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Silencing the Ballot: Judicial Attempts to Limit Political Movements

Michael J. Levens

COMMENT

SILENCING THE BALLOT: JUDICIAL ATTEMPTS TO LIMIT POLITICAL MOVEMENTS

Michael J. Levens†

I. INTRODUCTION

Over time, courts have become more involved—often by necessity—in contentious political and *cultural* issues such as abortion,[1] pornography,[2] capital punishment,[3] hate speech,[4] religious expression,[5] the definition of marriage,[6] and even the health care of every citizen.[7] Consequently, many Americans attempt to use the courts to further certain political agendas.[8] This is a dangerous use of the one branch of government that is generally meant to be apolitical.[9] This political engagement by the courts erodes judicial independence and undermines the original responsibility of the judiciary to protect individual rights against majoritarian excesses and to ensure that the Constitution is upheld.[10] In fact, the Founders believed that the judiciary would be "the weakest of the three departments of power"

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† *Articles & Book Reviews Editor*, LIBERTY UNIVERSITY LAW REVIEW, Volume 8. J.D. Candidate, Liberty University School of Law (2014); B.A., Political Science, University of Texas-Arlington (2010). I dedicate this article to my Lord and Savior Jesus Christ, my family, and my beautiful bride, Brooke.

1. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164 (1973).

2. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002).

3. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008).

4. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 395–96 (1992).

5. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006); *see also* Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

6. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

7. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607–08 (2012).

8. *See generally* THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS (Mitchell S. Muncy ed., 1997) (providing a collection of articles discussing judicial activism).

9. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 210–11 (1962) (explaining that courts are limited by justiciability doctrines and the idea of the separation of powers and may not answer political questions).

10. THE FEDERALIST NO. 78, at 413, 416 (Alexander Hamilton) (Hackett Pub. Co. ed., 2005).

because it is "least in a capacity to annoy or injure" the American people.[11] However, the judiciary is now the branch that many activists seek to utilize to further political agendas when they lack the support or power to advance their interests in the other branches of government.[12] Within the context of direct democracy movements, the politicization of the judiciary has resulted in the integration of judges in the politics of initiative campaigns.[13]

Nearly half of the states, along with the District of Columbia, have afforded their citizens the legislative power to propose, enact, or repeal constitutional amendments or statutes through ballot initiatives.[14] This power is subject to certain restrictions such as requiring the legislation's proponents to meet certain procedural requirements[15] or excluding certain topics from the people's power to legislate.[16] Courts widely agree that

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11. *Id.* at 412–13. However, the Anti-Federalists argued that the courts would eventually refuse to be bound by the law:

> There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.
>
> 1st. There is no power above them that can correct their errors or controul [sic] their decisions—The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits.—In this respect it differs from the courts in England, for there the house of lords is the highest court, to whom appeals, in error, are carried from the highest of the courts of law.

Brutus, XV, N.Y. J., Mar. 20, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 439 (Herbert J. Storing ed., 1981).

12. Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327, 343 (2010).

13. Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1264 (1998).

14. Michael J. Farrell, *The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?*, 53 FORDHAM L. REV. 919, 919 (1984).

15. *See, e.g.*, OR. CONST. art. IV, § 1(2)(c) (1902, amended 1968) (requiring proponents of a proposed constitutional amendment to collect valid signatures in support of the proposal equaling eight percent of the total number of votes cast for all gubernatorial candidates at the most recent general election held to elect a full-term governor); *see also* Kays v. McCall, 418 P.2d 511, 517 (Or. 1966) (en banc) (per curiam).

16. *See, e.g.*, ALASKA CONST. art. XI, § 7 (initiative or referendum not to be used to dedicate revenue, make or repeal appropriations, create courts or define courts' jurisdiction); ILL. CONST. art. XIV, § 3 (initiative limited to structural and procedural subjects contained in article IV of state constitution); MASS. CONST. amend. art. XLVIII, Initiative, pt. 2, § 2 (initiative not to relate to religion, court system, search and seizure, martial law, freedom of speech, freedom of press, freedom of elections or right of peaceful assembly).

reviewing compliance with such technical and procedural requirements prior to enactment is entirely proper.[17] Most courts will not entertain a substantive challenge to a ballot initiative prior to its adoption;[18] however, a minority of jurisdictions will undertake such review.[19]

This Comment begins by analyzing the nature of the ballot initiative right and the issues involved in substantive review of a ballot initiative prior to its enactment. Next, this Comment considers the current split among jurisdictions regarding such review and the particularly aggressive policies of Oklahoma courts to declare ballot initiatives unconstitutional prior to their enactment. Finally, this Comment concludes that, because such review is improper, when a state court relies on federal law as its basis for striking down an initiative, the proponents of that measure may seek an appeal in federal court.

II. BACKGROUND

A. *The State-Created Initiative Right*

Many states have created a right for citizens to place issues on the ballot, and every state has enacted some legislative process for the government itself to place issues on the ballot.[20] In the states that afford this right to citizens, it has either been reserved specifically within the state constitution or has been granted to the citizens of that state by the legislature.[21] This is not a right that is provided by the federal Constitution.[22] Furthermore, it is not inherent in the First Amendment right to petition one's government.[23] However, once the initiative right is recognized or created by either the state constitution or legislature, it is protected from state regulation that unduly

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17. Elizabeth Bircher, *Election Law Manual*, NCSC ELECTION LAW PROGRAM, 4-9 (2008), http://www.electionlawissues.org/Resources/Election-Law-Manual.aspx [hereinafter *Election Manual*].

18. *See* Wyo. Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 286 (Wyo. 1994) (listing cases in which state courts have decided that pre-enactment challenges to an initiative's constitutionality are and are not justiciable).

19. *Id.*

20. *See* INITIATIVE & REFERENDUM INSTITUTE, http://www.iandrinstitute.org/statewide_i&r.htm (last visited Nov. 24, 2012) (listing state-by–state information on the initiative and referendum processes available).

