating taxes, or otherwise preventing a referendum on a bill increasing taxes.

(4) If legislative action raising taxes is referred to the people by the legislature or is included in an initiative to the people found to be sufficient under RCW 29A.72.250, then the tax increase is exempt from an advisory vote of the people under this act.

Sec. 7. RCW 29A.72.040 and 2003 c 111 s 1805 are each amended to read as follows:

The secretary of state shall give a serial number to each initiative, referendum bill, ~~((or))~~ referendum measure, or measure for an advisory vote of the people, using a separate series for initiatives to the legislature, initiatives to the people, referendum bills, ~~((and))~~ referendum measures, and measures for an advisory vote of the

people, and forthwith transmit one copy of the measure proposed bearing its serial number to the attorney general. Thereafter a measure shall be known and designated on all petitions, ballots, and proceedings as "Initiative Measure No.," "Referendum Bill No.," ((or)) "Referendum Measure No.," or "Advisory Vote No."

NEW SECTION. Sec. 8. A new section is added to RCW 29A.72 and shall read as follows:

Within five days of receipt of a measure for an advisory vote of the people from the secretary of state under RCW 29A.72.040 the attorney general shall formulate a short description not exceeding thirty-three words and not subject to appeal, of each tax increase and shall transmit a certified copy of such short description meeting the requirements of this section to the secretary of state. The description must be formulated and displayed on the ballot substantially as follows:

"The legislature imposed, without a vote of the people, (identification of tax and description of increase), costing (most up-to-date ten-year cost projection, expressed in dollars and rounded to the nearest million) in its first ten years, for government spending. This tax increase should be:

Repealed . . . []
Maintained . . . []"

Saturdays, Sundays, and legal holidays are not counted in calculating the time limits in this section. The words "This tax increase should be: Repealed . . . [] Maintained . . . []" are not counted in the thirty-three word limit for a short description under this section.

NEW SECTION. Sec. 9. A new section is added to RCW 29A.72 and shall read as follows:

When the short description is finally established under section 8 of this act, the secretary of state shall file the instrument establishing it with the proposed measure and transmit a copy thereof by mail to the chief clerk of the house of representatives, the secretary of the senate, and to any other individuals who have made written request for such notification. Thereafter such short

description shall be the description of the measure in all ballots and other proceedings in relation thereto.

Sec. 10. RCW 29A.72.250 and 2003 c 111 s 1825 are each amended to read as follows:

If a referendum or initiative petition for submission of a measure to the people is found sufficient, the secretary of state shall at the time and in the manner that he or she certifies for the county auditors of the various counties the names of candidates for state and district officers certify to each county auditor the serial numbers and ballot titles of the several initiative and referendum measures and serial numbers and short descriptions of measures submitted for an advisory vote of the people to be voted upon at the next ensuing general election or special election ordered by the legislature.

Sec. 11. RCW 29A.72.290 and 2003 c 111 s 1829 are each amended to read as follows:

The county auditor of each county shall print on the official ballots for the election at which initiative and referendum measures and measures for an advisory vote of the people are to be submitted to the people for their approval or rejection, the serial numbers and ballot titles certified by the secretary of state and the serial numbers and short descriptions of measures for an advisory vote of the people. They must appear under separate headings in the order of the serial numbers as follows:

(1) Measures proposed for submission to the people by initiative petition will be under the heading, "Proposed by Initiative Petition";

(2) Bills passed by the legislature and ordered referred to the people by referendum petition will be under the heading, "Passed by the Legislature and Ordered Referred by Petition";

(3) Bills passed and referred to the people by the legislature will be under the heading, "Proposed to the People by the Legislature";

(4) Measures proposed to the legislature and rejected or not acted upon will be under the heading, "Proposed to the Legislature and Referred to the People";

(5) Measures proposed to the legislature and alternative measures passed by the legislature in lieu thereof will be under the heading, "Initiated by Petition and Alternative by Legislature";

(6) Measures for an advisory vote of the people under RCW 29A.72.040 will be under the heading, "Advisory Vote of the People".

Sec. 12. RCW 29A.32.031 and 2004 c 271 s 121 are each amended to read as follows:

The voters' pamphlet must contain:

(1) Information about each measure for an advisory vote of the people and each ballot measure initiated by or referred to the voters for their approval or rejection as required by RCW 29A.32.070;

(2) In even-numbered years, statements, if submitted, advocating the candidacies of nominees for the office of president and vice president of the United States, United States senator, United States representative, governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, commissioner of public lands, superintendent of public instruction, insurance commissioner, state senator, state representative, justice of the supreme court, judge of the court of appeals, or judge of the superior court. Candidates may also submit a campaign mailing address and telephone number and a photograph not more than five years old and of a size and quality that the secretary of state determines to be suitable for reproduction in the voters' pamphlet;

(3) In odd-numbered years, if any office voted upon statewide appears on the ballot due to a vacancy, then statements and photographs for candidates for any vacant office listed in subsection (2) of this section must appear;

(4) In even-numbered years, a section explaining how voters may participate in the election campaign process; the address and telephone number of the public disclosure commission established under RCW 42.17.350; and a summary of the disclosure requirements that apply when contributions are made to candidates and political committees;

(5) In even-numbered years the name, address, and telephone number of each political party with nominees listed in the pamphlet, if filed with the secretary of state by the state committee of a major political party or the presiding officer of the convention of a minor political party;

(6) In each odd-numbered year immediately before a year in which a president of the United States is to be nominated and elected, information explaining the precinct caucus and convention process used by each major political party to elect delegates to its national presidential candidate nominating convention. The pamphlet must also provide a description of the statutory procedures by which minor political parties are formed and the statutory methods used by the parties to nominate candidates for president;

(7) An application form for an absentee ballot;

(8) A brief statement explaining the deletion and addition of language for proposed measures under RCW 29A.32.080;

(9) Any additional information pertaining to elections as may be required by law or in the judgment of the secretary of state is deemed informative to the voters.

Sec. 13. RCW 29A.32.070 and 2003 c 111 s 807 are each amended to read as follows:

The secretary of state shall determine the format and layout of the voters' pamphlet. The secretary of state shall print the pamphlet in clear, readable type on a size, quality, and weight of paper that in the judgment of the secretary of state best serves the voters. The pamphlet must contain a table of contents. Federal and state offices must appear in the pamphlet in the same sequence as they appear on the ballot. Measures and arguments must be printed in the order specified by RCW 29A.72.290.

The voters' pamphlet must provide the following information for each statewide issue on the ballot except measures for an advisory vote of the people whose requirements are provided in subsection (11) of this section:

(1) The legal identification of the measure by serial designation or number;

(2) The official ballot title of the measure;

(3) A statement prepared by the attorney general explaining the law as it presently exists;

(4) A statement prepared by the attorney general explaining the effect of the proposed measure if it becomes law;

(5) The fiscal impact statement prepared under *RCW 29.79.075;

(6) The total number of votes cast for and against the measure in the senate and house of representatives, if the measure has been passed by the legislature;

(7) An argument advocating the voters' approval of the measure together with any statement in rebuttal of the opposing argument;

(8) An argument advocating the voters' rejection of the measure together with any statement in rebuttal of the opposing argument;

(9) Each argument or rebuttal statement must be followed by the names of the committee members who submitted them, and may be followed by a telephone number that citizens may call to obtain information on the ballot measure;

(10) The full text of the measure;

(11) Two pages shall be provided in the general election voters' pamphlet for each measure for an advisory vote of the people under section 6 of this act and shall consist of the serial number assigned by the secretary of state under RCW 29A.72.040, the short description formulated by the attorney general under section 8 of this act, the tax increase's most up-to-date ten-year cost projection, including a year-by-year breakdown, by the office of financial management under section 2 of this act, and the names of the legislators, and their contact information, and how they voted on the increase upon final passage so they can provide information to, and answer questions from, the public. For the purposes of this subsection, "names of legislators, and their contact information" includes each legislator's position (Senator or Representative), first name, last name, party affiliation (for example, Democrat or Republican), city or town they live in, office phone number, and office email address.

**PROTECTING TAXPAYERS BY REQUIRING FEE INCREASES TO BE VOTED ON BY
ELECTED REPRESENTATIVES, RATHER THAN IMPOSED BY
UNELECTED OFFICIALS AT STATE AGENCIES**

Sec. 14. RCW 43.135.055 and 2001 c 314 s 19 are each amended to read as follows:

(1) No fee may be imposed or increased in any fiscal year ((~~by a percentage in excess of the fiscal growth factor for that fiscal year~~)) without prior legislative approval and must be subject to the accountability procedures required by section 2 of this act.

(2) This section does not apply to an assessment made by an agricultural commodity commission or board created by state statute or created under a marketing agreement or order under chapter 15.65 or 15.66 RCW, or to the forest products commission, if the assessment is approved by referendum in accordance with the provisions of the statutes creating the commission or board or chapter 15.65 or 15.66 RCW for approving such assessments.

CONSTRUCTION CLAUSE

NEW SECTION. **Sec. 15.** The provisions of this act are to be liberally construed to effectuate the intent, policies, and purposes of this act.

SEVERABILITY CLAUSE

NEW SECTION. **Sec. 16.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

MISCELLANEOUS

NEW SECTION. **Sec. 17.** Subheadings and part headings used in this act are not part of the law.

NEW SECTION. **Sec. 18.** This act shall be known and cited as the Taxpayer Protection Act of 2007.

NEW SECTION. **Sec. 19.** This act takes effect December 6, 2007.

--- END ---

Exhibit B

Washington

Secretary of State
SAM REED

News Release

Initiative 960 Qualifies for Ballot

Issued: July 19, 2007

Contact: Stephanie Horn
(360) 902-4193

OLYMPIA ...Secretary of State Sam Reed announced today that Initiative 960 has sufficient valid signatures to qualify for a spot on the statewide ballot in November.

According to elections officials, a check of petition signatures submitted in support of the proposal has shown that the measure meets constitutional requirements for a minimum of 224,880 valid voter signatures. The measure will appear on the November 6 General Election ballot.

Initiative 960 would require two-thirds legislative approval or voter approval for tax increases, legislative approval of fee increases, certain published information on tax-increasing bills, and advisory votes on taxes enacted without voter approval. The official ballot summary on Initiative 960 reads, "This measure would require either a two-thirds vote in each house of the legislature or voter approval for all tax increases. New or increased fees would require prior legislative approval. An advisory vote would be required on any new or increased taxes enacted by the legislature without voter approval. The office of financial management would be required to publish cost information and information regarding legislators' voting records on bills imposing or increasing taxes or fees."

Sponsors of Initiative 960 submitted a total of 314,504 petition signatures to the Secretary of State. Election officials conducted a random sample of 9,607 signatures, of which 8,410 were valid signatures – 1,197 were determined invalid. Signatures are invalid if the signer is not a registered voter or if he or she signed more than once.

The petition was checked using the "random sample" process authorized by state law. Under the process, a statistically valid percentage of the signatures are selected at random and checked against voter registration records. A mathematical formula is then applied to the results to obtain a projected rate of invalidation.

Election officials examined 9,607 (a 3 percent sample) on Initiative 960. From that inspection, it was determined that the measure had an invalidation rate of 17.1 percent.

###

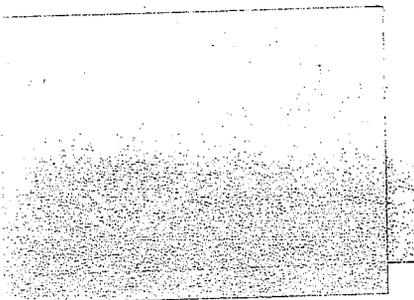


Exhibit C

JUL 13 2007

SUPERIOR COURT CLERK
EILEEN L. MCLEOD
DEPUTY

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

FUTUREWISE and SERVICE
EMPLOYEES INTERNATIONAL
UNION 775,

Plaintiff,

v.

SAM REED, in his official capacity as
Secretary of State of the State of
Washington,

Defendant.

NO. 07-2-16119-8 SEA

ORDER DISMISSING ACTION

This matter came before the Court on July 13, 2007, on Plaintiffs' Motion for Judgment on the Pleadings, and Defendant's Cross-Motion for Judgment on the Pleadings. Plaintiffs appeared by and through Knoll Lowney. Secretary of State Reed appeared by and through Deputy Solicitors General Jeffrey T. Even and James K. Pharris.

The Court heard argument and reviewed the following materials:

1. Complaint for Declaratory and Injunctive Relief Prohibiting Initiative 960 From Appearing on the Ballot and Declaring it Unconstitutional;
2. Plaintiffs' Motion for Judgment on the Pleadings;
3. Defendant's Answer;
4. State's Cross-Motion in Response to Plaintiffs' Motion For Judgment On The Pleadings;

1 5. Plaintiffs' Combined Reply in Support Of Motion For Judgment on the
2 Pleadings And Opposition To State's Cross Motion;

3 6. Motion to File Brief of Amicus Curiae;

4 7. Plaintiffs' Opposition to Motion for Amicus Brief;

5 8. Declaration of Knoll Lowney In Opposition Motion For Amicus Brief;

6 9. Brief of Amici Curiae Voters Want More Choices, Tim D. Eyman, M. (Mike) J.
7 Fagan, and Leo J. (Jack) Fagan;

8 10. Plaintiffs' Response to Brief of Amici Curiae;

9 11. Declaration of Adam Glickman;

10 12. Declaration of Aaron Ostrom, Executive Director of Plaintiff Futurewise;

11 13. _____
12 _____
13 _____

_____ ; and

14 14. All other papers, pleadings, and records of this Court on file in the above-
15 captioned matter.

16 The Court therefore ORDERS, ADJUDGES, AND DECREES, as follows:

17 1. The Court finds that, having been asked to review declarations outside the
18 pleadings of the respective parties in order to resolve this case and the Court not having
19 excluded such declarations, this motion is properly treated as one for summary judgment;

20 2. The Court finds that there are no disputes as to any material facts in this case
21 and that Secretary Reed is entitled to judgment as a matter of law;

22 3. The Court therefore grants SUMMARY JUDGMENT in favor Secretary Reed
23 and this action is DISMISSED with prejudice;

24 4. THE PARTIES AGREE THAT THIS MATTER SHOULD
25 BE CONSTRUED AS SUMMARY JUDGMENT.
26 _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

; and

5. This Order shall constitute a final judgment in this action.

Dated this 13th day of July, 2007.

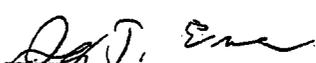


JUDGE

CATHERINE SHAFFER

Presented by:

ROBERT M. MCKENNA
Attorney General


JEFFREY T. EVEN, WSBA # 20367
JAMES K. PHARRIS, WSBA# 5313
Deputy Solicitors General
Attorney for Defendant Sam Reed,
Secretary of State

Receipt Acknowledged, Notice of
Presentation Waived:

Knoll Lowney, WSBA # 23457

1 SUPERIOR COURT IN AND FOR THE STATE OF WASHINGTON
2 IN AND FOR COUNTY OF KING

4 FUTUREWISE & SERVICE)
 5 EMPLOYEES INTERNATIONAL)
 6 UNION 77)
 7)
 8)
 9)
 10)
 11)
 12)
 13)
 14)
 15)
 16)
 17)
 18)
 19)
 20)
 21)
 22)
 23)
 24)
 25)

Plaintiff,) KING COUNTY CAUSE
 vs.) No. 07-2-16119-8 SEA
 SAM REED) SUMMARY JUDGMENT:
 Defendant.)

11 REPORT OF PROCEEDINGS
12 JULY 13, 2007

13 BEFORE THE HONORABLE CATHERINE SHAFFER

14 *****

15 PETE S. HUNT
16 CSR Reference No. HUNTPS5708.P
17 Official Court Reporter
18 King County Superior Court
19 516 Third Avenue, C912
20 Seattle, Washington, 98104
21 (206) 296-9356

19 A P P E A R A N C E S :

20 KNOLL LOWNEY
21 JUDITH KREBS
22 Attorney at Law,

23 appeared on behalf of the Plaintiff;

24 JEFFREY EVEN
25 JAMES PHARRIS
Attorney at Law,

appeared on behalf of the Defendant.

1 THE COURT: Be seated everyone.

2 I think I'm prepared to rule in this case.

3 Before the Court are cross motions for
4 judgment on pleadings. And the one matter that the
5 parties are agreed upon is that this case is in the
6 appropriate posture for the Court to grant judgment on
7 the pleadings.

8 The issue before the Court is with regard to
9 Initiative 960 and whether or not that initiative can
10 move forward.

11 I'm informed in oral argument that signatures
12 have been gathered and that the secretary is in the
13 process of assessing whether or not there's sufficient
14 signatures for this measure to appear on the ballot.

15 The parties have cross requested that the
16 Court grant judgment on pleadings either permitting or
17 not permitting Initiative 960 to move forward onto the
18 ballot, assuming that the signatures are sufficient and
19 are verified as sufficient.

20 And the Court has also been favored with
21 amicus curai briefing on behalf of the parties
22 proposing the initiative. In addition to a response
23 filed by plaintiffs in this case.

24 I have read all the pleadings before me very
25 carefully, I've read all the cases cited to me,

1 including out-of-state authority cited to me. By that
2 I'm referring to federal and out-of-state - - United
3 States decisions in other states.

4 And the Court has also looked very carefully
5 at the text of the initiative. And I was favored this
6 morning with excellent oral argument on both sides in
7 this case.

8 However, my ruling will be considerably
9 briefer than the materials presented to me. Which is
10 why I assure the parties that I've reviewed them
11 carefully.

12 Let me talk first about what it appears to
13 this Court Initiative 960 does and what it does not
14 do. And I'm speaking very broadly here without
15 reference to the specific provisions of Initiative
16 960.

17 In general, Initiative 960 does two new things
18 were it to be enacted. One is that it requires
19 preparation of very detailed statements for any revenue
20 or tax measure, about the impact year-by-year and over
21 a ten year period of any such measure. It would
22 essentially, it appears to the Court, supplant the
23 current fiscal note process with a considerably more
24 detailed statement about the financial consequences of
25 include passed in Olympia. And the fiscal information

1 provided would also include the names of legislators
2 involved in the process of enacting such legislation.

3 The other major feature of Initiative 960 is a
4 structure, a mechanism whereby matters that are not
5 ordinarily subject to a vote of the people that
6 involved revenue increases such as measures that
7 include a declaration of emergency need, would be
8 subject to an advisory vote of the people following the
9 enactment of such legislation. Those are the two big
10 new features of Initiative 960 as I see them. And as I
11 said, this is a very general description I'm giving,
12 not really detailed or section-by-section.

13 It's been argued to me on this motion that
14 Initiative 960 also is a new in enacting a two-thirds
15 super majority requirement within the State
16 legislature. However, it's clear in reviewing the text
17 of Initiative 960 that the language discussed is
18 already part of existing Washington State law. Whether
19 or not the legislature is currently following that
20 specific language for whatever basis that may or may
21 not be occurring.

22 There is nothing about 960 itself in terms of
23 the provisions of law it would add to existing law that
24 would require a super majority. And so the Court does
25 not consider whether or not the super majority

1 provisions already passed by the people in Initiative
2 601 were or were not within the people's initiative
3 power, were or were not properly legislative acts or
4 are or are not substantively constitutional. Those are
5 good issues but they are not before me. And I won't
6 reach them.

7 What I will reach is Initiative 960 itself and
8 whether or not it's appropriate for that to proceed to
9 the ballot. I'm going to remind the parties that the
10 Court is required to be very respectful of the right of
11 the citizens to consider and vote on proposed
12 initiatives and referenda under our State
13 Constitution. Washington has a particularly
14 deferential pre-election standard of review, which is
15 actually set forth in a case that the plaintiffs in
16 this case were involved in, City of Seattle versus Yes
17 For Seattle. Published at 122 Wn.App. 382, in 2004.
18 As Division 1 said in that case, "Generally, courts
19 will not review initiatives before they are adopted by
20 voters. Because courts do not want to interfere with
21 the political process or issue advisory opinions. An
22 established exception to the general rule is that a
23 court will review an initiative to determine if it is
24 within the scope of the initiative power. The idea the
25 courts can review initiatives to determine whether they

1 are authorized by Article 2 Section 1 of the State
2 Constitution is nearly as old as the amendment
3 establishing the initiative power itself."

4 And in considering this the Court of course
5 has looked at Article 2 Section 1, which states as
6 Section 1(a), "The first power reserved by the people
7 is the initiative". And goes on to spell out the
8 requirements for initiatives and referend in our
9 State. The preamble to this section of Section 1
10 states, "The legislative authority of the State of
11 Washington shall be vested in the legislature,
12 consisting of a senate and a house of representatives,
13 which shall be called the legislature of the State of
14 Washington. But, the people reserve to themselves the
15 power to propose bills, laws, and to enact or reject
16 the same at the polls, independent of the legislature
17 and also reserve power at their own option to approve
18 or reject at the polls any act, item, section or part
19 of any bill, act or law passed by the legislature."

20 I need not remind the parties what a that is
21 grant of power the people have reserved to themselves
22 under this section of the Washington Constitution. And
23 undoubtedly that's why the court has imposed serious
24 restraints on itself in terms of its ability to rule
25 on, for example, substantive constitutionality before a

1 measure is enacted.

2 The most recent statement of Washington
3 court's restraint in passing on initiatives before they
4 are voted upon is set forth in Coppernol versus Sam
5 Reed, decided at 155 Wn2d 290 in 2005 by our State
6 Supreme Court. And I'm going to quote here some
7 language from our State Supreme Court setting forth
8 some of the same policy considerations I've just
9 recited. Era initiative is first power reserved by the
10 people in the Washington Constitution. Adopted in 1911
11 the right of initiative is nearly as old as our
12 Constitution itself, deeply ingrained in our state's
13 history and widely revered as a powerful check and
14 balance on the other branches of government.
15 Accordingly, this potent vestige of our progressive
16 arrow past must be vigilantly protected by our courts."

17 Then the Supreme Court says, and I quote,
18 "That it has been a long-standing rule of our
19 jurisprudence that we refrain from inquiring into the
20 validity of a proposed law. Including an initiative or
21 referendum before it has been enacted." The Supreme
22 Court goes on to say, "We have only recognized", and we
23 here is the courts of Washington, "permit narrow
24 exceptions to this general rule against pre-election
25 review. And this depends on the type of review

1 sought". The courts specifically do not permit a
2 challenge to substantive unconstitutionality of a
3 proposed initiative. And as the court says, "the first
4 type of challenge, substantive mind, is not allowed in
5 this stage because of the constitutional preeminence of
6 the right of initiative.

7 There's also a comment here from our Supreme
8 Court that's worth bearing in mind, that substantive
9 pre-election review "may also unduly infringe on free
10 speech values".

11 The only types of challenges that are allowed
12 are first, challenges based on a ballot measure's
13 non-compliance with procedural requirements, an issue
14 not before me today. The parties concede that
15 procedural requirements have been met.

16 The only other type of pre-election review
17 that Washington courts permit is whether or not the
18 subject matter of the measure is proper for direct
19 legislation. There are two prior decisions finding
20 that an initiative in fact contained subject matter not
21 proper for direct legislation. And both those cases
22 have been discussed before this Court. One of them is
23 the Philadelphia II decision, in which there was an
24 effort via the initiative to essentially pass federal
25 law. That clearly would fall outside the scope of our

1 legislative power in our state and therefore that
2 initiative did not move forward.

3 The second case was very similar, it involved a
4 local challenge to the measures involving the
5 construction of the original I-90 bridge. And that too
6 was an effort by a local jurisdiction to exceed its own
7 local legislative power and opine on a matter of state
8 law.

9 I think it is also clear from Washington court
10 decisions, and the Attorney General has told the Court
11 so in pleadings here, that the initiative cannot be
12 used to amend the Constitution. Meaning that if the
13 Court were looking at a proposed constitutional
14 amendment it would fail. This is very limited review.

15 The argument before me is that the advisory vote
16 provisions and the super majority provisions of
17 Initiative 960 would effectively amend the
18 Constitution. I don't deal with the issue of the super
19 majority vote provisions because they were already
20 passed in a prior initiative. And the substantive
21 constitutionality of that prior enactment is not before
22 me. 960 does not newly enact that language into law.
23 It already exists in law. So I look only to whether or
24 not the advisory vote provisions here exceed the
25 initiative power.

1 It seems to the Court that although there may be an
2 argument later, and I don't opine on this, that this
3 structural creation may not be substantively
4 constitutional, because it may not square well with the
5 structure of the initiative and referendum power set
6 forth in Article 2 Section 1. For one thing,
7 nonetheless, it seems to me clear that it's within the
8 scope of the legislative power to pass such a law.
9 Regardless of its later substantive constitutionality
10 or unconstitutionality.

11 It is a sad but true thing that on occasions
12 legislatures pass laws which are not constitutional.
13 It is a sad but true thing that on occasion initiatives
14 are proposed that if enacted may result in a measure
15 that is substantively unconstitutional. And when that
16 happens, the doors to the courtroom are open for
17 aggrieved parties to seek a ruling by the court on
18 substantive unconstitutionality. But I cannot look at
19 these legislative measures and make a ruling now on
20 substantive unconstitutionality without undermining
21 Washington's respect for the initiative and referendum
22 power, and undermining the ability of the people to
23 opine on whether or not they want the measure to begin
24 with. That, it seems to me is the lesson of the strong
25 language of Article 2 Section 1 and the statements that

1 I've quoted from recent court decisions. Especially
2 that from the Supreme Court.

3 So, I grant judgment on pleadings to the Attorney
4 General in this case for the reasons I stated.

5 I'll sign an order.

6 MR. EVEN: Your Honor, I do have an order I
7 can hand up. I'll first hand it to Mr. Lowney.

8 There is one point in this order that I do
9 want to call to the Court's attention in light of the
10 Court's ruling. On Page 2, when we get to the order,
11 the Court therefore orders, adjudges and decrees, there
12 were two declarations submitted to the Court by
13 Mr. Lowney in response to the Amicus brief.

14 THE COURT: And I read those so we should
15 include them.

16 Mr. EVEN: And since I think having that been
17 done, Your Honor, I think that the case should properly
18 be regarded as summary judgment at this point rather
19 than a judgment on the pleadings.

20 THE COURT: Are the plaintiffs in agreement
21 with that? You submitted - -

22 MR. LOWNEY: Yes. That would be fine.

23 THE COURT: All right. If anybody wants a
24 more detailed record of my ruling please contact my
25 court reporter.

1 And I'm going to ask the parties to insert
2 under Paragraph 13 of this order the declarations that
3 the Court reviewed and the language as to summary
4 judgment.

5 We're in recess.
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

1
2 STATE OF WASHINGTON)
3 COUNTY OF KING) SS:
4)

5 I, PETE S. HUNT, an official reporter of the
6 state of washington, was appointed an official court
7 reporter in the superior court of the state of
8 washington, county of king, on march 16, 1987, do
9 hereby certify that the foregoing proceedings were
10 reported by me in stenotype at the time and place
11 herein set forth and were thereafter transcribed by
12 computer-aided transcription under my supervision and
13 that the same is a true and correct transcription of my
14 stenotype notes so taken.

15 I further certify that I am not employed by,
16 related to, nor of counsel for any of the parties named
17 herein, nor otherwise interested in the outcome of this
18 action.

19
20 OFFICIAL COURT REPORTER
21
22
23
24
25

Exhibit D

Washington State Constitution
Instances of Supermajority

Article II, Section 1(c): No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided*, That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.

Article II, Section 9: **RULES OF PROCEDURE.** Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and, with the concurrence of two-thirds of all the members elected, expel a member, but no member shall be expelled a second time for the same offense.

Article II, Section 12(2): Special Legislative Sessions. Special legislative sessions may be convened for a period of not more than thirty consecutive days by proclamation of the governor pursuant to Article III, section 7 of this Constitution. Special legislative sessions may also be convened for a period of not more than thirty consecutive days by resolution of the legislature upon the affirmative vote in each house of two-thirds of the members elected or appointed thereto, which vote may be taken and resolution executed either while the legislature is in session or during any interim between sessions in accordance with such procedures as the legislature may provide by law or resolution. The resolution convening the legislature shall specify a purpose or purposes for the convening of a special session, and any special session convened by the resolution shall consider only measures germane to the purpose or purposes expressed in the resolution, unless by resolution adopted during the session upon the affirmative vote in each house of two-thirds of the members elected or appointed thereto, an additional purpose or purposes are expressed. The specification of purpose by the governor pursuant to Article III, section 7 of this Constitution shall be considered by the legislature but shall not be mandatory.

Article II, Section 24: **LOTTERIES AND DIVORCE.** The legislature shall never grant any divorce. Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon.

Article II, Section 36: **WHEN BILLS MUST BE INTRODUCED.** No bill shall be considered in either house unless the time of its introduction shall have been at least ten days before the final adjournment of the legislature, unless the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house, said vote to be

taken by yeas and nays and entered upon the journal, or unless the same be at a special session.

Article II, Section 41: **LAWS, EFFECTIVE DATE, INITIATIVE, REFERENDUM - AMENDMENT OR REPEAL.** No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment. *Provided*, That any such act, law or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon. These provisions supersede the provisions of subsection (c) of section 1 of this article as amended by the seventh amendment to the Constitution of this state. [AMENDMENT 26, 1951 Substitute Senate Joint Resolution No. 7, p 959. Approved November 4, 1952.]

Article II, Section 43(7): The legislature may amend the redistricting plan but must do so by a two-thirds vote of the legislators elected or appointed to each house of the legislature. Any amendment must have passed both houses by the end of the thirtieth day of the first session convened after the commission has submitted its plan to the legislature. After that day, the plan, with any legislative amendments, constitutes the state districting law.

Article II, Section 43(8): The legislature shall enact laws providing for the reconvening of a commission for the purpose of modifying a districting law adopted under this section. Such reconvening requires a two-thirds vote of the legislators elected or appointed to each house of the legislature. The commission shall conform to the standards prescribed under subsection (5) of this section and any other standards or procedures that the legislature may provide by law. At least three of the voting members shall approve such a modification. Any modification adopted by the commission may be amended by a two-thirds vote of the legislators elected and appointed to each house of the legislature. The state districting law shall include the modifications with amendments, if any.

Article III, Section 12: **VETO POWERS.** Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, which house shall enter the objections at large upon the journal and proceed to reconsider. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present, it shall become a law; but in all such cases the vote of both houses shall be determined by the yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journal of each house respectively. If any bill shall not be

returned by the governor within five days, Sundays excepted, after it shall be presented to him, it shall become a law without his signature, unless the general adjournment shall prevent its return, in which case it shall become a law unless the governor, within twenty days next after the adjournment, Sundays excepted, shall file such bill with his objections thereto, in the office of secretary of state, who shall lay the same before the legislature at its next session in like manner as if it had been returned by the governor: *Provided*, That within forty-five days next after the adjournment, Sundays excepted, the legislature may, upon petition by a two-thirds majority or more of the membership of each house, reconvene in extraordinary session, not to exceed five days duration, solely to reconsider any bills vetoed. If any bill presented to the governor contain several sections or appropriation items, he may object to one or more sections or appropriation items while approving other portions of the bill: *Provided*, That he may not object to less than an entire section, except that if the section contain one or more appropriation items he may object to any such appropriation item or items. In case of objection he shall append to the bill, at the time of signing it, a statement of the section or sections, appropriation item or items to which he objects and the reasons therefor; and the section or sections, appropriation item or items so objected to shall not take effect unless passed over the governor's objection, as hereinbefore provided. The provisions of Article II, section 12 insofar as they are inconsistent herewith are hereby repealed. [AMENDMENT 62, 1974 Senate Joint Resolution No. 140, p 806. Approved November 5, 1974.]

Article IV, Section 9: **REMOVAL OF JUDGES, ATTORNEY GENERAL, ETC.** Any judge of any court of record, the attorney general, or any prosecuting attorney may be removed from office by joint resolution of the legislature, in which three-fourths of the members elected to each house shall concur, for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution.

Article V, Section 1: **IMPEACHMENT - POWER OF AND PROCEDURE.** The house of representatives shall have the sole power of impeachment. The concurrence of a majority of all the members shall be necessary to an impeachment. All impeachments shall be tried by the senate, and, when sitting for that purpose, the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

Article VIII, Section 1(i): The legislature shall prescribe all matters relating to the contracting, funding or refunding of debt pursuant to this section, including: The purposes for which debt may be contracted; by a favorable vote of three-fifths of the members elected to each house, the amount of debt which may be contracted for any class of such purposes; the kinds of notes, bonds, or other evidences of debt which may be issued by the state; and the manner by which the treasurer shall determine and advise the legislature, any appropriate agency, officer, or instrumentality of the state as to the available debt capacity within the limitation set forth in this section. The legislature may delegate to any state officer, agency, or instrumentality any of its powers relating to the contracting, funding or refunding of debt pursuant to this section except its power to determine the amount and purposes for which debt may be contracted.

Article XXIII, Section 1: **[AMENDMENTS -] HOW MADE.** Any amendment or amendments to this Constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the state for their approval, at the next general election; and if the people approve and ratify such amendment or amendments, by a majority of the electors voting thereon, the same shall become part of this Constitution, and proclamation thereof shall be made by the governor: *Provided*, That if more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such amendments separately. The legislature shall also cause notice of the amendments that are to be submitted to the people to be published at least four times during the four weeks next preceding the election in every legal newspaper in the state: *Provided*, That failure of any newspaper to publish this notice shall not be interpreted as affecting the outcome of the election. **[AMENDMENT 37, 1961 Senate Joint Resolution No. 25, p 2753. Approved November, 1962.]**

Article XXIII, Section 2: **CONSTITUTIONAL CONVENTIONS.** Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election, for or against a convention, and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session, provide by law for calling the same; and such convention shall consist of a number of members, not less than that of the most numerous branch of the legislature.

Article XXVIII, Section 1: **SALARIES FOR LEGISLATURE, ELECTED STATE OFFICIALS, AND JUDGES - INDEPENDENT COMMISSION - REFERENDUM.** Salaries for members of the legislature, elected officials of the executive branch of state government, and judges of the state's supreme court, court of appeals, superior courts, and district courts shall be fixed by an independent commission created and directed by law to that purpose. No state official, public employee, or person required by law to register with a state agency as a lobbyist, or immediate family member of the official, employee, or lobbyist, may be a member of that commission.

As used in this section the phrase "immediate family" has the meaning that is defined by law.

Any change of salary shall be filed with the secretary of state and shall become law ninety days thereafter without action of the legislature or governor, but shall be subject to referendum petition by the people, filed within the ninety-day period. Referendum measures under this section shall be submitted to the people at the next following general election, and shall be otherwise governed by the provisions of this Constitution generally applicable to referendum measures. The salaries fixed pursuant to this section shall supersede any other provision for the salaries of members of the legislature, elected

officials of the executive branch of state government, and judges of the state's supreme court, court of appeals, superior courts, and district courts. The salaries for such officials in effect on January 12, 1987, shall remain in effect until changed pursuant to this section.

After the initial adoption of a law by the legislature creating the independent commission, no amendment to such act which alters the composition of the commission shall be valid unless the amendment is enacted by a favorable vote of two-thirds of the members elected to each house of the legislature and is subject to referendum petition.

Article XXXII, Section 1: **SPECIAL REVENUE FINANCING.** The legislature may enact laws authorizing the state, counties, cities, towns, port districts, or public corporations established thereby to issue nonrecourse revenue bonds or other nonrecourse revenue obligations and to apply the proceeds thereof in the manner and for the purposes heretofore or hereafter authorized by law, subject to the following limitations:

(a) Nonrecourse revenue bonds and other nonrecourse revenue obligations issued pursuant to this section shall be payable only from money or other property received as a result of projects financed by the nonrecourse revenue bonds or other nonrecourse revenue obligations and from money and other property received from private sources.

(b) Nonrecourse revenue bonds and other nonrecourse revenue obligations issued pursuant to this section shall not be payable from or secured by any tax funds or governmental revenue or by all or part of the faith and credit of the state or any unit of local government.

(c) Nonrecourse revenue bonds or other nonrecourse revenue obligations issued pursuant to this section may be issued only if the issuer certifies that it reasonably believes that the interest paid on the bonds or obligations will be exempt from income taxation by the federal government.

(d) Nonrecourse revenue bonds or other nonrecourse revenue obligations may only be used to finance industrial development projects as defined in legislation.

(e) The state, counties, cities, towns, port districts, or public corporations established thereby, shall never exercise their respective attributes of sovereignty, including but not limited to, the power to tax, the power of eminent domain, and the police power on behalf of any industrial development project authorized pursuant to this section.

After the initial adoption of a law by the legislature authorizing the issuance of nonrecourse revenue bonds or other nonrecourse revenue obligations, no amendment to such act which expands the definition of industrial development project shall be valid unless the amendment is enacted by a favorable vote of three-fifths of the members elected to each house of the legislature and is subject to referendum petition.

Sections 5 and 7 of Article VIII and section 9 of Article XII shall not be construed as a

limitation upon the authority granted by this section. The proceeds of revenue bonds and other revenue obligations issued pursuant to this section for the purpose of financing privately owned property or loans to private persons or corporations shall be subject to audit by the state but shall not otherwise be deemed to be public money or public property for purposes of this Constitution. This section is supplemental to and shall not be construed as a repeal of or limitation on any other authority lawfully exercisable under the Constitution and laws of this state, including, among others, any existing authority to issue revenue bonds. [AMENDMENT 73, 1981 Substitute House Joint Resolution No. 7, p 1794. Approved November 3, 1981.]

Exhibit E

Tacoma, WA - Monday, July 23, 2007

[< Back to Regular Story Page](#)

Eyman gives it another go

Latest initiative effort rounded up more than 300,000 signatures, he says

SEAN COCKERHAM; The News Tribune

Last updated: July 9th, 2007 09:40 AM (PDT)

Professional initiative promoter Tim Eyman said Friday that he turned in more than 313,000 signatures for a ballot measure to make it tougher for the state to raise taxes and fees. That should be enough to get it on the November ballot.

Initiative 960 will qualify to go to voters if the secretary of state determines at least 224,880 of the signatures are valid. That would break a losing streak for Eyman, who failed to get his last two initiatives on the ballot.

Friday was the deadline for initiative backers to submit signatures to the secretary of state's office for review. Eyman was the only one to turn signatures in. That means none of the other three dozen initiatives filed will make it to the ballot this year.

I-960 calls for either voter approval or a two-thirds supermajority in the Legislature to raise taxes. There would also be a nonbinding public advisory vote anytime the Legislature passed a tax hike that included an "emergency clause" to make it go into effect immediately, thus preventing voters from repealing it in a referendum. And state agencies could not increase fees without a legislative vote of approval.

I-960 would also require the state budget office to issue public announcements any time a tax bill is filed or makes it to a committee in Olympia. The announcements would have to include how much the bill would cost taxpayers over 10 years.

Eyman's benefactor, retired Woodinville investor Michael Dunmire, has bankrolled the initiative with \$400,000 in contributions.

"It puts Olympia on a much shorter leash," Eyman said upon submitting the signatures.

I-960 has attracted influential foes.

A coalition including the state teacher's union, AARP of Washington and the Seattle Chamber of Commerce has formed to fight the initiative at the ballot.

They said it would hurt schools, health care and investments in areas like transportation that the economy needs. The I-960 opponents argue it would gum up the works in the Legislature and might even end up requiring a two-thirds vote to pass the budget, something Eyman denies.

The environmental group Futurewise and the Service Employees International Union are attempting to stop the initiative in court. They assert that requiring a two-thirds supermajority vote on any tax increase can be done only through a constitutional amendment. Eyman counters that the supermajority requirement for a tax increase already exists in state law, as a result of Initiative 601, and this measure just tries to make it more politically difficult for legislators to keep finding ways around it.

Regardless, courts rarely strike down an initiative before it goes to the ballot.

Initiatives that failed to make the ballot at Friday's deadline include measures to overturn the state's gay civil rights law and to crack down on public services for illegal immigrants.

Bob Baker of Mercer Island said supporters collected about 160,000 signatures for his measure requiring proof of U.S. citizenship to qualify for medical, housing and other benefits. Baker blamed lack of funding for not making it.

"The way the initiative process works in this state, it's very difficult. You have to go out and pay people to get signatures," Baker said.

Sean Cockerham:253-597-8603

sean.cockerham@thenewstribune.com

Originally published: July 7th, 2007 01:20 AM (PDT)

[Privacy Policy](#) | [User Agreement](#) | [Contact Us](#) | [About Us](#) | [Site Map](#) |
[Jobs@The TNT](#) | [RSS](#)



1950 South State Street, Tacoma, Washington 98405 253-597-8742



© Copyright 2007 Tacoma News, Inc. A subsidiary of The McClatchy Company

Eyman has new Washington initiative

314,000 signatures are in for anti-tax I-960

Curt Woodward

Associated Press

July 7, 2007

OLYMPIA – Activist Tim Eyman may have the initiative slate to himself this fall after turning in boxes of petitions that he said will guarantee an audience with voters.

State officials said Eyman's latest campaign – Initiative 960, an anti-tax measure – was the only one to turn in signatures by Friday, the last day for initiative submissions.

Under state law, initiative promoters must collect nearly 225,000 valid voter signatures to qualify measures for the ballot.

Eyman, flanked by partners Mike and Jack Fagan of Spokane, said he was dropping off more than 314,000. Secretary of State Sam Reed may have the petitions verified by month's end.

Democratic Gov. Chris Gregoire already has called Eyman's latest measure unnecessary. Other critics, including environmentalists and labor unions, plan an opposition campaign and have challenged the measure in court.

I-960 would make it harder for the Legislature to raise taxes by broadening existing requirements for a two-thirds majority to pass tax increases.

If lawmakers can't get that supermajority, they'd have to submit taxes for approval by a simple majority of voters. And even if taxes clear the two-thirds hurdle in Olympia, they would be subject to a nonbinding public advisory vote.

Fees imposed by state agencies also would be subject to approval by the Legislature.

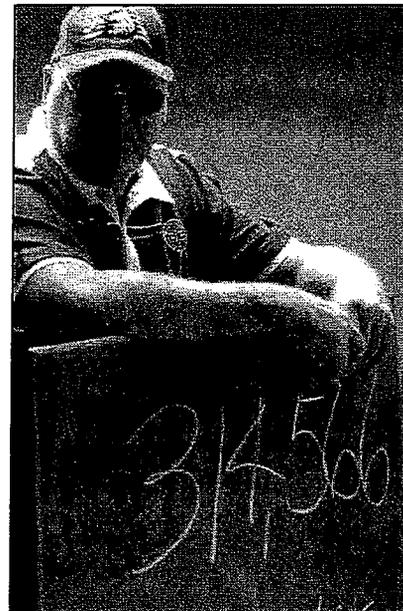
The initiative also would require the state budget office to provide a flood of information about every tax and fee bill introduced in Olympia, including estimates of how much they would cost taxpayers over 10 years.

Eyman said the initiative is needed because lawmakers have found too many ways to skirt the existing supermajority voting rules.

An ongoing court challenge to I-960 argues that facets of Eyman's measure need a constitutional amendment, not a citizen initiative. The courts, however, typically don't weigh in on the constitutionality of measures before they get a vote.

The "No on I-960" campaign includes the AARP, the Washington Education Association, the Greater Seattle Chamber of Commerce and the politically active Service Employees International Union Local 775.

Their message is: Eyman's measure will gum up efforts to pay for the priorities voters have asked lawmakers to tackle, spokesman Christian Sinderman said.



Spokane's Jack Fagan takes a break Friday in Olympia after he and others filed what they say is more than 314,000 signatures on behalf of an initiative designed to make it harder for state lawmakers to increase taxes. The Spokesman-Review (RICHARD ROESLER The Spokesman-Review)

Related stories

[Elections - General news](#)

"This is just a monkey wrench designed to create more bureaucracy and confuse voters," Sinderman said.

Eyman has raised about \$550,000, including some \$400,000 from Kirkland investment executive Mike Dunmire.

Most of the money was spent during signature gathering, and Eyman declined to say Friday how much he thinks the rest of the campaign will cost.

Referendum sponsors, meanwhile, need fewer signatures and have until July 21 to submit them.

At least one referendum is expected to make the ballot. R-67 would let voters decide whether to keep a new law that allows consumers to sue insurers for triple damages for unreasonably denying a claim.

The Seattle Times

seattletimes.com

Friday, July 6, 2007 - 12:00 AM

Permission to reprint or copy this article or photo, other than personal use, must be obtained from The Seattle Times. Call 206-464-3113 or e-mail resale@seattletimes.com with your request.

Eyman turns in signatures to put Initiative 960 on ballot

By Andrew Garber
Seattle Times staff reporter

OLYMPIA — Tim Eyman apparently got the signatures needed to put a measure on the ballot that could make it tougher for the state Legislature to increase taxes and for state agencies to increase fees.

Opponents have already started a campaign to defeat Initiative 960, which they contend would cause gridlock in the Legislature.

Eyman, who earns a living trying to pass ballot measures, says he turned in 314,566 signatures today, the deadline for turning them in. State law required valid signatures from 224,880 registered voters.

Initiative backers generally need to collect 25 to 30 percent more signatures than required to make sure they have enough to qualify.

Eyman says I-960 would pressure the state Legislature to take a two-thirds vote in both chambers in order to pass tax increases. Also, any tax approved would be placed on the ballot for a public advisory vote.

In addition, the measure would require the Legislature to approve any fee increases by state agencies. Currently, agencies are allowed to increase fees on their own as long as they don't exceed limits set by state law.

The initiative also requires additional public notification when the Legislature considers tax bills and a 10-year estimate of how much the proposals would cost.

Eyman contends the initiative is largely intended to reinstate I-601, a spending-limit measure approved by Washington voters in 1993.

Over the years, the Legislature has tinkered with I-601 to get around both its spending limit and a supermajority vote requirement to increase taxes.

The new ballot measure "puts Olympia on a much shorter leash," Eyman said, although he acknowledged the Legislature would still have the ability to suspend an existing two-thirds voting requirement for tax increases, even if I-960 passes.

Eyman contends that if voters approve his initiative, the Legislature would be under intense public pressure not so sidestep the provision.

The governor's budget office declined to comment about the initiative.

Opponents say Eyman is oversimplifying what the measure does.

"It is designed to tie state government in knots and make it less efficient and less responsive," said Christian Sinderman, a Democratic consultant involved in the No on I-960 campaign.

Opponents say the initiative is difficult to interpret, but it could be read to require a two-thirds vote for such actions as taking existing tax revenue and using it to increase funding for education and health care.

In other words, they say, simply passing the budget — without any tax increases — could require a two-thirds vote.

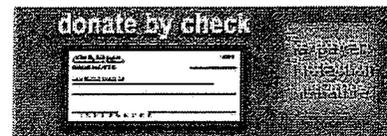
Eyman disagrees. "The opponents have been misreading and mischaracterizing I-960 from the very beginning," he said.

Andrew Garber: agarber@seattletimes.com or 360-236-8268

Copyright © 2007 The Seattle Times Company



Voters Want More Choices



Solving Problems Politicians Won't, In Washington State

HOME PAGE

Donate by
Credit Card

Donate by
Check

Text of I-
960

Newsletters
and Articles

Join Our
Email List

Join Our
Mailing List

Email Us

Our Resume

Email
Jack Fagan

Request
Petitions
by Postal
Mail

YOU DID IT!

Thanks to all of you, 313,000+ voters voluntarily signed an Initiative 960 petition. Such a huge number of voter signatures guarantees I-960 will be on the ballot.

Dear Fellow Taxpayer:

Thanks to your months of hard work, persistence, and consistent financial support, on Friday, July 6, the Initiative 960 campaign submitted over 313,000 voter signatures to the Secretary of State's office in Olympia. That's nearly 100,000 extra - there's no doubt that this guarantees I-960 will be on the November ballot. We couldn't be happier. We really appreciate everyone's extraordinary effort. We look forward to advocating for its approval by voters this fall.

I-960 is appropriately called the Taxpayer Protection Initiative because it will do just that.

Over 13 years ago, the voters of Washington overwhelmingly approved Initiative 601 which put reasonable limits on Olympia's out-of-control fiscal policies. Despite repeated Chicken Little, sky-is-falling predictions by opponents and many in the media, I-601 has worked well at stopping the boom-and-bust, roller coaster ride of fiscal chaos that was common in previous decades. But during the past 13 years, the Legislature has punched loophole after loophole into it. I-960 closes those loopholes and expands the transparency, broadens the public's participation, and increases the accountability for any tax increase. It puts Olympia on a much shorter leash. As everyone knows by now, I-960 will:

*** Allow either two-thirds legislative approval or voter approval at an election for any tax increase,**

*** Ensure a public vote on any tax increase that the Legislature**

blocks by declaring it an "emergency," and

*** Require public press releases by the state budget office for any bills proposing higher taxes (identifying their long-term costs and the bill's sponsors, voting records, and contact information) to be promptly and broadly disseminated to the people and the press at every stage of the legislative process.**

From I-960's intent section: "With this measure, the people intend to protect taxpayers by creating a series of accountability procedures to ensure greater legislative transparency, broader public participation, and wider agreement before state government takes more of the people's money." I-960's policies will protect taxpayers once and for all.

Now we ask you to please help us

Jack, Mike, and I only receive compensation from voluntary donations. We rely on our thousands of supporters to contribute to Help Us Help Taxpayers, a stand-alone campaign account that compensates us for our effective political work. This is completely unique. In the political world, no one organizes things this way. Everyone else earns either a fixed salary or a percentage of the funds raised from the campaign. We don't do that.

We don't decide our worth, you do.

Like I said, this is unique. But frankly, we're proud of it. We only receive what our supporters decide to give. And all of you are asked to contribute only AFTER the initiative's signature drive is over, ensuring that 100% of your contributions to the signature drive get spent on the signature drive. To say the least, it's an extremely risky way to be compensated because we must rely on everyone's voluntary participation.

Our program is based on faith - your faith in us - and our faith in you.

So, if you appreciate our past and current efforts and want us to continue fighting for taxpayers, please provide us with your most generous contribution. Simply go to the top of this webpage and click on either "donate by check" or "donate by credit card". Either way, please send in your most generous donation RIGHT NOW. And please consider a monthly pledge through the end of December for our fund. We ask you to please help us help taxpayers.

Congratulations on getting I-960 on the ballot - we look forward to working with all of you to get it approved by voters. As for our compensation fund, we would be extremely grateful for any financial assistance you can offer. Thanks.

Best Regards, Tim Eyman, Jack Fagan, & Mike Fagan, Fighting for Taxpayers for Ten Years

P.S. There are thousands of politicians, bureaucrats, lobbyists, and special interest groups working each and every day to raise your taxes. Shouldn't there be at least one person, one team, one organization that fights to lower your taxes? Please help us so we can continue our successful efforts on behalf of taxpayers.

EACH YEAR, FROM JANUARY THROUGH JUNE, WE ASK THAT YOU FOCUS YOUR DONATIONS TOWARD THE SIGNATURE GATHERING CAMPAIGN - THIS YEAR, THANKS TO YOUR HELP, WE SUCCEEDED AT QUALIFYING I-960 FOR THE BALLOT

EACH YEAR, FROM JULY THROUGH DECEMBER, WE ASK THAT YOU FOCUS YOUR CONTRIBUTIONS TOWARD HELP US HELP TAXPAYERS, THE COMPENSATION FUND FOR JACK, MIKE, AND TIM

NOW THAT I-960 HAS QUALIFIED, WE ASK THAT EACH AND EVERY ONE OF YOU SEND IN YOUR MOST GENEROUS CONTRIBUTION SO WE CAN CONTINUE OUR FIGHT ON BEHALF OF TAXPAYERS

WE'RE REALLY COUNTING ON YOU

HELP US HELP TAXPAYERS
 "Compensation fund for Tim, Jack & Mike"
 PO Box 18250
 Spokane, WA 99228
 jakatak@comcast.net



Jack Fagan, Tim Eyman, Mike Fagan

Directors of Voters Want More Choices

TAX RELIEF EARNED OVER THE YEARS (through 2007)

Over \$7.4 billion in tax savings so far - we're fighting for taxpayers.

YEAR	I-695 \$30 Tabs	I-747 1% Property Tax Cap	I-776 \$30
1999	\$0	\$0	\$0
2000	\$743 Million	\$0	\$0
2001	\$788 Million	\$0	\$0
2002	\$834 Million	\$68 Million	\$0
2003	\$884 Million	\$130 Million	\$50 Million
2004	\$936 Million	\$208 Million	\$51 Million
2005	\$990 Million	\$279 Million	\$52 Million
2006	\$1.047 Billion	\$374 Million	\$53 Million
2007	\$1,107 Billion	\$501 Million	\$54 Million
Totals	\$7.329 Billion *	\$1.560 Billion *	\$260 Million *

Grand Total: \$9.149 billion in tax savings so far !

AND THANKS TO YOUR SUPPORT AND HARD WORK, INITIATIVE 900
WILL BENEFIT THE TAXPAYERS FOR DECADES TO COME BY
IMPROVING THE EFFECTIVENESS AND EFFICIENCY OF STATE AND
LOCAL GOVERNMENTS BY AUDITING THEIR PERFORMANCE.



[donate by credit card](#) :: [donate by check](#) :: [email list](#) :: [mailing list](#) :: [email us](#) :: [resume](#) :: [email jack fagan](#)

Voters Want More Choices is a grassroots taxpayer-protection organization with about
26,000 supporters throughout the state of Washington.

Paid for by Voters Want More Choices :: PO Box 18250, Spokane, WA 99228 :: p 425-493-8707 :: f 509-467-
4323

© 2006. Voters Want More Choices. All rights reserved.

Webmaster
Mail

Exhibit F

133 Pa.Cmwth. 85, 574 A.2d 1190, 60 Ed. Law Rep. 827
(Cite as: 133 Pa.Cmwth. 85, 574 A.2d 1190)

H

Hempfield School Dist. v. Election Bd. of Lancaster
County
Pa.Cmwth., 1990.

Commonwealth Court of Pennsylvania.
HEMPFIELD SCHOOL DISTRICT, Appellant,

v.

ELECTION BOARD OF LANCASTER
COUNTY, Appellee.

Argued May 3, 1990.

Decided May 9, 1990.

School district brought action seeking to enjoin county election board from including on ballot **nonbinding referendum** question concerning school board's plan to build new high school. The Court of Common Pleas, No. 1407 of 1990, Lancaster County, Wilson Bucher, Senior Judge, dismissed school's request, and school appealed. The Commonwealth Court, No. 898 C.D. 1990, Smith, J., held that: (1) decision of whether or not to raise question of funding for new public high school on ballot as **nonbinding referendum** was prerogative of school board, and not election board; (2) election board had no legal authority to place **nonbinding referendum** on primary ballot; and (3) unlawful action by election board was per se immediate and irreparable harm which warranted issuing injunction.

Reversed.

West Headnotes

[1] Appeal and Error 30 ⇨854(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k851 Theory and Grounds of Decision
of Lower Court

30k854 Reasons for Decision

30k854(1) k. In General. Most

Cited Cases

Scope of review of Commonwealth Court is limited to determination of whether or not there are any apparently reasonable grounds for action of Court of Common Pleas. 2 Pa.C.S.A. §§ 551-555, 751-754.

[2] Elections 144 ⇨54

144 Elections

144III Election Districts or Precincts and
Officers

144k54 k. Powers and Proceedings of
Officers in General. Most Cited Cases

Governmental body such as election board has only those powers expressly granted to it by legislature. 25 P.S. §§ 2600-3573, 2641(a), 2645(a), par. 1.

[3] Statutes 361 ⇨341

361 Statutes

361X Referendum

361k341 k. Referendum in General. Most
Cited Cases

Election Code does not give election board discretion to place **nonbinding referendum** on ballot. 24 P.S. § 7-701.1; 25 P.S. § 2645.

[4] Schools 345 ⇨71

345 Schools

345II Public Schools

345II(D) District Property

345k66 School Buildings

345k71 k. Construction. Most Cited
Cases

Schools 345 ⇨74

345 Schools

345II Public Schools

345II(D) District Property

345k66 School Buildings

345k74 k. Sale or Other Disposition.
Most Cited Cases

133 Pa.Cmwlt. 85, 574 A.2d 1190, 60 Ed. Law Rep. 827
(Cite as: 133 Pa.Cmwlt. 85, 574 A.2d 1190)

School directors have option as to means for obtaining public review of construction or leasing of new school building or making substantial additions to existing buildings, and, thus, election board lacked legal authority to place **nonbinding referendum** concerning school construction issues on ballot. 24 P.S. § 7-701.1.

[5] Injunction 212 ⇐80

212 Injunction

212II Subjects of Protection and Relief

212II(E) Public Officers and Entities

212k80 k. Elections and Election Officers.

Most Cited Cases

Unlawful action by election board in placing on ballot **nonbinding referendum** concerning school construction was per se immediate and irreparable harm, and, thus, school board was entitled to have election board enjoined from including **nonbinding referendum** on ballot.

****1190 *87** Robert A. Longo, Martin, Honaman & Longo, Lancaster, for appellant.

John W. Espenshade, Sol., for appellee.

George T. Brubaker, with him, Robert M. Frankhouser, Jr., Hartman, Underhill & Brubaker, Lancaster, for amici curiae, School Dist. of Penn Manor, and the School Dist. of Lancaster.

Before MCGINLEY and SMITH, JJ., and BARRY, Senior Judge.

SMITH, Judge.

Before this Court is the appeal of Hempfield School District (Hempfield) from the April 23, 1990 order of the Court of Common Pleas of Lancaster County dismissing Hempfield's request to enjoin the Election Board of Lancaster County (Election Board) from including a non-binding referendum question on the May 15, 1990 primary ballot pursuant to request of the Council of Concerned Citizens, the Board of Supervisors of Hempfield Township and the Mountville Borough Council.

The Election Board held a special meeting on March 26, 1990 at the conclusion of which a resolution was passed authorizing placement of a non-binding referendum on the May 15, 1990

ballot. The proposed referendum reads as follows: "DO YOU FAVOR THE HEMPFIELD SCHOOL ****1191** BOARD'S PLAN TO BUILD A NEW HIGH SCHOOL?" On April 5, 1990, Hempfield filed with the trial court a request that the Election Board be enjoined from including the referendum on the ballot which was denied by opinion and order dated April 23, 1990.

[1] The issues presented in this case of first impression include whether the trial court erred in refusing to enjoin the Election Board from including a question on the ballot ***88** for the May 15, 1990 primary election in the form of a non-binding referendum; and whether Hempfield may seek review of a decision of the Election Board pursuant to the Local Agency Law, 2 Pa.C.S. §§ 551-555, 751-754.^{FN1}

FN1. This Court's scope of review is limited to a determination of whether or not there are any apparently reasonable grounds for the action of the trial court. *Valley Forge Historical Society v. Washington Memorial Chapel*, 493 Pa. 491, 426 A.2d 1123 (1981).

[2][3] Hempfield initially asserts that the Election Board does not have the statutory authority to place a non-binding referendum on the ballot on its own initiative. It is *a priori* that a governmental body such as an election board has only those powers expressly granted to it by the legislature. *See, e.g., Deer Creek Drainage v. County Board of Elections*, 475 Pa. 491, 381 A.2d 103 (1977); *Allegheny County Port Authority v. Pennsylvania Public Utility Commission*, 427 Pa. 562, 237 A.2d 602 (1968). The Election Board was created by the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3573. Section 301(a) of the Election Code, 25 P.S. § 2641(a), calls for a county board of elections in and for each county of this Commonwealth which shall have jurisdiction over the conduct of primaries and elections in that county in accordance with the provisions of the Election Code. Section 302 of the Election Code, 25 P.S. § 2642, enumerates the powers and duties of those county boards as follows:

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

133 Pa.Cmwlth. 85, 574 A.2d 1190, 60 Ed. Law Rep. 827
(Cite as: 133 Pa.Cmwlth. 85, 574 A.2d 1190)

The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following:

Further, Section 305(a)1, 25 P.S. § 2645(a)1, refers to the inclusion of "special questions" on the ballot as follows: The County shall be liable for the expenses ... on any special question which is required by law to be, or which is, at the discretion of the county board, as *hereinafter provided*, printed on the regular ballot after the list of *89 the candidates, or on the same voting machine as the list of candidates. (Emphasis added.)

Nowhere is it provided in the Election Code that county election boards have the discretion to authorize non-binding referenda questions on the ballot. The phrase "as hereinafter provided" in Section 2645 makes clear that the election boards only have discretion to place questions on the ballot when the Election Code specifically grants them that discretionary power. Analysis of the succeeding provisions of the Election Code fails to demonstrate any instances in which the Election Board is conferred discretion to place a question on the ballot.

In 1973, the legislature approved the Act of June 27, 1973, P.L. 75, 24 P.S. § 7-701.1 (Act 34), which granted new powers to the Pennsylvania Department of Education for review and approval of the building of school district facilities. More specifically, Act 34 set forth specific procedures to involve the public in decisions related to the construction or leasing of new school buildings or making substantial additions to existing school buildings. Act 34 provides in pertinent part:

[T]he board of school directors of any school district ... shall not construct, enter into a contract to construct or enter into a contract to lease a new school building or substantial addition to an existing school building without the consent of the electors obtained by referendum or without holding a public hearing as hereinafter provided.

**1192 24 P.S. § 7-701.1. In addition, Act 34

clearly requires that the board of school directors, not the election board, shall obtain the consent of the electorate by referendum or public hearing prior to the construction or leasing of a new school building or making substantial additions to an existing school building.

Several trial courts of this Commonwealth have confronted the issue of non-binding referendum by ballot. In *Northwestern Lehigh School District v. Election Board of Lehigh County*, 43 Lehigh Law Journal 99 (1988), the court stated:

*90 The issue of the right to have non-binding referenda on the ballot has been subjected to judicial review in this and other counties a sufficient number of times to have developed a certain amount of consistency with uniform results. Thus, in *Upper Saucon Township v. The Election Board of Lehigh County*, 83-C-279, following *Lansdale v. Election Board of Montgomery*, 7 D. & C.3d 220 (1978), this court held that in the absence of any specific legislative authority the court is without authority to compel an election board to place a non-binding advisory question on the ballot.

Id. at 101. In *In Re: School Building Referendum, Shanksville Stoney Creek School District*, 27 Somerset Legal Journal 10 (1971), the Court of Common Pleas of Somerset County held that there cannot be a non-binding referendum by ballot unless there is a specific constitutional or statutory authorization for it. Moreover, in the matter of *Allentown School District Referendum*, 13 D. & C.3d 741 (1980), where the Lehigh County Election Board attempted to place a non-binding question on the ballot in the 1980 primary election, the trial court in enjoining the election board action held that questions may not be placed before the electorate without limitations, particularly in those instances where the legislature has clearly delegated to school board members the operation of school districts. The court further observed that it was powerless to sanction ballot status for non-binding referenda questions and that "[i]t is not the intention of the court, nor would it be in the public interest, to open a floodgate of advisory questions on every issue of public moment." *Id.* at 744.

[4] Finally, in *Williams v. Rowe*, 3

133 Pa.Cmwlt. 85, 574 A.2d 1190, 60 Ed. Law Rep. 827
(Cite as: 133 Pa.Cmwlt. 85, 574 A.2d 1190)

Pa.Commonwealth Ct. 537, 544-45, 283 A.2d 881, 885 (1971), this Court held that:

One of the prices paid for the creation of a representative democracy is the vesting by the electorate of trust and responsibility in its elected representatives. Discretion is placed within the hands of the municipal legislators and we must accept the lawful exercise of this discretion. *91 The efficiency of government, its stability, and the protection of the public at large necessitates the creation of certain categories wherein the legislative prerogative is unfettered by the initiative and referendum processes. The electorate nevertheless is not helpless in defending itself against unlawful legislation in the statutorily excluded areas, for it is before our courts that one may come and assert the illegality of a particular piece of legislation. Furthermore, it is at the ballot box that a voter may express his disapproval of the legislative programs of his elected officials.

This logic has been used by a number of trial courts in situations similar to the one addressed by this Court today. See *Allentown School District Referendum*; *Roth v. Saeger*, 36 Lehigh Law Journal 515 (1976). Thus, although the trial court here found that the non-binding referendum represents a First Amendment right, this Court must recognize that the electorate does not have an unfettered right to question school board actions or intended actions.

It is therefore Hempfield's position, and this Court concurs, that applicable law provides to the school directors the option as to the means for obtaining public review of the construction or leasing of a new school building or making substantial additions to existing school buildings. It is thus clear that Act 34 placed the decision in the hands of the local school board, not the election board, as to exactly how to obtain public input (via elector referendum or public hearing) into plans to construct or lease a new school building or to make a substantial**1193 addition to an existing school building. Hence, the action of the Election Board was a violation of Act 34. As such, the Election Board here had no legal authority for its decision to place the non-binding referendum on the May 15, 1990 primary ballot.

[5] The Election Board contends that Hempfield is not entitled to an injunction because the referendum in question will not submit Hempfield to great and irreparable harm. That contention, however, must be rejected as the unlawful action by the Election Board per se constitutes immediate *92 and irreparable harm.^{FN2} *Commonwealth v. Coward*, 489 Pa. 327, 414 A.2d 91 (1980); *Pennsylvania Public Utility Commission v. Israel*, 356 Pa. 400, 52 A.2d 317 (1947); *Milk Marketing Board v. Kreider Dairy Farms*, 50 Pa.Commonwealth Ct. 560, 413 A.2d 426 (1980); *City of Erie v. Northwestern Pennsylvania Food Council*, 14 Pa.Commonwealth Ct. 355, 322 A.2d 407 (1974).

FN2. Before this Court is the appeal from the denial of a preliminary injunction by the trial court. This Court notes that were this an appeal of the merits of the underlying complaint and this Court were to determine the Election Board resolution to be an adjudication, it would appear that such action was invalid for failure to comply with the provisions of the Local Agency Law concerning notice and opportunity for hearing. See also *Callahan v. Pennsylvania State Police*, 494 Pa. 461, 431 A.2d 946 (1981). Accordingly, there would be every likelihood of success on the merits and the preliminary injunction was therefore improperly denied.

Accordingly, this Court concludes that there were no reasonable grounds for the action of the trial court and the injunctive relief requested by Hempfield must be granted. The decision of the trial court is reversed, and the Election Board of Lancaster County is enjoined from including the aforementioned non-binding referendum on the May 15, 1990 primary election ballot pursuant to order entered by this Court on May 8, 1990.

Pa.Cmwlt., 1990.
Hempfield School Dist. v. Election Bd. of Lancaster County
133 Pa.Cmwlt. 85, 574 A.2d 1190, 60 Ed. Law Rep. 827

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

133 Pa.Cmwlth. 85, 574 A.2d 1190, 60 Ed. Law Rep. 827
(Cite as: 133 Pa.Cmwlth. 85, 574 A.2d 1190)

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

LEXSEE 36 CAL.3D 687

AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS et al., Petitioners, v. MARCH FONG EU, as Secretary of State, etc., et al., Respondents; LEWIS K. UHLER, Real Party in Interest

S.F. No. 24746

Supreme Court of California

36 Cal. 3d 687; 686 P.2d 609; 206 Cal. Rptr. 89; 1984 Cal. LEXIS 210

August 27, 1984

SUBSEQUENT HISTORY:

On October 25, 1983, the Judgment was Modified to Read as Printed Above.

DISPOSITION:

Let a peremptory writ of mandate issue commanding respondents not to take any action, including the expenditure of public funds, to place the proposed Balanced Budget Initiative on the November 6, 1984, General Election ballot. We reserve jurisdiction for the purpose of considering petitioners' request for an award of attorney's fees.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner organizations and taxpayers filed an original action in the Supreme Court of California for a writ of mandamus to order respondent state officials to refrain from taking any action, including the expenditure of public funds, to place a proposed balanced federal budget statutory initiative on the November 1984 ballot.

OVERVIEW: Petitioners taxpayers and organizations initiated an action to order respondents state officials to refrain from taking action to place the proposed balanced federal budget statutory initiative on the November 1984 ballot. The court issued a peremptory writ of mandate commanding respondents not to take any action, including the expenditure of public funds, to place the proposed balanced budget initiative on the general election ballot. The court found that the initiative, to the extent that it applied for a constitutional convention or required the legislature to do so, did not conform to U.S. Const. art. V which provides for applications by the legislatures of two-thirds of the several states, not by the people through the initiative. The court also concluded that the

measure exceeded the scope of the initiative power under the controlling provisions of Cal. Const. art. II, § 8 and art. IV, § 1 because the balanced budget initiative did not adopt a statute or enact a law. It therefore concluded that the balanced budget initiative was invalid as a whole.

OUTCOME: The court issued a peremptory writ commanding respondents state officials not to take action to place the proposed balanced budget initiative on the November 6, 1984, general election ballot because it found that Article V of the United States Constitution provided for applications by the legislatures of two-thirds of the several states, not by the people through the initiative, and the measure exceeded initiative power.

LexisNexis(R) Headnotes**Constitutional Law > Amendment Process**

[HN1] U.S. Const. art. V. provides in part that 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, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress.

Constitutional Law > Amendment Process**Governments > Legislation > Initiative & Referendum**

[HN2] U.S. Const. art. V provides for applications by the legislatures of two-thirds of the several states, not by the people through the initiative; it envisions legislators free to vote their best judgment, responsible to their constitu-

ents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise.

*Constitutional Law > Amendment Process
Governments > Legislation > Enactment*

Governments > Legislation > Initiative & Referendum
[HN3] The initiative power is the power to adopt "statutes" -- to enact laws -- but the crucial provisions of the balanced budget initiative do not adopt a statute or enact a law. They adopt, and mandate the legislature to adopt, a resolution which does not change state law and constitutes only one step in a process which might eventually amend the federal Constitution. Such a resolution is not an exercise of legislative power reserved to the people under the California Constitution.

*Governments > Legislation > Initiative & Referendum
Governments > State & Territorial Governments > Elections*

[HN4] The purpose of an initiative is not a public opinion poll. It is a method of enacting legislation, and if the proposed measure does not enact legislation, or if it seeks to compel legislative action which the electorate has no power to compel, it should not be on the ballot.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Governments > Legislation > Initiative & Referendum
[HN5] The general rule inhibiting preelection review applies only to the contention that an initiative is unconstitutional because of its substance. If it is determined that the electorate does not have the power to adopt the proposal in the first instance the measure must be excluded from the ballot.

Civil Procedure > Parties > Real Parties in Interest > General Overview

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Larceny & Theft > General Overview

Governments > Legislation > Initiative & Referendum
[HN6] The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

Constitutional Law > Amendment Process

Governments > Legislation > Initiative & Referendum
[HN7] The application clause of U.S. Const. art. V. provides that the Congress, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments. No reported decisions have decided whether the term "legislatures" in this clause includes the reserved powers of initiative and referendum. The term "legislatures," however, also appears in the portion of U.S. Const. art. V. that specifies that an amendment becomes valid to all intents and purposes when ratified by the legislatures of three-fourths of the several states, and several cases have construed the meaning of "legislatures" in this provision.

Constitutional Law > Congressional Duties & Powers > Elections > Time, Place & Manner

Governments > Federal Government > Elections
[HN8] U.S. Const. art. I, § 4 provides that the manner of electing senators and representatives in each state shall be determined by the respective legislatures thereof, but that Congress may alter such regulations.

Governments > Legislation > Enactment

*Governments > Legislation > Initiative & Referendum
Governments > State & Territorial Governments > Legislatures*

[HN9] The legislative power of California is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum. Cal. Const. art. IV, § 1.

Governments > Legislation > Initiative & Referendum

[HN10] The 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.

Governments > Legislation > Initiative & Referendum

[HN11] Cal. Const. art. II, § 9 defines the referendum in similar terms; it is the power of the electors to approve or reject statutes.

Governments > Legislation > Initiative & Referendum

[HN12] It is the duty of the courts to jealously guard the people's right of initiative and referendum. It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled.

Governments > Legislation > Enactment

[HN13] A statute declares law; if enacted by the legislature it must be initiated by a bill, Cal. Const. art. IV, § 8, passed with certain formalities, art. IV, § 8, and presented to the governor for signature, Cal. Const. art. IV, § 10.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

On an original petition for writ of mandate, the Supreme Court directed issuance of a writ commanding the Secretary of State not to take any action, including the expenditure of public funds, to place a proposed Balanced Federal Budget Statutory Initiative on the November 6, 1984, General Election ballot. The initiative contained a resolution calling on Congress to submit a balanced budget amendment and applied to Congress for a constitutional convention to propose such an amendment, mandated the Legislature to adopt the resolution and provided sanctions for its failure to do so, and further provided for adoption of the resolution by the people with directions to the Secretary of State to transmit it to Congress if the Legislature failed to adopt it within 40 legislative days. The court held that the initiative, to the extent that it applied for a constitutional convention or required the Legislature to do so, did not conform to U.S. Const., art. V, providing for applications by the "Legislatures of two-thirds of the several states," not by the people through their initiative. The court further held that the measure exceeded the scope of the initiative power under the controlling provisions of the California Constitution (Cal. Const., art. II, § 8 and art. IV, § 1), under which the initiative power is the power to adopt "statutes," while the crucial provisions of the balanced budget initiative did not adopt a statute or enact a law, but adopted, and mandated the Legislature to adopt, a resolution, which did not change California law and constituted only one step in a process which might eventually amend the federal Constitution. It held such a resolution was not an exercise of legislative power reserved to the people under the California Constitution. The court also held that, because the present proceeding challenged the power of the people to adopt the proposed initiative, preelection judicial review of the measure was proper. (Opinion by Broussard, J., with Bird, C. J., Mosk, Reynoso and Grodin, JJ., concurring. Separate concurring opinion by Kaus, J. Separate dissenting opinion by Lucas, J.)

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Initiative and Referendum § 8--State Elections--Preelection Judicial Review.** --Preelection judicial review of the proposed Balanced Federal Budget Statutory Initiative was proper, where the initiative was challenged on the ground that the people lacked the power to adopt the proposed initiative, specifically that under U.S. Const., art. V, the people have no constitutional authority to apply to Congress for a constitutional convention, or to mandate their Legislature to submit such an application, and the proposed initiative was not legislative in character and does not enact a statute as required by Cal. Const., art. II, § 8.

(2) **Constitutional Law § 19--Constitutionality of Legislation--Raising Questions of Constitutionality--Initiative--Under Federal Constitution--Justiciable Issues.** --In a mandamus proceeding to prohibit the Secretary of State from placing on the ballot the proposed Balanced Federal Budget Statutory Initiative, issues arising under U.S. Const., art. V, relating to constitutional amendments, were justiciable, including judicial construction of the word "Legislature" as used in art. V.

(3) **Constitutional Law § 13--Construction of Constitutions--Language of Enactment--Federal Constitution--Amendment--Legislature.** --References in U.S. Const., art. V, to an application by the "Legislatures" of two-thirds of the states, calling for a constitutional convention, refers to the representative lawmaking bodies in those states, and any application directly by the People, through their reserved legislative power, would not conform to art. V, and would be invalid.

(4) **Constitutional Law § 3--Adoption and Alteration--Amendment--Federal Constitution--State Legislature--Initiative--Constitutional Convention.** --A state may not, by initiative or otherwise, compel its legislature to apply for a constitutional convention under U.S. Const., art. V, or to refrain from such action. Under art. V, the legislators must be free to vote their own considered judgment, being responsible to their constituents through the electoral process. Thus, a proposed Balanced Federal Budget Statutory Initiative, to the extent that it mandated the California Legislature to apply to Congress for a constitutional convention, violated U.S. Const., art. V.

(5) **Constitutional Law § 3--Adoption and Alteration--Amendment--Federal Constitution--Resolutions--Validity.** --A resolution, whether by the Legislature or by the people, urging Congress to approve a proposed federal constitutional amendment is not an act of constitutional significance. Such a resolution does not call for a national convention, propose an amendment, or ratify an

36 Cal. 3d 687, *, 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

amendment and does not raise any issue under the federal Constitution. Thus, a proposed Balanced Federal Budget Statutory Initiative did not offend U.S. Const., art. V, relating to constitutional amendments, insofar as it merely adopted a resolution urging Congress to submit a constitutional amendment to the states, and mandating the Legislature to adopt that resolution.

(6a) (6b) Initiative and Referendum § 6--State Elections--Initiative Measures--To Amend Federal Constitution--Validity--Adoption of Statute. --The proposed Balanced Federal Budget Statutory Initiative, which called on Congress to submit a balanced budget amendment, and applied to Congress for a constitutional convention to propose such an amendment, mandated the Legislature to adopt such resolution and provided sanctions against the Legislature for its failure to do so, and provided for adoption of the resolution by the people in the absence of legislative action, was invalid as a whole because it failed to adopt a statute, and thus did not fall within the reserved initiative power as set out in Cal. Const., art. II, which limits the initiative power to the adoption or rejection of statutes. An initiative which seeks to do something other than enact a statute is not within the initiative power reserved by the people. Even if a portion of the initiative could be upheld on the theory that the term "statute" in art. II could be liberally construed to include a policy resolution, a submission of the measure to the voters without redrafting would confuse the electorate and mislead many voters into casting their ballot on the basis of provisions which had already been found invalid.

(7) Initiative and Referendum § 4--State Elections--Judicial Interpretation. --It is the duty of the courts to jealously guard the people's right of initiative and referendum. It is judicial policy to apply a liberal construction to the power whenever it is challenged in order that the right not be improperly annulled.

(8) Initiative and Referendum § 4--State Elections--Nature of Power. --Even under the most liberal interpretation the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body. Those powers are limited, under Cal. Const., art. II, to the adoption or rejection of "statutes," which does not include a resolution that merely expresses the wishes of the enacting body, whether that expression is purely precatory or serves as one step in a process which may lead to a federal constitutional amendment.

(9) Statutes § 1--Definitions and Distinctions--Resolution. --A statute declares law, and if enacted by the Legislature, must be initiated by a bill (Cal. Const., art. IV, § 8), passed with certain formalities and pre-

sent to the Governor for signature (Cal. Const., art. IV, § 10). Resolutions serve to express the views of the resolving body. A resolution does not require the same formality of enactment as a statute and is not presented to the Governor for approval. A resolution, as distinct from a statute, is essentially an enactment which only declares a public purpose and does not establish means to accomplish that purpose.

COUNSEL:

Marsha S. Berzon, Fred H. Altshuler, Michael Rubin, George C. Harris, Altshuler & Berzon and Laurence Gold for Petitioners.

Douglas E. Mirell, Roger M. Witten, Wilmer, Cutler & Pickering, Steven L. Mayer and Howard, Rice, Nemerovski, Canady, Robertson & Falk as Amici Curiae on behalf of Petitioners.

John K. Van de Kamp, Attorney General, and N. Eugene Hill, Assistant Attorney General, for Respondents.

Nielsen, Hodgson, Parrinello & Mueller, John E. Mueller and Marguerite Mary Leoni for Real Party in Interest.

Ronald A. Zumbrun, John H. Findley, Jonathan M. Coupal, Robert A. Destro, Clint Bolick, Maxwell A. Miller, K. Preston Oade, Jr., and E. Robert Wallach as Amici Curiae on behalf of Real Party in Interest.

JUDGES:

Opinion by Broussard, J., with Bird, C. J., Mosk, Reynoso and Grodin, JJ., concurring. Separate concurring opinion by Kaus, J. Separate dissenting opinion by Lucas, J.

OPINION BY:

BROUSSARD

OPINION:

[*690] [**611] [***91] This is an original petition for writ of mandate to order respondent Eu, the Secretary of State of the State of California, to refrain [*691] from taking any action, including the expenditure of public funds, to place the proposed Balanced Federal Budget Statutory Initiative on the November 1984 ballot. n1 The principal effect of the proposed initiative would be to compel the California Legislature, on penalty of loss of salary, to apply to Congress to convene a constitutional convention for the limited and singular purpose of proposing an amendment to the United States Constitution requiring a balanced federal budget. If the Legislature fails to act, the Secretary of State is directed to

apply directly to Congress on behalf of the people of the State of California.

n1 The other respondents are Carl Olsen, San Francisco City Clerk, and Jay Patterson, San Francisco Registrar of Voters. Patterson has filed a disclaimer indicating that he does not intend to defend the suit.

The Fifth Article to the United States Constitution sets out two alternative methods of proposing constitutional amendments. n2 It provides in relevant part, that "[[HN1] 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, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress . . ."

n2 For a discussion of the drafting of article V, see Dillinger, *The Recurring Question of the "Limited" Constitutional Convention (1979)* 88 *Yale L.J.* 1623, 1624-1630.

n3 The remaining language in article V prohibited any amendment barring importation of slaves before 1808, and any amendment depriving a state of equal representation in the senate without its consent.

In the two centuries since the Constitution was promulgated, it has been amended only twenty-six times. Each of those amendments was proposed by the Congress. (All but one were ratified by state legislatures; the Twenty-first Amendment was ratified by state conventions.) Although there have been many efforts to call a constitutional convention to propose amendments, all have failed to secure applications by the legislatures of the necessary two-thirds of the states. n4

n4 See Brinkfield, *Problems Relating to a Federal Constitutional Convention (1957)* (Com. printing, House Judiciary Com., 85th Cong., 1st Sess.) The call for a convention to propose the direct election of senators came within one state of success, and may have induced Congress to sub-

mit the Seventeenth Amendment to the states for ratification.

In recent years a number of persons, including the current President, have urged the enactment of a constitutional amendment requiring a balanced federal budget. Numerous bills have been introduced in Congress. Although the Senate on one occasion approved a proposed constitutional amendment [*692] by the necessary two-thirds vote, the measure failed in the House of Representatives; thus the proposed amendment has never been submitted to the states for ratification.

In the meantime, proponents of the amendment attempted to avoid the necessity for congressional approval by resorting to the alternative method of proposing constitutional amendments -- a convention called upon application of two-thirds of the states. As of this writing the legislatures [***92] in 32 of the necessary 34 states have formally [**612] applied to the Congress to call such a convention. n5

n5 The applications from the several states differ as to the exact content of the proposed amendment and the responsibilities of the proposed convention. It is not clear whether there are currently 32 valid applications pending for a constitutional convention.

Following this strategy, proponents have regularly introduced resolutions in the California Legislature calling for a convention to propose a balanced budget amendment. The Legislature has held hearings on some of these measures, but it has declined to adopt any resolution calling for a federal constitutional convention. The supporters of the balanced budget amendment now seek to compel action by the California Legislature by popular initiative. n6

n6 Similar initiatives are pending in at least two other states, Montana and Washington.

The proposed initiative reads as follows:

"Initiative Measure to Be Submitted Directly to the Voters. 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

36 Cal. 3d 687, *, 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

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

"If the Congress of the United States proposes an amendment to the Constitution of the United States identical in subject matter to that contained [*693] herein and submits same to the States for ratification, this application shall no longer be of any force and effect; and

"This application shall be deemed null and void, rescinded and of no effect in the event that such convention not be limited to such specific and exclusive purposes; 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 Two. The following is added to sections 8901 through 8903 and *section 9320 of the Government Code* and shall modify, amend or control any other laws or regulations of the State of California similar in subject matter, heretofore or hereinafter enacted:

". . . If the California Legislature fails to adopt the resolution set forth in Section One of [this] initiative measure and submit same to the Congress of the United States, as required therein, on or before the end of the twentieth (20th) legislative day after approval by the people of the said initiative measure, or if the legislature adjourns or recesses during the regular session prior to the twentieth (20th) legislative day without adopting said resolution, or having adopted same, repeals, rescinds, nullifies or contradicts said resolution, all payments, compensation, benefits, expenses, perquisites and any other payments to any member of the California Legislature made pursuant to this Section shall be suspended as to each and every legislator until such time as the California Legislature adopts such resolution

"Section Three. (a) The people of the State of California hereby adopt the resolution set forth in Section One of this initiative [*613] measure; and (b) If the

California Legislature fails to adopt the resolution [***93] set forth in Section One of this initiative measure within forty (40) legislative days of the approval of this initiative measure, the Secretary of State of California shall transmit the resolution adopted pursuant to this Section 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 Four. [Limits legislative amendment of the initiative.]

[*694] "Section Five. If any section or subsection of this initiative or the aforementioned resolution shall be held invalid, the remainder of the initiative and the aforementioned resolution, to the extent they can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this chapter are severable."

On March 18, 1984, respondent Secretary of State certified that the proposed initiative had received sufficient signatures to appear on the November 1984 ballot. Petitioners, organizations and individual California taxpayers opposed to the initiative, n7 filed an original action in this court for writ of mandamus. We scheduled a special calendar to consider the matter before the ballots were printed for the forthcoming election.

n7 Petitioners are: American Federation of Labor-Congress of Industrial Organizations; American Association of University Women, California State Division; American Civil Liberties Union of Northern California; ACLU Foundation of Southern California; American Federation of State, County and Municipal Employees; American Jewish Committee; Americans United for Separation of Church and State; B'nai B'rith International; General Board of Church and Society, United Methodist Church; National Association for the Advancement of Colored People, Inc.; National Conference of Catholic Charities; National Council of La Raza; National Council of Senior Citizens; National Farmers Union; National Organization for Women; Office for Church in Society, United Church of Christ; Service Employees International Union; Edward J. Collins; Virginia Diogo; Rabbi Allen I. Freehling; and Timothy J. Twomey.

We have concluded that the initiative, to the extent that it applies for a constitutional convention or requires the Legislature to do so, does not conform to article V of the United States Constitution. [HN2] Article V provides for applications by the "Legislatures of two-thirds

36 Cal. 3d 687, *; 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

of the several States," not by the people through the initiative; it envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise.

We also conclude that the measure exceeds the scope of the initiative power under the controlling provisions of the California Constitution 339 (art. II, § 8 and art. IV, § 1). [HN3] The initiative power is the power to adopt "statutes" n8 -- to enact laws -- but the crucial provisions of the balanced budget initiative do not adopt a *statute* or enact a law. They adopt, and mandate the Legislature to adopt, a *resolution* which does not change California law and constitutes only one step in a process which might eventually amend the federal Constitution. Such a resolution is not an exercise of legislative power reserved to the people under the California Constitution.

n8 The initiative also includes the power to amend the state Constitution. The balanced budget initiative, however, was denominated as an "initiative statute," which requires the signatures of 5 percent of the registered voters. (Cal. Const., art. II, § 8.) An initiative which amends the state Constitution requires the signatures of 8 percent of the voters. (*Id.*)

[*695] Real party in interest argues that we should "let the people's voice be heard." Even if the initiative is invalid, he implies, the election will give the voters the opportunity to express their views on the desirability of a balanced budget, and the legislators may respond to the outcome of the election. This argument misunderstands [HN4] the purpose of the initiative in California. It is not a public opinion poll. It is a method of enacting legislation, [*694] or if it seeks to compel legislative [*614] action which the electorate has no power to compel, it should not be on the ballot.

We do not suggest that the voters of California are without a remedy. This is an election year, in which all members of the Assembly and one-half of the state senators are to be chosen. Voters for and voters against the balanced budget proposal have ample opportunity to make their views known to candidates for legislative seats, and the legislators will be able to act on those expressed views in future sessions.

I. Propriety of Preelection Review

One year ago we considered whether to issue a writ of mandamus to enjoin a special election called by the Governor to vote upon a proposed initiative measure

redistricting the state Legislature. (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658 [194 Cal.Rptr. 781, 669 P.2d 17].) Opponents of the initiative contended that redistricting could occur only once within the decade following a federal census, and thus that the initiative, which proposed a second redistricting within the same 10-year period, exceeded the legislative power reserved by the people. We agreed, and issued mandamus to bar the election.

Our opinion first discussed the propriety of preelection review. We began by reciting the general rule that "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity. [Citations.]' (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4 [181 Cal.Rptr. 100; 641 P.2d 200].) That principle is a salutary one, and where appropriate we adhere to it." (34 Cal.3d at p. 665.) We then went on, however, to note Justice Mosk's separate opinion in *Brosnahan v. Eu*, *supra*. Justice Mosk had stated that [HN5] the general rule inhibiting preelection review "applies only to the contention that an initiative is unconstitutional because of its substance. If it is determined that the electorate does not have the power to adopt the proposal in the first instance . . . the measure must be excluded from the ballot." (31 Cal.3d at p. 6.) He cited examples to support this exception: "election officials have been ordered not to place [*696] initiative and referendum proposals on the ballot on the ground that the electorate did not have the power to enact them since they were not legislative in character [citations], the subject was not a municipal affair [citations], or the proposal amounted to a revision of the Constitution rather than an amendment thereto [citation]." (*Id.*)

Our opinion in *Legislature v. Deukmejian*, *supra*, 34 Cal.3d 658 endorsed the standard described by Justice Mosk. "Here," we said, as in those cases cited by Justice Mosk, "the challenge goes to the power of the electorate to adopt the proposal in the first instance The question raised is, in a sense, jurisdictional." (P. 667.) Since the issue raised by the Legislature challenged the power of the people to enact a second legislative redistricting within a single decade, we concluded that preelection review was proper. n9

n9 The exercise of preelection review in *Legislature v. Deukmejian*, *supra* 34 Cal.3d 658, was not an unprecedented act. Previous decisions had barred elections on a state initiative measure (*McFadden v. Jordan* (1948) 32 Cal.2d 330 [196 P.2d 787]; *Gage v. Jordan* (1944) 23 Cal.2d 794 [147 P.2d 387]). Other court decisions have

36 Cal. 3d 687, *, 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

barred elections on local initiatives (e.g., *Simpson v. Hite* (1950) 36 Cal.2d 125 [222 P.2d 225]; *Mervynne v. Acker* (1961) 189 Cal.App.2d 558 [11 Cal.Rptr. 340]) and referenda (e.g., *Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506 [150 Cal.Rptr. 326]).