21. *Election Manual*, *supra* note 17, at 4-1.

22. Hoyle v. Priest, 59 F. Supp. 2d 827, 835 (W.D. Ark. 1999).

23. *Id.*

burdens First Amendment rights.[24] Government restrictions on the initiative right that limit the advocacy of legislation are "'wholly at odds with the guarantees of the First Amendment.'"[25] Thus, the initiative right receives some protection from the federal Constitution to the extent that any state regulation of that right violates core political speech, equal protection, due process, right of association, etc.[26]

1. Nature of Ballot Initiatives

States that reserve a legislative power in the people generally do so with either the power of initiative or referendum.[27] The initiative power is used primarily to propose new legislation or amendments to existing legislation.[28] The referendum power, on the other hand, is used to challenge legislative enactments to prevent them from taking effect.[29]

The ballot initiative is the purest form of democracy within our fifty-one systems of government.[30] In fact, some states consider "[t]he power of the legislature and the power of the people to legislate through initiative . . . [as] coequal, coextensive, and concurrent [powers that] share 'equal dignity.'"[31] There are arguments that such a grant of authority to the people actually violates the federal Constitution's Guarantee Clause, because this type of direct democracy is irreconcilable with the requirement that each state maintain a "[*r*]*epublican* [f]orm of [g]overnment."[32] These arguments,

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24. Meyer v. Grant, 486 U.S. 414, 426–28 (1988) (concluding that although the right to an initiative is not guaranteed by the federal Constitution, once an initiative procedure is created, the state may not place restrictions on the exercise of the initiative that unduly burden First Amendment rights); *see also* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 205 (1999).

25. *Meyer*, 486 U.S. at 428 (quoting Buckley v. Valeo, 424 U.S. 1, at 50 (1976)).

26. *Election Manual*, supra note 17, at 4-2; *see also* Gallivan v. Walker, 54 P.3d 1069, 1101 (Utah 2002) (Thorne, J., dissenting).

27. *Election Manual*, *supra* note 17, at 4-2. Note that while the *Election Manual* lists recalls with ballot initiatives, recalls are used for removal of officials rather than proposing or challenging legislation. *Id.* 4-2 to 4-3.

28. *Id.* at 4-2.

29. *Id.* at 4-3.

30. *Gallivan*, 54 P.3d 1069 at 1081.

31. *Id.* at 1080; *see also* McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980).

32. U.S. CONST. art. IV, § 4 (emphasis added); *see also* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (challenging the initiative process as a violation of the Guarantee Clause because it was an exercise in direct democracy, not republican government and holding that whether initiative powers violate the Guarantee Clause is a non-justiciable political question).

however, have never convinced a court to overturn a state's constitutional grant or reservation of the initiative power to the people. Rather, courts have traditionally construed this power broadly in favor of the people's ability to exercise their legislative authority.[33] In fact, many courts view government attempts to limit this right with the closest scrutiny[34]—although they have recognized that proper limitations may be imposed on the initiative power.[35]

2. Appropriate Constitutional and Judicial Limits on Initiatives

States usually establish several procedural requirements for the consideration of ballot initiatives.[36] Proponents of an initiative may be required to provide a statement of intent for the initiative to the appropriate official, meet certain criteria for approval from that official, demonstrate a level of public support, and provide the required information and documentation to the state.[37] Courts have upheld these types of procedural requirements as valid limitations and have found it appropriate to hear pre-enactment challenges to initiatives for failure to comply with these requirements.[38] Nevertheless, restrictions that impose burdensome requirements by substantially limiting ballot access are subject to strict scrutiny[39] because the signature gathering process is constitutionally protected "core political speech."[40] There are certain types of limitations and

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33. Colo. Project-Common Cause v. Anderson, 495 P.2d 220, 221 (Colo. 1972); Leg. of State of Cal. v. Deukmejian, 669 P.2d 17, 35 (Cal. 1983) (per curiam) (Richardson, J., dissenting).

34. Urevich v. Woodard, 667 P.2d 760, 762 (Colo. 1983); *see also McKee*, 616 P.2d at 972.

35. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 191 (1999) (noting agreement with *Am. Constitutional Found., Inc. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), which upheld Colorado's age restriction, six month circulation limit and affidavit requirements on initiative petitions).

36. *Election Manual*, *supra* note 17, at 4-3.

37. *Id.*

38. Stumpf v. Lau, 839 P.2d 120, 124 (Nev. 1992) (finding that the ballot measure proponent, not the Secretary of State, is responsible for crafting the proposal into proper legislative or constitutional form); State *ex rel.* Vickers v. Summit Cnty. Council, 777 N.E.2d 830, 834 (Ohio 2002) (per curiam) (holding that the city council was not legally required to submit the measure for voter approval where the petition's obsolete election falsification statement was more than mere technical non-compliance).

39. Hoyle v. Priest, 59 F. Supp. 2d 827, 836 (W.D. Ark. 1999).

40. Meyer v. Grant, 486 U.S. 414, 421–22 (1988); *see also Election Manual*, *supra* note 17, at 4-5. *But see Hoyle*, 59 F. Supp. 2d at 836 (finding petition requirements that do not

procedural requirements that courts have deemed to be unduly burdensome such as extreme restrictions on payment for petition circulators,[41] disclosure requirements,[42] and other restraints.[43]

Ballot measures can be challenged either for substantive deficiencies or for procedural failures.[44] Generally, all courts are willing to consider pre-election review of initiatives for failure to meet procedural requirements.[45] These procedural challenges are often brought by opponents of the initiative to dispute whether the initiative has actually complied, or by the proponents of the initiative to challenge the constitutionality of the requirements themselves.[46] These types of procedural challenges are appropriate for courts to consider; however, courts are split on the propriety of substantive challenges.[47] Courts that refuse to engage in pre-enactment reviews do so generally for issues of justiciability.[48]

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impact the ability to communicate a message, restrict petition circulation, impact the ability to communicate with voters, or regulate the content of speech do not impact core political speech).