(1) The present proceeding likewise challenges the power of the people to adopt the proposed initiative. The petitioners contend that under article V of the United States Constitution, the people have no constitutional authority to apply to the Congress [***95] for a constitutional convention, or to [**615] mandate their Legislature to submit such an application. They further contend that the proposed initiative is not legislative in character, a well established ground for barring an initiative measure from the ballot (see *Simpson v. Hite*, *supra*, 36 Cal.2d 125, 129-134), and that it does not enact a statute as required by article II, section 8 of the state Constitution. n10 These contentions state proper grounds for preelection review of the proposed balanced budget initiative. n11

n10 We note also the legal and practical problems which might arise in postelection review. Section 3 of the initiative adopts a resolution applying for a constitutional convention; it is arguable that this adoption is effective immediately (cf. *Dillon v. Gloss* (1921) 256 U.S. 368; 376 [65 L.Ed. 994, 997, 41 S.Ct. 510]) and that the validity of that application thereafter is not an issue within the purview of the courts (see *Coleman v. Miller* (1939) 307 U.S. 433 [83 L.Ed. 1385, 59 S.Ct. 972, 122 A.L.R. 695]). The provisions of section 2 suspending legislative salaries go into effect 20 legislative days after the election. It would be possible for petitioners to file a petition for mandate and seek a stay within this period. But one usual argument for postelection review -- that the court will have more time to consider the issues and decide the case -- loses some force when the court will have to act on an application for provisional relief within a very limited time period following the election.

n11 Language in some cases suggests that even if a proposed measure is within the scope of the initiative power, courts retain equitable discretion to examine the measure before the election upon a compelling showing that the substantive provisions of the initiative are clearly invalid. (See *Harnett v. County of Sacramento* (1925) 195 Cal. 676, 683 [235 P. 445]; *Gayle v. Hamm*

(1972) 25 Cal.App.3d 250, 255 [101 Cal.Rptr. 628]; Note, *The Scope of the Initiative and Referendum in California* (1966) 54 Cal.L.Rev. 1717, 1725-1729.) We did not base our decision to hear the present case before the election upon that doctrine, but instead relied upon the principle that allegations charging that a measure exceeds the initiative power are properly justiciable before election.

[*697] Although real party in interest recites the principles of popular sovereignty which led to the establishment of the initiative and referendum in California, those principles do not disclose any value in putting before the people a measure which they have no power to enact. [HN6] The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

II. Issues Arising Under Article V of the United States Constitution

Our discussion of the federal constitutional issues proceeds in three steps. First, we inquire whether the term "Legislatures" as used in article V refers to the representative body elected to enact the laws of the state -- in California, the state Senate and Assembly -- or to the whole of the state legislative power, including the reserved power of initiative. Our conclusion that it refers only to the representative body makes it clear that the people cannot by initiative apply directly to Congress for a constitutional convention. We then turn to two remaining questions: whether the people by initiative can (a) compel the Legislature to apply to Congress for a constitutional convention or (b) urge Congress to submit a proposed amendment to the states.

(2) We must first, however, address briefly the contention raised by distinguished amici curiae (former Attorney General Griffin Bell, former Senator Sam Ervin, and Professor John Noonan) that none of the federal constitutional issues raised here is justiciable. They cite *Coleman v. Miller* (1939) 307 U.S. 433 [83 L.Ed. 1385, 59 S.Ct. 972, 122 A.L.R. 695], in which the court refused to adjudicate the validity of Kansas' ratification of the proposed Child Labor Amendment. The *Coleman* petitioners first challenged the authority of the lieutenant governor to break a tie vote on ratification; the court divided equally on the justiciability of that issue. They next asserted that having once rejected the amendment, Kansas [***96] could not later ratify; the court, relying [**616] on the historical precedent of the Fourteenth

36 Cal. 3d 687, *; 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

Amendment, n12 held this to be a political question within the exclusive authority [*698] of the Congress. Finally, petitioners argued that Kansas had not ratified the amendment within a reasonable time after it was submitted to the states. The court reaffirmed *Dillon v. Gloss*, *supra*, 256 U.S. 368, where it said that an amendment must be ratified within a reasonable time, but held that the timeliness of a particular ratification was also a political question entrusted to the Congress. Four concurring justices went further, asserting that "The [amending] process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." (307 U.S. 433, 459 [83 L.Ed. 1385, 1399], conc. opn. of Black, J.)

n12 On July 20, 1868, the Secretary of State notified the Congress that three-fourths of the states had ratified the Fourteenth Amendment but that two states, Ohio and New Jersey, had subsequently rescinded their ratification. Congress was also aware that three southern states had initially refused to ratify until new state governments were created under congressional reconstruction programs. Congress nevertheless declared the Fourteenth Amendment duly ratified and a part of the Constitution.

The political question doctrine has undergone considerable change since *Coleman v. Miller*. (See *Powell v. McCormack* (1969) 395 U.S. 486 [23 L.Ed.2d 491, 89 S.Ct. 1944]; *Baker v. Carr* (1962) 369 U.S. 186 [7 L.Ed.2d 663, 82 S.Ct. 691].) Judges and commentators have questioned whether *Coleman v. Miller* is consistent with the criteria established in these later cases. (See *State of Idaho v. Freeman* (D.Idaho 1981) 529 F.Supp. 1107, vacated as moot, 459 U.S. 809 [74 L.Ed. 39, 103 S.Ct. 22]; *Dyer v. Blair* (N.D.Ill. 1975) 390 F.Supp. 1291, 1300-1303; Note, *Good Intentions, New Inventions, and Article V Constitutional Conventions* (1979) 58 Tex.L.Rev. 131, 158-162.)

But assuming that *Coleman v. Miller* remains controlling authority on the issues it decided -- that Congress alone has the power to decide whether a ratification submitted by a state is valid and timely -- that holding does not control in the present setting. *Hawke v. Smith*, No. 1 (1920) 253 U.S. 221 [64 L.Ed. 871, 40 S.Ct. 495, 10 A.L.R. 1504] (discussed at length later in this opinion (*post*, pp. 700-701)), is 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. Contrary to the suggestion of amici, the majority opinion in *Coleman v. Miller*

did not overrule *Hawke v. Smith*; it cited the earlier decision favorably on an issue of standing to sue (307 U.S. at pp. 438-449 [83 L.Ed. at pp. 1388-1394]), and never hinted that *Hawke v. Smith* decided a nonjusticiable issue.

In *Dyer v. Blair*, *supra*, 390 F.Supp. 1291, Judge Stevens, now a justice of the United States Supreme Court, considered the effect of *Coleman v. Miller* upon earlier Supreme Court article V decisions. The issue in that case was whether a state could constitutionally provide that more than a simple majority was required to ratify a constitutional amendment. Rejecting the argument that every aspect of the amending process is a nonjusticiable political question, Judge Stevens stated that "since a majority of the Court refused to accept that position in [*Coleman v. Miller*] and since the [*699] Court has on several occasions decided questions arising under article V, even in the face of 'political question' contentions, that argument is not one which a District Court is free to accept." (Pp. 1299-1300.) In deciding questions of federal constitutional law, a state court is equally bound by the controlling Supreme Court decisions.

Judge Stevens went on to consider the question of justiciability in light of *Powell v. McCormack*, *supra*, 395 U.S. 486, *Baker v. Carr*, *supra*, 369 U.S. 186, and the majority opinion in *Coleman v. Miller*, *supra*. He distinguished [**617] [***97] *Coleman v. Miller*; that decision rested on the historical precedent of congressional adjudication of the effect of withdrawing a ratification, and the difficulty of determining what constituted a reasonable time for ratification. Such precedents and problems, he said, had no relevance to the issue in *Dyer v. Blair* -- and, we must add, are equally irrelevant to the issue in the present case. Judge Stevens observed that "[decision] of the question presented requires no more than an interpretation of the Constitution. Such a decision falls squarely within the traditional role of the . . . judiciary . . . [para.] The mere fact that a court has little or nothing but the language of the Constitution as a guide to its interpretation does not mean that the task of construction is judicially unmanageable." (Pp. 1301-1302.) He then concluded: "We are persuaded that the word 'ratification' as used in article V of the federal Constitution must be interpreted with the kind of consistency that is characteristic of judicial, as opposed to political, decision making." (P. 1303.) We are similarly persuaded that the word "Legislatures" in article V is subject to judicial construction.

Concluding, therefore, that the issues here raised are justiciable, we turn to the task of construing the language of article V. [HN7] The application clause of that article provides that "[the] Congress . . . on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments . . ." No

reported decisions have decided whether the term "Legislatures" in this clause includes the reserved powers of initiative and referendum. n13 The term "Legislatures," however, also appears in the portion of article V which specifies that an amendment becomes "valid to all Intents and Purposes . . . when ratified by the Legislatures of three-fourths [*700] of the several States," and several cases have construed the meaning of "Legislatures" in this provision. We turn to examine these decisions.

n13 Only two decisions have considered the application clause of article V. In *Petuskey v. Rampton (D.Utah 1969)*, 307 F.Supp. 235, the district judge ruled that a malapportioned state legislature could not apply to Congress for a constitutional convention to propose an amendment overturning the Supreme Court's reapportionment decisions. The Tenth Circuit reversed the judgment on the ground that only a three-judge court would have jurisdiction to enjoin the state from transmitting its application to the Congress. (*Petuskey v. Rampton (10th Cir. 1970)* 431 F.2d 378, cert. den., 401 U.S. 913 [27 L.Ed.2d 812, 91 S.Ct. 882].) The second reported decision, *Opinion of the Justices to the Senate (1977)* 373 Mass. 877 [366 N.E.2d 1226], held that a governor could not veto an application by the legislature.

Many of the cases, including *Barlotti v. Lyons, (1920)* 182 Cal. 575 [189 P. 282], the only California case, concerned the ratification of the Eighteenth Amendment prohibiting the sale of alcohol. When the California Legislature ratified the amendment, Barlotti and other petitioners presented a referendum petition to the registrar of voters. The registrar refused to transmit the petition to the Secretary of State, and petitioners sought mandamus from this court. Our opinion noted two issues: whether the legislative ratification was conclusive under the federal Constitution, and whether the referendum provisions of the state Constitution were intended to apply to resolutions ratifying a constitutional amendment. It addressed only the federal issue, finding it decisive of the case.

Chief Justice Angellotti, for a unanimous court, defined the question narrowly, as "being simply one as to the meaning of the word 'legislatures' as used in the clause 'when ratified by the legislatures of three-fourths of the several states' of article V" (P. 577.) "If by those words was meant the *representative bodies* invested with the law-making power of the several states, which existed at the time of the adoption of the constitution . . . in each of the several states, and which have ever since so existed, as distinguished from the law-making power of the respective states, there is nothing left to

discuss, for with that meaning attributed to the term . . . the constitutional provision is so plain and unambiguous as not to admit of different constructions. The situation [**618] [***98] would then be that the people of the United States, in framing and ratifying the constitution . . ., 'have excluded themselves from any direct or immediate agency in making amendments to it.'" (P. 578.)

The opinion first examined the ordinary meaning of the term. "It certainly is not in consonance with the ordinary acceptance of the term 'legislature' to take it as meaning otherwise than a representative body selected by the people of a state and invested with the power of law-making for the state, whatever be the power reserved to the people themselves to review the action of that body or to initiate and adopt laws." (P. 578.) It then examined the California Constitution, in which the word "legislature" appears frequently, always with the plain meaning of the Senate and Assembly. Even former article IV, section 1, which reserved the right of initiative and referendum, referred to the Senate and Assembly as "The Legislature of the State of California." The opinion reviewed the use of the term in the United States Constitution, observing that in almost all cases it clearly referred to a representative body. Consequently, the court concluded that the term "Legislatures" in article V means "some official body of a state as distinguished [*701] from the state itself or the people of the state or the whole law-making power of the state." (P. 582.)

Chief Justice Angellotti recognized the argument that direct popular vote is a superior method of ascertaining the popular will. He replied that the argument "is, in the final analysis, based more upon some present day conceptions of what the law in this regard ought to be, than upon the intention of the framers of the constitution *as expressed therein*, and, to our mind, expressed so clearly as to preclude any other conclusion than the one we have reached." (P. 584.) The court accordingly dismissed the petition for mandamus, thereby precluding a referendum election on the ratification of the Eighteenth Amendment.

The courts of Maine and Michigan filed opinions agreeing with *Barlotti* that article V precludes a referendum on the ratification of a constitutional amendment (*Opinion of the Justices (1919)* 118 Me. 544 [107 A. 673, 5 A.L.R. 1412]; *Decher v. Secretary of State (1920)* 209 Mich. 565 [177 N.W. 388]), while Arkansas, Colorado, and Oregon reached the same result on state constitutional grounds (*Whittemore v. Terral (1919)* 140 Ark. 493 [215 S.W. 686]; *Prior v. Noland (1920)* 68 Colo. 263 [188 P. 729]; *Herbring v. Brown (1919)* 92 Ore. 176 [180 P. 328].) Ohio and Washington, however, upheld referendum elections. (*Hawke v. Smith (1919)* 100 Ohio St. 385 [126 N.E. 400]; *Mullen v. Howell (1919)* 107 Wash. 167 [181 P. 920].) The United States Supreme

36 Cal. 3d 687, *; 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

Court selected the Ohio decision for review and, in a unanimous decision, held unconstitutional a provision of the Ohio Constitution which declared that legislative ratification of a federal constitutional amendment was incomplete until approved by popular referendum. (*Hawke v. Smith*, *supra*, 253 U.S. 221.)

The opinion by Justice Day follows the same reasoning as that of our court in *Barlotti*. He first observes that "Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people [para.] The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people [However, the] language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed." (*Pp.* 226-227 [64 L.Ed. at p: 875].)

According to Justice Day, "The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by 'Legislatures'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the [*702] purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The [*619] [***99] term is often used in the Constitution with this evident meaning. Article I, § 2, prescribes the qualifications of electors of congressmen as those 'requisite for electors of the most numerous branch of the state legislature.' Article I, § 3, provided that senators shall be chosen in each State by the legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment which made provision for the election of senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the States understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the legislature of any State the power to authorize the Executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment. In Article IV the United States is required to protect every State against domestic violence upon application of the legislature, or of the Executive when the legislature cannot be convened. Article VI requires the members of the several legislatures to be bound by oath, or affirmation, to support the

Constitution of the United States. By Article I, § 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be. Article IV, § 3, provides that no new States shall be carved out of old States without the consent of the legislatures of the States concerned.

"There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several States. Article I, § 2." (*Pp.* 227-228 [64 L.Ed. at pp. 875-876].) n14

n14 [HN8] Article I, section 4 provides that the manner of electing senators and representatives "in each State shall be determined by the respective legislatures thereof, but that Congress may . . . alter such regulations" *Davis v. Hildebrant* (1916) 241 U.S. 565 [60 L.Ed. 1172, 36 S.Ct. 708], held that Ohio could submit a re-districting proposal to referendum. *Hawke v. Smith* distinguished that case on the ground that congressional legislation, enacted pursuant to this article, had granted each state the right to fix congressional districts in the manner provided by the laws thereof, language chosen for the purpose of permitting the initiative and referendum. (See 253 U.S. at pp. 230-231 [64 L.Ed. at p. 877].)

Ohio argued that the term "Legislatures" in article V referred to the legislative power of the state, however divided between representative assemblies [*703] and the people. Justice Day responded that the argument was fallacious, because "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word [para.] The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented." (*Pp.* 229-230 [64 L.Ed. at p. 876].) The court accordingly reversed the judgment requiring the submission of the ratification to popular referendum.

Many years have passed since *Barlotti* and *Hawke* were filed, but those decisions remain the unquestioned and controlling authority. (See *Opinion of the Justices to the Senate*, *supra*, 366 N.E.2d 1226.) Thus in 1975, when the California Attorney General was asked whether the voters by initiative could rescind the Legislature's ratification of the Equal Rights Amendment, he cited *Barlotti* and *Hawke*, and replied: "The California electorate can-

not effectively rescind the Legislature's ratification by the initiative process because amendments to the federal constitution are not subject to the initiative or referendum process in [**620] [***100] California." (58 *Ops. Cal. Atty. Gen.* (1975) 830, 831.)

As we noted earlier, the cited cases refer to the role of the Legislature in ratifying, not in proposing, constitutional amendments. Courts and commentators agree, however, that the term "Legislatures" bears the same meaning throughout article V. The Massachusetts Supreme Judicial Court, in holding that a governor cannot veto an application for a constitutional convention, declared that "[since] the word 'Legislatures' in the ratification clause of Art. V does not mean the whole legislative process of the State . . . , we are of the opinion that the word 'Legislatures' in the application clause, likewise, does not mean the whole legislative process." (*Opinion of the Justices*, *supra*, 366 N.E.2d 1226, 1228.) Senator Ervin, explaining proposed legislation to regulate a constitutional convention, stated that "[certainly] the term 'legislature' should have the same meaning in both the application clause and the ratification clause of Article V." (Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution* (1968) 66 *Mich. L. Rev.* 875, 889; see Bonfield, *Proposing Constitutional Amendments by Convention* (1969) 39 *N.D. L. Rev.* 659, 665.)

(3) We conclude that when article V refers to an application by the "Legislatures" of two-thirds of the states, calling for a constitutional convention, it refers to the representative lawmaking bodies in those states. Any application directly by the people, through their reserved legislative power, would not conform to article V.

Section 3 of the Balanced Budget Initiative states that the people adopt a resolution calling for a constitutional convention, and provides that, if the [*704] Legislature fails to adopt the resolution within 40 legislative days, the Secretary of State shall transmit the resolution so adopted to the Congress. Under the decisions previously discussed, it seems clear that a resolution adopted directly by the people and transmitted to Congress without action by the Legislature would be invalid under article V.

The initiative, however, proposes direct action, bypassing the Legislature, only as a last resort. The thrust of the measure is in the provision mandating the Legislature to adopt a resolution applying for a constitutional convention. (4) The question thus arises whether pro forma action by a state legislature, acting under compulsion of an initiative measure, is sufficient to comply with article V.

The question itself is one of first impression, but a number of decisions offer guidance. The ratification of

the Nineteenth Amendment, giving women the right to vote, was challenged on the ground that two state legislatures ratified in violation of state constitutional provisions restricting their freedom of action. The Missouri Constitution provided that the state legislature could not assent to any amendment that would impair the right to local self-government; the Tennessee Constitution provided that the legislature could not act upon any amendment until an election intervened. The Supreme Court rejected the challenge, holding that "[the] function of a state legislature in ratifying a proposed amendment to the Federal Constitution . . . is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." (*Leser v. Garnett* (1922) 258 U.S. 130, 137 [66 L.Ed. 505, 511, 42 S.Ct. 217]; see also *Trombetta v. Florida* (M.D. Fla. 1973) 353 F.Supp. 575; *Walker v. Dunn* (Tenn. 1972) 498 S.W.2d 102.) If a state cannot constitutionally prohibit its legislature from proposing or ratifying a constitutional amendment, by implication it cannot compel the legislature to do so.

Two other cases involve advisory initiatives. In 1928 the Massachusetts Supreme Judicial Court was asked to rule upon a proposed initiative requesting the state's congressional delegation to support repeal of the Eighteenth Amendment. The court held that the measure was not a proper initiative on both state and federal grounds, stating, in connection with the [**621] [***101] latter ground, that "[the] voters of the several States are excluded by the terms of art. 5 of the Constitution of the United States from participation in the process of its amendment." (*Opinion of the Justices* (1928) 262 *Mass.* 603, 606 [160 N.E. 439].)

Fifty years later the Nevada Supreme Court considered an initiative advising the state legislature whether to ratify the Equal Rights Amendment. The court distinguished *Hawke v. Smith*, *supra*, 253 U.S. 221, and *Leser* [*705] *v. Garnett*, *supra*, 258 U.S. 130 on the ground that the proposal "does not concern a binding referendum, nor does it impose a limitation upon the legislature [The] legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote." (*Kimble v. Swackhamer* (1978) 94 *Nev.* 600 [584 P.2d 161, 162].)

When opponents of the Nevada initiative sought a stay from the United States Supreme Court, Justice Rehnquist, sitting as circuit justice, denied the stay with the following order: "Appellants' . . . contention . . . is in my opinion not substantial because of the nonbinding character of the referendum Under these circumstances . . . reliance [on] . . . *Leser v. Garnett* . . . and *Hawke v. Smith* . . . is obviously misplaced I can see no constitutional obstacle to a nonbinding advisory referendum of this sort." (*Kimble v. Swackhamer* (1978)

439 U.S. 1385, 1387-1388 [58 L.Ed.2d 225, 228, 99 S.Ct. 51].)

The Massachusetts and Nevada cases squarely disagree on the validity of a nonbinding initiative, but both cases (and especially Justice Rehnquist's order) clearly imply that a binding initiative would offend article V. Real party in interest, however, cites a decision with contrary implications, *In re Opinions of the Justices* (1933) 226 Ala. 565 [148 So. 107]. The Alabama Supreme Court was asked to rule on a proposed statute requiring that delegates to a convention to ratify the Twenty-first Amendment pledge to follow the result of a statewide vote. Quoting *Hawke v. Smith*, *supra*, 253 U.S. 221, 226-227 [64 L.Ed. 871, 875], where the court said the framers of the Constitution "assumed" that legislatures and conventions "would voice the will of the people," the Alabama court reasoned that the function of deliberative bodies in ratifying proposed amendments was merely to ascertain and carry out the popular will. A direct and binding instruction to the delegates, it concluded, would more truly and efficiently fulfill that function. n15

n15 Real party in interest also cites *In re Opinions of the Justices* (1933) 204 N.C. 806 [172 S.E. 474]. That decision upheld the validity of a proposed bill which would have allowed the voters to decide whether to call a state convention to consider ratification of the Twenty-first Amendment. It does not appear that the delegates to such a convention, if called, were required to vote one way or the other on the ratification.

We question whether the reasoning of the Alabama court applies to the act of a legislature in proposing or ratifying an amendment. The analysis of the federal Constitution set out in *Barlotti* and *Hawke* indicates that the drafters of that document deliberately chose to vest the power of proposal and ratification in state legislatures instead of the people. The framers were, of course, aware of the difference between a representative body and the electorate as a whole; they knew that a legislature is a deliberative body, [*706] empowered to conduct hearings, examine evidence, and debate propositions. Its members may be assumed generally to hold views reflecting the popular will, but no one expects legislators to agree with their constituents on every measure coming before that body. Yet, although undoubtedly aware that the views of a deliberative body concerning a proposed amendment might depart from those of a majority of the voters, the framers of the Constitution chose to give the voters no direct role in the amending process; legislatures alone received the power to apply for a national convention, and legislatures or conventions, as Congress chose, the power to ratify amendments. n16

n16 It has been argued that the framers of the Constitution considered state conventions to be more representative than state legislatures, and for that reason directed that the ratification of the original Constitution be by conventions. (See discussion in *United States v. Sprague* (1931) 282 U.S. 716, 731 [75 L.Ed. 640, 644, 71 A.L.R. 1381].) If so, it is significant that the wording of article V permits Congress to choose between ratification by the more representative convention or the less representative legislature, but permits only the legislature to apply for a national convention.

[***102] The only conclusion we can draw from this fact is that the drafters wanted the amending process in the hands of a body with the power to deliberate upon a proposed amendment and, after considering not only the views of the people but the merits of the proposition, to render a considered judgment. A rubber stamp legislature could not fulfill its function under article V of the Constitution.

[**622] We conclude that a state may not, by initiative or otherwise, compel its legislators to apply for a constitutional convention, or to refrain from such action. Under article V, the legislators must be free to vote their own considered judgment, being responsible to their constituents through the electoral process. The proposed Balanced Budget Initiative, to the extent that it mandates the California Legislature to apply to Congress for a constitutional convention, violates article V of the United States Constitution.

The resolution set out in section 1 of the initiative includes language which merely petitions Congress to adopt a balanced budget amendment, and does not attempt to invoke the application process of article V. Since that language does not purport to bind Congress or the state Legislature to undertake any act of legal significance under article V, it is analogous to the advisory initiatives discussed earlier in this opinion. (*Ante*, pp. 704-705.) As we there noted, the decisions conflict, with one case (*Opinion of the Justices*, *supra*, 262 Mass. 603) ruling that an advisory initiative violates article V, but a later decision (*Kimble v. Swackhamer*, *supra*, 584 P.2d 616) upholding such an initiative.

[*707] (5) A resolution, whether by the Legislature or by the people, urging Congress to approve a proposed constitutional amendment is not an act of constitutional significance. Such a resolution does not call for a national convention, propose an amendment, or ratify an amendment. We therefore conclude, in accord with *Kimble v. Swackhamer*, that such a resolution does not

36 Cal. 3d 687, *; 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

raise any issue under the federal Constitution. It follows that the Balanced Budget Initiative, insofar as it merely adopts a resolution urging Congress to submit a constitutional amendment to the states, and mandates the Legislature to adopt that resolution, does not offend article V.

Our conclusion that the crucial provisions of the initiative measure are invalid under the United States Constitution, but that other, subordinate provisions are not, necessarily raises a question of severability. Since the same question arises in connection with our analysis of the state constitutional issues, we defer discussion of the matter until later in this opinion.

III. Issues Arising Under the California Constitution

The Balanced Budget Initiative contains three substantive sections. At the core of the initiative is the resolution set out in section 1, which calls upon Congress to submit a balanced budget amendment, and applies to Congress for a constitutional convention to propose such an amendment. Section 1 then mandates the Legislature to adopt this resolution. Section 2 provides that if the Legislature does not comply within 20 legislative days, the legislators' compensation is suspended. Section 3 provides for adoption of the resolution by the people, and directs the Secretary of State to transmit it to Congress if the Legislature fails to adopt it within 40 legislative days.

Article IV, section 1 of the California Constitution declares that "[HN9] the legislative power of this State is vested in the California Legislature which consists of the Senate [**623] and Assembly, but the people reserve to themselves the powers of initiative and [***103] referendum." Article II, section 8, subdivision (a) defines the initiative: "[HN10] The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Italics added.) n17 [HN11] Article II, section 9 defines the referendum in similar terms; it is "the power of the electors to approve or reject statutes." (Italics added.)

n17 The phrase "amendments to the Constitution" in article II refers to amendments to the state Constitution, and has no application to the present case.

Prior to the 1966 revision of the California Constitution, the relevant provision (then part of art. IV, § 1) reserved to the people the power to propose "laws" (the initiative) or to reject any "acts" passed by the Legislature [*708] (the referendum). The California Constitution Revision Commission selected the term "statutes" as a simpler statement of the reserved power, without a change in meaning. (Cal. Const. Revision Com., Proposed Revision Const. (1966) p. 43.) The 1966 revision

also amended article IV, section 15 (now art. IV, § 8, subd. (b)), which had declared in part that "No law shall be passed except by bill"; the new version reads "The Legislature may make no law except by statute and may enact no statute except by bill." n18

n18 Before the 1966 revision the California Constitution also provided for the "indirect initiative." (See former art. IV, § 1, para. 4.) The voters could propose a bill to the Legislature, and if the Legislature failed to enact that bill within 40 days, the matter was resubmitted to the voters for approval or rejection at the next general election. The 1966 Report of the California Constitution Revision Commission recommended deleting this provision, noting that it added an unnecessary step in the initiative process, and as a result was seldom used. (P. 52.)

(6a) The question we face is whether the Balanced Budget Initiative proposes to adopt a "statute" within the meaning of article II of the California Constitution. (7) In resolving this question, we must bear in mind the declared "[HN12] duty of the courts to jealously guard" the people's right of initiative and referendum. (*Martin v. Smith* (1959) 176 Cal.App.2d 115, 117 [1 Cal.Rptr. 307]; *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038].) "[It] has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled." (*Mervynne v. Acker*, *supra*, 189 Cal.App.2d 558, 563; *Gayle v. Hamm*, *supra*, 25 Cal.App.3d 250, 258; *Associated Home Builders, Inc. v. City of Livermore*, *supra*, 18 Cal.3d 582, 591; see *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 [149 Cal.Rptr. 239, 583 P.2d 1281]; *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 210, *fn. 3* [118 Cal.Rptr. 146, 529 P.2d 570, 72 A.L.R.3d 973], *app. dism.* 427 U.S. 901 [49 L.Ed.2d 1195, 96 S.Ct. 3184].)

(8) Even under the most liberal interpretation, however, the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body. Those powers are limited, under article II, to the adoption or rejection of "statutes." As we shall explain, it does not include a resolution which merely expresses the wishes of the enacting body, whether that expression is purely precatory or serves as one step in a process which may lead to a federal constitutional amendment.

(9) [HN13] A statute declares law; if enacted by the Legislature it must be initiated by a bill (Cal. Const., art.

IV, § 8), passed with certain formalities [*709] (*id.*), and presented to the Governor for signature (art. IV, § 10). Resolutions serve, among other purposes, to express the views of the resolving body. (See Mason, *Legislative Bill Drafting* (1926) 14 *Cal.L.Rev.* 379, 389-391.) A resolution does not require the same formality of enactment, and is not presented to the Governor for approval.
n19

n19 In one California case, *Mullan v. State* (1896) 114 *Cal.* 578 [46 P. 670], the distinction between a statute and a resolution proved a trap for the litigant. The Legislature, on request of the Governor, had passed a joint resolution authorizing Captain Mullan to negotiate with the federal government for reimbursement of state expenses and claims arising out of the Modoc Indian War. The resolution provided for payment to Captain Mullan of 20 percent of the amount collected, and when payment was not made, Mullan filed suit. Citing article IV, section 15, which then provided that "No law shall be passed except by bill," the court denied his claim. "A mere resolution," it said, "is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it. The fact that it may have been intended to subserve such purpose can make no difference 'Nothing becomes law simply and solely because men, who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode appointed by the instrument which invests them with power, and under all the forms which that instrument has rendered essential.'" (Pp. 584-585.)

[**624] [***104] "It is frequently said that the distinction between bills and resolutions is that resolutions are not law. As a generalization this is probably accurate, if by 'law' is meant those legislative actions which operate on all persons in society, and must be enforced by the executive department, and sustained by the judiciary." (1A Sutherland, *Statutory Construction* (Sands rev. ed. 1972) p. 335.) The writer adds that "In Congress and some of the states joint resolutions enacted with all the formalities of bills operate as law" (*id.*), but states in a footnote that in most states, including California, "specific constitutional provisions prevent a resolution from being treated as a law." (P. 336, fn. 4.) n20

n20 Two opinions of the California Attorney General comment on this matter. In 1943, the Assembly resolved that a government department

should undertake a study of the Los Angeles Airport; the department inquired whether it could use certain funds for that purpose. The Attorney General replied "A resolution of a single house of the legislature, or for that matter, a concurrent resolution, does not have the force and effect of law [An appropriation] can only be accomplished by a regular statute" (1 *Ops.Cal.Atty.Gen.* 438, 439 (1943).) Three years later the Attorney General repeated: "The Constitution, with certain exceptions, provides that no law shall be passed except by bill. [Citation.] A resolution merely expresses the views of both branches of the Legislature." (7 *Ops.Cal.Atty.Gen.* 381, 382 (1946).)

In *Hopping v. Council of City of Richmond* (1915) 170 *Cal.* 605 [150 P. 977], the court applied this distinction to a municipal referendum. It first declared that the referendum under state law applied only to "acts which must be passed in the form of a statute" (p. 609), as distinguished from a joint resolution, and construed the Richmond City Charter to conform to state practice. This language would seem to foreshadow the invalidity of the [*710] referendum, but the court then looked more closely at the resolution in question. The city council had resolved to accept a gift of land and money, but that gift was conditioned upon the city using the money (and additional city funds) to build a new city hall on the site donated. Viewing this resolution as the equivalent of an ordinance fixing the site of the city hall and appropriating money for its construction -- an exercise of legislative power -- the court held the resolution subject to referendum. (See pp. 613-615.) In other words, it is the substance, not the label, that controls, and if a "resolution" does enact a law, it is subject to referendum.

The decisions of other states, involving the ratification of the Eighteenth Amendment discussed earlier in this opinion (*ante*, pp. 700-701), addressed the specific question whether a resolution ratifying a constitutional amendment falls within the reserved power of initiative and referendum. (*Barlotti v. Lyons, supra*, 182 *Cal.* 575, the California decision concerning the Eighteenth Amendment, noted but did not decide the question whether a resolution ratifying a constitutional amendment was within the reserved power of referendum.) The majority of decisions, construing state constitutional provisions indistinguishable from the California provision, have concluded that such a resolution is not subject to popular vote.

Whittemore v. Terral, supra, 140 *Ark.* 493, held that the word "acts" in the Arkansas Constitution (the same word as in the pre-1966 *Cal. Const.*) "means an enacted law -- a statute." (Pp. 497-498.) The ratification of

[**625] a proposed constitutional amendment, the [***105] court said, is but a step in the enactment of a law; it does not in itself enact a law and is thus not subject to referendum. (P. 499.)

The court also construed the word "acts" in *Prior v. Noland, supra*, 68 Colo. 263. "It is only in the sense of a law, a statute that the term 'act' is used in the initiative and referendum." (P. 267.) Noting that the term is used in connection with "bill" -- as it also was in the pre-1966 California provisions -- the court stated that "A resolution is not a bill. [Citation.] The distinctions between a bill and a resolution are well defined 'The concurrent resolution . . . cannot be held to be a law of the state.'" (*Id.*)

In *Decher v. Secretary of State, supra*, 209 Mich. 565, the court concluded that "the framers of the [Michigan] Constitution, by the use of the word 'act' . . . had in mind a statute or law passed with the formality required by the Constitution and approved by the governor." (Pp. 576-577.) The act of the state legislature in ratifying a federal constitutional amendment "is not the making of a law or an 'act' as understood in legislative parlance." (P. 577.)

[*711] The Maine Supreme Court likewise declared that the resolution ratifying the Eighteenth Amendment was not subject to referendum because it "was neither a public act, a private act nor a resolve having the force of law. It was in no sense legislation." (*Opinion of the Justices, supra*, 118 Me. 544, 550.) Finally, the Oregon Supreme Court, in *Herbring v. Brown, supra*, 92 Ore. 176, concluded that "these sections [establishing the initiative and referendum] apply only to proposed laws, and not to legislative resolutions, memorials, and the like." (P. 180.) n21

n21 The only contrary decision came from the Washington Supreme Court. (*Mullen v. Howell, supra*, 181 P. 920.) That court reasoned that the argument that the legislature ratified the amendment by resolution and that a resolution was not subject to referendum was self-defeating because under the state constitution the legislature had no power to act except by bill. (This argument assumes that a state legislature's power to ratify a federal constitutional amendment derives from the state constitution and is subject to limitations in the document; *Leser v. Garnett, supra*, 258 U.S. 130, held to the contrary.) The Washington court further reasoned that it was not the resolution, but the act of the legislature in adopting it, that was subject to referendum.

Eight years after the Eighteenth Amendment took effect, the Massachusetts Supreme Judicial Court considered whether an initiative requesting the state's congressional delegation to support repeal of that amendment constituted a "proposed law" within the state's initiative power. "The word 'law'," the justices advised, "imports a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject; it implies command and not entreaty; it is something different from an ineffectual expression of opinion possessing no sanction to compel observance of the views announced. The text of the proposed law accompanying this initiative petition does not prescribe a general rule of conduct. It merely invites a declaration of opinion by voters on a subject over which the people of the Commonwealth possess no part of the sovereign power." (262 Mass. at p. 605.) The court concluded that the proposal was not within the reserved initiative power. n22

n22 The opinion also noted that "[the] mandate to the Secretary of the Commonwealth . . . to 'transmit copies . . . to each senator and representative in congress from this commonwealth' is subsidiary and incidental to the main purpose of the proposed law; it relates to a matter which standing alone possesses no legal force; it cannot convert into a law something in itself ineffectual." (262 Mass. at p. 606.)

Thus as of the 1920's, the majority view was that under constitutional provisions such as that in California, the reserved power of initiative and referendum was limited to such measures as constituted the exercise of legislative power to create binding law -- the kind of measure that would [**626] be introduced by bill, duly passed by both [***106] houses of the legislature, and presented to the governor for signature. That reserved power did not extend to the ratification of constitutional amendments, since a state in ratifying an amendment was not asserting legislative power under its own constitution, [*712] but exercising a power delegated to the state legislatures by article V of the federal Constitution. (See *Leser v. Garnett, supra*, 258 U.S. 130, 137 [66 L.Ed. 505, 511].) Neither did that power extend to resolutions which merely declared policy or entreated action, since such enactments did not constitute the exercise of legislative power to create statutory law. n23

n23 The issue in this guise -- the distinction between a statute (or an "act," a "law," or a "bill") and a resolution has not arisen since that date. Subsequent cases have concerned the question whether a measure was "legislative," "administra-

36 Cal. 3d 687, *; 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

tive," or "adjudicative." (See, e.g., *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511 [169 Cal.Rptr. 904, 620 P.2d 565]; *Housing Authority v. Superior Court* (1950) 35 Cal.2d 550 [219 P.2d 457]; *Simpson v. Hite*, supra, 36 Cal.2d 125; *Fishman v. City of Palo Alto*, supra, 86 Cal.App.3d 506; *O'Loane v. O'Rourke* (1965) 231 Cal.App.2d 774 [42 Cal.Rptr. 283]; *Mervynne v. Acker*, supra, 189 Cal.App.2d 558.) These cases assert generally that legislative acts "are those which declare a public purpose and make provisions for the ways and means of its accomplishment." (*Fishman v. City of Palo Alto*, supra, 86 Cal.App.3d 506, 509; accord, *O'Loane v. O'Rourke*, supra, 231 Cal.App.2d 774, 784.) That definition was fashioned to distinguish administrative acts, which "carry out the legislative policies and purposes already declared by the legislative body" (*Fishman v. City of Palo Alto*, supra, 86 Cal.App.3d at p. 509). It will serve in the present context, however, because a resolution, as distinct from a statute, is essentially an enactment which only declares a public purpose and does not establish means to accomplish that purpose.

Real party in interest, however, contends that current California practice and decisions permit an initiative which merely declares public policy. He points to Proposition 12 at the 1982 General Election, which endorsed a bilateral freeze on the construction of nuclear weapons and required the Governor to transmit that endorsement to the President and other federal officials. No judicial decision discussed the validity of the Nuclear Freeze Initiative, but real party suggests that policy initiative was justified by two earlier decisions, *Farley v. Healey* (1967) 67 Cal.2d 325 [62 Cal.Rptr. 26, 431 P.2d 650], and *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315 [118 Cal.Rptr. 637, 530 P.2d 605].

Farley v. Healey, supra, involved a San Francisco city initiative which declared city policy favoring an immediate cease-fire in Vietnam and withdrawal of American troops from that country. The San Francisco City Charter defined the right of initiative with unusual breadth: it included the power to adopt "any ordinance, act or other measure which is within the power conferred upon the board of supervisors to enact," and provided that "[any] declaration of policy may be submitted to the electors in the manner provided for the submission of ordinances . . ." (P. 328, quoting S. F. City Charter, § 179.) Consequently, the court rejected the argument that the initiative was invalid because it did not concern a municipal affair. "[Boards] of supervisors and city councils have traditionally made declarations of policy on matters of concern to the community whether or not

they had power to effectuate such declarations by binding legislation." [*713] (P. 328.) Thus the proposed declaration of policy, being within the power of the board of supervisors, could be enacted by initiative under the terms of the city charter.

Two later opinions of the California Attorney General indicated that *Farley v. Healey* did not state legal principles applicable to California initiatives generally, but was based on the specific language of the San Francisco Charter. In 1973 the voters in Humboldt County proposed to "direct the Board of Supervisors to notify the Congress and the President . . . of our desire to see a terminal date set for the withdrawal of all United States equipment and personnel from South East Asia . . ." The Attorney General, responding to a request from the Humboldt County Counsel, advised that [**627] "[such] a measure is not a proper subject [***107] for an initiative by the people of a county under the [California] Constitution and general laws for county government." (56 Ops. Cal. Atty. Gen. 61, 62 (1973)) because it did not constitute legislation but instead "requests the adoption of a nonlegislative resolution . . . relating to matters outside the purview of the county government." (*Id.*, at p. 63.) He distinguished *Farley v. Healey* on the ground that under the San Francisco Charter an initiative measure did not have to be a legislative act. P. 64.)

Two years later the Attorney General referred to his earlier opinion. In that opinion, he said, "this office distinguished the language of the San Francisco charter from the definition of 'initiative' in the California Constitution. [Citation.] In determining that local initiatives in general law counties cannot be used for policy declarations, inferentially we indicated that the statewide initiative is not available for such purposes either." (58 Ops. Cal. Atty. Gen. 830, 831, fn. 2 (1975).)

The second case on which proponents rely is *Santa Barbara Sch. Dist. v. Superior Court*, supra, 13 Cal.3d 315. A state initiative, Proposition 21, repealed *Education Code sections 5002 and 5003*, which directed school districts to eliminate racial imbalance, and added section 1009.6 to prohibit mandatory busing. In upholding the portion of the initiative repealing sections 5002 and 5003, we stated that "the people of California through the initiative process . . . have the power to declare state policy. The repealing provisions of Proposition 21 can conceivably be interpreted as an expression by the people . . . their preference for a 'neighborhood school policy.'" (P. 330.) The specific provisions upheld, however, did not declare policy except by inference; they simply repealed two specific sections of the Education Code. Whatever policies motivated that repeal, it is clear that Proposition 21 took statutory form.

36 Cal. 3d 687, *; 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

The cited cases, thus, are consistent with the conclusion we drew earlier -- that the function of the initiative under the California Constitution is to enact [*714] (or repeal) statutes. The statute may declare policy as well as provide for its implementation. Indeed it is common for statutes, including initiative statutes, to contain a section which declares policy and provides a guide to the implementation of the substantive provisions of the measure. n24 But an initiative which seeks to do something other than enact a statute -- which seeks to render an administrative decision, adjudicate a dispute, or declare by resolution the views of the resolving body -- is not within the initiative power reserved by the people.

n24 The distinction between a declaration of policy which takes statutory form and one that does not is functional as well as formal. In the former case, the declaration of policy can be cited and relied upon by administrators and courts in the interpretation and application of other statutory provisions. A declaration which merely requests action by Congress, and which relates to a matter beyond the state's legislative jurisdiction, can have no such legal effect.

We now turn to apply this analysis to the Balanced Budget Initiative. Section 1 of the initiative mandates the Legislature to adopt a resolution calling upon Congress to propose a balanced budget amendment, and applying for a constitutional convention to propose such an amendment. This section is in form neither a statute nor a resolution, but a cross between the indirect initiative repealed in 1966 (see fn. 20, *ante*) and a writ of mandamus. The distinction between an initiative which enacts a statute and one which commands the Legislature to do so is a narrow one, but may be constitutionally significant. If the people have the power to enact a measure by initiative, they should do so directly; if the people lack a power entrusted solely to the Legislature, they should not be permitted to circumvent that limitation. In any event, section 1 does not mandate the Legislature to enact a statute, but to adopt a resolution. That resolution is in part a simple declaration of policy, without statutory implementation, and in part a step in a federal process which may eventually lead to amendment of the federal Constitution. [**628] It does not create law and thus, under the [***108] authorities and analysis we have examined, does not "adopt" a "statute" within the meaning of article II of the California Constitution.

Section 2 of the initiative proposes to amend sections 8901 through 8903 and *section 9320 of the Government Code* relating to the payment of legislators' salaries. This section takes the form of a statutory enactment and, standing alone, could not be criticized on the ground

that it fails to "adopt" a "statute" within the scope of article II. n25 Section 2, however, simply [*715] provides a sanction, suspension of legislators' compensation, which goes into effect only if the Legislature fails to comply with section 1 within 20 legislative days. Consequently if section 1 is invalid, section 2 falls with it; it cannot be severed to obtain independent life.

n25 Section 2 states that if the Legislature fails to adopt the prescribed resolution within 20 legislative days, all payments to legislators shall be suspended until the resolution is adopted. Petitioners claim this section violates three provisions of the California Constitution: (1) article III, section 4, which provides that "salaries of elected state officials may not be reduced during their term of office"; (2) article IV, section 4, which provides that any adjustment in the compensation of members of the Legislature "may not apply until the commencement of the regular session commencing after the next general election following enactment of the statute [adjusting the compensation]"; and article IV, section 15, which makes it a felony to seek to "influence the vote or action of a member of the Legislature in the member's legislative capacity by bribery, promise of reward, intimidation, or other dishonest means."

Arguments of this character, which go to the substance of the initiative instead of the people's power to enact the measure, ordinarily would not justify preelection review. Moreover, even if section 2 were found invalid on one of these grounds, section 2 is severable in this respect. We would still face the question whether the people could mandate the Legislature to adopt a resolution calling for a constitutional convention, even if the specified means of enforcement were improper. We have therefore not attempted to analyze in depth or to resolve the substantive issues presented concerning the constitutionality of section 2 of the initiative.

Finally, section 3, the remaining substantive provision of the initiative, adopts a resolution calling upon Congress to propose a balanced budget amendment, and directs the Secretary of State to apply for a constitutional convention. We previously held that this application is invalid under article V of the federal Constitution. (See *ante* at pp. 703-704.) We now observe, in addition, that the adoption of this resolution under section 3 of the initiative does not constitute the adoption of a "statute," and thus does not fall within the scope of the initiative power under article II.

36 Cal. 3d 687, *, 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

(6b) We therefore conclude that the Balanced Budget Initiative is invalid as a whole because it fails to adopt a statute, and thus does not fall within the reserved initiative power as set out in article II of the California Constitution. We acknowledge the arguments of the proponents that there may be value to permitting the people by direct vote not only to adopt statutes, but also to adopt resolutions, declare policy, and make known their views upon matters of statewide, national, or even international concern. Such initiatives, while not having the force of law, could nevertheless guide the lawmakers in future decisions. Indeed it may well be that the declaration of broad statements of policy is a more suitable use for the initiative than the enactment of detailed and technical statutes. Under the terms of the California Constitution, however, the initiative does not serve those hortatory objectives; it functions instead as a reserved legislative power, a method of enacting statutory law. The present initiative does not conform to that model.

Even if we could uphold a portion of section 3 on the theory that the term "statute" in article II could be liberally construed to include a policy resolution, we would still be impelled to exclude the initiative from the ballot. The most important parts of the initiative, the provisions in section 1 mandating [*716] legislative action and the part of section 3 applying for a constitutional convention, would still be invalid. Section 2 would be inoperative, since the [*629] invalidity of the legislative mandate necessarily implies the invalidity of a salary suspension [***109] intended to coerce compliance with that mandate. Under such circumstances, to submit the measure to the voters without redrafting would confuse the electorate and mislead many voters into casting their ballot on the basis of provisions which had already been found invalid. As the court explained in *People's Lobby Inc. v. Board of Supervisors* (1973) 30 Cal.App.3d 869, 874 [106 Cal.Rptr. 666], n26 "to order the proposal to be placed on the ballot when only a small part of it could be valid would be using the writ of mandate for the purpose of misleading the voters." (See also *Alexander v. Mitchell* (1953) 119 Cal.App.2d 816, 829-830 [260 P.2d 261]; *Bennett v. Drullard* (1915) 27 Cal.App. 180, 186-187 [149 P. 368].) n27

n26 Disapproved on other grounds in *Associated Home Builders v. City of Livermore*, supra, 18 Cal.3d 582, 596, footnote 14.

n27 Our decision in *Santa Barbara Sch. Dist. v. Superior Court*, supra, 13 Cal.3d 315, rejected the argument that a different test of severability applies to initiative measures than to ordinary statutes passed by the Legislature. (See p. 332, fn. 7.) That case, however, involved postelection

review of an initiative, and used language which left open the test of severability in preelection review. (See *ibid.*) On this matter, we think the timing does make a difference. After the election, no harm ensues if the court upholds a mechanically severable provision of an initiative, even if most of the provisions of the act are invalid. In a preelection opinion, however, it would constitute a deception on the voters for a court to permit a measure to remain on the ballot knowing that most of its provisions, including those provisions which are most likely to excite the interest and attention of the voters, are invalid.

Let a peremptory writ of mandate issue commanding respondents not to take any action, including the expenditure of public funds, to place the proposed Balanced Budget Initiative on the November 6, 1984, General Election ballot. We reserve jurisdiction for the purpose of considering petitioners' request for an award of attorney's fees.

CONCUR BY:

KAUS

CONCUR:

KAUS, J. I agree with the majority that under article V of the United States Constitution as interpreted in the applicable federal precedents the initiative process cannot be used directly to apply for a call of a constitutional convention or indirectly to mandate the California Legislature to so apply. Because the governing federal law so clearly eviscerates the heart of the proposed initiative, I also agree that it is appropriate to remove the matter from the ballot at this time, before additional effort and expense are incurred on an inevitably futile task. I do not believe, however, that it is necessary to determine whether a small portion of the measure -- by which the electorate purports simply to urge Congress to propose a balanced budget amendment -- would, *standing alone*, be a proper initiative measure under [*717] the California Constitution. Although I am not ready to say that it would not be, it would surely be permitting the tail to wag the dog to find that the possible validity of this minor part of the measure justifies the submission of a largely invalid initiative to the electorate. (See *People's Lobby, Inc. v. Board of Supervisors* (1973) 30 Cal.App.3d 869, 874 [106 Cal.Rptr. 666], disapproved on another point in *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]; *Alexander v. Mitchell* (1953) 119 Cal.App.2d 816, 830 [260 P.2d 261].) Accordingly, I concur in the judgment.

DISSENT BY:

LUCAS

DISSENT:

LUCAS, J. I respectfully dissent. The majority, acting both precipitously and prematurely, has once again deprived the sovereign people of their precious initiative right. (See *Legislature v. Deukmejian* (1983) 34 Cal.3d 658 [194 Cal.Rptr. 781, 669 P.2d 17] [blocking vote on reapportionment initiative].) In my view, the majority errs in at least *three* separate respects, by (1) selecting this case for *preelection* review, contrary to the well-settled rule favoring the initial exercise of the [***110] people's franchise, (2) misinterpreting the federal constitutional provision (U. S. [**630] Const., art. V) pertaining to the calling of a constitutional convention "on application of" the state Legislatures, and (3) strictly and narrowly construing the scope of the people's reserved initiative power under California law, contrary to the rule in dozens of prior cases.

I. *Preelection Review*

The dissent of Justice Richardson in the foregoing reapportionment initiative case set forth the pertinent authorities which hold that, in the absence of a showing of "clear invalidity," we should not interfere with a scheduled election on an initiative measure but, instead, we should defer our review until *after* the people have had the opportunity to express their views. (*Legislature v. Deukmejian*, *supra*, 34 Cal.3d at p. 681 [dis. opn.]; see *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4 [186 Cal.Rptr. 30, 651 P.2d 274].) Even "grave doubts" regarding the validity of an initiative do not require preelection review. (*Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 256 [101 Cal.Rptr. 628].)

Our recent preelection review of the 1983 reapportionment initiative was "the first time in 35 years this court has removed from the ballot a qualified initiative measure, thereby preventing the people of California from voting on a subject of great importance to them . . ." (34 Cal.3d at p. 681 [dis. opn.].) Today's decision, filed *less than one year later*, reflects in my view a disturbing trend of this court to reach out and prematurely decide constitutional issues which might have been rendered entirely moot by the results [*718] of the forthcoming election, and which in any event readily could be addressed *after* the election has been held.

What reason does the majority offer for breaching, once again, the traditional rule of judicial restraint? The majority asserts that "The present proceeding . . . challenges the power of the people to adopt the proposed initiative," supposedly a "proper ground" for preelection review. (*Ante*, p. 696.) Surely, the mere "challenge" to an

initiative is not enough to trigger such expedited, accelerated review, for such a challenge could be made in every case. Instead, we must first satisfy ourselves that the initiative is *clearly* invalid, i.e., clearly beyond the people's power to adopt. No such showing is made here.

As I will explain, the people indeed do have the power to direct the Legislature to apply to Congress for a constitutional convention. But even were grave doubts presented regarding the initiative's validity, there are good reasons for deferring our review until after the people have expressed their views and voted upon the measure. As real parties herein point out in one of their briefs, "Participation in the electoral process and ongoing public debate on this important issue will benefit the citizenry and their elected representatives. It will allow citizens to exercise their first amendment rights to express their opinions." The majority's ruling unfortunately terminates abruptly any widespread public debate by California citizens regarding a matter so crucial to their own, and their nation's, financial well being. Might not the Legislature, the Congress and the voters each have welcomed a public airing of this important issue?

In addition, I question the propriety or necessity of the "rush to judgment" exhibited in this case, resulting from the majority's attempt to file its decision before impending election deadlines. Most of the briefing in this case was completed only a few *days* prior to oral argument; we filed today's opinion only a few *days* after hearing that argument. How can this court, already swamped with hundreds of pending cases, expect to reach a reasoned determination of the complex issues presented herein under such adverse circumstances?

Finally, several well respected amici (former Attorney General Griffin Bell, former Senator Sam Ervin, and Professor John Noonan) have raised an additional argument [***111] against preelection (or indeed *any*) judicial review which strikes me as quite [**631] persuasive: A court, and especially a state court, should not pass upon the essentially *political* question regarding the validity of an application for a constitutional convention pursuant to article V of the federal Constitution. (See *Coleman v. Miller* (1939) 307 U.S. 433 [83 L.Ed. 1385, 59 S.Ct. 972, 122 A.L.R. 695] [plurality opn., declining review of [*719] validity of state ratification of constitutional amendment].) Instead, we should defer to *Congress*, the body alone entrusted by the federal Constitution with the responsibility to receive and review such applications. As I indicate in the following part of this opinion, it is quite likely that Congress would conclude that the application is constitutionally valid. What possible harm could result from our deferring to Congress regarding this *federal* question?

II. *Validity Under Federal Law -- The Convention Clause*

Article V of the federal Constitution in pertinent part provides that Congress "*on the application of the Legislatures* of two-thirds of the several States, shall call a convention for proposing amendments" to the Constitution. (Italics added.) Such proposed amendments "shall be valid . . . when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof . . ." Contrary to the majority herein, the challenged initiative measure is not in conflict with the foregoing constitutional provision. The initiative simply directs *the Legislature* to file the requisite application so that California may be counted as supporting the calling of a constitutional convention. Where is the "clear invalidity" under federal law in that procedure?

Thus, section one, subdivision (a), of the challenged initiative measure recites that "The People of the State of California hereby mandate that the California Legislature adopt the following resolution and submit the same to the Congress . . ." The resolution which follows urges Congress to propose a balanced budget amendment to the federal Constitution and makes "application" to Congress for the calling of a constitutional convention to consider such an amendment. Assuming that, under *California* law, the initiative process may be used for this purpose (a subject I discuss in part III hereof), what basis exists for holding that the measure contravenes the *federal* constitutional requirements of article V? That article requires an "application" from the Legislature; the challenged measure is designed to provide such an application.

This is not a case where the voters are attempting to abrogate *prior* completed legislative action. (E.g., *Hawke v. Smith* (1920) 253 U.S. 221, 227-230 [64 L.Ed. 871, 875-876, 40 S.Ct. 495; 10 A.L.R. 1504]; *Barlotti v. Lyons* (1920) 182 Cal. 575, 578-584 [189 P. 282].) In both *Hawk* and *Barlotti*, the state Legislatures had *already ratified* the 18th Amendment ("prohibition") by joint resolution. Nevertheless, referendum petitions were thereafter circulated for the purpose of submitting the question to the voters for their approval or rejection. Both courts quite properly held that, under article V of the federal Constitution, the term "Legislature" refers [*720] only to the official representative body or bodies of the various states, rather than to the legislative power itself, as exercised through the referendum. Accordingly, the filing of the joint legislative resolutions *exhausted the ratification process*. As stated in *Hawke*, ratification "is but the expression of the assent of the state to a proposed amendment." (P. 229 [64 L.Ed. at p. 876].) Because article V mandated that such assent be expressed by the "Legislature," the referendum process was deemed inapplicable and incapable of abrogating the *prior* expression of legislative will.

In the present case, in contrast to *Hawke* and *Barlotti*, no attempt is made to "undo" any prior, completed legislative act which already had triggered a federal constitutional process such as calling a convention or ratifying a proposed amendment. Instead, here the initiative process is being used to assure that such an act finally is undertaken by our Legislature. Article V [***112] does not purport to prohibit the use of the initiative process as one means of inducing [**632] a state legislature to act. Indeed, as the foregoing cases make clear, the sole concern of article V is that the request for a convention call take the form of an application by a state legislature. As previously discussed, that concern is satisfied here.

III. *Validity Under California Law -- The Initiative Process*

Is an initiative measure which directs the state Legislature to apply for a constitutional convention "clearly invalid" under California law? Clearly not. Before confronting that issue, however, we should first review certain fundamental principles which control our disposition. First and foremost, "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Cal. Const., art. II, § 1.) A corollary to this is that "the legislative power of this State is vested in the California Legislature . . ., *but the people reserve to themselves the powers of initiative and referendum.*" (*Id.*, art. IV, § 1, italics added.) Finally, "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (*Id.*, art. II, § 8, subd. (a).)

The majority would apply a narrow construction of the scope of the initiative power under the California Constitution. In the majority's view, directing the Legislature to apply for a constitutional convention involves neither a "statute" nor an "amendment" to the state Constitution. But use of such a narrow construction of the people's initiative right is directly contrary to the teachings of prior decisions of this court which require a *liberal* construction favoring the exercise of the initiative power.

[*721] Justice Tobriner set forth the applicable principles as follows: "The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that *all power of government ultimately resides in the people*, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' (*Martin v. Smith* (1959) 176

36 Cal. 3d 687, *; 686 P.2d 609, **;
206 Cal. Rptr. 89, ***; 1984 Cal. LEXIS 210

Cal.App.2d 115, 117 [1 Cal.Rptr. 307]), the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' (*Mervynne v. Acker [1961] 189 Cal.App.2d 558, 563 [11 Cal.Rptr. 340]*). '[It] has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' (*Mervynne v. Acker, supra, 189 Cal.App.2d 558, 563-564; Gayle v. Hamm, supra, 25 Cal.App.3d 250, 258.*)" (*Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]*, italics added, fns. omitted.)

Since *Associated Home Builders*, we have often followed these admonitions regarding this constitutional right. (See, e.g., *Brosnahan v. Brown (1982) 32 Cal.3d 236, 241 [186 Cal.Rptr. 30, 651 P.2d 274]* [upholding the "Victims' Bill of Rights" initiative]; *Fair Political Practices Com. v. Superior Court (1979) 25 Cal.3d 33, 41 [157 Cal.Rptr. 855, 599 P.2d 46]* [upholding, in most respects, the Political Reform Act of 1974]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 219-220, 248 [149 Cal.Rptr. 239, 583 P.2d 1281]* [upholding the Jarvis-Gann property tax initiative]; see also *Legislature, supra, 34 Cal.3d 658, 683* [dis. opn.])

Under a liberal construction of the "precious" and reserved initiative power, the people clearly would have authority to direct their own representatives in the state [***113] Legislature to apply for a constitutional convention. Such an initiative measure [**633] reasonably could be deemed a proposal for the adoption of a "statute."

There is no fixed, immutable definition of the term "statute." The term could refer to any formal, written exercise of legislative power, whether or not codified and placed within the California codes. The Code of Civil Procedure defines "statute" as any "written law" other than a constitution. (§ 1897; see also former Cal. Const., art. IV, § 1 [initiative is the power to propose "laws"].) The people's written directive to the Legislature, mandating it to apply for a constitutional convention, certainly would qualify as [*722] a written law, i.e., a statute. Under this interpretation, we do not need to reach the further issue troubling the majority, namely, whether a legislative resolution applying for a constitutional convention is a statute. The statute involved here is the one enacted by the people, directing the Legislature to submit that application.

For example, a recent initiative measure in part required the Legislature to adopt provisions implementing

the right of crime victims to monetary restitution. (Prop. 8, adopted at the June 1982 Primary Election, now art. I, § 28, subd. (b).) Is not this procedural mandate from the people to the Legislature a "written law"? If so, then in what respects does the initiative measure before us fail to qualify as proposing such a law? Would it have made any difference if our measure had recited that its text would be formally incorporated into a new section of the Government Code? Surely such formalism cannot prevail over the people's right to be heard on matters of grave importance to them. Indeed, our prior cases require us to resolve all doubts in favor of the exercise of the initiative power, especially where the subject matter of the measure is of public interest and concern. (See *Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal.3d 315, 330 [118 Cal.Rptr. 637, 530 P.2d 605]* [state initiative measure declaring state policy on forced busing]; *Farley v. Healey (1967) 67 Cal.2d 325, 328-329 [62 Cal.Rptr. 26, 431 P.2d 650]* [local initiative measure adopting policy favoring immediate cease-fire and withdrawal from Vietnam].) As stated in the *Santa Barbara* case, "The people of California through the initiative process, have the power to declare state policy." (P. 330.) Surely, then, they have the power to direct the Legislature, as their representative, to declare such policy on their behalf.

We should bear in mind that, unlike the limited referendum power, the initiative is not confined by any state constitutional restrictions upon its scope or use. (See Cal. Const., art. II, §§ 8, 9; *Carlson v. Cory (1983) 139 Cal.App.3d 724, 728 [189 Cal.Rptr. 185]* [repeal of state inheritance and gift taxes].) As *Carlson* observes, "there is nothing in our state Constitution which prohibits the use of the statutory initiative to repeal tax laws." (P. 731.) Similarly, nothing in the state Constitution forbids use of the initiative to direct the Legislature to apply for a constitutional convention.

In a case upholding the validity of another statewide initiative measure (Prop. 13, adopted June 6, 1978, now Cal. Const., art. XIII A), we acknowledged that the initiative may be viewed as a "legislative battering ram" aimed at "[tearing] through the exasperating tangle of the traditional legislative procedure and [striking] directly toward the desired end." [Citation.]" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra, 22 Cal.3d 208, 228.*) Given the numerous rejected or abandoned [*723] bills aimed at accomplishing the end sought by the initiative measure challenged in this case, the foregoing description seems unusually apt. As in *Amador Valley*, "Although we express neither approval nor disapproval of the [measure] from the standpoint of sound fiscal or social policy" (p. 229), we should uphold it in recognition of the constitutional principle that "All political power is inherent in the people."

36 Cal. 3d 687, *, 686 P.2d 609, **;
206 Cal. Rptr. 89, ***, 1984 Cal. LEXIS 210

(Cal. Const., art. II, § 1.) Liberally construed, the initiative power applies here.

[**634] [***114] IV. *Severability*

Time constraints do not permit me to explore at length the validity of those additional provisions of the challenged initiative which impose financial sanctions upon the Legislature in the event of its noncompliance, and which requires the Secretary of State to act in lieu of the Legislature should it fail to adopt the resolution within 40 days of voter approval. Suffice it to say that these provisions are entirely severable from, and do not affect the validity of, the provision directing the Legisla-

ture to apply for a constitutional convention. (See *In re Blaney* (1947) 30 Cal.2d 643, 655 [184 P.2d 892].)

Indeed, each separate section of the initiative measure is made "severable" by the terms of the measure itself, and if any section or subdivision is held invalid, "the remainder of the initiative . . . shall not be affected thereby." I see no reason why the initiative may not be given effect, at least to the extent it directs the Legislature to apply for a constitutional convention. The distinct and severable questions of proper sanctions or alternative procedures in the event of noncompliance may be decided another day.

For all the foregoing reasons, I would deny the peremptory writ of mandate.

***** Print Completed *****

Time of Request: Tuesday, July 24, 2007 17:06:33 EST

Print Number: 1823:39214888

Number of Lines: 1303

Number of Pages:

Send To: LOPEZ, LONNIE
SMITH & LOWNEY PLLC
2317 E JOHN ST
SEATTLE, WA 98112-5412

1 of 1 DOCUMENT

ALASKANS FOR EFFICIENT GOVERNMENT, INC., an Alaskan non-profit corporation, and KAREN BRETZ, Appellants, v. STATE OF ALASKA, LOREN LEMAN, LIEUTENANT GOVERNOR, Appellee.

Supreme Court No. S-11916, No. 6103

SUPREME COURT OF ALASKA

153 P.3d 296; 2007 Alas. LEXIS 17

February 23, 2007, Decided

PRIOR HISTORY: **[**1]** Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Sharon L. Gleason, Judge. Superior Court No. 3AN-03-10863 CI.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff nonprofit organization and individual sued defendant State and Lieutenant Governor, challenging the decision to reject a petition proposing a ballot initiative designed to curb new taxes. The Superior Court of the State of Alaska, Third Judicial District, Anchorage granted summary judgment to defendants on the ground that *Alaska Const. art. II, § 14* could only be changed by constitutional amendment. Plaintiffs challenged the judgment.

OVERVIEW: The proposed initiative would have required, inter alia, a super-majority vote by the legislature to enact or increase taxes. Plaintiffs argued that *Alaska Const. art. II, § 14* simply established the minimum baseline for enacting a law. Plaintiffs' interpretation was unpersuasive where the clear consensus in other states was that super-majority voting requirements implicated a basic subject matter usually addressed by constitutional provision. Moreover, § 14 unmistakably signaled that Alaska's constitutional framers intended the majority-provision to be a substantive requirement instead of a mere procedural rule. In addition, the negative phrasing in § 14 did not have any automatic significance. Most importantly, the examples of more stringent voting requirements in other sections of the Alaska Constitution was convincing evidence of the framers' intent that § 14 was not a minimal standard. Thus, § 14 prevented an initiative from addressing the subject of the number of votes needed to enact a bill into law. The Lieutenant Governor, therefore, properly rejected the proposed ini-

tiative at the review stage for failing to comply with constitutional provisions regulating initiatives.

OUTCOME: The judgment was affirmed.

LexisNexis(R) Headnotes***Governments > Legislation > Initiative & Referendum***

[HN1] Alaska law usually requires an initiative to be enacted before its provisions become subject to challenge but allows a preelection challenge if the initiative conflicts with a constitutional provision that limits the initiative process.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

[HN2] The Supreme Court of Alaska reviews an award of summary judgment independently and will affirm if the evidence, when viewed in the light most favorable to the nonmoving party, fails to disclose a genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Civil Procedure > Appeals > Standards of Review > De Novo Review***Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview***

[HN3] The Supreme Court of Alaska reviews constitutional questions independently and will adopt the rule of law that is most persuasive in light of precedent, reason, and policy.

Governments > Legislation > Initiative & Referendum

[HN4] The Supreme Court of Alaska recognizes that when initiative petitions meet formal requirements for filing, the laws they propose to adopt are ordinarily not subject to immediate challenge: The general rule is that a court should not determine the constitutionality of an initiative unless and until it is enacted. The rule against preelection review is a prudential one, steeped in traditional policies recognizing the need to avoid unnecessary litigation, to uphold the people's right to initiate laws directly, and to check the power of individual officials to keep the electorate's voice from being heard. But this bar against preelection review has never been absolute: There are two exceptions to this general rule. First, where the initiative is challenged on the basis that it does not comply with the state constitutional and statutory provisions regulating initiatives, courts are empowered to conduct preelection review. Second, courts are also empowered to conduct preelection review of initiatives where the initiative is clearly unconstitutional or clearly unlawful.

Constitutional Law > Amendment Process

[HN5] Alaska Const. art. XIII provides two methods of amending the constitution: (1) by a constitutional convention, followed by ratification of the proposed amendment by the people, and (2) by a proposal that has obtained a two-thirds vote of each house of the legislature, and is adopted by the people by majority vote at a statewide election.

Constitutional Law > Amendment Process**Governments > Legislation > Initiative & Referendum**

[HN6] Alaska Const. art. XIII necessarily limits the scope of the initiative process: The initiative may be used only to enact laws, and not for the purpose of constitutional amendment.

Governments > Legislation > Enactment

[HN7] Alaska Const. art. II, § 14 authorizes the legislature to establish procedures for enacting laws and specifies that enacting a law generally requires a majority vote of both houses.

Governments > Legislation > Enactment

[HN8] See Alaska Const. art. II, § 14.

Constitutional Law > Amendment Process**Governments > Legislation > Enactment**

[HN9] To the extent that jurisdictions other than Alaska have addressed the issue, the clear consensus appears to view supermajority voting requirements as implicating the kind of basic subject matter usually addressed by constitutional provision rather than legislation.

Constitutional Law > State Constitutional Operation**Governments > Legislation > Enactment**

[HN10] By giving the legislature the duty to adopt procedural rules for enacting law, while spelling out the precise vote required to enact bills as law, Alaska Const. art. II, § 14 unmistakably signals that Alaska's constitutional framers intended the majority-voting provision to be a substantive requirement instead of a mere procedural rule.

Governments > Legislation > Enactment

[HN11] During the half-century since Alaska voters ratified its constitution, the majority-vote clause of Alaska Const. art. II, § 14 has uniformly been understood and applied as a substantive provision that sets both a floor and a ceiling: a requirement that bills be enacted by majority vote in all situations not covered by other requirements set out in the constitution.

Governments > Legislation > Enactment**Governments > Legislation > Initiative & Referendum**

[HN12] The majority-vote requirement in Alaska Const. art. II, § 14 operates as a constitutionally based subject-matter restriction, prohibiting the enactment of any law that proposes to modify the majority-vote standard. Because the legislature itself cannot change this constitutional standard by enacting a law, and an initiative cannot enact laws that the legislature has no authority to enact, it follows that Alaska Const. art. II, § 14 prevents an initiative from addressing the subject of the number of votes needed to enact a bill into law.

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN13] The Supreme Court of Alaska will not ordinarily consider issues unless they were raised in the trial court.

COUNSEL: Kenneth P. Jacobus, P.C., Anchorage, for Appellants.

Brenda B. Page, Assistant Attorney General, Anchorage, and David W. Marquez, Attorney General, Juneau, for Appellee.

JUDGES: Before: Bryner, Chief Justice, Matthews, Eastaugh, Fabe, and Carpeneti, Justices.

OPINION BY: BRYNER

OPINION

[*297] BRYNER, Chief Justice.

I. INTRODUCTION

Alaskans for Efficient Government, an Alaskan nonprofit corporation, submitted Initiative Petition 03TMLT for certification by the lieutenant governor. The initiative included a section requiring a supermajority vote for the legislature to pass tax-related bills. The lieutenant governor declined to certify the proposed initiative, ruling that it failed to comply with constitutional provisions governing the initiative process. The question presented in this appeal is whether the initiative could properly be rejected before being voted [*2] on and enacted. [HN1] Alaska law usually requires an initiative to be enacted before its provisions become subject to challenge but allows a pre-election challenge if the initiative conflicts with a constitutional provision that limits the initiative process. Here, we conclude that the initiative's supermajority requirement conflicts with *article II, section 14 of the Alaska Constitution*, which requires bills to be enacted by a majority vote. Since *article XI, section 1 of the Alaska Constitution* does not allow an initiative to amend a constitutional requirement, we hold that the initiative was properly rejected for violating constitutional restrictions on the initiative process.

II. FACTS AND PROCEEDINGS

In 2003 Karen Bretz, an Alaska voter and organizer of a non-profit corporation called Alaskans for Efficient Government (AFEG), filed a petition that proposed a ballot initiative designed to curb new taxes. The initiative proposed: (1) to require a three-fourths (seventy-five percent) vote by the legislature (or a majority vote by the electorate) to enact or increase taxes; (2) to allow municipalities to use initiatives for limiting local taxes; and (3) to prohibit taxes on [*3] real estate transfers. After consulting with the Department of Law, the lieutenant governor rejected the petition, notifying Bretz that the department had determined that the proposal "does not comply with the constitutional and statutory provisions governing the use of the initiative."

Bretz and AFEG¹ appealed to the superior court, claiming that the proposed initiative dealt with a proper subject and should have been certified. The parties filed cross-motions for summary judgment; their dispute centered on the validity of the proposed initiative's first section - its supermajority voting requirement:

Section 1. Limitation on State Taxes.
No new state taxes may be imposed, nor may existing rates on existing taxes be increased, except as follows:

(1) Upon the affirmative vote of 75% of the members of each house of the Alaska Legislature,

(2) Upon the affirmative vote of a majority of those voters of the State of Alaska voting on this question at a regular or special election, or

(3) If necessary to comply with the terms of state bonded indebtedness existing as of the effective date of this Act.^[2]

1 For convenience we will refer to Bretz and AFEG collectively as AFEG.

[*4]

2 Since the issues on appeal do not require us to consider the initiative petition's remaining sections, we do not set them out as part of this opinion. For ease of reference, however, the initiative's full text is included as an appendix to the opinion.

The state maintained that the proposed initiative's call for a supermajority vote would violate the Alaska Constitution, which authorizes the legislature to enact most laws by a simple majority vote. Contending that approval of the supermajority requirement would effectively amend the constitution - a change that cannot be made by the initiative process - the state reasoned that AFEG's initiative was properly rejected. AFEG in turn defended the initiative, insisting that it merely proposed to enact a law, not a constitutional amendment. Because the proposed initiative was not clearly unconstitutional, AFEG argued, it could only be challenged after [*298] being placed on the ballot and approved by the voters.

The superior court granted summary judgment to the state. In the court's view, *article II, section 14 of the Alaska Constitution*, which allows [*5] the legislature to enact bills by majority vote, could only be changed by a constitutional amendment. Since an initiative cannot amend the constitution, the court concluded, AFEG's initiative could not properly be used to enact a supermajority voting requirement.

AFEG appeals.

III. STANDARD OF REVIEW

[HN2] We review an award of summary judgment independently and will affirm if the evidence, when viewed in the light most favorable to the non-moving party, "fails to disclose a genuine issue of material fact and the moving party is entitled to judgment as a matter of law."³ [HN3] We likewise review constitutional questions independently and will "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."⁴

³ *Sonneman v. State*, 969 P.2d 632, 635 (Alaska 1998) (quoting *Dayhoff v. Temsco Helicopters, Inc.*, 772 P.2d 1085, 1086 (Alaska 1989)).

⁴ *Sonneman*, 969 P.2d at 636 (citing *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

[**6] IV. DISCUSSION

A. Pre-Election Review of Supermajority Requirement

[HN4] We have long recognized that when initiative petitions meet formal requirements for filing, the laws they propose to adopt are ordinarily not subject to immediate challenge: "The general rule is that a court should not determine the constitutionality of an initiative unless and until it is enacted."⁵ The rule against pre-election review is a prudential one, steeped in traditional policies recognizing the need to avoid unnecessary litigation, to uphold the people's right to initiate laws directly, and to check the power of individual officials to keep the electorate's voice from being heard.⁶ But this bar against pre-election review has never been absolute:

There are two exceptions to this [general rule]. First, where the initiative is challenged on the basis that it does not comply with the state constitutional and statutory provisions regulating initiatives, courts are empowered to conduct pre-election review. Second, courts are also empowered to conduct pre-election review of initiatives where the initiative is clearly unconstitutional or clearly unlawful.⁷

⁵ *State v. Trust the People*, 113 P.3d 613, 614 n.1 (Alaska 2005).

[**7]

⁶ *Id.* at 628-29.

⁷ *Id.* at 614 n.1.

AFEG argues that its proposed initiative should have avoided review and been placed on the ballot because it is not "clearly unconstitutional"⁸ as required under the second exception: "The case at bench involves a claim that the proposed initiative is in conflict with the Constitution of Alaska and, accordingly, is an attempt to amend it. Judicial review of Constitutional challenges, however, should not be conducted until after the passage of the initiative by the voters, if in fact it is passed."

⁸ *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003).

But the state responds that the initiative was properly rejected under the first exception - not because it might be unconstitutional if enacted but rather because enacting an initiative on a subject that can only be changed by constitutional amendment fails to [**8] comply with constitutional provisions regulating the initiative process.

The state's argument starts from the premise that the Alaska Constitution does not permit constitutional amendments to be enacted by initiative. As this court recognized soon after statehood in *Starr v. Hagglund*,

[HN5] [Article XIII of the Alaska Constitution] provides two methods of amending the constitution: (1) by a constitutional convention, followed by ratification of the proposed amendment by the people, and (2) by a proposal that has obtained a two- [*299] thirds vote of each house of the legislature, and is adopted by the people by majority vote at a statewide election.⁹

As we further recognized in *Starr*, [HN6] article XIII necessarily limits the scope of the initiative process: "The initiative may be used only to enact laws, and not for the purpose of constitutional amendment."¹⁰

⁹ *Starr v. Hagglund*, 374 P.2d 316, 317 n.2 (Alaska 1962).

¹⁰ *Id.*; see also *State v. Lewis*, 559 P.2d 630, 639 (Alaska 1977) ("The Alaska Constitution may not be amended by popular vote alone, without prior action by either the legislature or a constitutional convention."). Notably, *article XI, section 1* empowers voters to "enact laws by the initiative" (emphasis added); no similar provision

extends the initiative power to include constitutional amendments.

[**9] Building on the premise that article XIII forbids the initiative from being used to amend the constitution, the state's argument turns to *article II, section 14 of the Alaska Constitution*. [HN7] This provision authorizes the legislature to establish procedures for enacting laws and specifies that enacting a law generally requires a majority vote of both houses:

[HN8] The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal. [11]

11 *Alaska Const. art. II, § 14* (emphasis added).

In the state's view, the majority-vote clause of *article II, section 14*, restricts the use of an initiative [**10] by establishing that, except when otherwise provided in the constitution, a majority vote of both houses is the exclusive method for enacting a bill. Under this view, since a majority vote is a constitutional requirement and, as such, under article XIII, is not subject to change by initiative, a proposal to adopt a supermajority vote by initiative is barred because it conflicts with constitutional provisions that place the topic off limits to the initiative process. As the state puts it:

The Alaska Constitution requires only a majority vote of each house of the legislature to enact legislation. The measure proposed by the AFEG initiative, however, would establish new, additional requirements for enactment of taxation legislation. Specifically, the proposed measure would require a 75 percent majority vote of both houses of the Alaska legislature, or approval of a majority of the electorate, to enact legislation that would impose or increase state taxes. Such a fundamental change to the constitutional requirements for enactment of legislation

constitutes an amendment to the Alaska Constitution. Under the Alaskan constitutional restrictions on initiatives, the initiative process [**11] cannot be used to amend the constitution. Accordingly, the lieutenant governor properly denied certification of the application.

Although AFEG concedes that the initiative process may not be used to amend the constitution, it disputes the state's reading of *article II, section 14's* majority-vote clause. AFEG reads *article II, section 14* as simply establishing the minimum baseline for enacting a law. In AFEG's view, this baseline does not preclude a more stringent law requiring a supermajority vote.

But AFEG's interpretation of *article II, section 14's* majority-vote requirement is unpersuasive for several reasons.

Initially, we note that other states that have adopted supermajority or voter-approval requirements for enacting tax-related bills have almost always treated these requirements as constitutional matters. Indeed, of the states that have such requirements, it appears that all but one have implemented them as constitutional provisions.¹² Moreover, [**300] the only state to adopt a supermajority requirement by ordinary legislation, Washington, later suspended it through a bill enacted by a majority vote, leaving Washington law where it started until its next legislative session. [**12]¹³ The subject has also been viewed as a constitutional one in the federal arena. In 1995, when the House of Representatives passed a rule requiring supermajority votes for certain tax-related legislation,¹⁴ members of the House immediately filed a constitutional challenge.¹⁵ Although the challenge stalled for lack of standing¹⁶ and ultimately became moot after the House determined that the rule could be waived by a majority,¹⁷ Chief Judge Edwards of the D.C. Circuit expressed the view that the supermajority rule clearly violated the United States Constitution by "fundamentally alter[ing] the balance of power established by the Framers."¹⁸

12 See *Ariz. Const. art. IX, § 22*; *Ark. Const. art. V, § 38*; *Cal. Const. art. XIII A*; *Colo. Const. art. X, § 20*; *Del. Const. art. VIII, § 11*; *Fla. Const. art. VII, § 5*; *Ky. Const. § 36*; *La. Const. art. VII, § 2*; *Mich. Const. art. IX, § 25*; *Miss. Const. art. IV, § 70*; *Okla. Const. art. V, § 33*; *Or. Const. art. IV, § 25*; *S.D. Const. art. XI, § 13*; see also *Nev. Const. art. 4, § 18* (subsequently ruled invalid in part on state constitutional grounds not relevant here, see *Guinn v. Legislature of State of Nevada*, 119 Nev. 277, 71 P.3d 1269, 1274-76 (Nev.

2003), decision clarified on denial of reh'g by 119 Nev. 460, 76 P.3d 22 (Nev. 2003), cert. denied sub nom., *Angle v. Guinn*, 541 U.S. 957, 124 S. Ct. 1662, 158 L. Ed. 2d 392 (2004).

[**13]

13 See *Wash. Rev. Code* § 43.135.035.

14 See H.R. Res. 6, 104th Cong. (1995), 141 Cong. Rec. 462, 463 (1995) (adding subsections (c) and (d) to House Rule XXI(5)).

15 *Skaggs v. Carle*, 324 U.S. App. D.C. 87, 110 F.3d 831, 833 (D.C. Cir. 1997).

16 *Id.* at 837.

17 141 Cong. Rec. 29463, 29476-77 (1995) (Speaker Pro Tempore rules that waiving supermajority rule only requires a majority).

18 *Skaggs*, 110 F.3d at 847 (Edwards, C.J., dissenting) (expressing view that House Rule XXXI(5)(c) violated the presentment clause of the Constitution, *U.S. Const. art. I, § 7, cl. 2*).

Thus, [HN9] to the extent that other jurisdictions have addressed the issue, the clear consensus appears to view supermajority voting requirements as implicating the kind of basic subject matter usually addressed by constitutional provision rather than legislation.

This view coincides with the Alaska Constitution's text and its traditional application by the Alaska legislature. As already mentioned, *article II, section 14*, of [**14] *the Alaska Constitution* directs the legislature to "establish the procedure for enactment of bills into law"; *section 14* then goes on to specify that "[n]o bill may become law without an affirmative vote of a majority of the membership of each house." [HN10] By giving the legislature the duty to adopt procedural rules for enacting law, while spelling out the precise vote required to enact bills as law, *section 14* unmistakably signals that Alaska's constitutional framers intended the majority-voting provision to be a substantive requirement instead of a mere procedural rule.

AFEG insists that the negative phrasing of *section 14's* majority-vote clause - "[n]o bill may become law without an affirmative vote of a majority" - should be read as signaling the framers' intent to set a floor, not a ceiling: to require at least a majority vote while allowing laws imposing stricter requirements. If the framers had intended to require no more than a majority vote, AFEG contends, they would have drafted the clause to read: "Any bill may be enacted by an affirmative vote of the majority of the membership of each house."

But as the state correctly observes, other courts interpreting constitutional [**15] language have wisely refrained from attributing any automatic significance to the distinction between negative and positive phrasing.¹⁹ Here, for example, had the framers said "any bill" rather than "no bill," AFEG's logic would just as readily compel the anomalous [*301] conclusion that *section 14* was meant to set a ceiling but not a floor - that a majority vote would be the maximum needed to enact any bill, but the legislature would remain free to specify a sub-majority vote as sufficient to enact laws dealing with specified subjects, as it saw fit.²⁰

19 See, e.g., *Powell v. McCormack*, 395 U.S. 486, 538-39, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) (recognizing that the *U.S. Constitution's qualifications clause* provides an exclusive list of qualifications for legislators, notwithstanding its negative phrasing); *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366, 1372-73 (Wash. 1998) (Washington Supreme Court found that negative phrasing could still mean exclusivity of a provision and did not just mean a minimum); *Cathcart v. Meyer*, 2004 WY 49, 88 P.3d 1050, 1070-71 (Wyo. 2004) (not distinguishing between positive and negative phrasing, but noting that some other jurisdictions maintained the distinction); cf. *Mississippi County v. Green*, 200 Ark. 204, 138 S.W.2d 377, 379 (Ark. 1940) ("Why fix [legislative qualifications, even in negative phrasing] in the first place if the makers of the constitution did not intend to fix all the qualifications required, and why fix only a part of them and leave it up to the legislators to fix other qualifications?").

[**16]

20 Moreover, as demonstrated by *article II, section 12*, it would be problematic to categorically reject this interpretation on the assumption that the framers would never have authorized any form of sub-majority voting requirement. In establishing various legislative procedures, *section 12* provides, "[a] majority of the membership of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day and may compel attendance of absent members." (Emphasis added.)

More important, the Alaska Constitution includes other provisions that undercut AFEG's contention that the framers intended *section 14's* majority-vote clause as a minimal standard. Alaska's constitutional framers, well aware of their ability to require more stringent voting requirements, included such requirements in the Alaska Constitution for laws dealing with various subjects. Examples can be found in the three-readings clause of *arti-*

cle II, section 14; ²¹ the veto-override clause of *article II, section 16*; ²² the effective-date provisions of *article II, section 18*; ²³ the impeachment standard [**17] set out in *article II, section 20*; ²⁴ and the provisions governing budget reserve fund appropriations set out in *article IX, section 17(c)*. ²⁵ In our view, the superior court correctly recognized these examples as convincing evidence of the framers' intent to include provisions in the Alaska Constitution describing all instances in which supermajority votes could be required to enact a bill.

21 *Alaska Const. art. II, § 14* states, in part, "[n]o bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it."

22 *Alaska Const. art. II, § 16* states "[b]ills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature."

23 *Alaska Const. art. II, § 18* states "[l]aws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date."

[**18]

24 *Alaska Const. art. II, § 20* states "[a]ll civil officers of the State are subject to impeachment by the legislature. Impeachment shall originate in the senate and must be approved by a two-thirds vote of its members."

25 *Alaska Const. art. IX, § 17(c)* states "[a]n appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature." We note additionally that *article II, section 19* provides an example of a voter-approval requirement:

The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination. Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of

the qualified voters voting thereon in the subdivision affected.

To support its position that *section 14's* majority-vote clause just sets a minimal level for enacting bills into law, AFEG further cites numerous instances in which the legislature [**19] has adopted rules establishing voting requirements, including some rules requiring supermajority votes. Yet all of the cited rules either deal with non-substantive matters relating to internal legislative procedures or simply mirror substantive voting requirements expressly included in the Alaska Constitution. ²⁶ AFEG identifies no rule that alters any provision of the constitution specifying the votes for enacting a bill; nor does AFEG cite any rule establishing a supermajority requirement for enacting any bill not already covered by supermajority requirements set out in the constitution's text. And AFEG points to no authority suggesting that the legislature, the Department of Law, or this court has ever interpreted the constitution to allow a rule of this sort.

26 For instance, Legislative Rule 14 incorporates voting requirements of *article II, sections 14, 16, and 18*; Legislative Rule 39 relies on *article II, section 14*; and Legislative Rule 45 relies on *article II, sections 15 and 16*.

Apparently, then, [**20] [HN11] during the half-century since Alaska voters ratified our constitution, the majority-vote clause of *article II, section 14* [**302] has uniformly been understood and applied as a substantive provision that sets both a floor and a ceiling: a requirement that bills be enacted by majority vote in all situations not covered by other requirements set out in the constitution.

So construed, [HN12] the majority-vote requirement operates as a constitutionally based subject-matter restriction, prohibiting the enactment of any law that proposes to modify the majority-vote standard. Because the legislature itself cannot change this constitutional standard by enacting a law, and an initiative cannot enact laws that the legislature has no authority to enact, ²⁷ it follows that *article II, section 14* prevents an initiative from addressing the subject of the number of votes needed to enact a bill into law. Accordingly, we conclude that the lieutenant governor correctly reviewed the proposed initiative before it appeared on the ballot and properly rejected it at that stage for failing to comply with constitutional provisions regulating initiatives. ²⁸

27 See *Starr, 374 P.2d at 317 n.2*; *Lewis, 559 P.2d at 639*; *Alaska Const. art. XI, § 1* (empowering voters to "enact laws by the initiative").

[**21]

28 *Kodiak Island Borough*, 71 P.3d at 898; see also *Trust the People*, 113 P.3d at 628-29; *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999).

B. Severance

AFEG separately argues that the proposed initiative's severance clause authorizes us to remove the offending provisions from the measure and allow the rest to go forward. But the lieutenant governor rejected the entire initiative, not just its supermajority vote provision. In appealing this ruling to the superior court, AFEG failed to argue the severance issue. And its cursory briefing of the point on appeal to this court fails to provide a meaningful basis for appellate review. We have often emphasized that [HN13] "[w]e will not ordinarily consider issues unless they were raised in the trial court."²⁹ Given AFEG's untimely and conclusory argument on the severance issue, we hold that AFEG has failed to preserve the point.