41. *Meyer*, 486 U.S. 414 (striking down a statute criminalizing the use of paid petition circulators for ballot measures and noting that no such ban was in force for candidacy petition circulators); Prete v. Bradbury, 438 F.3d 949, 971 (9th Cir. 2006) (finding the prohibition on per signature payment served the important state interest in preventing forgery and fraud); Term Limits Leadership Council, Inc. v. Clark, 984 F. Supp. 470 (S.D. Miss. 1997) (granting summary judgment to plaintiffs and finding a constitutional violation in prohibition on per signature payments and requirement that petition circulators be qualified electors of the state because the state offered only speculation and not proof that these requirements were necessary to deter fraud).

42. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 197-98 (1999) (opining that the desire to engage in anonymous speech is greatest when the ballot proposal is controversial).

43. *See generally Election Manual, supra* note 17, at 4-3 to 4-8.

44. *Id.* at 4-9.

45. *Id.*

46. *Id.*

47. *See infra*, Part II.C.; State *ex rel.* Fidanque v. Paulus, 688 P.2d 1303 (Or. 1984) (discussing the ballot qualification process for initiatives and limitations on the court's pre-election review of initiatives); *see also* Tilson v. Mofford, 737 P.2d 1367 (Ariz. 1987) (noting the court's pre-election authority to intervene and enjoin a ballot measure is limited to situations where the measure is defective in form, fails to meet signature requirements or is procedurally deficient).

48. *See infra*, Part II.B.

B. *The Common Problems Involved with Pre-Enactment Reviews*

Many courts refuse to engage in a review because it would raise issues of ripeness and standing,[49] would constitute a violation of separation of powers,[50] or would violate the rule against advisory opinions.[51] These issues of justiciability should bar review of a ballot initiative's substance prior to its enactment. Further, courts' general disfavor of facial challenges[52] to law should require plaintiffs to pass a high bar when seeking to have an initiative struck down substantively, prior to its enactment.[53]

1. Issues of Justiciability

While federal justiciability requirements from Article III are not binding on state courts,[54] many state courts adhere to federal standards of justiciability.[55] Those state courts that do not apply federal justiciability standards may be more accessible than federal courts and may exercise broader jurisdiction.[56] While some states may grant broader jurisdiction to their courts than that afforded to federal courts by Article III,[57] all states recognize limitations on that authority and employ some standard of justiciability.[58] The federal doctrine of justiciability, which is used by many state jurisdictions, is useful for a discussion on the general issues of justiciability raised by pre-enactment challenges to ballot initiatives.

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49. *See* McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980).

50. *See Tilson*, 737 P.2d at 1372.

51. *See* Anderson v. Byrne, 242 N.W. 687, 691 (N.D. 1932).

52. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450–51 (2008).

53. *See infra*, Part II.B.2.

54. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989); *see also* Pennell v. City of San Jose, 485 U.S. 1, 8 (1988); Bateman v. Arizona, 429 U.S. 1302, 1305 (1976); Doremus v. Bd. of Educ. of Borough of Hawthorne, 342 U.S. 429, 434 (1952).

55. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1906 (2001).

56. *Id.*

57. For example, some states allow their courts to issue advisory opinions. *See* Collett, *supra* note 12, at 337; *see also* Jonathan D. Persky, *"Ghosts that Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155 (2005) (analyzing state supreme courts' advisory opinions between 1990 and 2004).

58. *See* Hershkoff, *supra* note 55, at 1838–40.

a. Issues of standing and ripeness

The federal justiciability prerequisite of standing stems from the Article III requirement that there be an actual case or controversy.[59] While the Constitution does not define those terms, the Supreme Court has required that a plaintiff satisfy three elements.[60] First, the plaintiff must have suffered an imminent and concrete injury in fact.[61] Second, there must be a causal connection between that injury and the challenged conduct.[62] Last, the plaintiff must show that the alleged injury would be redressed by a favorable judgment from the court.[63]

Not only must the plaintiffs have standing, but the claim must also be ripe for adjudication. Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[64]

In evaluating a claim to determine whether it is ripe for judicial review, courts consider both "'the fitness of the issues for judicial decision'" and "'the hardship of withholding court consideration.'"[65] Furthermore, the party bringing the suit bears the burden of proving that the claim is ripe for review.[66] In addition to establishing the tests for determining when a claim is ripe for judicial review, the Supreme Court established a bright-line test in *Texas v. United States*[67] to help determine when a case is *per se* not ripe: "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[68]

In the context of a pre-enactment challenge, a plaintiff would be unable to show an imminent or concrete injury because the proposed initiative

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59. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992).

60. *Id.* at 560.

61. *Id.*

62. *Id.* at 560.

63. *Id.* at 561.

64. Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967).

65. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1767 (2010) (quoting Nat'l Park Hospitality Assn. v. Dep't of Interior, 538 U.S. 803, 808 (2003)).

66. Renne v. Geary, 501 U.S. 312, 315–16 (1991).

67. Texas v. United States, 523 U.S. 296 (1998).

68. *Id.* at 300 (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580–81 (1985)) (internal quotation marks omitted).

would not have the force of law to be able to infringe any of the plaintiff's asserted rights.[69] Moreover, pre-enactment review meets the test provided in *Texas*, because any claim leveled against an initiative prior to its enactment rests entirely upon future events that may not occur at all. There is a distinct possibility that a challenged initiative would not garner the requisite signatures to qualify to be on the ballot or, even if it had received enough signatures, that it could be voted down by the electorate. Thus, a claim challenging an initiative prior to its enactment is clearly not ripe and would serve as a prime example of the type of "premature adjudication" that the doctrine of ripeness is intended to prevent.[70]

b. Violations of the separation of powers

Courts and commentators have noted that all justiciability doctrines limiting judicial authority, especially those of standing and ripeness, stem from the idea of the separation of powers.[71] The Supreme Court has explained:

> "All of the doctrines that cluster about Article III–not only standing but mootness, ripeness, political question, and the like–relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."
>
> The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government.[72]

This concept was deeply rooted in our system of government because of the Founders' understanding that "[w]hen great and extraordinary powers are vested in any man, or body of men, which in their exercise, may operate to the oppression of the people, it is of high importance that powerful

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69. *See* McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980).

70. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

71. Allen v. Wright, 468 U.S. 737, 752 (1984); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (noting that "[t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"); Hershkoff, *supra* note 55, at 1882.

72. *Allen*, 468 U.S. at 750 (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)).

checks should be formed to prevent the abuse of it."[73] Separation of powers is the machinery that drives the limiting doctrines on courts' authority to hear cases before there is actual injury, engage in political determinations, issue advisory opinions, or render moot judgments.[74]

When a state court reviews legislation pre-enactment, even ballot initiatives, it is "interfer[ing] with the exercise of the political power of the people, acting as [a] legislative branch of state government."[75] The doctrine of the separation of powers should "forbid the use of judicial power to prevent or interfere with the legislative process invoked by the initiative petition."[76] Judges should not act as gatekeepers in the political process of lawmaking by imputing meaning to language prior to its enactment.[77] Such action is an invasion of the power committed to the legislative branch in a republican form of government and therefore a violation of the separation of powers.

c. The rule against advisory opinions

No rule of justiciability is more deeply rooted in federal jurisprudence than the rule against advisory opinions,[78] and it, like the other doctrines of justiciability, is "based on the separation of powers doctrine."[79] The rule originates from Chief Justice John Jay's decision not to provide advice to

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73. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 331 (Ralph Ketcham ed., New Am. Library, 2003) (1788).

74. *Allen*, 468 U.S. at 752; *see also* Powell v. McCormack, 395 U.S. 486, 512 (1969); Baker v. Carr, 369 U.S. 186, 210–11 (1962).

75. *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 15 (Okla. 1992) (Alma, J., dissenting).

76. *Id.* at 16.

77. *Id.* at 19 (Opala, C.J., dissenting). Further, some courts have noted that even if an initiative is in direct conflict with the Constitution, the courts should not prevent its enactment. They reject arguments of political or economic expediency and recognize that they simply lack the authority to interfere with the people's right to enact these types of initiatives. *See* Iman v. Bolin, 404 P.2d 705, 709 (Ariz. 1965) ("[E]ven were the measure in conflict with the Constitution, this has no bearing on the right of the people to enact it. The same is true of an act of the legislature. Only after legislation becomes law will its constitutionality be tested." (citations omitted)).

78. *See* Patrick C. McKeever & Billy Dwight Perry, Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L.J. 785, 803 (1962) (observing that the prohibition on advisory opinions is "a tradition so firmly engrained in our constitutional law that the Court has never questioned and seldom bothered to discuss it in any detail").

79. James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 305 (1989).

President George Washington on the policy of neutrality with France.[80] Further, this rule stems from the idea that an advisory opinion is not an exercise of judicial authority at all;[81] rather, an advisory opinion is merely a consultative opinion that is not "finally decisive."[82] The quintessential advisory opinion is a judicial opinion on a bill pending in the legislature.[83]

Not all states have the same rule against advisory opinions.[84] In fact, there are eight states that permit or require their respective state supreme courts to provide advisory opinions under certain circumstances.[85] However, even in these states, the courts' advisory authority is still constrained by certain state constitutional limitations on that power.[86] For example, Delaware and Florida permit advisory opinions only for matters concerning the duties of the official requesting the opinion.[87]

In the context of a pre-enactment challenge, because the initiative does not yet have the force of law behind it, the challenged initiative could not affect any alleged rights of the challenger.[88] Thus, any action brought against it would necessarily require the court to issue an advisory opinion on the constitutionality of proposed legislation.[89]

2. The Disfavor of Facial Challenges

When a court has decided to determine the constitutionality of a ballot initiative, it must decide by what standard it will handle the facial challenge. The Supreme Court held in *United States v. Salerno*[90] that a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of

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80. Hershkoff, *supra* note 55, at 1844.

81. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 153 (1893).

82. Hershkoff, *supra* note 55, at 1845.

83. Gordon, *supra* note 79, at 304–05.

84. Collett, *supra* note 12, at 337.

85. *Id.* at 337 n.52 ("Eight states permit or require the state supreme court to give advisory opinions: Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota."); *see also* Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 254–56 (1997).

86. Topf, *supra* note 85, at 214.

87. *Id.* at 216.

88. McKee v. City of Louisville, 616 P.2d 969, 972–73 (Colo. 1980).

89. *See McKee*, 616 P.2d at 973; Coalson v. City Council of Victoria, 610 S.W.2d 744, 747 (Tex. 1980); State ex rel. Althouse v. City of Madison, 255 N.W.2d 449, 455 (Wis. 1977); Anderson v. Byrne, 242 N.W. 687, 692 (N.D. 1932).

90. United States v. Salerno, 481 U.S. 739 (1987).

circumstances exists under which the [law] would be valid."[91] More recently, however, there has been some speculation as to the validity of this standard.[92] No matter the standard employed, the Supreme Court has recognized that because of the inherently speculative, possibly premature, and anti-democratic nature of facial challenges, they should be granted "sparingly, and only as a last resort."[93] Thus, a higher burden should be placed on those who wish to succeed in a facial challenge than on parties bringing an as-applied challenge, in order to preserve the integrity of the court system.

a. Nature of facial challenges and the traditional *Salerno* standard

The strict rule from *Salerno*, requiring that a plaintiff establish that no set of circumstances exists under which the challenged law would be valid,[94] supports a limited concept of federal judicial power to render judgments only "out of the necessity of adjudicating rights in particular cases between . . . litigants" who have suffered harm.[95] Additionally, this rule follows the precedent that "[c]onstitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between . . . litigants brought before the Court."[96] Such a stringent rule supports the Court's assertion that as-applied challenges are preferred because facial challenges "often rest on speculation" as they do not involve specific applications of a statute, but rather hypothetical applications.[97] Consequently, because any pre-enactment challenge to law is necessarily a facial challenge, such challenges to ballot initiatives should be judged according to the strictest standard and should be rarely successful.