29 *Brooks v. Brooks*, 733 P.2d 1044, 1053 (Alaska 1987); see also *Moore v. State, Dep't of Natural Res.*, 992 P.2d 576, 577 n.5 (Alaska 1999); *Jackson v. Nangle*, 677 P.2d 242, 251 n.10 (Alaska 1984).

[**22] V. CONCLUSION

For these reasons, we AFFIRM the superior court's judgment upholding the lieutenant governor's rejection of Initiative Petition 03TMLT.

APPENDIX

AN INITIATIVE REQUIRING 75% LEGISLATIVE MAJORITY OR VOTER APPROVAL TO IMPOSE NEW TAXES OR INCREASE EXISTING TAXES, PROHIBITING REAL ESTATE TRANSFER TAXES, AND PROVIDING FOR CERTAIN LOCAL OPTIONS

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

Section 1. Limitation on State Taxes. No new state taxes may be imposed, nor may existing rates on existing taxes be increased, except as follows:

(1) Upon the affirmative vote of 75% of the members of each house of the Alaska Legislature,

(2) Upon the affirmative vote of a majority of those voters of the State of Alaska voting on this question at a regular or special election, or

(3) If necessary to comply with the terms of state bonded indebtedness existing as of the effective date of this Act.

Section 2. Local Option. Any home rule or general law municipality, including cities, boroughs and unified municipalities, may enact or repeal ordinances through action by the governing body or through the initiative or referendum, which limit the imposition [**23] of new taxes or the increase of rates on existing taxes, repeal or reduce existing taxes, or determine maximum rates or amounts of any local tax.

Section 3. Real Estate Transfer Taxes Prohibited. Neither the State nor any municipality may impose any transfer taxes or [*303] tax rates on transfers of real property by sale or lease. This section does not affect the right of the State or a municipality to impose taxes or royalties on the harvesting, extraction, or use of oil or gas, minerals, timber, and other natural resources which may be deemed to be part of the land.

Section 4. Interpretation. This Act shall be interpreted in the manner which reasonably restricts most the growth of government. The term "taxes", for the purposes of this act, shall include all taxes, permit fees, license fees and user fees.

Section 5. Supersedes Conflicting Statutes, Ordinances, and Regulations. This initiative supersedes all conflicting provisions of State statutes, local ordinances and State and local regulations and procedure, which provisions shall be of no further force or effect.

Section 6. Applicability. The provisions of this Act apply to all new taxes and all rate [**24] increases on existing taxes which are levied or imposed on or after January 1, 2004. If this date may not be used for legal reasons as determined by a court of competent jurisdiction, then the provisions of this Act apply to all new taxes and all rate increases on existing taxes which are levied or imposed on or after the effective date of this Act.

Section 7. Severability. The provisions of this Act are independent and severable, and if any provision of this Act, or the applicability of any provision to any person or circumstance, shall be held to be invalid by a court of competent jurisdiction, the remainder of this Act shall not be affected and shall be given effect to the fullest extent practicable.

LEXSEE 3 F.SUPP.2D 1088

LINDA K. BARKER, BARBARA EVERIST, and ROY LETELLIER, Plaintiffs, -v.-
JOYCE HAZELTINE, in her Official Capacity as Secretary of State, Defendant.

CIV 97-4242

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DA-
KOTA, SOUTHERN DIVISION

3 F. Supp. 2d 1088; 1998 U.S. Dist. LEXIS 5704

March 31, 1998, Decided
March 31, 1998, Filed

DISPOSITION: [**1] Plaintiffs' Motion for Summary Judgment granted. Defendant's Motion for Summary Judgment denied.

court granted reasonable attorney's fees, expenses, and costs to the citizens as the prevailing party.

CASE SUMMARY:

LexisNexis(R) Headnotes

PROCEDURAL POSTURE: Appellant Secretary of State (secretary) sought to place an initiative on the ballot which required her to disclose which of the candidates favored term limits. Appellee citizens claimed that the initiative was constitutionally improper and sought a permanent injunction.

Constitutional Law > Amendment Process

[HN1] The Federal Constitution may be amended only through the process established in the Constitution. *U.S. Const. Art. V.*, states in pertinent part: 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, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

OVERVIEW: The secretary sought validation of an initiative which was adopted by majority vote, directing the secretary to identify those candidates for Senator and Representatives who had not supported term limit provisions advocated in the initiative. The three plaintiffs, as citizens, had a legal interest in the constitutionality of the initiated measure, so they were properly before the court in the suit filed pursuant to 42 U.S.C.S. § 1983. The court found that the secretary also had a legal interest in the resolution of the case, so that she was also properly before the court. The court heard arguments, and it permanently enjoined the secretary from placing the initiative on the ballot and granted summary judgment in favor of the citizens. It found that the initiative was constitutionally infirm and that it was properly enjoined from being placed on the ballot. In addition, the court found that the initiative was violative of the U.S. Constitutional Due Process, Free Speech, Speech and Debate, and the *Fourteenth Amendment*.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Political Speech
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

[HN2] Free and open speech is absolutely essential to those individuals who seek public office, as well as to those who are elected to public office. Freedom of speech and debate are essential to any democratic form of government, for it is only through vigorous discussion of conflicting ideas that sound decisions are made for the good of the country at large, and laws burdening political speech must be analyzed under a strict scrutiny standard.

OUTCOME: The court declared the initiative unconstitutional and permanently enjoined its enforcement. The

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Political Speech

[HN3] When an equal protection challenge to ballot access is brought, the court must consider whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity.

COUNSEL: For PLAINTIFF: Scott D. McGregor, Viken, Viken, Pechota, Leach & Dewell, Rapid City, SD.

For DEFENDANT: Mark W. Barnett, Sherri Sundem Wald, Attorney General's Office, Pierre, SD.

JUDGES: Lawrence L. Piersol, United States District Judge.

OPINION BY: Lawrence L. Piersol

OPINION

[*1089] MEMORANDUM OPINION AND ORDER

This case does not determine whether or not it is desirable to establish term limits for United States Representatives and United States Senators. The Federal Constitution does not now impose term limits. In recent years there has been vigorous debate concerning term limits. The Court's decision today does not, should not, and cannot, resolve the ultimate question of whether the Federal Constitution should be amended to limit congressional incumbents to a predetermined number of terms in office. The power to decide that issue lies with the people of the United States, and not with the Federal Judiciary. The Court's decision today decides a separate issue which is properly considered by the Judiciary. The issue is whether the method by which South Dakota Initiated Measure 1 attempts to establish [**2] congressional term limits complies with federal constitutional principles. Initiated Measure [*1090] 1, adopted by majority vote, directs the South Dakota Secretary of State to place labels on the primary and general election ballots to identify those candidates for United States Senator and United States Representative who do not support the particular term limits provision advocated in Initiated Measure 1. As discussed more fully below, the Court declares Initiated Measure 1 unconstitutional and permanently enjoins its enforcement.

I. The Parties

The issue is brought to the Court by three plaintiffs through this action for declaratory and injunctive relief. Plaintiff Linda K. Barker is an elected State Representative from Legislative District 13 in Minnehaha County, South Dakota, and she resides in Sioux Falls. Plaintiff

Barbara Everist is an elected State Senator from Legislative District 14 in Minnehaha County, and she also lives in Sioux Falls. Plaintiff Roy Letellier is a former elected State Representative from District 29 in Meade and Butte Counties, South Dakota, and he is a former candidate for the office of Public Utilities Commission. He resides in Belle Fourche, in Butte [**3] County, South Dakota. The three plaintiffs, as citizens, residents, taxpayers, registered voters, and current or former South Dakota elected officials, have a legal interest in the constitutionality of Initiated Measure 1 which they may properly bring before the Court in this suit pursuant to 42 U.S.C. § 1983.

Defendant Joyce Hazeltine is the duly elected and acting Secretary of State of the State of South Dakota. In her capacity as Secretary of State, defendant Hazeltine is the legally designated custodian of the official laws of the State of South Dakota, and she serves as the chief election official of the State of South Dakota. She is specifically charged with implementing the provisions of Initiated Measure 1. Therefore, Secretary of State Hazeltine also has a legal interest in the resolution of this case.

II. The History of Initiated Measure 1

On April 10, 1996, the full text of the initiated petition, later designated as Initiated Measure 1, was filed in Secretary of State Hazeltine's office as required by South Dakota law. *S.D. Codified Laws Ann. § 2-1-6.2* (1992). On May 6, 1996, Secretary of State Hazeltine received the completed ballot label initiative petition [**4] as required by *S.D. Codified Laws Ann. § 2-1-2* (1992). On August 9, 1996, after remand by the South Dakota Supreme Court for validation of signatures on certain disputed petition sheets, *Larson v. Hazeltine, 1996 S.D. 100, 552 N.W.2d 830 (S.D. 1996)*, Secretary of State Hazeltine filed the initiative petition and declared it Initiated Measure 1 for the 1996 general election. On August 12, 1996, defendant Hazeltine certified the text, statement, title, Attorney General's explanation and recitation of effect of Initiated Measure 1 to all South Dakota County Auditors for inclusion on the 1996 general election ballot, as required by *S.D. Codified Laws Ann. § 12-13-1* (1995). Initiated Measure 1 was titled, "An Act requiring South Dakota's Congressional delegation to use their powers to adopt a congressional term limits amendment to the United States Constitution."

The South Dakota Attorney General's ballot explanation of Initiated Measure 1, drafted pursuant to *S.D. Codified Laws Ann. § 12-13-9* (1995), stated:

This initiated law would require the U.S. Senators and Representative from South Dakota to use all of their powers to

support an amendment to the U.S. Constitution which [**5] establishes congressional term limits of three terms for a Representative and two terms for a Senator. If the incumbent Senators and Representative do not use their power in eight designated situations to support a term limits amendment, the Secretary of State would be required to place the words "Disregarded Voters' Instruction on Term Limits" on the ballot next to that candidate's name at his/her next election. A candidate who is not currently in the Senate or the House would be given an opportunity to take a pledge supporting term limits and agreeing, if elected, to use his/her powers to enact the amendment. The Secretary of State would be required to place the words "Declined to Pledge to Support Term Limits" on the ballot next to the name of a candidate who refused to pledge. These restrictions would continue until a constitutional [*1091] amendment establishing term limits is enacted by Congress and ratified by the states.

At the general election held on November 5, 1996, the voters passed Initiated Measure 1 by a vote of 205,852 (67.59%) in favor of the measure to 98,696 (32.41%) against it. The official state canvass of the vote on Initiated Measure 1 was held on November 15, [**6] 1996. The following day, Initiated Measure 1 became law and was codified at *S.D. Codified Laws Ann. § 12-16-1.2* (1997 Advance Code Serv.). The full text of Initiated Measure 1 is appended to this decision as Appendix A.

During its 1997 session, the South Dakota Legislature passed House Bill 1188 to repeal Initiated Measure 1 as codified. 1997 S.D. Laws Ch. 80, § 1. Governor William J. Janklow signed the bill on March 11, 1997, repealing Initiated Measure 1 effective July 1, 1997.

On March 25, 1997, the full text of a referendum on House Bill 1188 was filed with Secretary of State Hazeltine pursuant to *S.D. Codified Laws Ann. § 2-1-6.2* (1992). On June 9, 1997, defendant Hazeltine received the completed referendum petition with a sufficient number of signatures, and on June 19, 1997, she certified the referendum for inclusion on the 1998 general election ballot as Referred Law 1. The effect of certification of Referred Law 1 was to prevent the repeal of Initiated Measure 1 effective July 1, 1997, until the issue could be presented to the voters at the general election on November 3, 1998. Consequently, Initiated Measure 1, requiring ballot labels next to the names of those candidates [**7]

for United States Senator and United States Representative who do not meet the requirements of Initiated Measure 1, remains the law of South Dakota. *See SDDS, Inc. v. State of South Dakota*, 481 N.W.2d 270, 272 (S.D. 1992) ("The purpose for the delay provision [in legislation taking effect] is to allow our citizens time to obtain sufficient signatures to begin the referendum process.")

During the recently-ended 1998 Session, the South Dakota Legislature amended Initiated Measure 1 by passing House Bill 1007 to direct the Secretary of State to take certain actions regarding her implementation of Initiated Measure 1, including a provision requiring candidates for the offices of United States Senator and Representative to file an affidavit or pledge with the Secretary of State by March 1, 1998, attesting to their compliance with Initiated Measure 1. Governor William J. Janklow signed House Bill 1007 on February 14, 1998, and because the bill contained an emergency clause, it became effective immediately. A certified copy of House Bill 1007, as passed by the South Dakota Legislature and signed by Governor Janklow, is appended to this decision as Appendix B.

On February 27, 1998, [**8] at the request of plaintiffs, this Court entered a Temporary Restraining Order, effective until the close of business on Tuesday, March 31, 1998, enjoining Secretary of State Hazeltine from implementing the 1998 amendments to Initiated Measure 1. Specifically, the Court enjoined defendant Hazeltine from requiring incumbent candidates for the offices of United States Senator and Representative to complete and return to the Secretary of State a congressional candidate's affidavit and from requiring non-incumbent candidates for the same offices to complete and return a term limits pledge.

Plaintiffs Barker, Everist, and Letellier now challenge the constitutionality of Initiated Measure 1 on several grounds pursuant to 42 U.S.C. § 1983. Secretary of State Hazeltine defends Initiated Measure 1 as constitutional. The Court has federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, and the Court has authority to issue a declaratory judgment pursuant to 28 U.S.C. § 2201 and § 2202. Venue properly lies with this Court pursuant to 28 U.S.C. § 1391(b).

The plaintiffs and the defendant agree that there are no facts in dispute which would require a trial, and the Court is presented [**9] only with important questions of federal constitutional law. Counsel for the parties have filed legal briefs which thoroughly and helpfully explain their positions. The Court finds that further oral argument is not necessary.

[*1092] III. Analysis

Approximately half of the states had adopted congressional term limit measures by the time the United States Supreme Court declared them unconstitutional in *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995). The Supreme Court held in *Thornton* that the Federal Constitution prohibits the states from imposing congressional qualifications in addition to those enumerated in the text of the Constitution, and any such fundamental change in the electoral process must be accomplished through the amendment procedures of *Article V of the Federal Constitution*. *Id.*, at 837, 115 S. Ct. at 1871. The Supreme Court observed that "permitting individual states to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure." *Id.*, at 822, 115 [*10] S. Ct. at 1864.

Following the *Thornton* decision, South Dakota supporters of congressional term limits led the effort culminating in Initiated Measure 1. Measure 1 requires congressional candidates, whether incumbents or not, to support the particular term limits proposal contained in Initiated Measure 1 or suffer the consequence of having appear next to the candidate's name, on future primary and general election ballots, the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS," or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." Similar initiatives were undertaken by term limits supporters in other states as well.

Both federal and state courts in some of those jurisdictions have been asked to consider the constitutionality of the initiated measures adopted in those states. With one limited exception, courts have concluded that initiatives similar to Initiated Measure 1 are unconstitutional, and courts have enjoined the enforcement of the initiated measures. This Court recognizes, as Secretary of State Hazeltine urges, that the Court should begin with the presumption that Initiated Measure 1 is constitutional, and the Court does so. See *Casbah, Inc. v. Thone*, 651 F.2d 551, [*11] 564 (8th Cir. 1981), cert. denied, 455 U.S. 1005, 71 L. Ed. 2d 874, 102 S. Ct. 1642 (1982). For the reasons explained below, however, this Court joins those federal and state courts holding that the method and process utilized in Initiated Measure 1 to require South Dakota congressional candidates to support the specific term limits proposal in Initiated Measure 1 is unconstitutional and will not be enforced.

A. Article V

[HN1] The Federal Constitution may be amended only through the process established in *Article V of the Constitution*. Article V states in pertinent part:

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, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[.]

U.S. Const. art. V. This language is plain and leaves [*12] no doubt that the only methods permissible for proposing amendments to the Constitution are by two-thirds vote of Congress or by application of two-thirds of the state legislatures. The amendments proposed in either of these two ways become effective upon ratification by three-fourths of the state legislatures or by an equal number of state conventions. See *League of Women Voters of Maine v. Gwadosky*, 966 F. Supp. 52, 55 (D. Maine 1997). The Framers intended for the amendment process "to be a deliberate and often difficult task," *id.* at 56, and the Framers did not provide for a direct role of the citizens in proposing and ratifying constitutional amendments. *Id.* at 55-56. The citizens' role is to elect competent state and congressional legislators who may, in turn, amend the Constitution in accordance with the methods described in Article V. *Id.* at 56. "Not only did the Framers require a super majority in Congress and of the various [*1093] state legislatures, but the bodies granted the power to propose and ratify amendments were specifically designated. No exceptions were allowed." *Id.*

In *Hawke v. Smith*, 253 U.S. 221, 40 S. Ct. 495, 64 L. Ed. 871 (1920), the Supreme [*13] Court held that a provision in the Ohio constitution allowing ratification of proposed amendments to the Federal Constitution by citizen referendum conflicted with the amendment process outlined in Article V. In holding the Ohio provision unconstitutional, the Supreme Court stated that the power to ratify a constitutional amendment derives from the Federal Constitution and that the people, through a process of referendum, cannot amend the Federal Constitution. *Id.*, at 230, 40 S. Ct. at 498. The result of the *Hawke* case was that the people of Ohio lacked power to ratify directly the *Eighteenth Amendment*, which enacted Prohibition in the United States. Shortly after *Hawke*, in *Leser v. Garnett*, 258 U.S. 130; 42 S. Ct. 217, 66 L. Ed. 505 (1922), the Supreme Court was presented with the argument that the *Nineteenth Amendment*, which granted women the right to vote, was not a valid Amendment

because the constitutions of several of the thirty-six states that ratified the Amendment did not permit ratification of constitutional amendments by their legislatures. The Supreme Court concluded that the power to ratify federal constitutional amendments is derived from *Article V* of [**14] *the Federal Constitution* and that the various states were not required to have a specific constitutional or statutory provision permitting ratification by the state legislatures. *Id.* at 137, 42 S. Ct. at 217-18.

While both *Hawke* and *Leser* pertained to ratification of constitutional amendments, the rationale of those cases applies equally to the proposal of constitutional amendments. Both cases strongly indicate the Supreme Court's view that the function of the citizens in the amendment process is strictly limited to the election of federal and state officials. See *Gwadosky*, 966 F. Supp. at 57. Nonetheless, a 1978 decision issued by Justice Rehnquist, acting as a Circuit Justice, held that a purely advisory referendum requested by the Nevada state legislature regarding the citizens' position on the proposed Equal Rights Amendment did not offend Article V principles. *Kimble v. Swackhamer*, 439 U.S. 1385, 1386-1388, 99 S. Ct. 51, 53-54, 58 L. Ed. 2d 225 (Rehnquist, Circuit Justice (1978)). The Nevada Legislature solicited information from the citizens as to whether they favored the amendment, but the Legislature retained the authority to act on the proposed amendment [**15] in the way it determined best. Justice Rehnquist wrote that Article V does not eliminate all communication between state legislatures and the citizens and that there is "no constitutional obstacle to a nonbinding, advisory referendum" of the kind utilized in Nevada. *Id.* at 1388, 99 S. Ct. at 54.

South Dakota's Initiated Measure 1 is neither purely advisory, like the citizen referendum analyzed in *Kimble*, nor does it delegate complete authority to authorize constitutional amendments to the citizens of South Dakota, which is prohibited by *Hawke* and *Leser*. Initiated Measure 1 falls somewhere on the spectrum between the two extremes. See *Gwadosky*, 966 F. Supp. at 57. If South Dakota's congressional candidates fail to comply with the provisions of Initiated Measure 1, they are sanctioned by the placement of a negative label next to their names in the ballot box.

Initiated Measure 1 is not a "nonbinding, advisory referendum" like that envisioned by then-Justice Rehnquist. Rather, Initiated Measure 1 attempts to accomplish indirectly what *Article V of the Federal Constitution* prohibits South Dakota citizens from doing directly. See *Thornton*, 514 U.S. at 829, 115 [**16] S. Ct. at 1867; *Gwadosky*, 966 F. Supp. at 59. Thus, the Court does not agree with the defendant that the sentence in Initiated Measure 1, "each member of the state's congressional delegation shall use all of their powers to pass a congressional term limits amendment[.]" may be read as

a nonbinding advisory expression of the will of the South Dakota people. The purpose of Initiated Measure 1 is to mandate that South Dakota congressional candidates support the term limits amendment specifically defined in Initiated Measure 1. Congressional candidates are given no discretion to support some other proposed term limits amendment or to oppose the concept of term limits. Initiated [**1094] Measure 1's tool of coercion and its price for disobedience is the mandatory placement of a negative label next to the candidate's name on the ballot.

The ballot labels at issue here are not neutral. The phrases "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" and "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" convey negative connotations. They are, effectively, "brands of disapproval by the State," *Gwadosky*, 966 F. Supp. at 60, and they are disseminated to voters at a time when voters are most susceptible [**17] to persuasion--while they are in the ballot box--and at a time when candidates are most politically vulnerable. One court referred to such ballot labels as "threatening potential political death[.]" *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119, 127-28 (Ark. 1996), cert. denied, 137 L. Ed. 2d 216, 117 S. Ct. 1081 (1997). These labels coerce congressional candidates to follow the dictates of Initiated Measure 1 regardless of the merits of the term limits proposal contained within it. To suggest that placement of such labels on the ballot would not affect a congressional candidate's judgment "raises naivete to new heights." *Gwadosky*, 966 F. Supp. at 60. Without doubt, Initiated Measure 1 brings to bear an undue influence on South Dakota's congressional candidates, and the deliberative and independent amendment process envisioned by the Framers when they drafted Article V is lost.

Because the Court cannot agree that Initiated Measure 1 can be read as a nonbinding advisory initiative, the Court is not persuaded by defendant Hazeltine's reliance upon the Idaho Supreme Court's opinion in *Simpson v. Cenarrusa*, 130 Idaho 609, 944 P.2d 1372 (Idaho 1997). In that case, the court struck down [**18] similar ballot labels as violative of the *Speech and Debate clause of the Federal Constitution*, U.S. Const. art. I, § 6, a conclusion with which this Court agrees later in this opinion. Having struck down the ballot labels, the Idaho Supreme Court then applied the severability clause of the initiative to hold that the remaining provisions amounted to a nonbinding advisory that did not violate Article V. 944 P.2d at 1375-77. This Court concludes that Initiated Measure 1 is not severable because all of its provisions are integral and indispensable to one another. Therefore, the Court will not follow the Idaho Supreme Court's action in severing the provisions regarding ballot labels from the remainder of the initiative. Moreover, the Court be-

lieves, based upon its own analysis, and upon the analysis of all the other cases cited in this opinion, that *Simpson* is wrongly decided on the Article V issue.

State courts in other jurisdictions have held that citizen initiatives similar to Initiated Measure 1 violate Article V. The Court has carefully considered the decision of the Arkansas Supreme Court in *Donovan*, the decision of the Colorado Supreme Court in *Morrissey v. State of Colorado*, [**19] 951 P.2d 911 (Colo. 1998), and the decision of the Supreme Court of Oklahoma in *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996). The Court has also considered the Advisory Opinion presented to the Maine House of Representatives by the Supreme Judicial Court of Maine in *Opinion Of The Justices*, 673 A.2d 693 (Me. 1996). These decisions lend support to the Court's conclusion that Initiated Measure 1 violates Article V of the Federal Constitution because it allows the citizens to do indirectly what they may not do directly and thereby destroys the constitutional amendment process created by the Framers.

The Court draws further support from the cases of *Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826 (Mont. 1984), and *American Fed. Of Labor-Congress Of Indus. Org. v. Eu*, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984) (en banc). In both of those cases, the Supreme Courts of Montana and California held unconstitutional citizen initiatives mandating that their state legislatures apply to Congress for a constitutional convention to consider a balanced budget amendment. Both courts held that such initiatives violate the principles enunciated in Article [**20] V of the Federal Constitution.

In summary, South Dakota's United States Senators and United States Representative are elected to use their good judgment for the benefit of the country as a whole, not only for the benefit of South Dakota citizens. [*1095] See *Thornton*, 514 U.S. at 804, 115 S. Ct. at 1855 ("The text of the Constitution thus gives the representatives of all the people the final say in judging the qualifications of the representatives of any one State.") Congressional officeholders must not, and cannot, be bound to speak and vote in one particular way on the important issue of congressional term limits. Each officeholder must have the discretion to consider changing circumstances and to revise his or her own thinking on the term limits issue, even if that means that the officeholder ultimately takes a different position than the one he or she firmly supported prior to the election. The Court holds that Initiated Measure 1 violates Article V of the Federal Constitution, and the Court declares Initiated Measure 1 unconstitutional on that ground.

B. First and Fourteenth Amendments

Plaintiffs contend that Initiated Measure 1 is also unconstitutional because it violates [**21] the Free Speech rights of congressional candidates, as guaranteed by the *First Amendment*, as well as the right to equal access to the ballot, as guaranteed by the *Fourteenth Amendment*. Initiated Measure 1 mandates adherence to a specific term limits amendment and sanctions all those who dare to disagree. Even a candidate who strongly supports term limits violates the dictates of Initiated Measure 1 if he or she supports some other version of a terms limits amendment. Those candidates who openly do not support Initiated Measure 1 face labeling at the ballot box, while those candidates who support it or hide their true views appear on the ballot without a negative label attached.

Free speech is dear to every American citizen, and political speech lies at the very core of the *First Amendment's* protection. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, [*1096] 117 S. Ct. 1364, 1369, 137 L. Ed. 2d 589 (1997); *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). [HN2] Free and open speech is absolutely essential to those individuals who seek public office, as well as to those who are elected to public office. Freedom of speech and debate are essential to any [**22] democratic form of government, for it is only through vigorous discussion of conflicting ideas that sound decisions are made for the good of the country at large. Because the freedom of speech plays such a central role in our history, our government, and our jurisprudence, laws burdening political speech must be analyzed under a "strict scrutiny" standard. *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988). Moreover, [HN3] when an equal protection challenge to ballot access is brought, the Court must consider "whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Clements v.ashing*, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982) (quoted case omitted).

The Court agrees with plaintiffs that it is hard to imagine a more chilling impact on political speech than that created by Initiated Measure 1. It is also difficult to see how such a provision can create any greater unfairness or unnecessary burden on the availability of political opportunity. However well-meaning the proponents of Initiated Measure 1 may be, the result of their labors strips congressional candidates of all rights to free speech [**23] and debate with regard to the issue of congressional term limits. If this method of limiting free speech and debate were accepted, surely other speech limitations on many other issues would follow. As the freedom of speech on issues is diminished, so is the freedom of thought on those same issues, since our political system thrives on an open and robust exchange of ideas.

This method, if allowed, would diminish our political system as it now exists. Elected representatives must not be deprived of their legislative discretion. "In our system, the people set policy by choice, not control, of their elected representatives." *Morrissey*, 951 P.2d at 917.

The constitutionality of Initiated Measure 1 cannot be saved by characterizing the ballot labels threatened for noncompliant candidates as proper time, place, and manner restrictions. Without doubt, the Federal Constitution grants states broad power to control the election process for United States Senators and Representatives. *U.S. Const. art. I, § 4, cl. 1*; *Timmons*, U.S. , 117 S. Ct. at 1369-70. But the ballot labels created by Initiated Measure 1 go far beyond informing the electorate about the stand of any [**24] candidate on the term limits issue. See *Duggan v. Moore*, 4:CV97-3074, Memorandum And Order at 7-8 (D.Neb. May 15, 1997) (unpublished) (holding negatively-worded ballot labels imposed for failure to support term limits provision fail to meet even minimal requirements that such regulations be reasonable and nondiscriminatory). As already mentioned, these ballot labels essentially brand the candidates as unworthy of public office because they would not support one particular term limits provision. The defendant is correct that candidates for public office do not enjoy a constitutional right to hide their views from the voters on major issues. But the threatened imposition of a ballot label, as a sanction for taking any position other than that advocated in Initiated Measure 1, thwarts the political debate that is critical to public decisionmaking.

As previously stated, what is at issue in this case is not the question of whether term limits are a good idea. The issue is whether the procedure used in an attempt to establish term limits is a procedure in keeping with our Federal Constitution. The Court concludes that it is not. Therefore, the Court declares Initiated Measure 1 unconstitutional [**25] as violative of the *First* and *Fourteenth Amendments*.

C. *Speech and Debate Clause*

Plaintiffs contend that Initiated Measure 1 violates *Article I, Section 6, Clause 1 of the United States Constitution* because it requires Secretary of State Hazeltine to question, and perhaps sanction, South Dakota's United States Senators and Representative about their positions on term limits at a place other than either House of Congress. As the Idaho Supreme Court observed, this clause was designed by the Framers to assure the co-equal Legislative Branch of government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch and without accountability before a possibly hostile Judiciary. *Simpson*, 944 P.2d at 1375 (citing *Gravel v. United States*, 408 U.S. 606, 616, 92 S. Ct. 2614, 2622, 33 L. Ed. 2d 583 (1972)). Any re-

striction on a legislator's freedom ultimately undermines the public interest by interfering with the rights of the people to representation in the democratic process. The Court declares Initiated Measure 1 unconstitutional as violative of the *Speech and Debate Clause*.

D. *Fifth and Fourteenth Amendments*

Finally, [**26] plaintiffs assert that Initiated Measure 1, even as recently amended by the 1998 Legislature, violates the Due Process requirements of the *Fifth* and *Fourteenth Amendments* because, if it contains standards at all by which the Secretary of State may determine which candidates should have the negative ballot label affixed adjacent to their names, such standards are vague and arbitrary. The Court agrees with plaintiffs' assessment. As currently amended, Initiated Measure 1, § 12-16-1.2(8), provides:

The secretary of state shall make an accurate determination as to whether the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" is placed adjacent to a candidate's name on the election ballot pursuant to this section. The secretary of state in making this determination may rely exclusively on the affidavit or pledge which is filed pursuant to section 1 or 2 of this Act.

Subsection (8) fails to establish any standards by which the Secretary of State shall make "an accurate determination" other than reliance upon the affidavits or pledges filed by congressional candidates. The "Incumbent Congressional Candidate's Affidavit" [**27] drafted to satisfy § 12-16-1.2(8) requires candidates to state whether they have complied with Initiated Measure 1 by providing "Yes" or "No" answers to eight specific questions without any elaboration. The Court concludes that the "Incumbent Congressional Candidate's Affidavit" or a similar non-incumbent candidate's pledge, violates the candidates' Due Process rights as secured by the *Fifth* and *Fourteenth Amendments*. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-10, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d [**1097] 222 (1972) ("If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."); *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249, 1254 (8th Cir. 1981) (same). Therefore, the Court declares Initiated Measure 1 unconstitutional on the Due Process ground as well.

E. *Referred Law 1*

In light of the Court's declaration that Initiated Measure 1 is unconstitutional, a question arises whether Referred Law 1, which seeks to obtain a majority vote of the electorate to overturn the South Dakota Legislature's repeal of Initiated Measure 1, should appear on the November 1998 general election ballot. The Court [**28] concludes that Referred Law 1 has become moot in light of the Court's declaration of unconstitutionality of Initiated Measure 1 and that Referred Law 1 should not appear on the November 1998 general ballot. Even if the voters were to pass Referred Law 1 and overturn the Legislature's repeal, this Court has declared Initiated Measure 1 unconstitutional, and its provisions would not take effect in violation of the permanent injunction entered in this case. Accordingly,

IT IS ORDERED:

(1) that plaintiffs' Motion for Summary Judgment is granted. (Doc. 12.)

(2) that defendant's Motion for Summary Judgment is denied. (Doc. 9.)

(3) that Initiated Measure 1, *S.D. Codified Laws Ann. § 12-16-1.2*, as amended through February 14, 1998, is declared unconstitutional as violative of Article V, Article I, § 6, cl. 1, and the *First, Fifth, and Fourteenth Amendments of the United States Constitution*.

(4) that the Court enters a permanent injunction enjoining defendant Joyce Hazeltine, in her official capacity as Secretary of State of the State of South Dakota, and her officers, agents, servants, employees, attorneys, and all other persons in active concert or participation [**29] with her, from carrying out, implementing, and enforcing the provisions of Initiated Measure 1, *S.D. Codified Laws Ann. § 12-16-1.2*, in any manner whatsoever, in accordance with this Memorandum Opinion and Order.

(5) that the Court declares moot Referred Law 1, which had been certified for inclusion on the 1998 general election ballot, and Referred Law 1 will not appear on the 1998 general election ballot.

(6) that plaintiffs, as prevailing parties under *42 U.S.C. § 1988*, will be entitled to reasonable attorney's fees, expenses, and costs upon presentation to the Court of a properly supported post-Judgment motion.

Dated this 31st day of March, 1998.

BY THE COURT:

Lawrence L. Piersol

United States District Judge

[*1098] APPENDIX A

CHAPTER 12-16

BALLOTS AND ELECTION SUPPLIES

Section

12-16-1.2. Ballot to reflect congressional term limits amendment.

12-16-1.2. Ballot to reflect congressional term limits amendment.

(1) For the purposes of this section, a congressional term limits amendment is any amendment to the United States Constitution which is defined as follows:

(a) No person shall serve in the office of United States Representative for more [**30] than three terms, but upon ratification of this amendment no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

(b) No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve more than one additional term.

(c) This article shall have no time limit within which it must be ratified by the legislatures of three-fourths of the several states.

(2) Each member of the state's congressional delegation shall use all of their powers to pass a congressional term limits amendment.

(3) All primary and general election ballots shall have printed the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" adjacent to the name of any United States Senator or Representative from South Dakota who:

(a) Fails to vote in favor of a proposed congressional term limits amendment, as defined by this section, when brought to a vote;

(b) Fails to second a proposed congressional term limits amendment, as defined by this section, [**31] if it lacks for a second before any proceeding of the legislative body;

(c) Fails to propose or otherwise bring to a vote of the full legislative body a proposed congressional term limits amendment, as defined by this section, if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body a proposed congressional term limits amendment as defined by this section;

(d) Fails to vote in favor of all votes bringing a proposed congressional term limits amendment, as defined by this section, before any committee or subcommittee of the respective house upon which the member serves;

(e) Fails to reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body of a proposed congressional term limits amendment as defined by this section;

(f) Fails to vote against any proposed constitutional amendment that would establish longer term limits than those set forth in subdivision (1) of this section regardless of any other actions in support of a proposed congressional term limits amendment as defined by this section;

(g) Sponsors or cosponsors any proposed constitutional amendment or law that establishes longer [**32] term limits than those set forth in subdivision (1) of this section; or

(h) Fails to ensure that all votes on a congressional term limits amendment are recorded and made available to the public.

(4) The information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" may not appear adjacent to the names of incumbent candidates for Congress if a congressional term limits amendment, as de-

defined by this section, is before the states for [*1099] ratification or has become part of the United States Constitution.

(5) Non-incumbent candidates for the United States Senate and House of Representatives shall be given an opportunity to take a term limits pledge when the candidate files to run for such office. Any non-incumbent candidate who declines to take the term limits pledge shall have the information "DECLINED TO PLEDGE TO SUPPORT TERMS LIMITS" printed adjacent to the candidate's name on every primary and general election ballot.

(6) The term limits pledge provided by subdivision (5) of this section shall be offered to non-incumbent candidates for the United States Senate and House of Representatives until a congressional terms limits amendment, as defined by this section, has been ratified [**33] by the states.

(7) The term limits pledge that each non-incumbent candidate, as provided by subdivision (5) of this section, shall be offered is as follows: I support term limits and pledge to use all my legislative powers to enact a congressional term limits amendment as defined by this section. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name.

Signature of Candidate

(8) The secretary of state shall make an accurate determination as to whether the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" is placed adjacent to a candidate's name on the election ballot pursuant to this section.

(9) The secretary of state shall consider timely submitted public comments prior to making the determination required in subdivision (8) of this section.

(10) The secretary of state, in accordance with subdivision (8) of this section shall determine and declare what information, if any, shall appear adjacent to the names of each incumbent member of the United States Senate or House of Representatives if the member is a candidate [**34] in the next election. This determination and declaration shall be made in a timely manner to ensure the orderly printing of primary and general election ballots with allowance made for all legal action as provided in subdivisions (11) and (12) of this section. This determination and declaration shall be based upon the member's action during the member's current term of office and any action taken in any concluded term, if the action was taken after the determination and declaration was made by the secretary of state in a previous election.

(11) If the secretary of state makes the determination that the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" is not to be placed on the ballot adjacent to the name of a candidate as provided by this section, any elector may appeal such decision within five business days to the South Dakota Supreme Court as an original action or shall waive any right to appeal such decision. The burden of proof shall be upon the secretary of state, relying on information provided by the candidate, to demonstrate by clear and convincing evidence that the candidate has met the requirements set forth in [**35] this section and therefore should not have the information "DISREGARDED VOTERS' INSTRUCTION OF TERM LIMITS" or [*1100] "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidate's name.

(12) If the secretary of state determines that the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall be placed on the ballot adjacent to a candidate's name, the candidate may appeal such decision within five business days to the South Dakota Supreme Court as an original action or shall waive any right to appeal such decision. The burden of proof shall be upon the candidate to demonstrate by clear and convincing evidence that the candidate should not have the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidate's name.

(13) The Supreme Court shall hear the appeal provided for in subdivisions (11) and (12) of this section within twenty days and issue a decision not later than thirty days before the date of the primary election and sixty days before the date of the general election.

(14) Upon the ratification of [**36] a congressional term limits amendment as defined by this section, this section shall be repealed.

(15) Any legal challenge to this section shall be filed as an original action before the Supreme Court of this state.

(16) If any portion, clause, or phrase of this initiative is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.

Source: 1996 Initiated Measure No. 1, approved Nov. 5, 1996, effective Nov. 16, 1996.

APPENDIX B

AN ACT

ENTITLED An Act to revise the requirements concerning a candidate's support of congressional term limits and to provide the board of elections with rule-making authority for implementing the voter's instructions on term limits and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That *subdivision (3) of § 12-16-1.2* be amended to read as follows:

(3) All primary and general election ballots shall have printed the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" adjacent to the name of any United States Senator or Representative [**37] from South Dakota who:

(a) Fails to vote in favor of a proposed congressional term limits amendment, as defined by this section, when brought to a vote;

(b) Fails to second a proposed congressional term limits amendment, as defined by this section, if it lacks for a second before any proceeding of the legislative body;

(c) Fails to propose or otherwise bring to a vote of the full legislative body a proposed congressional term limits amendment, as defined by this section, if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body a proposed congressional term limits amendment as defined by this section;

(d) Fails to vote in favor of all votes bringing a proposed congressional term limits amendment, as defined by this section, before any committee or subcommittee of the respec-

tive house upon which the member serves;

(e) Fails to reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body of a proposed congressional term limits amendment as defined by this section;

(f) Fails to vote against any proposed constitutional amendment that would establish longer term limits than those set [**38] forth in subdivision (1) of this section regardless of any other actions in support of a proposed congressional term limits amendment as defined by this section;

(g) Sponsors or co-sponsors any proposed constitutional amendment or law that establishes longer terms limits than those set forth in subdivision (1) of this section; or

(h) Fails to ensure that all votes on a congressional term limits amendment are recorded and made available to the public.

An incumbent candidate who has complied with these eight requirements shall file a sworn affidavit acknowledging that the candidate has not failed to comply with each of these eight requirements during the member's current term of office or any concluded term in which a determination and declaration was made by the secretary of state in a [*1101] previous election. The affidavit shall be filed in the Office of the Secretary of State or mailed to the Office of the Secretary of State by registered mail by March first of the general election year for candidates who file for nomination pursuant to chapter 12-6 or by August first for candidates who file for nomination pursuant to chapter 12-7.

Section 2. That *subdivision (5) of § [**39] 12-16-1.2* be amended to read as follows:

(5) Nonincumbent candidates for the United States Senate and House of Representatives shall be given an opportunity to take a term limits pledge. The pledge shall be filed in the Office of the Secretary of State or mailed to the Office of the Secretary of State by registered mail by March first of the general election year for candidates who file for nomination pursuant to chapter 12-6 or by August first for candidates who file for nomination pursuant to chapter 12.7. Any nonincumbent candidate who declines to take the term limits pledge shall have the information "DECLINED TO PLEDGE TO SUPPORT TERMS LIMITS" printed adjacent to the candidate's name on every primary and general election ballot.

Section 3. That *subdivision (8) of § 12-16-1.2* be amended to read as follows:

(8) The secretary of state shall make an accurate determination as to whether the information "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" is placed adjacent to a candidate's name on the election ballot pursuant to this section. The secretary of state in making this determination may rely exclusively on the [**40] affidavit or pledge which is filed pursuant to section 1 or 2 of this Act.

Section 4. That *subdivision (9) of § 12-16-1.2* be amended to read as follows:

(9) The secretary of state shall consider public comments submitted to the Office of the Secretary of State by March first of the general election year for candidates who file for nomination pursuant to chapter 12-6 or by August first for candidates who file for nomination pursuant to chapter 12-7 prior to making the determination required in subdivision (8) of this section.

Section 5. That *subdivision (13) of § 12-16-1.2* be amended to read as follows:

(13) The Supreme Court shall hear the appeal provided for in subdivisions (11) and (12) within twenty days and issue a decision not later than sixty days before the date of the primary or general election.

Section 6. That *§ 12-16-1.2* be amended by adding thereto a NEW SUBDIVISION to read as follows:

The Board of Elections may promulgate rules pursuant to chapter 1-26 to provide forms, deadlines, and procedures for implementing this section.

Section 7. Whereas, this Act is necessary for the support of the state government and its existing public institutions, [**41] an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

House Bill No. 1007

File No.

Chapter No.

An Act to revise the requirements concerning a candidate's support of congressional term limits and to provide the board of elections with rule-making authority for implementing the voter's instructions on term limits and to declare an emergency.

[*1102] I certify that the attached Act originated in the

HOUSE as Bill No. 1007

Karen Gerdes

Chief Clerk

Speaker of the House

Attest:

Karen Gerdes

Chief Clerk

President of the Senate

Attest:

Patricia Adom

Secretary of the Senate

Received at this Executive Office this 11th day of February, 1997 at 3:15 PM.

By

for the Governor

The attached Act is hereby approved this 14th day of February, A.D., 1998

Governor

STATE OF SOUTH DAKOTA,

ss.

Office of the Secretary of State

Filed Feb. 14, 1998 at 10:45 o'clock AM.

Secretary of State

By

Asst. Secretary of State

JUDGMENT

In accordance with the Memorandum Opinion and Order entered this date with the Clerk,

IT IS ORDERED, ADJUDGED, and DECREED: [**42]

(1) that Judgment is entered in favor of plaintiffs Linda K. Barker, Barbara Everist, and Roy Letellier and against defendant Joyce Hazeltine, Secretary of State of the State of South Dakota.

(2) that Initiated Measure 1, *S.D. Codified Laws Ann. § 12-16-1.2*, as amended through February 14, 1998, is declared unconstitutional as violative of Article V, Article I, § 6, and the *First, Fifth, and Fourteenth Amendments of the United States Constitution*.

(3) that the Court enters a permanent injunction enjoining defendant Joyce Hazeltine, in her official capacity as Secretary of State of the State of South Dakota, and her officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with her, from carrying out, implementing, and enforcing the provisions of Initiated Measure 1, *S.D. Codified Laws Ann. § 12-16-1.2*, in any manner whatsoever, in accordance with this Memorandum Opinion and Order.

(4) that the Court declares moot Referred Law 1, which had been certified for inclusion on the 1998 general election

ballot, and Referred Law 1 will not appear on the 1998 general election ballot.

(5) that plaintiffs, as prevailing [**43] parties under 42 U.S.C. § 1988, are entitled to attorney's fees from defendant in the amount of and costs from defendant in the amount of \$, as hereinafter determined by the Court and inserted in the Judgment by the Clerk.

Dated this 31st day of March, 1998.

BY THE COURT:

Lawrence L. Piersol

United States District Judge

118JTP

***** Print Completed *****

Time of Request: Tuesday, July 24, 2007 17:10:40 EST

Print Number: 1862:39215793

Number of Lines: 597

Number of Pages:

Send To: LOPEZ, LONNIE
SMITH & LOWNY PLLC
2317 E JOHN ST
SEATTLE, WA 98112-5412

LEXSEE 930 P.2D 186

IN RE: INITIATIVE PETITION NO. 364, STATE QUESTION NO. 673.