In a pre-enactment challenge the courts would "have had no occasion to construe the law in the context of actual disputes . . . or to accord the law a

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91. *Id.* at 745.

92. Washington v. Glucksberg, 521 U.S. 702, 739–40 (1997) (Stevens, J., concurring).

93. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

94. *Salerno*, 481 U.S. at 745.

95. *Broadrick*, 413 U.S. at 611.

96. *Id.*; *see also* United States v. Raines, 362 U.S. 17, 21 (1960) ("This Court . . . 'has no jurisdiction to pronounce any statute . . . void, because [it is] irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885))).

97. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008).

limiting construction to avoid constitutional questions."[98] This would deny the state courts any opportunity to follow the Supreme Court's dictate that "'[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'"[99] Consequently, the Supreme Court has explained that it prefers to wait for laws to be applied and actually harm a plaintiff before considering a challenge to their validity.[100]

In the more recent decision of *Washington State Grange v. Washington State Republican Party*,[101] the Supreme Court did in fact rule on a facial challenge brought against a ballot initiative.[102] This initiative modified the nomination process for Washington's primary elections that had been enacted but not completely implemented.[103] Thus, the Court noted that the challenge against the initiative was "not in the context of an actual election, but in a facial challenge."[104] The Court expressed its long-held belief that such challenges are disfavored for three reasons.[105] First, "[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'"[106] Second, facial challenges "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance' . . . 'nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[107] Third, "facial challenges threaten to short circuit the

98. *Id.*; *see also* Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 220 (1912) ("How the state court may apply [a statute] to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail, are matters upon which we need not speculate now.").

99. Ward v. Rock Against Racism, 491 U.S. 781, 795–96 (1989) (quoting Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982)).

100. Webster v. Reprod. Health Servs., 492 U.S. 490, 507 (1989).

101. *Wash. State Grange*, 552 U.S. 442.

102. *Id.* at 444.

103. *See id.* at 448 (finding that the suit was filed "[i]mmediately after the State enacted regulations to implement I-872").

104. *Id.* at 449.

105. *Id.* at 450–51.

106. *Id.* at 450 (quoting Sabri v. United States, 541 U.S. 600, 609 (2004)) (internal quotation marks omitted).

107. *Id.* (quoting Ashwander v. TVA, 297 U.S. 288, 347 (1936)) (internal quotation marks omitted).

democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."[108]

After discussing the disfavor courts have for such challenges, the Court still subjected the Washington initiative to the facial challenge and decided that it was constitutional because the facial challenges against the initiative all depended on mere "possibilit[ies]" and "sheer speculation."[109] Thus, *Grange* serves as an example of a time when the Court did entertain a facial challenge against a ballot initiative before it was implemented. However, this still does not provide precedent for the assertion that it is proper to review the constitutionality of an initiative before it is even *enacted.*

Additionally, the issue of whether the case was ripe for judicial review was never argued before, or decided by, the Court. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."[110] Were a court to rely on "assumptions that have gone unstated and unexamined," it would be risking great error.[111] In *Grange*, the issue of whether the claim was ripe for review was neither decided nor argued, other than one short and unsourced sentence in a brief before the Court.[112] Therefore, *Grange* does not provide precedent from the Supreme Court authorizing a court to entertain a facial challenge against a ballot initiative prior to its enactment.

b. The less stringent *Glucksburg* standard for facial attacks

In his concurring opinion in *Washington v. Glucksberg*,[113] Justice Stevens called into question the *Salerno* standard for reviewing facial challenges to law and asserted that the Court has never applied the strict *Salerno* standard

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108. *Id.* at 451.

109. *Id.* at 454.

110. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1448 (2011); *see, e.g.*, Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio.").

111. *Winn*, 131 S. Ct. at 1449.

112. *See* Reply Brief for Petitioner at 15, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008), No. 06-730, 2007 WL 2679380, at *15 ("The political parties' reasoning . . . does not present an actual ballot that is ripe for judicial review.").

113. Washington v. Glucksberg, 521 U.S. 702 (1997).

literally.[114] Justice Stevens then advocated for a more lenient standard that merely "requires the challenger to establish that the invalid applications of a statute 'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'"[115] Later, the Supreme Court acknowledged and applied this standard along with the *Salerno* standard.[116] Finally, in a very recent decision, the Supreme Court combined the two standards into a single rule, providing that "[t]o succeed in a typical facial attack, [a party] would have to establish 'that no set of circumstances exists under which [the law] would be valid,' or that the statute lacks any 'plainly legitimate sweep.'"[117] However, the Court acknowledged that determining "[w]hich standard applies in a typical case is a matter of dispute."[118]

It is apparent that there is a measure of contention among the justices as to which standard to apply when reviewing a facial challenge to a law; however, it is undisputed that, were the Court to adopt this lower standard, it would lead to more acts of the legislative branch being declared unconstitutional. Our system of government features a particular structure—the separation of powers—and "[i]t is axiomatic to the American political order that the legislature makes the laws, the executive enforces the laws, and the judiciary interprets and applies the laws."[119] If the courts continue to employ this lower standard, thereby invalidating an increased number of the legal expressions of the will of the people, it will create a reality that the courts are imposing their own values rather than requiring compliance with the Constitution.[120] Such action will cause the

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114. *Id.* at 740.

115. *Id.* at 740 n.7 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

116. *Wash. State Grange*, 552 U.S. at 449. "While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 739–40 & n.7 (1997) (internal quotation marks omitted).

117. United States v. Stevens, 130 S. Ct. 1577, 1587 (2010).

118. *Id.*

119. Collett, *supra* note 12, at 347.

120. *See, e.g.*, Roy L. Brooks, *The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After* Bush v. Gore, 13 STAN. L. & POL'Y REV. 33, 34 (2002) (arguing that judges "make up" policy, as well as "discover" and "vindicate" policy during judicial policy formation); Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 429 (2008) (arguing that the Supreme Court makes law rather than interprets it and insisting that the courts have become "partners" with the legislature in law making).

people to view the courts as another political branch, thereby decreasing public confidence in the courts as unbiased arbiters of conflicts.[121]

Regardless of the effect that this standard will have on the legitimacy of the courts, many jurisdictions have begun to recognize or apply the "plainly legitimate sweep" standard in reviewing facial attacks to law.[122] If facial challenges brought against ballot initiatives, prior to their enactment, are reviewed according to this standard, it is more probable that they will succeed. The burden of proof would remain with the party bringing the facial challenge, so doubts are resolved against invalidation.[123] However, the Court could plausibly attempt to interpret the substantial effect of that initiative prior to any limited application ascribed by the legislature or state courts.[124]

C. *The Split in Authority Among States with Ballot Initiatives*

There is disagreement among the various jurisdictions on whether it is appropriate to conduct a pre-enactment review of a ballot initiative on the grounds that it is unconstitutional. However, a majority of courts will review an initiative's constitutionality not only post-election but also post-

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121. *See generally* Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239 (1998). Some more recent decisions of the Supreme Court may be reasonably interpreted as an effort by the Court to return to a commitment to judicial restraint. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007) (rejecting pre-enforcement facial challenge to the federal partial-birth abortion ban); Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (rejecting claims that the California marriage amendment violated the California Constitution). If this trend continues, the American confidence and trust in the judiciary as a non-political branch of government might be restored. *See* Collett, *supra* note 12, at 349.

122. *See, e.g.*, Doe v. City of Albuquerque, 667 F.3d 1111, 1126–27 (10th Cir. 2012); Roach v. Stouffer, 560 F.3d 860, 869 n.5 (8th Cir. 2009); Phelps-Roper v. Strickland, 539 F.3d 356, 360 (6th Cir. 2008); Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 762 n.23 (5th Cir. 2008); United States v. Simington, EP-10-CR-2275-KC, 2011 WL 145326 (W.D. Tex. Jan. 14, 2011); Ga. Outdoor Network, Inc. v. Marion Cnty., Ga., 652 F. Supp. 2d 1355, 1360 (M.D. Ga. 2009).

123. *See* Broadrick v. Oklahoma, 413 U.S. 601, 618 (1973) (rejecting facial challenge because plaintiff failed to show that statute was substantially invalid).

124. Ward v. Rock Against Racism, 491 U.S. 781, 795–96 (1989) ("[I]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." (internal quotation marks omitted)).

enactment.[125] A minority of courts have decided to exercise authority over ballot initiatives that have yet to reach the electorate and prevent them from appearing on the ballot if they are clearly unconstitutional.[126] For many jurisdictions, this practice is not new; rather, some state courts have permitted such reviews for decades.[127] The subsequent paragraphs will provide examples from the various jurisdictions that present this split in authority.

1. States That Deny Pre-Enactment Reviews

The majority of jurisdictions hold to the rule that it is improper to engage in a substantive pre-enactment review of a ballot initiative.[128] Many courts refuse to engage in a review because it would be a violation of separation of powers,[129] would raise issues of ripeness and standing,[130] or would violate the rule against advisory opinions.[131] Some courts have even noted that pre-enactment reviews are non-justiciable even if the initiative is in direct "conflict with the Constitution."[132]

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125. *See* Wyo. Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 286 (Wyo. 1994) (listing cases in which state courts have decided that pre-enactment challenges to an initiative's constitutionality are and are not justiciable).

126. *Id.*; *see also In re* Initiative Petition No. 349, State Question 642, 838 P.2d 1, 13 (Okla. 1992).

127. *In re* Initiative Petition No. 349, 838 P.2d at 13 (citing *In re* Initiative Petition No. 348, 820 P.2d 772, 780 (Okla. 1991)); *In re* Initiative Petition No. 341, State Question No. 627, 796 P.2d 267, 269 (Okla. 1990); *In re* Initiative Petition No. 315, State Question No. 553, 649 P.2d 545, 547–48 (Okla. 1982)).

128. *See Karpan*, 881 P.2d at 286 (listing cases in which state courts have decided that pre-enactment challenges to an initiative's constitutionality are and are not justiciable); *see also* Ranjel v. City of Lansing, 417 F.2d 321, 324 (6th Cir. 1969); Speed v. Hosemann, 68 So. 3d 1278, 1281 (Miss. 2011); Herbst Gaming, Inc. v. Heller, 141 P.3d 1224, 1231 (Nev. 2006); Tilson v. Mofford, 737 P.2d 1367, 1372 (Ariz. 1987); Associated Taxpayers of Idaho, Inc. v. Cenarrusa, 725 P.2d 526, 526 (Idaho 1986); State *ex rel.* Cramer v. Brown, 454 N.E.2d 1321, 1322 (Ohio 1983); McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980); Coalson v. City Council of Victoria, 610 S.W.2d 744, 747 (Tex. 1980); State *ex rel.* Althouse v. City of Madison, 255 N.W.2d 449, 455 (Wis. 1977); Johnson v. City of Astoria, 363 P.2d 571, 575 (Or. 1961); Anderson v. Byrne, 242 N.W. 687, 691–92 (N.D. 1932).

129. *See Tilson*, 737 P.2d at 1372.

130. *See McKee*, 616 P.2d at 972–73.

131. *See Anderson*, 242 N.W. at 692.

132. Iman v. Bolin, 404 P.2d 705, 709 (Ariz. 1965) ("[E]ven were the measure in conflict with the Constitution, this has no bearing on the right of the people to enact it. The same is true of an act of the legislature. Only after legislation becomes law will its constitutionality be tested." (citations omitted) (internal quotation marks omitted)).