No. 86,828

SUPREME COURT OF OKLAHOMA

1996 OK 129; 930 P.2d 186; 1996 Okla. LEXIS 144; 67 O.B.A.J. 3874

December 10, 1996, Filed

DISPOSITION: [**1] INITIATIVE PETITION NO. 364 DECLARED INVALID; ORDERED DENIED SUBMISSION TO THE PEOPLE. APPLICATION TO WITHDRAW SIGNATURES AND DISMISS APPEAL DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Protestant individual filed an action pursuant to *Okla. Stat. tit. 34, § 8* (Supp. 1992) to challenge the legal sufficiency of an initiative petition. Proponent, the Chairman of the Oklahoma Term Limits, appealed the ballot title prepared by the Oklahoma Attorney General, pursuant to *Okla. Stat. tit. 34, § 10*.

OVERVIEW: The individual filed an action under *Okla. Stat. tit. 34, § 8* (Supp. 1992), urging that the initiative measure violated *U.S. Const. art. V* and *Okla. Stat. art. V, § 1*. The individual contended that the initiative measure violated *Okla. Stat. art. V, § 1* because it was neither a "law" nor an amendment to the Oklahoma Constitution and it sought to ultimately sought to amend the United States Constitution in a coercive manner. The individual also argued that the initiative measure violated *U.S. Const. art. V* by proposing to amend the United States Constitution by a process that did not conform to *U.S. Const. art. V*. The Chairman sought review of the Attorney General's preparation of the associated ballot title. The court declared the initiative petition invalid and denied submission of it to the people. The court held (1) that the measure violated *U.S. Const. art. V*, as it would have allowed the people to indirectly propose amendments to the United States Constitution; and (2) that the measure violated *Okla. Stat. art. V, § 1*, as it was beyond the power of the initiative granted the people.

OUTCOME: The court declared that the initiative petition was invalid. The court therefore denied submission of it to the people.

LexisNexis(R) Headnotes

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > Amendment Process

Governments > Legislation > Initiative & Referendum

[HN1] *U.S. Const. art. V* provides the process by which that document may be amended. It sets forth alternative methods of proposing constitutional amendments, by vote of Congress or on application of two-thirds of state legislatures calling for a constitutional convention. It states: The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to the Constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year 1808 shall in any manner affect *U.S. Const. art. I, § 9, cl. 1, 4*, and that no state, without its consent, shall be deprived of its equal suffrage in the Senate. The application for a convention must come from the legislature acting freely without restriction or limitation, not from the people through exercise of their initiative power. The legislative power in the amendment process of *U.S. Const. art. V* includes only that power which has been delegated to the representative bodies of the several states.

Constitutional Law > Amendment Process

Governments > Federal Government > U.S. Congress

Governments > Legislation > Initiative & Referendum

1996 OK 129; 930 P.2d 186, *;
1996 Okla. LEXIS 144, **; 67 O.B.A.J. 3874

[HN2] Okla. Stat. art. V, § 1 reserves to the people the legislative power of the initiative and the referendum. It provides: the legislative authority of the State shall be vested in a legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Oklahoma Constitution and to enact or reject the same at the polls independent of the legislature, and also reserve power at their own option to approve or reject at the polls any act of the legislature. The initiative measure does not propose a law. While it purports to be an amendment to the Oklahoma Constitution it is merely a nonbinding legislative resolution. The people have no reserved authority to propose nonbinding resolutions by the initiative process.

Governments > Legislation > Initiative & Referendum

[HN3] Oklahoma cases liberally construe the constitutionally reserved power of the people to enact "laws" through the initiative process.

Governments > State & Territorial Governments > Legislatures

[HN4] Laws are the creation of, and subject to, formal statutory procedures and constraints. They must be introduced, passed and enacted according to Oklahoma's existing laws and they must be enforceable. A resolution is just a collective expression of opinion and desire. A bill and a resolution of the legislature are entirely different in their creation, nature and purpose. A resolution is not a law but merely the form in which the legislative body expresses an opinion. It is ordinarily passed without the forms and delays which are generally required by constitutions, prerequisites to the enactment of valid laws.

Governments > Legislation > Initiative & Referendum

[HN5] A temporary initiative measure is not a part of the permanent fundamental law of a state and should not be submitted under the guise of a constitutional amendment.

Constitutional Law > Amendment Process

Governments > Legislation > Enactment

Governments > Legislation > Initiative & Referendum

[HN6] The people's legislative power as defined in Okla. Stat. art. V, § 1 does not include the power to use the initiative process to attempt to change federal constitutional law.

Constitutional Law > Amendment Process

[HN7] A constitution can only be revised or amended in the manner prescribed by the instrument itself, and any attempt to revise a constitution in a manner other than the one provided in the instrument is almost invariably treated as extraconstitutional and revolutionary.

Governments > Legislation > Initiative & Referendum

[HN8] The right to sign an initiative petition is a personal privilege, and the right to withdraw a signature from a petition can be exercised only by the person directly concerned. One who has signed an initiative petition may withdraw his signature after the petition has been filed only so long as action has not been taken to determine the sufficiency of the signatures.

SYLLABUS

Original action challenging legal sufficiency of Initiative Petition No. 364, State Question No. 673, and appeal of ballot title.

COUNSEL: Gary W. Gardenhire, Norman, Ok. 73069, For Proponent Joe Windes, Oklahoma Term Limits.

Neal Leader, Senior Assistant Attorney General, Oklahoma City, Oklahoma, For State of Oklahoma.

Thomas Dee Frasier, Frasier and Frasier, Tulsa Oklahoma, Gary D. Allison, Tulsa, Oklahoma, For Protestant, James V. Thomas.

JUDGES: KAUGER, V.C.J., and LAVENDER, SIMMS, OPALA (CONCURS SPECIALLY) and WATT, JJ., CONCUR. SUMMERS, J., CONCURS IN PART, DISSENTS IN PART. WILSON, C.J., and HODGES, HARGRAVE, JJ., DISSENT.

OPINION BY: SIMMS

OPINION

[*188] ORIGINAL PROCEEDING TO DETERMINE VALIDITY OF

INITIATIVE PETITION NO. 364, STATE QUESTION NO. 673 and APPEAL OF BALLOT TITLE

SIMMS, J:

This is an original action brought pursuant to 34 O.S. Supp. 1992 § 8 by protestant, James C. Thomas, to challenge the legal sufficiency of Initiative Petition No. 364, State Question No. 673, and an appeal by proponent, Joe R. Windes, as chairman of Oklahoma Term Limits, from the ballot title prepared by the Attorney General, pursuant to 34 O.S. § 10. We conclude that the measure is facially violative of the constitutions of Okla-

homa and the United States and may not be placed on the ballot for submission to the people.

I.

OKLAHOMA AND THE TERM LIMITS BATTLE

[**2] In 1994, Oklahoma became the first state to enact term limits for its Congressional representatives. This was achieved through an amendment to the Oklahoma Constitution by way of an initiative election. See *In re Initiative Petition No. 360*, 879 P.2d 810 (Okla.1994). In that election, the state question garnered 67 per cent of the vote. Twenty-one other states had adopted term limit measures at the time the United States Supreme Court held them unconstitutional on May 22, 1995, in *United States Term Limits v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995). The Court suggested that such a fundamental change in the federal constitutional framework "must come not by legislation adopted either by Congress or by an individual state, but rather - as have other important changes in the electoral process - through the amendment procedures set forth in Article V." 115 S. Ct. at 1871 (footnote omitted).

[*189] Congressional term limits supporters have begun a campaign to get two-thirds of the states to apply to Congress to call a federal constitutional convention on the question. One effort in that campaign is Initiative Petition No. 364.

II

INITIATIVE PETITION NO. 364 and

PROTESTANT'S [**3] LEGAL CHALLENGE

This initiative measure declares that the people of Oklahoma desire that the Oklahoma Legislature apply to Congress for the calling of a Federal Constitutional Convention leading to the adoption of the specific proposed amendment which is set forth in full, and the voters should be kept informed of their legislators' efforts in this regard. ¹ The proposed application to Congress on behalf of the People and the Legislature pursuant to their power under Article V to call a convention is set forth. The measure then states the public policy of Oklahoma regarding term limits, namely "that the term of members of the United States Congress should be limited to three terms for members of the House of Representatives and two terms for members of the Senate, and the United States Constitution should be amended to so provide." ² It then instructs "each member of the Oklahoma Legislature to use all his or her delegated powers to make application under *article V of the United States Constitution* to the United States Congress calling for an *article V convention*" to propose the federal term limits amendment it specifies. ³ The measure requires that the [*190] clause

"FAILED TO COMPLY [**4] WITH CONSTITUTIONAL INSTRUCTION ON TERM LIMITS" be printed next to the name of any member of the State Legislature appearing on any ballot following a legislative term in which the legislator failed to support the calling of a constitutional convention or failed to support the specified term limit amendment. ⁴ The Secretary of the State Election Board is charged with the duty to determine whether the ballot notation shall appear on any ballot. ⁵ The provisions of the measure are severable. ⁶

1 The People of Oklahoma find and declare that:

Whereas, the People of our State voted by over sixty-six percent to limit the terms of U.S. Representatives to three terms and limit U.S. Senators to two terms, and

Whereas, the U.S. Supreme Court has ruled that an amendment to the U.S. Constitution is necessary to limit terms of members of Congress, and

Whereas, there are two methods to propose amendments to the U.S. Constitution that must then be ratified by three-fourths of the States, or thirty-eight. These methods are (1) for two-thirds of both houses of the United States Congress to so vote, or (2) for thirty-four States to apply for an Article V convention to so vote, and

Whereas, the Congress has refused to propose such an amendment, and by a clear majority, defeated the same term limits passed by over sixty-six percent of the Voters of our State in 1994, and

Whereas, the Congress has a clear conflict of interest in proposing term limits on its own members.

Therefore, We, the People of Oklahoma, hereby amend our state constitution pursuant to our power under that constitution.

We, the People of Oklahoma, hereby state our desire that this Oklahoma constitutional amendment leads to the adoption of the United States Constitutional Amendment set forth in this amendment.

We, the People of Oklahoma, find that the Voters of our State should be informed regarding incumbent state legislators' support for the following proposed application to Congress:

We, the People and Legislature of the State of Oklahoma, due to our desire to establish Term Limits on the Congress of the United States, hereby make application to Congress, pursuant to

our power under Article V, to call an Article V Convention

[**5]

2 Section 2 - Public Policy of Oklahoma Regarding Federal Term Limits.

It is hereby declared to be the Public Policy of the State of Oklahoma that the terms of office of Members of the United States Congress should be limited to three terms for members of the House of Representatives and two terms for Members of the Senate, and the United States Constitution should be amended to so provide.

3 Section 3 - Instruction to the Legislature Regarding Federal Term Limits.

In furtherance of the Public Policy stated in Section 2 of this Amendment, the People of Oklahoma hereby instruct each Member of the Oklahoma Legislature to use all of his or her delegated powers to make application under *Article V of the United States Constitution* to the United States Congress calling for an Article V Convention for the purpose of proposing the following Amendment to the United States Constitution:

CONGRESSIONAL TERM LIMITS AMENDMENT

Section A. No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section B. No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve for more than one additional term.

Section C. This amendment shall have no time limit within which it must be ratified to become operative upon the ratification of the legislatures of three-fourths of the several States.

[**6]

4 Section 4 - Information to the Voters Regarding Federal Term Limits.

In furtherance of the Public Policy stated in Section 2 of this Amendment and the Resolution of the People stated in Section 3 of this Amend-

ment, all primary, runoff, and general election ballots shall have the notation: "FAILED TO COMPLY WITH CONSTITUTIONAL INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any Member of the State Legislature seeking state legislative office who, during their preceding term of office:

(a) failed to sponsor or otherwise to propose, in a timely fashion, a legislative measure that would cause to be made the application to Congress set forth in Section 3 of this Amendment, if no other legislator has so sponsored or otherwise proposed such a measure; or

(b) failed to vote in favor of any measure to make application to Congress set forth in Section 3 of this Amendment when brought to a vote in the State Legislature or any committee or subcommittee thereof; or

(c) failed to vote against any change, addition, or modification to the application set forth in *Section 1* of this Amendment; or

(d) failed to vote against any attempt to delay, table, or otherwise prevent a vote of the Legislature on any measure to make the application to Congress set forth in Section 3 of this Amendment; or

(e) failed in any way to ensure that all votes of the Oklahoma legislature on the application set forth above or any amendment sent to the States for ratification are recorded and made available to the People; or

(f) failed to vote in favor of the constitutional amendment set forth in Section 3 of this Amendment, if it is sent to the States for ratification; or

(g) failed to vote against any amendment with longer term limits if such an amendment is sent to the States for ratification.

The notation provided for in this section when required by any of subsections (a) through (e) shall not appear adjacent to the names of candidates for state legislature if the State of Oklahoma has made an application to Congress for an Article V convention pursuant to the Act and such application has not been withdrawn, or if a Congressional Term Limits Amendment has been submitted to the states for ratification.

The notation provided for in this section when required by any of subsections (f) through (g) shall not appear adjacent to the names of candidates for state legislature if the State of Okla-

homa has ratified the proposed Congressional Term Limits Amendment set forth above.

The notation provided for in this section when required by any of subsections (a) through (g) shall not appear adjacent to the names of candidates for state legislature if the proposed Congressional Term Limits Amendment set forth above has become part of the United States Constitution.

[**7]

5 Section 5 - Determination of Applicability of Notation Regarding Federal Term Limits.

It shall be the ministerial duty of the Secretary of State Election Board to ascertain whether the notation provided in Section 4 of this Amendment shall be printed on any ballot adjacent to the name of any candidate. The Secretary of the State Senate and the Chief Clerk of the State House of Representatives shall provide to the Secretary of the Election Board such records as are necessary in order to ascertain whether the notation provided in Section 4 of this Amendment shall be so printed.

Within ten days following the last day of the filing period for state legislative offices, the Secretary of the Election Board shall cause to be published in a newspaper of general circulation a list of candidates whose names on the ballot shall be accompanied by the notation provided in Section 4 of this Amendment. Within ten days following the publication of the list described in the preceding sentence, any person may file an objection with the Secretary of the State Election Board to have the notation placed on the ballot adjacent to the name of any candidate. Upon the filing of such objection, the notation shall be placed on the ballot unless the Secretary of the State Election Board finds, by clear and convincing evidence, that the candidate in question has fully compiled (sic) with this amendment.

[**8]

6 Section 6 - Severability.

The provisions of this Amendment are severable, and if any part or provision of this Amendment shall be void, invalid, or unconstitutional, the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this Amendment, and the remaining provisions of this Amendment shall continue in full force and effect.

Protestant urges that the initiative measure is violative of the constitutions of the United States and the State of Oklahoma. [*191] His major argument regarding

state constitutional grounds is that the initiative violates Art. 5, *section 1* as it is not a valid exercise of the people's reserved power because: (1) it is neither a "law" nor an amendment to the state constitution, and (2) it seeks ultimately to amend the Constitution of the United States by mandating and coercing members of the Oklahoma Legislature to vote in favor of a federal constitutional convention. He also asserts that the proposal violates the multiple subject prohibition of Art.24 *sec.1*. Protestant contends that the initiative violates the Constitution [**9] of the United States in several ways: (1) it proposes to amend the Constitution by a process which does not conform to Article V, and (2) it denies Oklahoma State Legislators their right to free speech by instructing them how to vote, and (3) it denies equal protection of the laws to incumbent Legislators who will be denied equal access to impartial ballots by reason of their political expression.

We conclude that the initiative measure is constitutionally invalid and cannot be submitted to the people. We find protestant's arguments regarding issues arising under *Article V of the Constitution of the United States* and *Art.5, sec.1 of the Oklahoma Constitution* are persuasive and determinative of the challenge. The measure is facially violative of both provisions and must be stricken in its entirety. Accordingly, we limit our discussion to those contentions.

III

ISSUES ARISING UNDER ARTICLE V OF THE
CONSTITUTION OF THE UNITED STATES

[HN1] *Article V of the federal constitution* provides the process by which that document may be amended. It sets forth alternative methods of proposing constitutional amendments, by vote of Congress or on application of two-thirds of state Legislatures [**10] calling for a constitutional convention. It 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, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article, and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

1996 OK 129; 930 P.2d 186, *;
1996 Okla. LEXIS 144, **; 67 O.B.A.J. 3874

To date, all the amendments have been proposed by Congress and no effort to call a constitutional convention has been successful.

Protestant contends that this proposal would allow the people to do indirectly what they cannot do directly - propose amendments to the Constitution of the United States. We [**11] agree. To the extent that the initiative applies for a constitutional convention or requires the Legislature to do so, it is facially violative of Article V. The law is plain that the application for a convention must come from the Legislature acting freely without restriction or limitation, not from the people through exercise of their initiative power. The legislative power in the amendment process of Article V includes only that power which has been delegated to the representative bodies of the several states, it does not include the reserved legislative power of the people.

In *Hawke v. Smith, No. 1, 253 U.S. 221, 40 S. Ct. 495, 64 L. Ed. 871 (1920)*, the United States Supreme Court held that a provision in the Ohio Constitution which would have extended the referendum to the action of the General Assembly ratifying the proposed prohibition amendment to the Constitution of the United States conflicts with Article V. Answering the question, "What did the framers of the Constitution mean in requiring ratification by 'legislatures'?", the Court determined that under Article V "both methods of ratification by Legislatures or conventions call for action by deliberative assemblages [**12] representative of the people, which it was assumed would voice the will of [*192] the people." 253 U.S. at 226-27. See also *Hawke v. Smith, No. 2, 253 U.S. 231, 40 S. Ct. 498, 64 L. Ed. 877 (1920)*, concerning the same question but involving the Nineteenth Amendment extending the right of suffrage to women.

The Oklahoma Supreme Court had almost immediate occasion to follow the authority of *Hawke v. Smith, ex rel. Gill v. Morris, 79 Okla. 89, 191 P. 364 (1920)* where it refused to allow the prohibition amendment to be submitted to a vote of the people after it had been ratified by the Oklahoma Legislature. The Court held that the referendum provision of the State Constitution could not be applied in the ratification process of an amendment to the United States Constitution without violating Article V of that document. Our Court upheld the position of respondent in that action, that Article V excluded the people of the several states from voting directly on amendments to the Constitution and gave that right only to the "Legislature", which word was found to refer to a representative legislative body and did not refer to or comprehend the Legislative authority of a state.

The people may [**13] not place limitations on the deliberative process of the Legislature. In *Leser v. Garnett, 258 U.S. 130, 42 S. Ct. 217, 66 L. Ed. 505 (1922)*

the United States Supreme Court turned away a challenge to the validity of the ratification of the Nineteenth Amendment on the ground that Article V prohibited the limitations placed on Legislatures by their state constitutions in an effort to impair their power to ratify the Amendment. Striking the limitations, the Court stated:

"The function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state." At 217-218.

Recent similar attempts at directing state legislatures to call a federal constitutional convention have been held to violate Article V. *Amer. Fed. of Labor-Congress v. March Fong Eu, 36 Cal. 3d 687, 206 Cal. Rptr. 89, 686 P.2d 609 (Cal.1984)*, and *State of Montana, ex rel. Harper v. Waltermire, 213 Mont. 425, 691 P.2d 826 (1984)*, addressed the issue in the context of initiatives which proposed balanced [**14] budget amendments. Both decisions held that "a state may not, by initiative or otherwise, compel its legislators to apply for a constitutional convention, or to refrain from such action." *Eu, 686 P.2d at 622; Waltermire, 691 P.2d at 831*. Legislators must be free to deliberate and vote their own considered judgment, being responsible to their constituents through the electoral process. "A rubber stamp legislature could not fulfill its function under Article V of the Constitution." *Eu, 36 Cal. 3d 687, 686 P.2d 609, 622, 206 Cal. Rptr. 89*. No court has reached the conclusion that the people of a state may compel their legislators to call for a federal constitutional convention and direct them to vote for a specified amendment.

Proponents argue that the challenged initiative measure merely requests the Oklahoma Legislators to use their lawful delegated power toward a lawful end in following Article V amendment procedure. They assert that nothing in the proposal could "actually force" a legislator to make the convention call and they contend that to sustain protestant's position is to deny citizens their most basic rights of free political expression and communication with their elected representatives.

They rely on [**15] *Kimble v. Swackhamer, 439 U.S. 1385, 99 S. Ct. 51, 58 L. Ed. 2d 225 (1978)*, for support of their argued right to "communicate" freely with their legislators by way of initiative referendum. That case is inapposite, however. There the Legislature of the State of Nevada submitted a nonbinding advisory question to the voters of Nevada to obtain their views regarding the proposed equal rights amendment. The measure was challenged as violative of Article V but the Nevada Supreme Court in *Kimble v. Swackhamer, 94 Nev. 600, 584 P.2d 161 (Nev.1978)*, found that the ques-

tion did not violate Art. V. because it was purely advisory; the Legislature was able to vote for or against ratification or refrain from voting at all, without regard to the advisory vote. The Supreme Court of Nevada distinguished Hawke and [*193] Leser because this purely advisory question was not a limitation on legislative power.

Still challenging only the issue of conflict with Article V, the protestants sought a stay from the United States Supreme Court. Justice Rehnquist, sitting as Circuit Judge, refused all requested interim relief. He did not believe a federal question was presented and found protestant's reliance on [**16] Hawke and Leser misplaced. He observed that he saw no federal constitutional "obstacle" to the Nevada Legislature submitting a nonbinding advisory referendum to the people which provided by its terms that "the result of voting on this question does not place any legal requirement on the legislature or any of its members." The matter was dismissed for want of a federal question at *439 U.S. 1041, 99 S. Ct. 713, 58 L. Ed. 2d 700 (1978)*.

Proponents of today's challenged measure argue that the Oklahoma Legislature would still have the power to disregard its direction concerning the convention call. That assertion is not correct.

This measure, if adopted, would be neither nonbinding nor purely advisory in its federal aspects. Its very words distinguish it from the measure at issue in Kimble. The initiative states "the People . . . instruct each member of the Oklahoma Legislature . . . to make the specific application under Article V [to] Congress calling for an Article V Convention for the purpose of proposing the following Amendment to the United States Constitution." This is an express mandate from the people to the Legislature to take a specific action. Also, if a Legislator [**17] failed to follow the directive, his or her failure would be noted on the ballot. Under these constraints, the application made by the Legislature would violate Article V as interpreted in Hawke and Leser. Legislative deliberation cannot exist where the outcome is a predetermined specific action.

Our conclusion that these provisions of the measure which apply for a constitutional convention or seek to compel the Legislature to do so are facially violative of *Article V of the United States Constitution*, necessarily raises questions of severability and the validity of the remaining provisions under State constitutional challenges.

IV

ISSUES ARISING UNDER THE OKLAHOMA

CONSTITUTION, ART. 5, § 1

Protestant contends that this proposed measure is beyond the power of the initiative granted the people in the Oklahoma constitution. We agree.

Article 5, § 1 of the Oklahoma Constitution [HN2] reserves to the people the legislative power of the initiative and the referendum. It provides:

"The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and [**18] amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature."

The initiative process was designed to propose laws and amendments to our State Constitution and the power of the people may not be extended past those limits. The initiative measure does not propose a law. While it purports to be an amendment to the Constitution it is merely a nonbinding legislative resolution. The people have no reserved authority to propose nonbinding resolutions by the initiative process. Our constitution is not unique in this regard and we are not alone in this view.

In *State of Montana ex rel. Harper v. Waltermire, supra*, the people of that state proposed, through the initiative process, to amend the Montana Constitution to direct the 1985 legislature to adopt a resolution requesting Congress to call a constitutional convention for the purpose of adopting a balanced budget amendment. The initiative also provided that if the resolution was not adopted within 90 days after the voters passed the initiative, the Legislature would be required [**19] to remain in session without compensation until the resolution was adopted. Finding that the initiative process in the Montana Constitution was "designed to enact laws", the Montana [*194] Supreme Court held that the initiative power does not include the power to enact legislative resolutions. The Court observed that while the document had the form and label of a constitutional amendment, the "subject matter reveals its true nature. It is a directive to the Legislature to take a specific action: to adopt a resolution." The Court pointed out that just labeling a document a constitutional amendment does not make it one and invalidated the citizens' attempt to create a legislative resolution by direct vote of the people. The Court stated: "A constitutional amendment facade does not enlarge the initiative power granted the people by the Montana Constitution to include the power of legislative resolution. The electorate cannot circumvent their Constitution by indirectly doing that which cannot be done directly."

In *State of Nebraska ex rel. Brant v. Beermann, 217 Neb. 632, 350 N.W.2d 18 (1984)*, the Supreme Court of

1996 OK 129; 930 P.2d 186, *;
1996 Okla. LEXIS 144, **; 67 O.B.A.J. 3874

Nebraska rejected a proposed initiative petition seeking to express the [**20] views of the populace on a nuclear freeze and forwarding that statement of position to those in power in the United States and the Soviet Union, finding it was merely a nonbinding expression of public opinion which was not a proper subject for the initiative. Nebraska's Constitution, like Oklahoma's, gives the people the power to enact "laws". The Beerman court reviewed with approval a discussion by the Supreme Judicial Court of Massachusetts in Opinion of the Justices Relative to the Eighteenth Amendment, 262 Mass. 603, 160 N.E. 439 (1928) considering a similar question where that court was asked whether a "proposed law" introduced by an initiative petition was really a "law" within the meaning of the initiative provisions of the constitution. Holding it was not a law, but only a non-binding expression of public opinion, the Massachusetts court set forth the following which is relevant to our situation:

"Without undertaking to frame a definition of 'law' as used in this amendment sufficiently accurate and comprehensive to meet all the conditions of the future, reference may be made to two definitions given in other jurisdictions in discussing the force and effect of statutes. [**21] In *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356, 29 S. Ct. 511, 512 (53 L. Ed. 826, 16 Ann. Cas. 1047), it was said by Mr. Justice Holmes:

'Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts.'

In *In re Opinion of the Justices*, 66 N.H. 629, 632, 33 A. 1076, 1078, (1891) appears this pertinent discussion:

'Law is a rule; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. * * *'

The word 'law' imports a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject; it implies command and not entreaty; it is something different in kind from an ineffectual expression of opinion possessing no sanction to compel observance of the views announced. The text of the proposed law accompanying this initiative petition does not prescribe a general rule of conduct. It merely invites a declaration of opinion by voters on a subject over which the people of the commonwealth possess no part of the sovereign power. Amendment of the Constitution of the United [**22] States and repeal of amendments thereof constitute federal functions derived in every particular entirely from the Constitution of the United States. That instrument transcends all provisions sought to be enacted by the people or by the legislative authority of any state.

The voters of the several states are excluded by the terms of *article 5 of the Constitution of the United States* from participation in the process of its amendment. By that article all power over the subject is vested exclusively in the Legislatures of the several states. *Hawke v. Smith* (No. 1) 253 U.S. 221, 227, 40 S. Ct. 495, 64 L. Ed. 871, 10 A. L. R. 1504; *Leser v. Garnett*, 258 U.S. 130, 137, 42 S. Ct. 217, 66 L. Ed. 505. The result of the vote as proposed in this initiative petition would be lacking in any effective force. The proposed law is wanting in features essential to constitute its provisions [*195] a law within any permissible conception of the meaning of that word. Superficial appearances cannot clothe with the attributes of law something in substance vain and inoperative. The mandate to the secretary of the commonwealth in section 2 to tabulate the returns of the votes and to 'transmit copies * * * to each [**23] Senator and Representative in Congress from this commonwealth' is subsidiary and incidental to the main purpose of the proposed law; it relates to a matter which standing alone possesses no legal force; it cannot convert into a law something in itself ineffectual." Opinion of the Justices Relative to the Eighteenth Amendment, 262 Mass. 603, 160 N.E. 439, 440 (1928).

In *Paisner, et al v. Attorney General, et al.* 390 Mass. 593, 458 N.E.2d 734 (Mass.1983), the Supreme Judicial Court of Massachusetts, relying on *Opinion of the Justices supra*, held that an initiative which would be no more than a nonbinding expression of opinion is not a law and is not an appropriate subject for the popular initiative.

In *Amer. Fed. Of Labor-Congress v. March Fong Eu, supra*, an initiative was held to be invalid as a whole because it failed to adopt a "statute" and thus did not fall within the reserved initiative power set out in the California Constitution. The proposed initiative mandated the California Legislature to apply to Congress for a constitutional convention for the purpose of adopting a balanced budget amendment. The California Supreme Court observed that the reserved powers of [**24] initiative and referendum do not encompass all possible actions of a legislative body. Those powers are limited, under their State constitution, to the adoption or rejection of "statutes".

Recognizing that the right of initiative is precious to the people and is one which the courts are zealous to protect and preserve, [HN3] our cases have liberally construed the constitutionally reserved power of the people to enact "laws" through the initiative process. *Oliver v. City of Tulsa*, 654 P.2d 607 (Okla.1982). But even the most liberal interpretation will not include mere resolutions or expressions of popular opinion. [HN4] Laws are the creation of, and subject to, formal statutory procedures and constraints. They must be introduced, passed

1996 OK 129; 930 P.2d 186, *;
1996 Okla. LEXIS 144, **; 67 O.B.A.J. 3874

and enacted according to our existing laws and they must be enforceable. A resolution is just a collective expression of opinion and desire. Explaining that difference in *Hawks v. Bland*, 156 Okla. 48, 9 P.2d 720 (1932), the Court noted that a bill and a resolution of the legislature "are entirely different in their creation, nature and purpose . . . A resolution is not a law but merely the form in which the legislative body expresses an opinion . . . [it] [**25] is ordinarily passed without the forms and delays which are generally required by constitutions . . . prerequisites to the enactment of valid laws." *Id.* at 721. In *Eu*, the California Supreme Court observed that "a resolution, as distinct from a statute, is essentially an enactment which only declares a public purpose and does not establish means to accomplish that purpose." *Id.* 686 P.2d at 626 n.23.

If enacted, the initiative could not be incorporated into our constitution as it is not law; it is not binding, it is incapable of being carried into effect, and it is incapable of being enforced.

There are two additional issues regarding the measure's invalidity on state constitutional grounds. First, the subject matter of the initiative is such that, at best, the initiative would create a transient amendment for a specialized purpose: mandating the legislature to apply to Congress for a constitutional convention for the adoption of the proposed term limits amendment. [HN5] A temporary initiative measure is not a "part of the permanent fundamental law of a state and should not be submitted under the guise of a constitutional amendment. *State ex rel. Harper v. Waltermire*, 213 Mont. 425, at [**26] 428-29, 691 P.2d at 828.

Four years ago, this Court held that [HN6] the people's legislative power as defined in *article 5, section 1, of the Oklahoma Constitution* does not include the power to use the initiative process to attempt to change federal constitutional law. In *re* Petition No. 349, *State Question No. 642*, 838 P.2d 1, (Okla.1992). [*196] Initiative Petition No. 349 proposed to amend Oklahoma's Constitution to ban most abortions. The measure was intended as a means of setting up a test case to see if the United States Supreme Court would overturn its abortion rights decisions. After noting that "the goal clearly implicit in [the] 'test case' strategy is a change in federal constitutional law," this Court held that the "initiative process guaranteed to our citizens was never intended to be a vehicle for amending the United States Constitution - nor can it serve that function in our system of government." At 11.

The present initiative measure explicitly states the "desire that this Oklahoma constitutional amendment leads to the adoption of the United States Constitutional Amendment set forth in this amendment." That desire is

to be fulfilled by amending the Oklahoma Constitution in [**27] an attempt to force Oklahoma legislators to apply to Congress for a federal constitutional convention and the ratification of a specific congressional term limits amendment. Like the abortion initiative, this initiative measure is designed to trigger a process for changing federal constitutional law.

Proponents argue that this initiative measure is distinguishable from the abortion initiative because there is no United States Supreme Court case "diametrically opposed" to it. Thus, they argue, the holding concerning the abortion initiative is limited to "test case" circumstances. Proponents' reading of that case is much too narrow. The holding applies to any attempt to use Oklahoma's initiative process to amend the United States Constitution and the initiative provisions are therefore invalid under *article 5, sec. 1 of the Oklahoma Constitution* to the extent they also attempt to effect an amendment to the United States Constitution.

It is a fundamental principle that [HN7] a constitution can only be revised or amended in the manner prescribed by the instrument itself, and that any attempt to revise a constitution in a manner other than the one provided in the instrument is almost invariably [**28] treated as extraconstitutional and revolutionary. In *re Initiative Petition on Proposed Charter*, 89 Okla. 134, 214 P. 186 (Okla.1923). "While it is universally conceded that the people are sovereign and that they have power to adopt a constitution and to change their own work at will, they must, in doing so, act in an orderly manner and according to the settled principles of constitutional law. And where the people, in adopting a constitution, have prescribed the method by which the people may alter or amend it, an attempt to change the fundamental law in violation of the self-imposed restrictions, is unconstitutional." 214 P. at 188.

In *Associated Industries of Oklahoma v. Oklahoma Tax Commission*, 176 Okla. 120, 55 P.2d 79, (1936), the Court explained that the limitations on the power of the people to amend their constitution must be carefully guarded and enforced. The Court stated:

"It must be remembered that the people solemnly adopted a Constitution containing certain restrictions not only against its delegated officers and its established departments but also upon the people themselves, to the end that the Constitution should be perpetually maintained and upheld. Subject to the limitations [**29] imposed by the Federal Constitution, the reserved power of the people of the state to amend their Constitution is unlimited. But this power must be exercised in substantial conformity to the provision of the Constitution itself. Courts can approve only those acts of the people which

are in substantial conformity with the procedure provided by or under authority of the Constitution."

Proponent, Joe Windes, through his attorney, filed an application on November 13, 1996, to allow proponent Windes to withdraw the 204,901 signatures to this initiative petition, and have this Court dismiss these proceedings as moot. He states he wishes to advance a different but undisclosed constitutional procedure. No legal authority is cited in the application which would permit a proponent to withdraw signatures from an initiative petition after the petition has been submitted to a court for determination of the legality of the petition, nor has this Court found any such authority. [HN8] The right to sign an initiative petition is a personal privilege, and the right to withdraw a signature from a petition can be exercised only by the person directly [*197] concerned. *State, ex rel., Hindley v. Superior Court*, [**30] 70 Wash. 352, 126 P. 920, 923 (1912). In re Initiative Petition No. 2, *City of Chandler*, 170 Okla. 507, 41 P.2d 101 (1935), and cases therein cited, hold that one who has signed an initiative petition may withdraw his signature after the petition has been filed only so long as action has not been taken to determine the sufficiency of the signatures.

The sufficiency of the number of signatures upon the petition in this case was made long ago. Furthermore, the legal issues arising from this initiative petition case fall within the rubric of public law questions, and one party or proponent may not unilaterally invalidate the signatures to the petition and attempt to moot the issues. Therefore, this belated application to withdraw the signatures from the initiative petition is DENIED.

The term limits initiative is invalid as a whole because it is beyond the reserved initiative power of the people set out in *article 5, sec. 1 of the Oklahoma Constitution*. It may not be submitted to the people.

Our decision today to invalidate Initiative Petition No. 364, State Question No. 673 is based upon separate, adequate, and independent State law grounds. *Michigan v. Long*, 463 U.S. 1032, [**31] 1041, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201, (1983).

KAUGER, V.C.J., and LAVENDER, SIMMS, OPALA (CONCURS SPECIALLY) and WATT, JJ., CONCUR.

SUMMERS, J., CONCURS IN PART, DISSENTS IN PART.

WILSON, C.J., and HODGES, HARGRAVE, JJ., DISSENT.

CONCUR BY: OPALA; SUMMERS (In Part)

CONCUR

OPALA, J., concurring.

Today the court *condemns* as unfit for submission to the electorate the initiative measure here under consideration, which calls for a vote on whether the Oklahoma Legislature should be "*instructed*" to (a) *apply* that the U.S. Congress call a national constitutional convention for the purpose of (b) *submitting to the States* a proposed amendment to the U.S. Constitution whose provisions would impose congressional office term limits. The court's sentence of nullity rests not on federal law but on the measure's unfitness for submission under the standards that govern the State's initiative process. Because I accede to the court's view that the use of Oklahoma's initiative process *must be confined to those measures which on their adoption by the people become binding as this State's law*, I concur in today's pronouncement.

The *entire initiative* before us -- [**32] i.e., the declaration of state public policy that (a) congressional office terms be limited and (b) a national constitutional convention be sought in furtherance of this policy aim -- *is nothing more or less than a demand for a plebiscite*.¹ *It utterly fails to satisfy the state constitution's standards for a true initiative*. Even if it were adopted, the measure could *never become recognized, perceived or applied* as part of this State's corpus of law. Measures that would be ineffective as state law may not be proposed by the State's initiative process. To allow this measure's submission would (a) be nothing more than a charade lulling the electorate into a *false belief that their will on this issue could be translated into effective political action*, and (b) contribute to increased disillusionment and further growth of popular cynicism about *unresponsive government and its devious legal process*.

¹ *Plebiscite* is a general term for *any test of the people's sentiment, preference, choice or will upon any issue*. For the use of this term in a broad context see *Kuniyuki v. Acheson*, 94 F. Supp. 358, 365 (W.D. Wash. 1950); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1187 (Alaska 1985) (Moore, J., dissenting). A plebiscite is distinguishable from an initiative or referendum. *The latter has a much narrower meaning*. For an in-depth discussion of various forms of *plebiscite*, see generally Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *Yale L.J.* 1503 (1990); Eule, *Checking California's Plebiscite*, 17 *Hastings Const. L.Q.* 151 (1990).

[**33] Today's pronouncement does not clip the people's political wings, leaving them *sans* hope for achieving the desired change. What the court holds is that the proponents' recourse is not through the *state initiative process*, but by *political action* -- i.e., through lobbying state and federal lawmakers and through the

ballot box -- by voting out of [*198] office those officials who fail to take appropriate action on the issue. The proponents' freedom of *political action* remains *utterly unimpaired* by today's opinion.

I

THE PROVISIONS OF ARTICLE 5 OF THE U.S.

CONSTITUTION AND THEIR MEANING UNDER

EXTANT U.S. SUPREME COURT JURISPRUDENCE

The proponents' obvious objective is to initiate the process that would bring about a national constitutional convention for the purpose of submitting to the states an amendment to the federal constitution whose provisions would impose congressional office term limits. By the initiative in contest *state legislators are instructed* to advance the proponents' cause by an application calling upon the Congress to convene a national constitutional convention. Should a state lawmaker fail to do as instructed, the words "FAILED TO COMPLY [**34] WITH CONSTITUTIONAL INSTRUCTION ON TERM LIMITS" shall be placed next to his name on ballots to be used in future elections.

Article 5, U.S. Const., provides that constitutional amendments may be proposed only by the vote of two thirds of both Houses of Congress or by application of the legislatures of two thirds of the states.² This process secures "deliberation and consideration before any change can be proposed."³ Recent federal constitutional jurisprudence, *U. S. Term Limits, Inc. v. Thornton*,⁴ declares that the legislatures of *the United States and of the fifty states* (and territories) are themselves powerless to place a *limit on the term of office* held (or to be held) by members of the Congress. The only legally effective method for imposing a limit on the terms of a congressional officeholder is through the Art. 5 amendment procedures. Early federal constitutional jurisprudence teaches that the electorate's reserved power of the state initiative and referendum cannot be extended to the process of ratifying federal constitutional amendments. By its pronouncement in *Hawke v. Smith*⁵ the Court holds that a *state constitutional provision*, which allows [**35] or *requires* the referendum process to be used for the ratification of amendments proposed to the U.S. Constitution, stands in conflict with *Art. 5, U.S. Const.* Because the power to ratify an amendment is derived from the U.S. Constitution, neither courts nor legislative bodies (state or federal) may alter the textually prescribed process. Two years later in *Leser v. Garnett*⁶ the Court, once again, condemned as unconstitutional any measure which attempts to place in the hands of the state electorate the power to ratify amendments proposed to the U.S.

Constitution. *Leser* pronounces that the act of a state legislature in ratifying a proposed amendment to the U.S. Constitution is an exercise of a purely *federal function*. The procedural regime of the federal constitution trumps any barriers sought to be erected by the electorate of a state.

2 The terms of *Art. 5, U.S. Const.*, are:

"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, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." (Emphasis added.)

See Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 *Columbia J. Law & Soc. Probs.* 251 (1996).

[**36]

3 *Hawke v. Smith*, 253 U.S. 221, 226-227, 40 S. Ct. 495, 497, 64 L. Ed. 871 (1920).

4 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

5 *Hawke*, *supra* note 3, 253 U.S. at 226-227, 40 S. Ct. at 496-497.

6 258 U.S. 130, 137, 42 S. Ct. 217, 218, 66 L. Ed. 505 (1922).

A recent Arkansas initiative on *congressional office term limits* expresses a goal similar to that pressed for by the document [*199] before us today.⁷ The measure instructs Arkansas' state legislators and congressional delegates to use all the powers of their respective offices to propose and secure a U.S. constitutional amendment that would limit congressional office terms. The Arkansas Supreme Court, in *Donovan v. Priest*,⁸ held the measure offensive to the amendatory process of *Art. 5, U.S. Const.*, and hence clearly contrary to the state's initiative process. The U.S. Supreme Court stayed on November 2, 1996 the effect of the Arkansas court's pro-

nouncement during the pendency of certiorari proceedings.⁹

7 *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119, 126 (Ark. 1996). Other states also have considered the issue whether the electorate could dictate to the state legislature that it make an application to Congress for a national constitutional convention. In *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826 (Mont. 1984), the proposed measure directed the Montana legislature to apply to Congress for a national convention in order to propose a balanced-budget amendment to the U.S. Constitution. If the legislature failed to do so within 90 days, the measure provided, the state lawmaking body would have to remain in session, with only three days of permissible recess and without pay, until the application was made. Relying on *Hawke*, *supra* note 3 and *Leser*, *supra* note 6, the Montana court held that the word "legislatures" in both the ratification and application clauses of Art. 5, referred to the legislative bodies of the states. The court concluded that "legislative deliberation cannot exist where the outcome is a predetermined specific action The people through initiative cannot [coercively] affect the deliberative process." 213 Mont. at 830-831. In *AFL-CIO v. March Fong Eu*, 36 Cal. 3d 687, 686 P.2d 609, 620-622, 206 Cal. Rptr. 89 (Cal. 1984), the court rejected as unconstitutional a measure that would have compelled the California legislature, on penalty of loss of salary, to apply to Congress for a constitutional convention that would propose a balanced-budget amendment. The court declared that the framers intended the amending process to reside in a body with the power to deliberate upon a proposed amendment. The highest court of Maine struck down as contrary to the Art. 5 amendatory process a state initiative similar to that proposed in *Donovan*, *supra*. Its opinion states that neither the state's electors nor her legislature may, without offending "the essence of federalism," control the action of the members of U.S. Congress in the performance of their duties. *Opinion of the Justices*, 673 A.2d 693, 696 (Maine 1996).

[**37]

8 *Donovan*, *supra* note 7 at 126.

9 *Priest v. Donovan*, 326 Ark. 353; 931 S.W.2d 119 (1996); *Arkansas Term Limits v. Donovan*, U.S. , 136 L. Ed. 2d 298, 117 S. Ct. 380 (1996).

Unlike the Arkansas court, which based its opinion on federal law, this court declares today that the measure is unfit for submission under the adequate and independ-

ent standards of Oklahoma's initiative process.¹⁰ That fundamental-law regime is limited to facilitating effective changes in the *state constitution* or in the body of *state statutory law*. The measure in contest goes clearly beyond these parameters.

10 The U.S. Supreme Court's denial of stay request in two state-court cases in which a balanced-federal-budget initiative was refused submission to a vote, rests on "independent state-law grounds." *Montanans For A Balanced Budget Committee v. Harper*, 469 U.S. 1301, 105 S. Ct. 13, 83 L. Ed. 2d 1 (1984)(Rehnquist, J.); *Uhler v. AFL-CIO*, 468 U.S. 1310, 105 S. Ct. 5, 82 L. Ed. 2d 896 (1984)(Rehnquist, J.). In *Uhler*, Justice Rehnquist notes that the Court "will not review state-court decisions [based on adequate and independent state grounds] . . . , largely for the reason that decisions on the federal questions in such cases would amount to no more than advisory opinions. See *Michigar v. Long*, 463 U.S. 1032, 1037-1039, 103 S. Ct. 3469, 3474-3476, 77 L. Ed. 2d 1201 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S. Ct. 459, 462-463, 89 L. Ed. 789 (1945)." *Id.*

[**38] II

SUBMISSION OF THE PROPOSED MEASURE
WOULD PUT OKLAHOMA

AT RISK OF DISAPPROVING ACTION BY THE
U.S. CONGRESS ACTING

IN THE EXERCISE OF ITS ENFORCEMENT
POWERS UNDER THE

GUARANTEE CLAUSE OF THE U.S. CONSTITUTION "

11 The terms of *Art. 4, § 4, U.S. Const.*, are:

"The United States shall guarantee to every State in this Union a *Republican Form of Government*, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." (Emphasis added.)

The U.S. Constitution provides that "the United States shall guarantee to every State in this Union a Republican Form of Government."¹² [*200] *The Guarantee Clause is a major constitutional norm which the U.S. Supreme Court has held to be judicially unenforceable.*¹³ Our own jurisprudence recognizes the Guarantee Clause's nonjusticiability.¹⁴ Although the clause is *nonjusticiable*, it is nonetheless *enforceable* by action of the U.S. Congress exercising [*39] its power to deny an

1996 OK 129; 930 P.2d 186, *;
1996 Okla. LEXIS 144, **; 67 O.B.A.J. 3874

*offending state's congressional delegation its seat in the federal lawmaking assembly.*¹⁵

12 Art. 4, § 4, U.S. Const., *supra* note 11.

13 In *Luther v. Borden*, 48 U.S. 1, 41, 12 L. Ed. 581, 599 (1849), the Court first announced the principle that federal courts will not enforce guarantee-clause claims. The Court refused to decide which of two factions in a Rhode Island political upheaval formed the legitimate state government, holding that the Guarantee Clause treats the issue of a state government's legitimacy as a *political question* entrusted to Congress. Congress affirms a state's republican form of government by admitting her senators and representatives "into the councils of the Union." See also *Colegrove v. Green*, 328 U.S. 549, 556, 66 S. Ct. 1198, 1201, 90 L. Ed. 1432 (1946). For an in-depth discussion of the Guarantee Clause, see *Pacific States Tel. and Tel. Co. v. Oregon*, 223 U.S. 118, 133, 32 S. Ct. 224, 228, 56 L. Ed. 377 (1912); In re Initiative Petition No. 348, *Okl.*, 820 P.2d 772, 781 (1991)(Opala, C.J., concurring in result). See in this connection Heaton, *The Guarantee Clause: A Role For The Courts*, 16 Cumberland L.Rev. 477, 478 (1986). The Guarantee Clause was first invoked in response to a series of rebellions waged against state and national authority between 1793 and 1843, when several brief episodes of violence flared up, culminating in the 1842 Dorr Rebellion in Rhode Island. Wiecek, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 78-85 (Cornell University Press 1972).

[**40]

14 *Brown v. State Election Board*, *Okl.*, 369 P.2d 140, 149 (1962), citing *Colegrove*, *supra* note 13.

15 See *Luther*, *supra* note 13, 48 U.S. at 41, 12 L. Ed. at 599; *Colegrove*, *supra* note 13, 328 U.S. at 556, 66 S. Ct. at 1201.

The proposed measure calls for "instructing" the members of the state legislature to use "all of their delegated powers" to apply to the Congress for a national constitutional convention for the purpose of proposing a congressional office term limit amendment. The measure's *critical* statement for the support of these limits, which one of the dissents would have this court declare fit for submission, is clearly subject to condemnation as calling for an impermissible plebiscite. That offending section's text is:

Section 2 - Public Policy of Oklahoma Regarding Federal Term Limits.

It is hereby declared to be the Public Policy of the State of Oklahoma that the terms of office of Members of the United States Congress should be limited to three terms for members of the House of Representatives and two terms for Members of the Senate, and the United States [**41] Constitution should be amended to so provide.

The only *legitimate lawmakers* for our State are (1) the legislators sitting in both houses of her assembly and (2) the people who invoke their fundamental-law power of initiative and referendum *to affect state law*. The proposed measure *goes beyond the parameters of state constitutional initiative and referendum*. It is an attempt to force a plebiscite upon the proponents' *federal-law* objective. This court cannot place its imprimatur upon the use of the state initiative either for public opinion polls¹⁶ or for a pure plebiscite. A contrary action -- one that would approve submission of the measure in context -- would recast this State's political system into a form vulnerable to attack for offending basic republicanism. It would put this State *at risk* of (a) *losing* congressional accreditation for Oklahoma's elected delegation to the Congress and (b) *descending* to a clouded status as a co-equal participant in this Nation's Union of sister states.

16 *Donovan*, *supra* note 7 at 126; *Eu*, *supra* note 7 at 613.

[**42] In sum, even if approved, the initiative in contest could *not transform popular will into any form of effective, enforceable or binding law*. Regardless of whether this measure calls for a change in the body of state or federal law, it is unfit for submission because its text cannot become state law. State lawmakers, like their federal counterparts, cannot be compelled to cast a vote in obedience to an electorate's instructions.¹⁷ Moreover, [**201] Oklahoma's fundamental law does not permit invocation of the *state* initiative and referendum process for a change in the U.S. Constitution or in the body of federal law.¹⁸

17 *Thornton*, *supra* note 4; *Kimble v. Swackhamer*, 439 U.S. 1385, 1387, 99 S. Ct. 51, 58 L. Ed. 2d 225 (1978); *Hawke*, *supra* note 3, 253 U.S. at 226-227, 40 S. Ct. at 496-497. See also *State ex rel. Gill v. Morris*, 79 Okla. 89, 191 P. 364, 365 (1920); *Eu*, *supra* note 7 at 620-622; *Waltermire*, *supra* note 7 at 828.

18 Art. 5, § 1, *Okl. Const.*, *infra* note 19; *Gill*, *supra* note 17 at 365.

[**43] III

THE ENTIRE MEASURE PLAINLY OFFENDS
ART. 5,

§§ 1-3, OKL.CONST., WHICH RESERVES TO
THE PEOPLE

THE POWER TO MAKE OR REJECT STATE
LAW, BUT NOT

A BLANKET LICENSE TO FORCE ANY
FORM OF PLEBISCITE

A.

*The Use Of Art. 5, § 1 Initiative Process Is Restricted To
Passing State Laws*

Not only is the proposed measure likely to be viewed as offending orthodox notions of republicanism but, more importantly, as contravening the plain text of Art. 5, §§ 1-3¹⁹ of the Oklahoma Constitution.

19 The terms of Art. 5, § 1, Okl. Const., are:

"The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the *power to propose laws and amendments to the Constitution* and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." (Emphasis added.)

The terms of Art. 5, § 2, Okl. Const., are:

"The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the *right to propose any legislative measure*, and fifteen per centum of the legal voters shall have the *right to propose amendments to the Constitution* by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. * * * " (Emphasis added.)

The terms of Art 5, § 3, Okl. Const., are:

" * * * Any measure referred to the people by the initiative or referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise.

* * *

. . . The Legislature shall make suitable provisions for carrying into effect the provisions of this article." (Emphasis added.)

[**44] Article 5 of Oklahoma's fundamental law reserves in the people the right of the initiative (popular law-making) and of the referendum (the enacted law's popular disapproval). Under the *initiative rubric* of Art. 5, § 1 only two types of measures can qualify: (a) those that propose changes in *state statutory law* and (b) those that propose amendments to the *State's constitution*. Both must be capable of taking effect as law.²⁰ A referendum petition, on the other hand, is designed to call an election for the purpose of preventing a legislatively passed enactment from becoming a law.²¹ Both the initiative and referendum measures must deal with law. The State's constitution clearly so mandates by providing that any measure referred to the people by the initiative or referendum, when approved by the electorate, have the "force" and "effect" of law.²² *Enforceability*²³ is indeed a critical attribute for qualifying a measure under the State's constitutional initiative. *Unenforceable* law is the very antonym of an *initiative-authorized* legal product. Proposing for adoption (through the initiative process) a measure that is *facially incapable of application* [****45**] as a state law is as much an oxymoron as "gentle cruelty" or "deft clumsiness."

20 Art. 5, § 1, Okl. Const., *supra* note 19.

21 See Art. 5, § 1, Okl. Const., *supra* note 19.

22 Art. 5, § 3, Okl. Const., *supra* note 19.

23 "Enforceability" does not mean that a legal norm may never be denied compulsory status. What it does mean is that, to qualify as legal, the norm to be tested must be considered invocable for application as law. In this sense enforceability is nothing more than fitness for application as law by a judicial organ in some definite procedure. Hermann Kantorowicz, *THE DEFINITION OF LAW* at 79 (Cambridge University Press 1958).

Oklahoma legislators, acting on any matter validly before them, cannot be reduced to puppets by the use of coercive initiative measures that restrict the independence of the lawmakers' deliberative decision-making [****202**] process.²⁴ The popular initiative of Oklahoma's government charter is a conduit for *enacting state law, not a vehicle for* [****46**] *testing the electorate's taste (or will) for visiting political intimidation upon state or federal legislators.*

24 In *Donovan*, *supra* note 7 at 127-128, the court notes that although the initiative measure

there under consideration did not threaten state lawmakers with loss of salary, it was "nonetheless binding on the legislators in an extortive manner as failure to heed the amendment's instruction will result in threatened potential political deaths."

The court's approval of the measure proposed by the initiative in contest would plainly *enlarge* the powers reserved to the people in *Art. 5, § 1, Okl. Const.* It would make those powers co-extensive with a blanket license for calling a plebiscite on any desired expression of popular preference.²⁵ A judicial construction that creates in the electorate the power to invoke a plebiscite would transform Oklahoma's government from its constitutionally required republican form into a direct, Athenian-like democracy.²⁶ In short, this State's constitutional initiative [**47] regime cannot be extended to serve as the functional equivalent of plebiscite process for conducting any form of public opinion polls.

25 For the definition of *plebiscite*, see *supra* note 1.

26 An Athenian-like democracy is one that rests on the principle that all law-and other decision-making power is vested *directly* in the people who act through an assembly of citizens. See *The Emptiness of Majority Rule*, 1 *Mich. J. Race & L.* 195 (1996); Wright & Miller, *Federal Practice and Procedure* § 5663 (1992).

B.

The So-called Public Policy as Law

According to the proponents, the proposed measure is a *law* within the meaning of *Art. 5, § 1, Okl. Const.*²⁷ They reason that (a) *every statute is a law* and a *statute declaring public policy* must, by settled practice, be treated as law, and (b) if statutory law may embody public policy, it follows that the reserved power of initiative implies popular authority to declare the public policy of this State. Proponents point to the [**48] terms of 25 *O.S.1991 § 302*²⁸ as a statutory example that embodies this State's notion of legislatively declared public policy. *I view this argument as utterly lacking in jurisprudential support.*

27 For the terms of *Art. 5, § 1, Okl. Const.*, see *supra* note 19.

28 The terms of 25 *O.S.1991 § 302* are:

It is the public policy of the State of Oklahoma to encourage and facilitate an informed

citizenry's understanding of the governmental processes and governmental problems.

Oklahoma's public policy is *derived from the established law* of the State to be *found in her constitution, statutes and judicial decisions.*²⁹ *Section 302*, enacted as a part of the Oklahoma Open Meeting Act,³⁰ is designed *as an interpretive device for giving the act its legislatively intended meaning.* The cited statute is clearly distinguishable from the terms of *this measure's declaration of public policy.* The latter provides that (a) federal senate and house office terms should be limited and (b) state [**49] legislators be "instructed" to apply to the U.S. Congress to call a national constitutional convention as a vehicle for achieving the popularly desired goal. Because the initiative's statement of public policy *stands by itself, detached as it is from any viable legal norm that is to be enacted, the measure can have no effect as law.*

29 *Tate v. Browning-Ferris, Okl.*, 833 P.2d 1218, 1225 (1992); *Tom Dolan Heating Co. v. Public Service Co., Okl.*, 480 P.2d 270, 271 (1971); *Board of County Com'rs of Tulsa County v. Mullins*, 202 *Okla.* 628, 217 P.2d 835, 841 (1950); *Cameron & Henderson, Inc. v. Franks*, 199 *Okla.* 143, 184 P.2d 965, 967 (syl. 7)(1947). See also *Batchelor v. American Health Insurance Co.*, 234 *S.C.* 103, 107 *S.E.2d* 36, 38 (*S.C.* 1959). In *Batchelor* the court notes that public policy is not susceptible of exact definition, but for purposes of juridical application, *a state has no public policy, cognizable by the courts, which is not derived or derivable by clear implication from the established law of the state.*[

30 25 *O.S.1991* §§ 301-314.

[**50] C.

The Proposed Measure Is Not Capable of Being Transformed into Law by Plebiscite

It is far more difficult to *define law* -- a [*203] well-nigh impossible task³¹ -- than it is to *identify nonlaw.* The highest court of this Nation viewed to be facially ineffective as law a resolution *passed by only one House of the Congress.*³² Also brought within the broad category of nonlaw was a state statute that went unenforced for nearly all of its existence.³³ These are but two telling examples of how the highest Court of this Nation has dealt with norms of conduct that are either *facially unfit for application as law* or fail to pass muster as law on a closer examination of their origin or of their postenactment treatment by officials who are charged with enforcement.³⁴

31 There is no "air tight" definition of "law". Legal philosophers concede that an all-inclusive definition of law is impossible to craft.

A definition both excludes and includes. It marks out a field. It makes some matters fall inside the field; it makes some fall outside. And the exclusion is almost always rather arbitrary. I have no desire to exclude anything from matters legal. In one aspect law is as broad as life, and for some purposes one will have to follow life pretty far to get the bearings of the legal matters one is examining. Karl Llewellyn, JURISPRUDENCE 4 (1962).

[**51]

32 *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983). In *Chadha*, the Court held unconstitutional the assumed power of either House of Congress, acting alone, to overrule by resolution the Attorney General's discretionary suspension of deportation for reasons of "extreme hardship". The one-House congressional veto provision, the Court held, violates the explicit constitutional requirement for bicameral passage and presentment of the bill to the President before it becomes law. *Id.*, 462 U.S. at 946-948, 957-959, 103 S. Ct. at 2781-2783, 2787-2788. The *lawmaking process* must adhere in strict fashion to the "explicit and unambiguous provisions of the Constitution [which] prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Id.*, 462 U.S. at 945, 103 S. Ct. at 2781.

33 *Poe v. Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L. Ed. 2d 989 (1961). The plurality opinion in *Poe* holds that a justiciable controversy does not exist if "compliance with statutes is uncoerced by the risk of their enforcement." 367 U.S. at 508, 81 S. Ct. at 1758. There, the challenged Connecticut statute, which prohibited the giving of medical advice on the use of contraceptives, had been enacted in 1879, and, with but a single exception, no one had ever been prosecuted under its prohibition. The threat of prosecution was deemed "chimerical" because the state law had fallen into virtual *desuetudo* (disuse) through lack of prosecution for over 80 years. "Desuetudo annuls a norm, identical in character with a statute whose only function is to repeal a previously valid statute." Hans Kelsen, GENERAL THEORY OF LAW AND STATE 119 (1945)(reprinted 1961)(quoted in George C. Christie, JURISPRUDENCE (Text and Readings On The Philosophy of Law) 628 (1973)).

[**52]

34 Today's opinion relies on several decisions in which initiative measures were held *facially unfit for application as law*. *Paisner v. Attorney General*, 390 Mass. 593, 458 N.E.2d 734 (Mass. 1983); *State ex rel. Askew v. Meier*, 231 N.W.2d 821 (N.D. 1975); *Eu*, *supra* note 7; *Waltermire*, *supra* note 7; *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (Neb. 1984); Opinion of the Justices Relative to the Eighteenth Amendment, 262 Mass. 603, 160 N.E. 439 (Mass. 1928). The Nebraska and Massachusetts courts cited with approval the U.S. Supreme Court's definition of *law* in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356, 29 S. Ct. 511, 512, 53 L. Ed. 826 (1909): "Law is a statement of the circumstances in which *the public force will be brought to bear upon men through the courts*." (Emphasis mine.) *Beermann*, *supra* 350 N.W.2d at 22; *Opinion of the Justices*, *supra* at 440.

The court's task here *is not to define law* as an abstract concept but *to test whether this measure, if adopted, could attain the quality of law*.³⁵ The proposed measure in [*204] contest, "I must conclude, is not within the parameters [**53] of a true initiative. It does not *propose a state law*; rather, it calls for a plebiscite to elicit popular preference for the proponents' federal-law objective, which, if approved, will exist solely *dehors* the coercive framework of the law.

35 "The law-creating process includes not only the process of legislation [all forms of law-making], but also the procedure of the judicial and administrative authorities. Even judgments of the courts very often contain legally irrelevant elements. If by the term 'law' is meant something pertaining to a certain legal order, then *law is anything which has been created according to the procedure prescribed by the constitution fundamental to this order*. This does not mean, however, that everything which has been created according to this procedure is law in the sense of a legal norm. *It is a legal norm only if it purports to regulate human behavior, and if it regulates human behavior by providing an act of coercion as sanction*." (Emphasis added.) Hans Kelsen, *supra* note 33 at 123 (quoted in *Christie*, *supra* note 33 at 631). See *Christie*, *supra* note 33 at 638, where he refers to H.L.A.Hart's THE CONCEPT OF LAW. Professor Hart, one of the most respected contemporary English jurisprudential thinkers, acknowledges that he owes much to the work of Hans Kelsen.

1996 OK 129; 930 P.2d 186, *;
1996 Okla. LEXIS 144, **; 67 O.B.A.J. 3874

See comments by other legal philosophers and jurisprudential thinkers who consider *enforceability* (whether actual or perceived) a *critical attribute of law*: (1) "[Law is a] body of rules prescribing external conduct and considered *justiciable*." Kantorowicz, *supra*, note 16 at 21-22 (who is careful to note that (a) this definition of law is not the only possible one and (b) a norm is considered "justiciable" if it is invocable for application as law. Kantorowicz, *supra*, note 16 at 21) and (2) "[Legal rules] . . . provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life *within the coercive framework of the law*." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW 593 (1958)(emphasis added).

[**54] IV

THREE IMPEDIMENTS PREVENT THE PROPOSED

MEASURE FROM EVER BECOMING LAW

The measure in contest -- which presses for congressional action that would convoke a constitutional office term limits -- cannot become part of the State's law because (a) it is facially unfit for *incorporation into the corpus of her constitution* as enforceable state law, (b) it is incapable of being *implemented by state legislation* that would be binding on individual state lawmakers and (c) this court would be powerless to clothe the measure with binding force by crafting vitalizing jurisprudence.

The Art. 5 provisions of this State's fundamental law are not self-executing.³⁶ They require legislative implementation.³⁷ The legislature cannot enlarge the people's reserved power; it can only vitalize it by acts that will "take effect and be in force."³⁸ The breath of the power reserved by the initiative is to be drawn by tracking the language of the state constitution.³⁹

36 See the terms of Art. 5, § 3, *supra* note 19, which direct the legislature to implement the provisions of this article.

[**55]

37 For the implementing provisions of Art. 5, §§ 1-3, *supra* note 19, see 34 O.S. 1991 §§ 1 *et seq.*

38 See Art. 5, § 3, *supra* note 19 (emphasis added).

39 The Oklahoma Constitution, to which all statutes must yield, is to be so construed as to

give effect to the intent of its framers and of the people adopting it. *Hendrick v. Walters*, Okl., 865 P.2d 1232, 1238 (1993); *Draper v. State*, Okl., 621 P.2d 1142, 1145 (1980).

If the proposed measure were adopted, it could *not become law* as part of the State's constitution. It is neither intended to be state law nor does its text appear to demonstrate the properties that would make it self-executing and facially capable of being carried into effect. The measure's declaration of public policy could never be comprised within the framework of any viable state legislation.

The process of changing by initiative petition either the State's statutory law or her constitution is a form of lawmaking. Any change in this State's constitution, to be effected by the initiative process, must hence qualify as law. The proposed measure would [**56] allow to be incorporated into this State's constitution a provision which, if adopted, would be neither *justiciable* nor *enforceable* directly or through the command of this State's constitutional jurisprudence.

State constitutional case law, like federal fundamental-law jurisprudence,⁴⁰ is a process akin to lawmaking. It may take effect either *retrospectively* or *prospectively* -- very much like legislative enactments. This court would be *powerless* either (a) to give *this initiative* the force of law by crafting constitutional jurisprudence that could make the measure's terms binding on any of this State's officialdom or (b) to require the legislature to obey the policy that is sought to be adopted. If approved, this initiative could have *no effect as law in any form*.⁴¹ In short, the measure in contest *usurps* for the people power that [*205] is broader than that which stands reserved to them by the state's constitution.

40 See, e.g., *Linkletter v. Walker*, 381 U.S. 618, 624-625, 85 S. Ct. 1731, 1734, 1735, 14 L. Ed. 2d 601 (1965).

41 For *enforceability* as a critical attribute of law, see *Paisner*, *supra* note 34; *Beermann*, *supra* note 34; *Meier*, *supra* note 34; *Eu*, *supra* note 7; *Waltermire*, *supra* note 7.

[**57] V

THE TEACHINGS OF THREADGILL

My commitment to the *undiluted force of Threadgill v. Cross*⁴² continues with *undiminished fervor*.⁴³ *Threadgill* teaches that conformity of an initiative measure's *content* to the commands of our constitution -- state or federal -- may not be judicially examined *in advance of the initiative petition's adoption by the people*. *Threadgill* protects from presubmission, content-based

constitutional challenges those measures which, if adopted by the people, *would become law* -- not measures which are *facially* incapable of attaining the status of law.

42 26 Okla. 403, 109 P. 558 (1910).

43 My unswerving commitment to *Threadgill*, *supra* note 42, is documented in several reported decisions. See *In re Initiative Petition No. 362*, Okl., 899 P.2d 1145, 1153 (1995)(Opala, J., concurring in result); *In re Initiative Petition No. 360*, Okl., 879 P.2d 810, 821 (1994)(Opala, J., concurring in result); *In re Initiative Petition No. 358*, Okl., 870 P.2d 782, 788 (1994)(Opala, J., concurring in result); *In re Initiative Petition No. 349*, Okl., 838 P.2d 1, 18 (1992)(Opala, C.J., dissenting); *In re Initiative Petition No. 348*, *supra* note 13 at 781 (Opala, C.J., concurring in result); *In re Initiative Petition No. 347*, Okl., 813 P.2d 1019, 1037 (1991)(Opala, C.J., concurring); *In re Initiative Petition No. 341*, Okl., 796 P.2d 267, 275 (1990)(Opala, V.C.J., concurring in result); *In re Initiative Petition No. 317*, Okl., 648 P.2d 1207, 1222 (1982)(Opala, J., concurring in the judgment); *In re Initiative Petition No. 315*, Okl., 649 P.2d 545, 554-555 (1982)(Opala, J., concurring in result); see also *In re Initiative Petition No. 349*, 838 P.2d 1 (1991)(Opala, C.J., concurring in part and dissenting in part).

[**58] Presubmission review of an initiative's fundamental-law conformity *should be confined to fatally vitiating infirmities in the initiative process itself* -- to measures that are procedurally flawed, patently invalid or, as in this case, are *facially* incapable of becoming law. The electorate's effort at legislating *directly must not* be hindered by pre-election attacks *other* than those which target the petition's compliance with some *insuperable barrier to the measure's submission*.

Since the proposed measure is clearly and *facially* contrary to state law, ⁴⁴ *Threadgill* is no obstacle to this court's presubmission scrutiny of the initiative's validity and to a presubmission sentence of nullity.

44 For the "clearly-contrary-to-law" test for limiting pre-election challenges, see *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139, 142 (Ark. 1992); *Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656, 659 (Ark. 1912).

VI

THE PROPOSED MEASURE DIFFERS FROM THAT IN INITIATIVE PETITION NO. 349

This proposed measure is distinguishable [^{**59}] from that in *In re Initiative Petition No. 349*. ⁴⁵ The latter initiative -- which would have prohibited abortions except in four instances and imposed *criminal penalties* for the proposed law's violation -- *was held not to qualify for submission* to a vote of the electorate. ⁴⁶ I was in dissent there. ⁴⁷

45 *In re Initiative Petition No. 349*, *supra* note 43.

46 *Planned Parenthood v. Casey*, 505 U.S. 833, 845, 112 S. Ct. 2791, 2804, 120 L. Ed. 2d 674 (1992).

47 *In re Initiative Petition No. 349*, *supra* note 43 at 18 (Opala, C.J., dissenting).

Only in the clearest case of *firmly settled* and *stable* federal or state constitutional jurisprudence that *absolutely* condemns the proposed measure as *facially* impossible of enforcement, application or execution -- and then *only* if the protestants have standing to complain of constitutional infirmity -- is this court ever justified in not clearing an initiative petition for submission. It is for this reason that I receded from the [^{**60}] court's pronouncement in *Initiative No. 349*. *The anti-abortion measure there under scrutiny was, in my view, not facially fraught with a fundamental-law infirmity*. It was clearly entitled to at least a presumption of correctness. Had it been tainted by a fatal facial constitutional flaw, I would have acceded to the court's resolve to withhold it from submission.

SUMMARY

I concur in not allowing *any portion of the proposed measure* to survive the axe of today's [^{**206}] invalidation. Its entire text falls *dehors* the parameters of a constitutionally authorized initiative. Its terms neither propose a state law nor are capable of becoming state law. The use of the initiative as a vehicle for invoking a plebiscite would make our state government vulnerable to congressional condemnation as unrepresentative in form.

The State's constitutional initiative is not to be treated as a license for *any* public opinion poll. Judicial clearance for submission of a measure must be restricted to *proposals for the state law's change or, in case of a referendum, for the state law's rejection*. If a measure is not intended to be state law or is clearly and *facially* contrary to law, its submission [^{**61}] offends *Art. 5, § 1, Okl. Const.*

That portion of the measure -- which proposes to amend the State's constitution by adding to its text a "statement of public policy" on congressional office term

limits -- can never be translated into viable law of this State. The initiative in contest clearly offends Oklahoma's initiative regime and impermissibly invades and undermines the independence of the State Legislature's deliberative decision-making process. The plebiscite that is desired for the expression of popular preference lies *dehors the permissible parameters of this State's initiative process*. An election whose result can bring no concrete impact on the *state government's constitutional order or on the body of her law* is an exercise in futility and a fraud upon the people.

DISSENT BY: ALMA WILSON; HARGRAVE; Hodges; SUMMERS (In Part)

DISSENT

ALMA WILSON, Chief Justice, dissenting:

I would allow the initiative petition to be submitted to a vote of the people.

HARGRAVE, J., DISSENTING.

I respectfully dissent from the majority opinion in this case. A plain reading of *Article 5, Section 1, of the Oklahoma Constitution* reserves to the people the right to propose an amendment [**62] to the Constitution and to vote on the adoption or rejection of the same. I find no impediment to the people amending the Constitution for the purpose of making a statement therein. Neither do I find the proposal so facially infirm as to strike it, at this time, from a submission to the people. I would treat this proposal as any other proposed act of legislation and, if and when it is adopted, at that time determine its constitutionality in the presentment of a proper case. I would let the people complete their attempt to use the reserved right of the initiative process.

I AM AUTHORIZED TO STATE THAT CHIEF JUSTICE WILSON CONCURS IN THIS VIEW.

Hodges, J., dissenting.

I agree that the initiative measure as submitted violates the Oklahoma and United States Constitutions. This Court, however, has failed to give effect to the severability provision of the measure which allows the valid portions to continue in full force and effect. Once the offending portions are severed, the question of whether the remainder is to enjoy a vote of the people is no longer a constitutional question and the people have a right to enact it or reject it at the polls.

We live at a time when [**63] people have become increasingly skeptical concerning their government. The term limits battle is but one example of the electorate's desire to exercise more direct control over government.

At such a time, the constitutional initiative is one device which helps maintain a balance between representative government and pure democracy. It is an avenue of communication between government and the people, to whom government must respond.

During an earlier era of popular distrust, the framers of the Oklahoma Constitution established that "the first power reserved by the people is the initiative." *Okla. Const. art. 5, § 2*. "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *Oliver v. City of Tulsa, 654 P.2d 607, 613 (Okla. 1982)* (quoting *McFadden v. Jordan, 32 Cal. 2d 330, 196 P.2d 787, 788 (Cal. 1948)*). *Article 5, Section 1, of the Oklahoma Constitution* states that "the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature." (emphasis added).

This Court's construction [**64] of *Article 5, Section 1*, establishes a requirement which was not expressed by the framers of the Oklahoma Constitution. Nothing in the Oklahoma Constitution states that the people's power is limited to enacting only "laws". The people have also reserved the power to enact amendments to the Oklahoma Constitution through the initiative process. In fact, while twenty-six states have a method of enacting legislation by popular vote, only seventeen states recognize the constitutional initiative. [*207] See Dennis W. Arrow, *Representative Government and Popular District: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition*, 17 *Okla. City U.L. Rev.* 5, 8 (1992). Oklahoma is one of those seventeen states.

The fact that Proponents have failed to present an initiative measure which fully complies with constitutional requirements does not require that the initiative process be withheld from advocates of term limits. When unconstitutional provisions in an initiative measure may be stricken without impairing the measure's effect, the remaining portions are valid. *In re Initiative No. 191, 201 Okla. 459, 207 P.2d 266, 270 (Okla. 1949)*. A severability provision [**65] creates a presumption that the valid remaining portions would have been enacted without the omitted unconstitutional portions. *Englebrecht v. Day, 201 Okla. 585, 208 P.2d 538, 544 (Okla. 1949)*. The section 6 severability provision of this initiative measure is the mechanism by which a constitutionally permissible proposed expression of the will of the people should be placed on the ballot. It provides:

The provisions of this Amendment are severable, and if any part or provision of this Amendment shall be void, invalid, or unconstitutional, the decision of the court so holding shall not affect or impair any of the re-

1996 OK 129; 930 P.2d 186, *;
1996 Okla. LEXIS 144, **; 67 O.B.A.J. 3874

maining parts or provisions of this Amendment, and the remaining provisions of this Amendment shall continue in full force and effect.

After severing the offending portions of the initiative measure and amending the ballot title to accommodate the remaining provisions, State Question 673 would provide:

SHALL THE FOLLOWING PROPOSED AMENDMENT TO THE CONSTITUTION BE APPROVED?

() YES-FOR THE AMENDMENT

() NO-AGAINST THE AMENDMENT

BE IT ADOPTED BY THE PEOPLE OF THE STATE OF OKLAHOMA

OKLAHOMA CONGRESSIONAL TERM LIMITS AMENDMENT

AN AMENDMENT TO THE OKLAHOMA CONSTITUTION STATING [**66] THE FINDINGS AND DECLARATIONS OF THE PEOPLE AND STATING THE PUBLIC POLICY OF OKLAHOMA RELATING TO TERM LIMITS FOR MEMBERS OF THE UNITED STATES CONGRESS.

The People of Oklahoma find and declare that:

Whereas, the People of our State voted by over sixty-six percent to limit the terms of U.S. Representatives to three terms and limit U.S. Senators to two terms, and

Whereas, the U.S. Supreme Court has ruled that an amendment to the U.S. Constitution is necessary to limit terms of members of Congress, and

Whereas, there are two methods to propose amendments to the U.S. Constitution that must then be ratified by three-fourths of the States, or thirty-eight. These methods are (1) for two-thirds of both houses of the United States Congress to so vote, or (2) for thirty-four States to apply for an Article V convention to so vote, and

Whereas, the Congress has refused to propose such an amendment, and by a clear majority, defeated the same term limits passed by over sixty-six percent of the Voters of our State in 1994, and

Whereas, the Congress has a clear conflict of interest in proposing term limits on its own members.

Therefore, We, the People of Oklahoma, hereby amend [**67] our state constitution pursuant to our power under that constitution.

Section 2 - Public Policy of Oklahoma Regarding Federal Term Limits.

It is hereby declared to be the Public Policy of the State of Oklahoma that the terms of office of Members of the United States Congress should be limited to three terms for members of the House of Representatives and two terms for Members of the Senate, and the United States Constitution should be amended to so provide.

If enacted, the resulting constitutional amendment would express the public policy of Oklahoma regarding term limits for its members of Congress. With the unconstitutional directive removed from the measure, each legislator would remain free to express [*208] his or her own deliberative vote in representing his or her own district.

The amended measure would be consistent with the nonbinding referendum measure approved in *Kimble v. Swackhamer*, 439 U.S. 1385, 58 L. Ed. 2d 225, 99 S. Ct. 51 (1978). There, Chief Justice Rehnquist determined that citizen participation in a nonbinding referendum as to whether the Nevada Legislature should ratify the Equal Rights Amendment did not violate *Article V of the United States Constitution*. He noted that he would be "most [**68] disinclined" to rule out "communication between members of the legislature and their constituents." 439 U.S. at 1387-88. Apparently, this Court does not share Chief Justice Rehnquist's judicial restraint. Under today's holding, no advisory amendment to the Oklahoma Constitution could be enacted directly by the people through the initiative process. This Court should facilitate the use of the initiative process by applying the severability provision of the proposed measure and placing the constitutional portions of the measure on the ballot.

SUMMERS, J., Concurring in part and dissenting in part.

I join Justice Hodges' dissenting opinion insofar as he would sever the unconstitutional part of the proposal and submit the remainder to a vote.

I concur in the majority's conclusion that the attorney may not withdraw the signatures to the initiative petition.

***** Print Completed *****

Time of Request: Tuesday, July 24, 2007 16:23:54 EST

Print Number: 1842:39205399

Number of Lines: 1123

Number of Pages:

Send To: LOPEZ, LONNIE
SMITH & LOWNEY PLLC
2317 E JOHN ST
SEATTLE, WA 98112-5412

169 F.3d 1119
(Cite as: 169 F.3d 1119)

▷

Miller v. Moore
C.A.8 (Neb.), 1999.

United States Court of Appeals, Eighth Circuit.
Andrew MILLER and Martin R. Hoer, Appellees,

v.

Scott MOORE, Secretary of State for the State of
Nebraska, Appellant,

and U.S. Term Limits Foundation, Nebraska Term
Limits Coalition, and Robert D. Wright,
Intervenor-Defendants.

Timothy J. Duggan, Ray L. Lineweber, ACLU
Nebraska, Ron Withem, and Ernest Chambers,
Appellees,

v.

Scott Moore, Secretary of State for the State of
Nebraska, Appellant,
and U.S. Term Limits Foundation, Nebraska Term
Limits Coalition, and Robert D. Wright,
Intervenor-Defendants.

Timothy J. Duggan, Ray L. Lineweber, ACLU
Nebraska, and Ron Withem, Appellees,

v.

Scott Moore, Secretary of State for the State of
Nebraska, Defendant,
and U.S. Term Limits Foundation, Appellant,
and Nebraska Term Limits Coalition and Robert D.
Wright, Intervenor-Defendants.

Nos. 98-1563, 98-1566 and 98-1827.

Submitted Nov. 18, 1998.

Decided March 2, 1999.

State senator and voters brought § 1983 action against Nebraska secretary of state, challenging state constitutional amendment, passed by voter initiative, directing state's elected officials to seek federal term limits. The United States District Court for the District of Nebraska, Warren Urbom, J., granted declaratory and injunctive relief to plaintiffs and assessed attorney's fees against both secretary and intervening foundation. Secretary and foundation appealed. The Court of Appeals, Morris

Sheppard Arnold, Circuit Judge, held that: (1) state senator had standing to challenge provisions applicable to state legislators; (2) voters had standing to challenge amendment in its entirety; (3) amendment impermissibly interfered with federal constitution's prescribed method of amendment; (4) amendment's labelling provisions amounted to unconstitutional infringement on the right to vote; (5) section of amendment establishing "official position" in favor of federal term limits was valid; and (6) award of attorney's fees required reconsideration.

Affirmed in part and remanded.

Beam, Circuit Judge, dissented in part.
West Headnotes

[1] Constitutional Law 92 ⇨725

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise
Constitutional Questions; Standing

92VI(A)4 Particular Constitutional
Provisions in General

92k725 k. In General. Most Cited Cases

(Formerly 92k42.3(3))

State senator who opposed federal term limits had standing to challenge state constitutional amendment, passed by voter initiative, directing state's elected officials to seek federal term limits, since amendment required pejorative ballot label to be placed next to names of incumbent officials who failed to comply with its terms. Neb.Const. Art. 18, § 1 et seq.

[2] Constitutional Law 92 ⇨725

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise
Constitutional Questions; Standing

92VI(A)4 Particular Constitutional
Provisions in General

169 F.3d 1119
(Cite as: 169 F.3d 1119)

92k725 k. In General. Most Cited Cases

(Formerly 92k42.3(1))

Registered voters had standing to challenge state constitutional amendment, passed by voter initiative, directing its state and federal elected officials and candidates to seek and endorse federal term limits, where amendment also required pejorative ballot labels to be placed next to names of officials and candidates who failed to comply with amendment, which could injure voters by greatly diminishing likelihood that candidates of their choice would prevail in election. Neb.Const. Art. 18, § 1 et seq.

[3] Elections 144 ⇨21

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k20 Power to Regulate Nominations and Ballots

144k21 k. In General. Most Cited Cases

In reviewing ballot regulations, court's primary concern is not the interest of the candidate but rather, the interests of the voters who chose to associate together to express their support for that candidacy and the views espoused, and a voter therefore has standing to challenge a state law regulating elections when that law would restrict his ability to vote for the candidate of his choice or dilute the effect of his vote if his chosen candidate were not fairly presented to the voting public.

[4] Constitutional Law 92 ⇨523

92 Constitutional Law

92III Amendment and Revision of Constitutions

92III(B) United States Constitution

92k523 k. Particular Amendments. Most Cited Cases

(Formerly 92k10)

United States 393 ⇨11

393 United States

393I Government in General

393k7 Congress

393k11 k. Regulation of Elections of Senators and Representatives. Most Cited Cases

State constitutional amendment, passed by voter initiative, that directed state's elected officials and candidates to seek federal term limits, and placed pejorative ballot label next to names of officials and candidates who did not comply with amendment, was impermissible interference with federal constitution's prescribed method of amendment. U.S.C.A. Const. Art. 5; Neb.Const. Art. 18, § 1 et seq.

[5] Constitutional Law 92 ⇨522

92 Constitutional Law

92III Amendment and Revision of Constitutions

92III(B) United States Constitution

92k522 k. Ratification or Rejection by States. Most Cited Cases

(Formerly 92k10)

Nonbinding, advisory **referendum** on proposed constitutional amendments does not violate constitutionally prescribed method of amendment. U.S.C.A. Const. Art. 5.

[6] Constitutional Law 92 ⇨1476

92 Constitutional Law

92XVII Political Rights and Discrimination

92k1476 k. Term Limits. Most Cited Cases

(Formerly 92k82(8))

Constitutional Law 92 ⇨1467

92 Constitutional Law

92XVII Political Rights and Discrimination

92k1467 k. Ballots and Ballot Access. Most Cited Cases

(Formerly 92k82(8))

United States 393 ⇨11

393 United States

393I Government in General

393k7 Congress

393k11 k. Regulation of Elections of Senators and Representatives. Most Cited Cases
Provision in state constitutional amendment directing state's elected officials and candidates to seek federal term limits, which placed pejorative ballot label next to names of officials and

169 F.3d 1119
(Cite as: 169 F.3d 1119)

candidates who did not comply with amendment, was unconstitutional infringement on the right to vote, as labelling provision was not politically neutral or evenhanded. Neb.Const. Art. 18, § 1 et seq.

[7] Elections 144 ↪9

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k8 Statutory Provisions Conferring or Defining Right

144k9 k. Constitutionality and Validity. Most Cited Cases

Elections 144 ↪21

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k20 Power to Regulate Nominations and Ballots

144k21 k. In General. Most Cited Cases

While states enjoy a wide latitude in regulating elections and in controlling ballot content and ballot access, they must exercise this power in a reasonable, nondiscriminatory, politically neutral fashion.

[8] Elections 144 ↪9

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k8 Statutory Provisions Conferring or Defining Right

144k9 k. Constitutionality and Validity. Most Cited Cases

State's legitimate interests in regulating elections are limited to promoting orderly, fair, and honest elections.

[9] Elections 144 ↪21

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k20 Power to Regulate Nominations and

Ballots

144k21 k. In General. Most Cited Cases

State laws are permissible when they regulate election procedures and do not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position, but a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates.

[10] Constitutional Law 92 ↪523

92 Constitutional Law

92III Amendment and Revision of Constitutions

92III(B) United States Constitution

92k523 k. Particular Amendments. Most

Cited Cases

(Formerly 92k10)

United States 393 ↪11

393 United States

393I Government in General

393k7 Congress

393k11 k. Regulation of Elections of Senators and Representatives. Most Cited Cases

Section of state constitutional amendment, passed by voter initiative, establishing as the official position of state and its citizens that state's elected officials should enact federal term limits amendment was advisory, nonbinding communication between people and their representatives that was not barred by federal constitution. Neb.Const. Art. 18, § 1.

[11] Civil Rights 78 ↪1480

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1480 k. Parties Entitled or Liable; Immunity. Most Cited Cases

(Formerly 78k294)

Award of attorney's fees against both state's secretary of state and foundation that intervened as defendant in action brought by state senator and voters challenging state constitutional amendment that directed state's elected officials and candidates to seek federal term limits was improper, absent

169 F.3d 1119
 (Cite as: 169 F.3d 1119)

consideration of defendants' relative degrees of culpability and the time the plaintiffs were forced to spend litigating against the respective defendants. Neb.Const. Art. 18, § 1 et seq.; 42 U.S.C.A. § 1988(b).

[12] Federal Civil Procedure 170A ↪ 2737.3

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2737 Attorneys' Fees

170Ak2737.3 k. Bad Faith,

Vexatiousness, Etc. Most Cited Cases

A court should assess attorney's fees against losing intervenors only where the intervenors' action was frivolous, unreasonable, or without foundation.

L. Steven Grasz, Asst. Atty. Gen., Lincoln, NE, argued, for appellant/defendant Scott Moore.

James C. Linger, Butler & Linger, Tulsa, OK, argued, for appellees Miller and Hoer.

William Scott Davis, Keating, O'Gara, Davis & Nedved, P.C., Tulsa, OK, argued (Gary L. Young, on the brief), for appellee Chambers.

Alan E. Peterson, Cline, Williams, Wright, Johnson & Oldfather, Lincoln, NE, argued (Terry R. Wittler, on the brief), for appellees Duggan, Lineweber and ACLU Nebraska.

David S. Houghton, Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., Omaha, NE, argued, for appellee Withem.

John M. Boehm, Lincoln, NE, argued, for appellant/intervenor-defendants US Term Limits Foundation, Nebraska Term Limits Coalition, and Robert D. Wright.

Before BEAM, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Nebraska State Senator Ernie Chambers, ACLU Nebraska, Timothy Duggan, Martin Hoer, Ray Lineweber, Andrew Miller, and Ron Withem brought this action under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against Scott Moore, the secretary of state of Nebraska. (Although this appeal actually involves three separate cases, we treat them as one case for purposes of simplicity.) The plaintiffs sought to

enjoin Mr. Moore from implementing and enforcing Article XVIII of the Nebraska Constitution, an amendment passed by voter initiative in the 1996 general election.

*1122 Article XVIII makes it Nebraska's "official position" that its elected officials should work to enact an amendment to the U.S. Constitution limiting congressional service to two terms in the Senate and three terms in the House of Representatives. The provision then "instructs" each of Nebraska's representatives in Congress to "use all of his or her delegated powers" to pass the specified term limits amendment. It also "instructs" members of the Nebraska legislature to apply to Congress, *see* U.S. Const. art. V, for a national convention, the purpose of which is to propose a congressional term limits amendment. Nebraska's Article XVIII also includes a detailed list of instructions to legislators with respect to proposing, seconding, and voting in favor of the term limits amendment, and it requires that the label "DISREGARDED VOTERS [sic] INSTRUCTIONS ON TERM LIMITS" be placed on the ballot adjacent to the name of any incumbent candidate who fails to comply with all of those instructions. The Nebraska secretary of state is assigned the task of determining whether an incumbent candidate will receive the pejorative ballot label.

Article XVIII also requires that nonincumbent candidates for Congress or for the Nebraska legislature be given an opportunity to take a "Term Limits Pledge" stating that, if elected, they will use their legislative powers to enact the term limits amendment specified in Article XVIII. Nonincumbent candidates who refuse to take the pledge receive the ballot label "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS."