Arizona is among the jurisdictions that follow this majority rule and takes a hard stance against pre-enactment reviews of ballot initiatives.[133] Arizona repeatedly dismissed actions challenging ballot initiatives on their substance.[134] It declines such reviews because they violate the separation of powers and are not ripe for adjudication as there are no actual "litigants whose rights are affected."[135] In fact, the Arizona Supreme Court has held that the initiative right reserved to the people in the Arizona Constitution is a legislative power "as great as that of the legislature."[136] Thus, in Arizona, a ballot initiative's constitutionality can only be properly adjudicated by the courts after its enactment because a measure's "conflict with the Constitution . . . has no bearing on the right of the people to enact it."[137]

Colorado provides the same protection to the initiative right.[138] Like Arizona, Colorado cites to the doctrine of separation of powers; however, it also references the rule against advisory opinions.[139] Colorado courts begin their justification of this rule with the recognition that "'[a]ll political power is vested in and derived from the people,' and all government originates from the people."[140] Furthermore, the courts recognize that the people of Colorado make it clear that this power is not one "grant[ed] to the people but a reservation by them for themselves."[141] Thus, the Colorado courts

133. *See Tilson*, 737 P.2d at 1372; *Iman*, 404 P.2d at 709; State v. Osborn, 143 P. 117, 118–19 (Ariz. 1914); *accord* Williams v. Parrack, 319 P.2d 989, 990–91 (Ariz. 1957).

134. *Tilson*, 737 P.2d at 1372; *Iman*, 404 P.2d at 709; *Osborn*, 143 P. at 118–19.

135. *Id.*

136. *Id.* at 1369; *see* ARIZ. CONST. art. XXII, § 14.

137. *Iman*, 404 P.2d at 709.

138. *See* McKee v. City of Louisville, 616 P.2d 969, 972–73 (Colo. 1980) ("Nor may the courts interfere with the exercise of this right by declaring unconstitutional or invalid a proposed measure before the process has run its course and the measure is actually adopted. Then and only then, when actual litigants whose rights are affected are before it, may the court determine the validity of the legislation."); City of Rocky Ford v. Brown, 293 P.2d 974, 976 (Colo. 1956); Speer v. People, 122 P. 768, 771 (Colo. 1912).

139. *City of Rocky Ford*, 293 P.2d at 976 ("The separation of governmental powers must be held inviolate, therefore the trial court or this court may not intrude upon the legislative powers through an advisory opinion.").

140. *McKee*, 616 P.2d at 972 (quoting U.S. CONST. art. II, § 1); *see also* Hudson v. Annear, 75 P.2d 587, 589 (Colo. 1938).

141. *McKee*, 616 P.2d at 972; *see also In re* Legislative Reapportionment, 374 P.2d 66, 71 (Colo. 1962).

hold the power of the initiative as "a fundamental right at the very core of [their] republican form of government."[142]

Oregon has a similar view to that of Arizona and Colorado.[143] Oregon courts will abstain from review until enactment, even if the ballot initiative is clearly unconstitutional,[144] and, generally, this abstention flows from a desire to maintain the doctrine of separation of powers.[145] Alternatively, Idaho has refused to engage in such reviews, but not because of the doctrine of separation of powers.[146] Rather, Idaho courts have continually pointed to issues of justiciability,[147] relying on standards from the United States Supreme Court to guide them in deciding when a justiciable case or controversy is before it.[148]

Mississippi has flip-flopped on its rule for pre-enactment reviews on the substance of initiatives.[149] The original rule provided by *Power v. Ratliff*[150] was that "courts have no more right to interfere with this legislative act of the people than they have to prevent an . . . attempt of the Legislature to pass a law."[151] However, the Mississippi Supreme Court broke from this rule

142. *McKee*, 616 P.2d at 972; Bernzen v. City of Boulder, 525 P.2d 416, 419 (Colo. 1974); Brownlow v. Wunsch, 83 P.2d 775, 776–77 (Colo. 1938).

143. Barnes v. Paulus, 588 P.2d 1120, 1123 (Or. Ct. App. 1978).

144. Johnson v. City of Astoria, 363 P.2d 571, 575 (Or. 1961) ("'If [a proposed initiative] is unconstitutional and should be adopted, the Constitution itself will require the courts, if the question is properly presented, to pronounce the measure to be unconstitutional, but the courts possess no such power as to any proposed bill before the same has become a law . . . .'").

145. *Johnson*, 363 P.2d at 592 ("[T]he courts possess no such power as to any proposed bill before the same has become a law and neither the executive department of the state nor the judicial department has authority to say to either of the legislative branches of the state . . . .").

146. *See* Associated Taxpayers of Idaho, Inc. v. Cenarrusa, 725 P.2d 526, 526 (Idaho 1986); *see also* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1980); Harris v. Cassia Cnty., 681 P.2d 988, 991 (Idaho 1984).

147. *See supra* Part II.B.1.

148. *Cenarrusa*, 725 P.2d at 526 ("Petitioners' action attacking the constitutionality of the proposed initiative is premature and presents no justiciable controversy at this time. For this Court to act, '[there] must be a real and substantial controversy . . . .'").

149. *Compare* Speed v. Hosemann, 68 So. 3d 1278, 1281 (Miss. 2011) (holding that a pre-enactment review is inappropriate), *with In re* Proposed Initiative Measure No. 20, 774 So. 2d 397 (Miss. 2000) (holding that a pre-enactment review is appropriate).

150. Power v. Ratliff, 72 So. 864 (Miss. 1916).

151. *Id.* at 867.

in *In re Proposed Initiative Measure 20*,[152] where the court held implicitly that substantive challenges to proposed initiatives also are proper for pre-enactment review.[153] Later, *Speed v. Hoseman*[154] abrogated that ruling; the court ridiculed the *Measure 20* court for breaking from the long established precedent against such reviews.[155] Thus, Mississippi has returned to its original rule forbidding pre-enactment substantive reviews of proposed initiatives.[156]

Other jurisdictions that have adopted this majority rule include Nevada,[157] North Dakota,[158] Ohio,[159] Texas,[160] Wisconsin,[161] and even some federal circuits.[162] Still other jurisdictions adopt this general rule but have allowed a substantive review of ballot initiatives prior to enactment when it relates to some subject matter that has been specifically excluded from the people's authority to legislate.[163]

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152. *In re* Proposed Initiative Measure No. 20, 774 So. 2d 397 (Miss. 2000).