The district court granted declaratory and injunctive relief to the plaintiffs, holding that Article XVIII violates both the First Amendment and Article V of the U.S. Constitution. Secretary of State Moore appeals, and we affirm the judgment of the district court with respect to these issues. The district court also assessed attorney's fees against U.S. Term Limits Foundation, which appeals that award. We remand the case for reconsideration with

169 F.3d 1119
 (Cite as: 169 F.3d 1119)

respect to the issue of attorney's fees.

I.

[1] As a preliminary matter, we address the issue of standing. We agree with the district court that Nebraska State Senator Ernie Chambers, as an opponent of a constitutional term limits amendment, has alleged a sufficiently particularized and concrete injury to give him standing in this case. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The district court found that Article XVIII injures Senator Chambers by threatening him with a pejorative ballot label if he refuses to comply with its mandates, a ballot label that would seriously jeopardize his chances of reelection and threaten his political career and livelihood. The record amply supports the district court's finding, and we think that the threatened harm is sufficient under the relevant cases to confer standing on Senator Chambers to challenge the constitutionality of Article XVIII's provisions pertaining to state legislators. See, e.g., *Meese v. Keene*, 481 U.S. 465, 473, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) (state legislator seeking to show films identified as "political propaganda" under Foreign Agents Registration Act had standing to challenge constitutionality of act, where legislator claimed that his exhibition of films with that label would harm his chances for reelection and adversely affect his reputation in the community). See also *Lujan*, 504 U.S. at 561-62, 112 S.Ct. 2130 (when suit challenges legality of a governmental action, and plaintiff is object of that action, plaintiff ordinarily has standing).

In support of the argument that Senator Chambers lacks standing, Secretary of State Moore draws our attention to the Supreme Court's recent decision in *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 2322, 138 L.Ed.2d 849 (1997), in which the Court held that members of Congress lacked standing to challenge the Line Item Veto Act. We think, however, that *Raines* is clearly distinguishable from the case before us. In *Raines*, the Court emphasized that the injury alleged by the legislators was merely an "abstract dilution of institutional

legislative power," *id.* 117 S.Ct. at 2320-21, that affected all members of Congress equally, rather than a concrete injury to individual legislators who were singled out for "specially unfavorable treatment," *id.* at 2318. Here, however, the district court found, and with reason, that Article XVIII's ballot labeling provisions threaten Senator Chambers's political*1123 career and livelihood—precisely the type of individualized, concrete injury that the Supreme Court found lacking in *Raines*. Accordingly, *Raines* has no application here.

[2][3] Because Senator Chambers, as an incumbent state legislator, lacks standing to challenge the provisions in Article XVIII pertaining to either incumbent U.S. representatives or nonincumbent candidates, we must decide whether Messrs. Duggan, Hoer, Lineweber, Miller, and Withem, as registered voters, have standing to challenge these provisions. In reviewing ballot regulations such as Article XVIII, "our primary concern is not the interest of [the] candidate ... but rather, the interests of the voters who chose to associate together to express their support for [that] candidacy and the views ... espoused." *Anderson v. Celebrezze*, 460 U.S. 780, 806, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). A voter therefore has standing to challenge a state law regulating elections when that law "would restrict his ability to vote for the candidate of his choice or dilute the effect of his vote if his chosen candidate were not fairly presented to the voting public." *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir.1988) (holding that voter had standing to challenge ballot access law that he claimed was overly restrictive in signature requirements and deadlines). In our case, the voters contend that Article XVIII's pejorative ballot labels injure them by greatly diminishing the likelihood that the candidates of their choice will prevail in the election. We agree with the district court's finding that this constitutes a sufficiently concrete and particularized injury to give the plaintiffs standing in the case before us.

Because we find that Messrs. Duggan, Hoer, Lineweber, Miller, and Withem have standing as voters to challenge the constitutionality of Article XVIII in its entirety, we need not decide whether

169 F.3d 1119
(Cite as: 169 F.3d 1119)

Mr. Lineweber also has standing as a potential future candidate for the state legislature, or whether ACLU Nebraska has standing on behalf of its members. See *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986).

II.

[4] The U.S. Constitution provides two exclusive methods for its own amendment:

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.

U.S. Const. art. V. In the handful of cases discussing Article V's amendment scheme, the Supreme Court has made it clear that both methods of amendment that the framers provided "call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people." *Hawke v. Smith*, 253 U.S. 221, 226-27, 40 S.Ct. 495, 64 L.Ed. 871 (1920). As a consequence, the voters in an individual state have, at best, a very limited role in the amendment process. In *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922), for example, the Supreme Court held that provisions in several state constitutions that forbade the legislatures of those states to adopt a constitutional amendment granting women the right to vote, were in conflict with Article V. The Court explained: [T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.

Id. at 137, 42 S.Ct. 217; see also *Hawke*, 253 U.S. at 231, 40 S.Ct. 495 (striking down under Article V a state constitutional provision requiring that ratification of proposed amendments to the U.S. Constitution be submitted to popular referendum).

[5] On the other hand, we believe that a "nonbinding, advisory referendum," *Kimble v.*

Swackhamer, 439 U.S. 1385, 1388, 99 S.Ct. 51, 58 L.Ed.2d 225 (1978), on proposed constitutional amendments does not violate Article V. In *Kimble*, Justice Rehnquist, sitting as Circuit Justice, had before him a Nevada statute that required submission of an "advisory question," *id.* at 1386, 99 S.Ct. 51, to Nevada voters as to whether the state legislature should vote to ratify the Equal Rights Amendment. The statute expressly provided, however, that the result of the popular *1124 referendum placed no legal requirement on the members of the legislature regarding their own votes on the amendment. *Id.* Justice Rehnquist refused to grant interim relief against the referendum, noting that he "would be most disinclined to read either *Hawke* ... or *Leser* ... as ruling out communication between the members of the legislature and their constituents." *Id.* at 1387-88, 99 S.Ct. 51.

The question before us, then, is where Nebraska's Article XVIII falls on the spectrum between impermissible direct involvement of the people in the amendment process (as in *Leser* and *Hawke*) and permissible advisory and nonbinding communication between the people and their representatives (as in *Kimble*). Secretary of State Moore maintains that Article XVIII is merely an advisory statement of popular opinion that legislators are free to ignore, and is thus permissible under *Kimble*. He argues, moreover, that because he and other Nebraska state officials have construed Article XVIII as nonbinding on legislators, we must defer to that interpretation.

We disagree. Unlike the measure in *Kimble*, which specifically stated that legislators were not bound by the results of the referendum, we believe that Nebraska's Article XVIII represents a clear attempt to coerce or bind legislators into exercising their Article V powers to pass a term limits amendment. The language of Article XVIII is mandatory: It does not, for example, "advise" or "suggest" or "urge" Nebraska's legislators to pass a term limits amendment; instead, it "instructs lawmakers to proceed on a precise and inflexible course of action utilizing the full range of their Article V authority," *Morrissey v. Colorado*, 951 P.2d 911, 916 (Colo.1998) (*en banc*). Article XVIII penalizes

169 F.3d 1119
(Cite as: 169 F.3d 1119)

legislators who disobey its mandate, moreover, by notifying the voters in the next election that these legislators have "disregarded" the voters' "instructions" on term limits. We do not think that such a provision can plausibly be read as merely advisory.

An examination of the constitutional history behind popular "instructions" to legislators gives us further cause to doubt the constitutionality of Article XVIII. In 1789, the House of Representatives rejected a proposed "right to instruct Representatives" that would have been one of the rights specified in the First Amendment. See P. Kurland and R. Lerner, eds., *5 The Founders' Constitution* 200-06 (1987) (debate on inclusion of proposed "right to instruct Representatives"), and A. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U.Chi.L.Rev.* 1043, 1058-60 (1988). James Madison and his fellow Federalists, in particular, feared that popular instructions to legislators would destroy legislative debate and make compromise impossible. See Kurland and Lerner, *5 The Founders' Constitution*, at 201-02, and Amar, *Philadelphia Revisited*, at 1059. They feared, in addition, that a right to instruct, whether or not legally binding on legislators, would convey to the people the idea that they had a right to control the debates of Congress, thus undermining the Federalists' scheme of representative government. See Kurland and Lerner, *5 The Founders' Constitution*, at 202-04, and Amar, *Philadelphia Revisited*, at 1058-60.

We think that Article XVIII's instructions to legislators do precisely what the members of the House of Representatives were seeking to prevent by rejecting a right of instruction: They undermine representative government by permitting the people to control and direct the Article V powers of Nebraska's legislators in a very specific, detailed manner. The ballot label ("DISREGARDED VOTERS [sic] INSTRUCTIONS ON TERM LIMITS"), moreover, reinforces the erroneous impression among voters that the people in fact have the right to "instruct" and control their legislators in this way.

We therefore conclude that Nebraska's Article

XVIII is an unconstitutional attempt effectively to remove the Article V power from legislators and to place it in the hands of the people, thus substituting popular will for the will of the independent "deliberative assemblage," *Hawke*, 253 U.S. at 227, 40 S.Ct. 495, envisioned by the framers of the Constitution. Such direct involvement by the people is impermissible under Article V's amendment scheme, and we therefore hold that Sections 2, 4, and 5 of Nebraska's Article XVIII (the provisions pertaining to legislators) are unconstitutional.

*1125 III.

[6][7] In addition to the conflict with Article V, we think that the ballot labeling provisions of Nebraska's Article XVIII ("DISREGARDED VOTERS [sic] INSTRUCTIONS ON TERM LIMITS" for incumbent candidates, and "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" for nonincumbent candidates) are an unconstitutional infringement on the right to vote, a "fundamental political right," *Williams v. Rhodes*, 393 U.S. 23, 38, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (Douglas, J., concurring). The Supreme Court has made it clear that some state laws governing ballot content and ballot access may unconstitutionally infringe on "the right of qualified voters ... to cast their votes effectively," *Williams*, 393 U.S. at 30, 89 S.Ct. 5, and on a candidate's or political party's right to "continued availability of political opportunity" through reasonable access to the ballot, *Lubin v. Panish*, 415 U.S. 709, 716, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). Thus while states enjoy a wide latitude in regulating elections and in controlling ballot content and ballot access, they must exercise this power in a reasonable, nondiscriminatory, politically neutral fashion. See *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

The Supreme Court has addressed the constitutionality of a state's ballot labeling provision on only one occasion. See *Anderson v. Martin*, 375 U.S. 399, 401-02, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964) (striking down, on equal protection grounds, Louisiana statute requiring that candidate's

169 F.3d 1119
(Cite as: 169 F.3d 1119)

race appear next to candidate's name on ballot); *see also McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir.1980) (holding that North Dakota statute requiring that incumbent candidates be listed first on ballot burdened right to vote by showing favoritism to voters who supported incumbent and major-party candidates). We think, however, that the Supreme Court's decisions addressing state laws governing ballot access and other election procedures are equally applicable here.

[8][9] Those decisions make it clear that a state's legitimate interests in regulating elections are limited to promoting "orderly, fair, and honest elections." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 834, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). In *U.S. Term Limits*, the Supreme Court reviewed its case law on the states' power to regulate elections, and concluded: "States are thus entitled to adopt 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" *Id.* at 834, 115 S.Ct. 1842, quoting *Anderson*, 460 U.S. at 788 n. 9, 103 S.Ct. 1564. State laws are permissible, therefore, when they "regulate election procedures and [do] not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position" (emphasis in original). *U.S. Term Limits*, 514 U.S. at 835, 115 S.Ct. 1842. But "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates." *Id.* at 836, 115 S.Ct. 1842.

Article XVIII's ballot labeling provisions do not qualify as politically neutral or evenhanded. The likely (and, we believe, the intended) effect of these ballot labels is to place a severe handicap on any candidate who does not support the term limits amendment specified in Article XVIII. Secretary of State Moore contends that these ballot labels are no different from ballot labels identifying a candidate's political party affiliation, and that they further the state's interest in providing voters with information regarding a candidate's position on term limits. But we see no reason why the requirement of political neutrality applicable in the ballot access context should not be applicable to any information that a state may choose to provide to voters through

the content of the ballot. Information conveyed through the official state ballot necessarily enjoys the official imprimatur of the state, and we therefore believe that such information must be conveyed in a neutral, nondiscriminatory fashion.

In fact, it is precisely this official neutrality that distinguishes existing ballot labels (such as those identifying a candidate's political party affiliation or incumbent status) from the pejorative ballot labels at issue here. Article XVIII's ballot labels effectively place the state's official stamp of disapproval on a specific group of candidates, namely, those whom the state disfavors because of their views on a single political issue or, in the case *1126 of incumbent candidates, because they failed to comply to the letter with Article XVIII's detailed list of instructions. We therefore conclude that Article XVIII's ballot labeling provisions constitute an improper exercise of Nebraska's authority to regulate the content of its ballots.

Proponents of a constitutional term limits amendment of course have a variety of means at their disposal for expressing their views and for publicizing candidates' positions on term limits. The function of the official election process, however, is "to winnow out and finally reject all but the chosen candidates," ... not to provide a means of giving vent to 'short-range political goals.' " *Burdick*, 504 U.S. at 438, 112 S.Ct. 2059, quoting *Storer v. Brown*, 415 U.S. 724, 735, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Accordingly, we believe that the State may not "undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997). We therefore hold that Sections 2, 3, 4, and 5 of Article XVIII are an unconstitutional infringement on the right to vote.

IV.

[10] Section 8 of Article XVIII states that if any portion of the article is held to be invalid, the remaining portions shall remain in full force and effect. We agree with the district court that Section

169 F.3d 1119
(Cite as: 169 F.3d 1119)

1 of the article, establishing as the "official position of the citizens and State of Nebraska" that its elected officials should enact a specific term limits amendment, is severable from the invalid portions of Article XVIII. Section 1, standing alone, is exactly the sort of advisory, nonbinding communication between the people and their representatives that is permissible, and we therefore conclude that it may remain in effect.

V.

[11] U.S. Term Limits Foundation, which intervened as a defendant in this case, appeals from the district court's award of attorney's fees against it. The district court, in its order assessing attorney's fees under 42 U.S.C. § 1988(b), stated that the foundation had been "sufficiently active in the suit to be responsible for awardable fees and expenses," and assessed fees jointly and severally against it and Secretary of State Moore.

[12] Under *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989), however, a court should assess attorney's fees "against losing intervenors only where the intervenors' action was frivolous, unreasonable, or without foundation." In apportioning attorney's fees between the losing parties, moreover, we think that the district court should have taken into account "the defendants' relative degrees of culpability and the time the plaintiffs were forced to spend litigating against the respective defendants," *Jenkins v. Missouri*, 838 F.2d 260, 266 (8th Cir.1988), *cert. denied in pertinent part*, 488 U.S. 889, 109 S.Ct. 221, 102 L.Ed.2d 212 (1988); *see also Hendrickson v. Branstad*, 934 F.2d 158, 164 (8th Cir.1991). We therefore remand this case to the district court for a reconsideration of its assessment of attorney's fees against U.S. Term Limits Foundation.

VI.

In summary, we affirm the district court's judgment declaring invalid Sections 2, 3, 4, and 5 of Article XVIII of the Nebraska Constitution. We likewise

affirm the district court's order permanently enjoining Secretary of State Moore from implementing those sections. We remand this case to the district court, however, for a reconsideration under *Zipes* of its assessment of attorney's fees against U.S. Term Limits Foundation.

BEAM, Circuit Judge, dissents with respect to Part III.
C.A.8 (Neb.), 1999.
Miller v. Moore
169 F.3d 1119

END OF DOCUMENT

LEXSEE 213 MON. 425

STATE OF MONTANA, ex rel., Steve HARPER, Robert C. Waltmire, Brad Belke,
and Common Cause of Montana, a State affiliate of common cause, Plaintiffs and
Relators, v. JIM WALTERMIRE, Secretary of State, State of Montana, Defendant
and Respondent, and Montanans for a Balanced Federal Budget Committee, Real
Party in Interest

No. 84-391

Supreme Court of Montana

213 Mont. 425; 691 P.2d 826; 1984 Mont. LEXIS 1107

October 1, 1984, Submitted
November 28, 1984, Decided

DISPOSITION: [***1] Relief granted.

LexisNexis(R) Headnotes

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs filed an application for writ of injunction seeking an order finding a constitutional initiative requiring a balanced budget void and unconstitutional. They further sought to enjoin defendants, the Secretary of State and other election officials, from certifying a ballot and delivering a voter pamphlet containing the ballot initiative.

*Constitutional Law > Amendment Process
Governments > Legislation > Initiative & Referendum*
[HN1] Labeling a document a constitutional amendment does not make it one. A temporary initiative measure is not a part of the permanent fundamental law of a state and should not be submitted under the guise of a constitutional amendment.

OVERVIEW: The initiative would have directed the Legislature to apply to Congress pursuant to *Article V of the United States Constitution* to call a convention to consider a federal balanced budget amendment. Plaintiffs contended that the initiative was beyond the power of initiative granted the people by the state constitution. The initiative process in the state constitution was designed to enact laws, state constitutional amendments, and to initiate a call for a state constitutional convention. Although the initiative purported to be a constitutional amendment, it was nothing but a legislative resolution. It was a directive to the Legislature to take a specific action: to adopt a resolution. It was an attempt to create a legislative resolution by direct vote of the people and was invalid. The court held that the initiative attempted to direct and orchestrate the legislative application process in contravention of the plain language of Article V. The initiative was no less than an express directive from the people to the Legislature to take a specific action. Because the initiative placed significant constraints on the state legislature it was facially unconstitutional under Article V.

*Constitutional Law > Amendment Process
Governments > Federal Government > U.S. Congress
Governments > State & Territorial Governments > Legislatures*

[HN2] *Article V of the United States Constitution* provides a procedure under which the federal constitution may be amended. It provides in part that 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 which in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress. Thus, there are two methods by which amendments may be proposed: by vote of Congress or through a convention called by Congress on the application of two-thirds of the state legislatures. Proposed amendments become effective upon ratification by the state legislatures or state conventions.

OUTCOME: The court granted the relief requested.

**Constitutional Law > Amendment Process
Governments > State & Territorial Governments > Leg-
islatures**

[HN3] The function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution it transcends any limitations sought to be imposed by the people of a State.

**Constitutional Law > Congressional Duties & Powers >
General Overview**

**Constitutional Law > Amendment Process
Governments > State & Territorial Governments > Leg-
islatures**

[HN4] Whenever a state legislature acts to amend the United States Constitution under Article V powers, the body must be a deliberative representative assemblage acting in the absence of any external restrictions or limitations.

**Constitutional Law > Amendment Process
Constitutional Law > State Constitutional Operation
Governments > Legislation > Initiative & Referendum**

[HN5] A state may not, by initiative or otherwise, compel its legislators to apply for a constitutional convention, or to refrain from such action. Under *U.S. Const. art. V*, the legislators must be free to vote their own considered judgment, being responsible to their constituents through the electoral process.

COUNSEL: McGarvey, Lence & Heberling, Jon L. Heberling argued, Kalispell, Jonathan Motl, Helena, for plaintiffs and relators.

Mike Greely, Atty. Gen., Alan D. Robertson, Luxan & Murfitt, Walter Murfitt argued, Helena, for defendant and respondent.

Ted Lympus argued, Kalispell, for defendant and respondent Hindman.

John W. Larson argued, Helena, Maxwell Miller argued, Denver, Colorado, for real party in interest.

Harrison, Loendorf & Poston, Jerome Loendorf, Helena, for amicus curiae, National Taxpayers.

John T. Noonan, Jr., Berkeley, California, for amicus curiae Sam Ervin, Jr., and Taxpayers Foundation.

JUDGES: Mr. Chief Justice Haswell delivered the Opinion of the Court. Mr. Justices Harrison, Weber, Sheehy and Morrison concur. Mr. Justice Shea specially concurs and will file a separate opinion later. Mr. Justice Gulbrandson, dissenting.

OPINION BY: HASWELL

OPINION

[*426] [**827] Plaintiffs filed an application for writ of injunction on September 11, 1984, seeking an order finding Constitutional [*427] Initiative No. 23 void and unconstitutional. Plaintiffs further sought to enjoin the Secretary of State and other election officials from certifying a ballot [***2] and delivering a voter pamphlet containing this ballot initiative. After hearing arguments of the parties on September 28, 1984, the requested relief was granted by this Court in an order dated October 1, 1984. Application for a stay of this order was denied by the United States Supreme Court October 10, 1984. *Montanans for a Balanced Fed. Budget Comm. v. Harper (1984)*, U.S. , 105 S.Ct. 13, 83 L.Ed. 2d 1. This opinion sets forth this Court's reasoning on the original October 1, 1984, order.

[**828] Initiative No. 23 is a measure that, if adopted by the voters, would have directed the Legislature to apply to Congress pursuant to *Article V of the United States Constitution* to call a convention to consider a federal balanced budget amendment. On July 13, 1984, the Secretary of State certified that the requisite number of signatures had been submitted to qualify the initiative for the November ballot. The statement of purpose drafted to accompany the initiative on the ballot reads as follows:

"This initiative would amend the Montana Constitution to direct the 1985 Legislature to adopt a resolution requesting Congress to call a constitutional convention for the [***3] purpose of adopting a balanced budget amendment. The initiative would also require that if the resolution is not adopted within ninety legislative days, the Legislature shall remain in session without compensation to its members, and with no recess in excess of three calendar days, until the resolution is adopted. The initiative would become void if the convention is not limited to the subject of a balanced budget or if Congress itself proposes a similar amendment." Initiative No. 23 by form is a constitutional amendment. By the language of the initiative, the Secretary of State is directed to forward copies of the amendment to the Secretary of the United States Senate, the Clerk of the United States House of Representatives, and officers of the state legislatures [*428] after ninety days of deliberation by the Montana Legislature regardless of whether that body had adopted the resolution.

Plaintiffs and relators contend that Initiative No. 23 is beyond the power of initiative granted the people by the Montana Constitution. We agree.

I

The initiative process in the Montana Constitution was designed to enact laws, *Art. III, Sec. 4, 1972 Mont. Const.; state constitutional [***4] amendments, Art. XIV, Sec. 9, 1972 Mont. Const.*; and to initiate a call for a state constitutional convention, *Art. XIV, Sec. 2, 1972 Mont. Const.* Although Initiative No. 23 purports to be a constitutional amendment, it is nothing but a legislative resolution. The initiative power within the Montana Constitution does not include the power to enact a legislative resolution, particularly a resolution making an Article V application for a federal constitutional convention.

The only attribute that the balanced budget initiative shares with a bona fide constitutional amendment initiative is its form and label. The subject matter of the initiative reveals its true nature. It is a directive to the Legislature to take a specific action: to adopt a resolution. Its import and purpose is to create this resolution. To accomplish this goal, the constitutional amendment form is used as a vehicle to transport language that reads as a resolution and alternatively as an act. The measure contains references to "the resolution required," "the following resolution," and "this act."

[HN1] Labeling a document a constitutional amendment does not make it one. See, *Stovall v. Gartrell (Ky. 1960)*, [***5] 332 S.W.2d 256. This simple truth is particularly appropriate here where the initiative at issue would create a transient amendment for a specialized purpose. A temporary initiative measure is not a part of the permanent fundamental law of a state and should not be submitted under the guise [***429] of a constitutional amendment. See *Buchanan v. Kirkpatrick (Mo. 1981)*, 615 S.W. 2d 6; *Livermore v. Waite (1894)*, 102 Cal. 113; 36 P. 424.

Initiative No. 23, unmasked, is an attempt to create a legislative resolution by direct vote of the people. A constitutional amendment facade does not enlarge the initiative power granted the people by the Montana Constitution to include the power of legislative resolution. The electorate cannot circumvent their Constitution by indirectly doing that which cannot be done directly.

[***829] We have invalidated this ballot measure recognizing that the initiative power should be broadly construed to maintain the maximum power in the people. *Chouteau County v. Grossman (1977)*, 172 Mont. 373, 563 P.2d 1125. However, we cannot fail to recognize the independent legislative power vested in the legislature. *Art. V, Sec. 1, 1972, Mont. [***6] Const.* The stricken

ballot measure would compel the Legislature to reach a specific result under threat of confinement and no pay. Such coercion is repugnant to the basic tenets of our representative form of government guaranteed by the Montana Constitution.

The initiative is therefore invalid on these state grounds, entirely independent, separate and apart from federal constitutional infirmities to which we now turn.

II

[HN2] *Article V of the United States Constitution* provides a procedure under which the federal constitution may be amended. In relevant part, Article V provides: "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 which in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other [*430] mode of ratification may be proposed by the congress;"

Thus, there are two methods by which amendments may be proposed: [***7] by vote of Congress or through a convention called by Congress on the application of two-thirds of the state legislatures. Proposed amendments become effective upon ratification by the state legislatures or state conventions. The ballot measure at issue seeks to direct the Montana Legislature to submit an application to Congress for a constitutional convention. The question becomes whether the people of Montana may properly dictate to the Legislature that such application be made. In other words, does the initiative constitute a constitutionally permissible manner of initiating the Article V amendment process?

Resolution of the question involves interpretation of the Article V language: "on the application of the legislatures." The United States Supreme Court has not previously interpreted this exact clause. The Supreme Court has had the occasion to interpret the word "legislatures" for purposes of Article V and we find its opinions on the issue controlling.

A joint resolution of Congress was adopted in 1917 proposing the *Eighteenth Amendment to the United States Constitution*. The amendment proposed a prohibition on the sale and manufacture of alcohol and was submitted to the [***8] states for ratification. The Ohio Constitution provided that all proposed federal amendments be subject to a referendum vote of the people following ratification by the Ohio legislature. After the state legislature ratified the Eighteenth Amendment, it was placed on the ballot for approval. In a subsequent

suit for injunctive relief, the Ohio Supreme Court found this referendum proper. The United States Supreme Court reversed the Ohio court in *Hawke v. Smith* (1920), 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871.

The *Hawke* opinion discussed the meaning of the word "legislatures" for purposes of Article V. The Court noted that the framers' intent was clear and that they consciously chose ratification by a representative body over other possible methods, including a vote by the people. The Court [*431] stated that use of "legislatures" within the ratification process called for "action by deliberative assemblages representative of the people . . ." 253 U.S. at 227, 40 S.Ct. at 497. The Court held that the Ohio constitutional requirement of referendum violated the Article V ratification process.

This Court followed the holding of *Hawke* in an analogous case, *State* [***9] *ex rel. Hatch v. Murray* (1974), 165 Mont. 90, 526 P.2d 1369. In *Hatch* we held that the [***830] Montana Legislature could not constitutionally subject its ratification of the proposed Equal Rights Amendment to a referendum vote of the people.

The discussion in *Hawke* of legislatures in the context of the amendment ratification clause of Article V is equally applicable to the application clause. There is no reason that the framers would have ascribed different meanings to the two instances in which they used the word "legislatures" within the same sentence of Article V. A legislature making an application to Congress for a constitutional convention under Article V must be a freely deliberating representative body.

The deliberative process must be unfettered by any limitations imposed by the people of the state. *Leser v. Garnett* (1922), 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505. After Congress proposed the Nineteenth Amendment giving women the right to vote, the people of the various states placed limitations in their state constitutions upon the power of their legislature to ratify the amendment. In *Leser*, these limitations were struck down by the United States [***10] Supreme Court:

" . . . [HN3] [t]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution . . . it transcends any limitations sought to be imposed by the people of a State." 258 U.S. at 137, 42 S.Ct. at 217-18. (Emphasis supplied.)

Again, we find the ratification language of the Court in [*432] *Leser* applicable to the present controversy where the people of Montana through an initiative measure seek to compel their Legislature to make an application under the federal Article V amendment process.

Summarizing this discussion, we find that [HN4] whenever a state legislature acts to amend the United States Constitution under Article V powers, the body must be a deliberative representative assemblage acting in the absence of any external restrictions or limitations. Initiative No. 23 is facially unconstitutional for precisely this reason. The measure attempts to direct and orchestrate the legislative application process in contravention of the plain language of Article V.

It has been suggested by the sponsors of Initiative [***11] No. 23 and real party in interest, Montanans for a Balanced Federal Budget Committee, that the initiative is a nonbinding recommendation to the Legislature and does not remove the application function from the Legislature as the body remains the final actor in the Article V process. We need only look to the wording of Initiative No. 23 and the precedent of *Hawke* and *Leser* to determine the merit of this argument.

The initiative states: "The people . . . adopt and direct the next regular legislative session to adopt the following resolution [making an application to Congress to call a convention] and submit the same to the Congress . . ." This is no less than an express directive from the people to the Legislature to take a specific action. Until this action is taken, the Legislature is kept in perpetual session. After ninety legislative days, no members may be compensated and no additional business may be considered. Under these constraints, any application made by the Legislature would violate the language and spirit of Article V as interpreted by the United States Supreme Court in *Hawke* and *Leser*. Legislative deliberation cannot exist where the outcome is a [***12] predetermined specific action.

Recently the California Supreme Court considered the [*433] constitutionality of a balanced budget initiative strikingly similar to Initiative No. 23. *Amer. Fed. of Labor-Congress v. March Fong Eu* (1984), 36 Cal.3d 687, 206 Cal.Rptr. 89, 686 P.2d 609. This initiative was in the form of a law that would direct the California legislature to adopt a resolution making application to Congress for a constitutional convention. In striking the initiative from the ballot, the California court concluded:

" . . . A rubber stamp legislature could not fulfill its function under article V of the Constitution.

" . . . [***831] [HN5] [A] state may not, by initiative or otherwise, compel its legislators to apply for a constitutional convention, or to refrain from such action. Under article V, the legislators must be free to vote their own considered judgment, being responsible to their constituents through the electoral process . . ." 206 Cal.Rptr. at 102, 686 P.2d at 622.

213 Mont. 425, *; 691 P.2d 826, **;
1984 Mont. LEXIS 1107, ***

The framers of the United States Constitution could have provided the people, through direct vote, a role in the Article V application process. They chose instead to solely vest this power [***13] within deliberative bodies, the state legislatures. The people through initiative cannot affect the deliberative process. As Initiative No. 23 places significant constraints on the Montana Legislature it is facially unconstitutional under Article V.

Accordingly, the relief requested by plaintiffs and relators has been granted.

MR. JUSTICES HARRISON, WEBER, SHEEHY and MORRISON concur.

MR. JUSTICE SHEA specially concurs and will file a separate opinion later.

DISSENT BY: GULBRANDSON

DISSENT

MR. JUSTICE GULBRANDSON, dissenting.

I respectfully dissent.

***** Print Completed *****

Time of Request: Tuesday, July 24, 2007 16:31:02 EST

Print Number: 1822:39206907

Number of Lines: 243

Number of Pages:

Send To: LOPEZ, LONNIE
SMITH & LOWNEY PLLC
2317 E JOHN ST
SEATTLE, WA 98112-5412

231 N.W.2d 821
(Cite as: 231 N.W.2d 821)

C

State ex rel. Askew v. Meier,
N.D. 1975.

Supreme Court of North Dakota.
STATE of North Dakota ex rel. Bonnie ASKEW et
al., Petitioners,

v.

Ben MEIER, as Secretary of State of the State of
North Dakota, Respondent.
Div. No. 9129.

July 11, 1975.

Rehearing Denied July 30, 1975.

Petitions were filed to enjoin the Secretary of State from placing on ballot for referral the legislature's ratification of proposed amendment to the United States Constitution popularly known as the Equal Rights Amendment. The Supreme Court, Vogel, J., held that the ratification by the legislature of the federal constitutional amendment was not subject to referendum under state law, and that petitions proposing a referendum of resolution ratifying amendment which were ineffectual for proposed purpose could not be construed to call for a nonbinding plebiscite or straw vote.

Injunction granted.
West Headnotes

[1] Constitutional Law 92 ⇨522

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(B) United States Constitution
92k522 k. Ratification or Rejection by
States. Most Cited Cases
(Formerly 92k10)

Ratification of amendment to United States Constitution is not act of legislation, but an expression of assent to proposed amendment and is an exercise of power conferred by the Federal Constitution. U.S.C.A.Const. art. 5.

[2] Constitutional Law 92 ⇨522

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(B) United States Constitution
92k522 k. Ratification or Rejection by
States. Most Cited Cases
(Formerly 92k10)

Congressional selection of legislature as agent of state to ratify or reject an amendment to the United States Constitution does not permit state to ratify by any other method or to review the ratification by referendum. U.S.C.A.Const. art. 5.

[3] Constitutional Law 92 ⇨522

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(B) United States Constitution
92k522 k. Ratification or Rejection by
States. Most Cited Cases
(Formerly 92k10)

Ratification by state legislature of federal constitutional amendment is not subject to referendum under state law. U.S.C.A.Const. art. 5; Const. § 25.

[4] Constitutional Law 92 ⇨522

92 Constitutional Law
92III Amendment and Revision of Constitutions
92III(B) United States Constitution
92k522 k. Ratification or Rejection by
States. Most Cited Cases
(Formerly 92k10)

Referendum petitions whose language was indicative of an intent to suspend operation of resolution approving amendment to the United States Constitution were ineffectual to either require a referendum under State Constitution of legislature's ratification of the amendment to the United States Constitution or to authorize a nonbinding plebiscite or straw vote, a procedure not authorized by state constitutional provisions

231 N.W.2d 821
(Cite as: 231 N.W.2d 821)

relating to suspending the operation of measure enacted by legislature. Const. § 25.

[5] Constitutional Law 92 ⇨ 1435

92 Constitutional Law

92XV Right to Petition for Redress of Grievances

92k1435 k. In General. Most Cited Cases
(Formerly 92k91)

Plebiscite or straw vote is permissible method by which to petition for redress of grievances under State and Federal Constitution. U.S.C.A.Const. Amend. 1; Const. § 10.

*821 Syllabus by the Court

1. Ratification of an amendment to the United States Constitution is not legislation,*822 but an expression of assent to a proposed amendment. It is the exercise of a power conferred by the Federal Constitution.

2. Congressional selection of the Legislature as the agent of the State to ratify or reject a constitutional amendment does not permit the State to ratify by any other method or to review the ratification by a referendum.

3. The ratification by the Legislature of a Federal constitutional amendment is not subject to a referendum under State law.

4. A plebiscite or straw vote is a permissible method of petitioning for redress of grievances under State and Federal Constitutions. N.D. Constitution, Art. I, Sec. 10; U.S. Constitution, First Amendment.

5. Petitions under the North Dakota Constitution, Section 25, proposing a **referendum** of a resolution ratifying an amendment to the United States Constitution, which are ineffectual for the proposed purpose, cannot be construed to call for a **nonbinding** plebiscite or straw vote.

R. W. Wheeler and Kent A. Higgins, Bismarck, and Alice Olson, Senior Law Student, for petitioners,

argued by Olson.

Owen L. Anderson, Sp. Asst. Atty. Gen., Bismarck, for respondent Secretary of State.

Elton W. Ringsak, Grafton, for referral committee.

VOGEL, Justice.

The question before us is whether the ratification by the Legislature of the Equal Rights Amendment can be the subject of a referendum, either binding or advisory.

The Forty-fourth Legislative Assembly of the State of North Dakota, during its regular 1975 Session, passed Senate Concurrent Resolution No. 4007, which reads:

'WHEREAS, the 92nd Congress of the United States of America at its second Session, in both Houses, by a constitutional majority of two-thirds thereof, adopted the following proposition to amend the Constitution of the United States of America in the following words, to wit:

'JOINT RESOLUTION

'Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the Legislature of three-fourths of the several States within seven years from the date of its submission by the Congress:

'ARTICLE

'Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

'Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

'Section 3. This Amendment shall take effect two years after the date of ratification.'

'NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF THE STATE OF NORTH

231 N.W.2d 821
(Cite as: 231 N.W.2d 821)

DAKOTA, THE HOUSE OF
REPRESENTATIVES CONCURRING THEREIN:

'That the said proposed amendment to the Constitution of the United States of America be and the same is hereby ratified by the Forty-fourth Legislative Assembly of the state of North Dakota; and

'BE IT FURTHER RESOLVED, that certified copies of this resolution be forwarded by the Governor of the state of North Dakota to the Administrator of *823 General Services, Washington, D.C., and to the President of the Senate and the Speaker of the House of Representatives of the Congress of the United States.'

Subsequently, petitions were filed with the Secretary of State of North Dakota, seeking a referendum of Senate Concurrent Resolution No. 4007 under Section 25 of the North Dakota Constitution. The petitioners herein, alleging that resolutions ratifying amendments to the United States Constitution are not subject to referenda by the people of the various States, commenced this proceeding.

Article V of the United States Constitution reads:

'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, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.'

The Constitution of North Dakota provides:

'The legislative power of this state shall be vested

in a legislature consisting of a senate and a house of representatives. The people, however, reserve the power, first, to propose measures and to enact or reject the same at the polls; second, to approve or reject at the polls any measure or any item, section, part or parts of any measure enacted by the legislature.

'The second power reserved is the referendum. Seven thousand electors at large may, by referendum petition, suspend the operation of any measure enacted by the legislature, except an emergency measure. But the filing of a referendum petition against one or more items, sections or parts of any measure, shall not prevent the remainder from going into effect. Such petition shall be filed with the Secretary of State not later than ninety days after the adjournment of the session of the legislature at which such measure was enacted.'

Art. II, Sec. 25, N.D. Constitution.

I

[1][2][3] Although attempts to refer ratification of amendments to the United States Constitution have not previously been made in this State, such challenges have been made elsewhere. Two such challenges reached the United States Supreme Court in 1920. One challenged the Ohio ratification of the Nineteenth Amendment, granting suffrage to women, and the other challenged the Ohio ratification of the Eighteenth Amendment, relating to prohibition. The Supreme Court held that Article V of the Bill of Rights is a grant of authority by the people to the Congress; that the method of ratification of amendments is an exercise of a national power specifically granted by the Constitution; that the power is conferred upon the Congress and is limited to two methods: by action of the legislatures of three-fourths of the States, or conventions in a like number of States; that ratification of a constitutional amendment is not an act of legislation within the proper sense of the word, but an expression of the assent of the State to a proposed amendment; that the act of ratification by the State derives its authority from the Federal Constitution; and that a State has no authority to require the submission of the ratification to a

231 N.W.2d 821
(Cite as: 231 N.W.2d 821)

referendum under the State Constitution. *824
Hawke v. Smith, 253 U.S. 221, 40 S.Ct. 495, 64
L.Ed. 871 (1920); Hawke v. Smith, 253 U.S. 231,
40 S.Ct. 598, 64 L.Ed. 877 (1920); National
Prohibition Cases, 253 U.S. 350, 40 S.Ct. 486, 64
L.Ed. 946 (1920).

A number of State courts have held to the same
effect. The Supreme Court of Maine held, in *In re
Opinion of the Justices*, 118 Me. 544, 107 A. 673,
675, 5 A.L.R. 1412 (1919), that the power of the
people of Maine

‘ . . . over amendments had been completely and
unreservedly lodged with the bodies designated by
article 5, and so long as that article remains
unmodified they have no power left in themselves
either to propose or to ratify federal amendments.
The authority is elsewhere.

‘But the people; by the adoption of the initiative
and referendum amendment, did not intend to
assume or regain such power.’

The Supreme Court of Missouri held, in *State ex
rel. Tate v. Sevier*, 333 Mo. 662, 62 S.W.2d 895,
897, 87 A.L.R. 1315, Cert. denied, 290 U.S. 679,
54 S.Ct. 102, 78 L.Ed. 586 (1933):

‘The ratification or rejection of an amendment to
the federal Constitution is a federal function derived
from the federal Constitution itself. By the
adoption of article 5 of the federal Constitution the
people divested themselves of all authority to either
propose or ratify amendments to the Constitution.
By the same article they vested the power to
propose amendments in the Congress and in a
convention called by Congress, and designated the
state Legislatures and state conventions as
representatives of the people, with authority to
ratify or reject proposed amendments to the
Constitution. When a state Legislature performs
any act looking to the ratification or rejection of an
amendment to the federal Constitution, it is not
acting in accordance with any power given to it by
the state Constitution, but is exercising a power
conferred upon it by the federal Constitution.’

Other State court decisions in accord are *State v.
Murray*, 526 P.2d 1369 (Mont.1974); *Decher v.*

Vaughan, 209 Mich. 565, 177 N.W. 388 (1920);
and *State ex rel. Gill v. Morris*, 79 Okl. 89, 191 P.
364 (1920). The only decisions *Contra* antedate the
two United States Supreme Court decisions in
Hawke v. Smith, *supra*, and were overruled by
them. *State ex rel. Mullen v. Howell*, 107 Wash.
167, 181 P. 920 (1919); *Hawke v. Smith*, 100 Ohio
St. 385, 126 N.E. 400 (1919).

All the decisions cited above contain scholarly
references to the constitutional convention
proceedings and authoritative interpretations of the
Constitution supporting their conclusions. We will
not repeat the discussions here, but only note our
agreement with them.

II

The parties appear to agree that the referendum
sought here cannot undo the ratification of the
amendment. However, the attorney for the
referendum petitioners now tells us that the purpose
of the referendum petitions was to obtain a ‘straw
vote’ or plebiscite on the ratification, and he asks us
to permit the referendum to proceed on that basis.

[4] The first answer to this argument is that the
stated purpose of the referendum petitions was to
request that Senate Concurrent Resolution No.
4007, . . . providing for the ratification of a
amendment to the Constitution of the
United States, prohibiting states from denying a
citizen equality of rights under law on account of
sex, popularly known as the so called Equal Rights
Amendment, be placed upon the ballot, and that it
be submitted by the Secretary of State For approval
or rejection by the electors of the State of North
Dakota at the next primary or special Statewide
election, whichever comes first; and that, in the
meanwhile, the Operation of Senate Concurrent
Resolution No. 4007 Be *825 in all things
suspended.’ (Emphasis added.)

This is not language indicative of an intention to
hold a straw vote or nonbinding plebiscite. It is,
instead, language indicative of an intention to
suspend operation of a resolution and thereby end
or destroy its operative effect.[FN1]

231 N.W.2d 821
(Cite as: 231 N.W.2d 821)

FN1. One of the referral petitioners, Rep. Earl C. Rundle, has suggested that a straw vote on preference as to time zones, held in the western part of North Dakota on September 3, 1968, presents a historical parallel to the proposed referendum here. However, we take judicial notice of Associated Press stories printed in the Bismarck Tribune of May 27, 1968, and the Fargo Forum of June 23, 1968, and of a letter from the Attorney General to the Governor dated May 24, 1968, and find that the 1968 vote was conducted by county commissioners of the separate counties, at the suggestion of the Governor but at county expense, pursuant to an opinion of the Attorney General that such is nonbinding straw vote was a matter of legitimate county concern, but that no State funds could be spent. We therefore conclude that the 1968 vote does not assist us in deciding the issue before us, which involves the use of the constitutional referendum procedure to refer a ratification of a constitutional amendment.

The second answer is that Section 25 of the Constitution, invoked by the referral petitioners, does not authorize the use of the referendum procedure for nonbinding plebiscites or straw votes. Section 25 provides that the requisite number of electors may suspend the operation of any measure enacted by the Legislature, except an emergency measure. It provides a method for accomplishing that purpose the suspension of operation of a measure enacted by the Legislature. The word 'measure' is defined to include resolutions.

We therefore hold that the petitions are ineffectual to either (1) require a referendum under the State Constitution of the Legislature's ratification of the Equal Rights Amendment; or (2) authorize a nonbinding plebiscite or straw vote as to the views of the electorate on such ratification.

III.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[5] This is not to say that a 'straw vote,' authorized as such by the Legislature or by the initiative, could not held. Such a straw vote may be possible, in accordance with the right guaranteed in the First Amendment to the United States Constitution, which provides:

'Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances';

and Section 10 of Article I of the North Dakota Constitution, which provides: 'The citizens have a right, in a peaceable manner, . . . to apply to those invested with the powers of government for the redress of grievances, or for other proper purposes, by petition, address or remonstrance.'

See *Spriggs v. Clark*, 45 Wyo. 62, 14 P.2d 667 (1932), and *State ex rel. Fulton v. Zimmerman*, 191 Wis. 10, 210 N.W. 381 (1926). The issue is not before us in this case, however, and has not been briefed or argued.

We hold here that an attempt to reverse the legislative ratification through the referendum process, forbidden by Federal constitutional law, cannot be converted into a nonbinding plebiscite.

The Secretary of State is therefore enjoined from placing on the ballot at any Statewide election, on the basis of the referendum petitions filed with him by the referral committee, a referendum upon the adoption of Senate Concurrent Resolution No. 4007 by the Forty-fourth Legislative Assembly of the State of North Dakota.

ERICKSTAD, C.J., and PEDERSON, PAULSON and SAND, JJ., concur.
N.D. 1975.

State ex rel. Askew v. Meier
231 N.W.2d 821

END OF DOCUMENT