153. *Id.* at 401.

154. Speed v. Hosemann, 68 So. 3d 1278 (Miss. 2011).

155. *Id.* at 1281 ("Citing no constitutional, statutory, or caselaw authority, the *Measure 20* Court stated that 'proposed initiatives are subject to review of form and, therefore, content inasmuch as content affects form and form affects content.' The lack of authority is no surprise, as such authority is nonexistent. In fact, our existing caselaw has held exactly the opposite. According to *Ratliff*, 'the courts ... must deal altogether with the finished product.'" (quoting *In re Proposed Initiative Measure 20*, 774 So. 2d at 401 and *Ratliff*, 72 So. at 867)).

156. *Id.* (citing to MISS. CONST. art. 15, § 273(9); MISS. CODE ANN. § 23-17-23 (2007)) (overruling *In re Proposed Initiative Measure 20* to the extent that it allows pre-enactment substantive review of proposed initiatives).

157. Herbst Gaming, Inc. v. Heller, 141 P.3d 1224, 1231 (Nev. 2006).

158. Anderson v. Byrne, 242 N.W. 687, 692 (N.D. 1932).

159. State *ex rel.* Cramer v. Brown, 454 N.E.2d 1321, 1322 (Ohio 1983).

160. Coalson v. City Council of Victoria, 610 S.W.2d 744, 747 (Tex. 1980).

161. State *ex rel.* Althouse v. City of Madison, 255 N.W.2d 449, 449–50 (Wis. 1977).

162. Ranjel v. City of Lansing, 417 F.2d 321, 324 (6th Cir. 1969).

163. Wyo. Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 286 (Wyo. 1994); *see, e.g.*, Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections and Ethics, 441 A.2d 889, 914 (D.C. 1981) (holding that it was appropriate to strike down an initiative that would have permitted the appropriation of funds before it was enacted as such initiatives were prohibited by law); Whitson v. Anchorage, 608 P.2d 759, 761–62 (Alaska 1980); Bowe v. Sec'y of the Commonwealth, 69 N.E.2d 115, 127 (Mass. 1946).

2. States That Allow Pre-Enactment Reviews

Despite the sound rationale espoused by the majority of jurisdictions, some courts conduct pre-enactment substantive reviews of proposed initiatives. These courts justify their position by pointing to the judicial economy, as they believe it would be an abuse of the initiative right to allow invalid proposals to be submitted to the electorate.[164] These jurisdictions entertain claims that a proposed initiative violates either the state or the federal constitution.[165] Most of these courts require that the initiative in question be *clearly* or *patently* unconstitutional before they will review its substance.[166]

The District of Columbia is one of the jurisdictions that have split from the majority rule.[167] D.C. courts acknowledge that pre-enactment reviews are "imprudent" but allow for a pre-enactment substantive review of an initiative in "extreme cases" where the initiative is "patently unconstitutional."[168] In *Hessey v. Burden*, the court examined the views of the various jurisdictions that provide an initiative right to its citizens and held that, in these rare circumstances of patent unconstitutionality, the courts could review the initiative on its merits.[169] The court noted the dangers in such a review, arguing that "[j]udges who strike a legislative proposal from the ballot before the voters have a chance to vote on it 'could be perceived, at least by the measure's supporters, as meddlers interfering with the process of popular legislation.'"[170] Such an observation could harm the legitimacy of the judiciary. Consequently, courts weigh this perception against the inefficiency that would be the inevitable result of holding an election for an initiative that, if adopted, would be struck down by the courts.[171]

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164. *See In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 10 (Okla. 1992); City of Newark v. Benjamin, 364 A.2d 563, 568 (N.J. Super. Ct. Ch. Div. 1976).

165. *See In re Initiative Petition No. 349*, 838 P.2d at 10; State *ex rel.* Harper v. Waltermire, 691 P.2d 826, 828 (Mont. 1984).

166. *See* Karpan, 881 P.2d at 286; Hessey v. Burden, 615 A.2d 562, 574 (D.C. 1992); Gray v. Winthrop, 156 So. 270, 272 (Fla. 1934).

167. *Hessey*, 615 A.2d at 574.

168. *Id.*

169. *Id.* at 572–74.

170. *Id.* at 573 (citations omitted).

171. *Id.* ("Efficiency and fiscal responsibility are also put forth as reasons for pre-election review: 'The court ought not to compel the doing of a vain thing and the useless spending of public money.' Holding an election on an unconstitutional initiative would clearly be

Many of the other jurisdictions that engage in these reviews follow a similar rule and rationale to that applied in *Hessey*. Jurisdictions that have adopted this rationale include California,[172] Connecticut,[173] Florida,[174] Louisiana,[175] Kentucky,[176] New Jersey,[177] and Wyoming.[178] Other jurisdictions, like Oklahoma, will review constitutional claims against a proposed initiative *regardless* of whether the initiative is clearly unconstitutional or not.[179] The Oklahoma courts have engaged in this type of review for decades.[180] In fact, Oklahoma's legislature has arguably granted this power to the courts by statute where it purportedly gave the Oklahoma Supreme Court the right to hear "arguments for and against the sufficiency" of an initiative.[181] However, it may be argued that when taken in context of the rest of this section of the Oklahoma statute, "sufficiency" refers merely to the procedural constitutional requirements rather than the

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inefficient in hindsight, although that inefficiency must be weighed against the cost in judicial resources of pre-election review." (quoting Utz v. City of Newport, 252 S.W.2d 434, 437 (Ky. 1952))).

172. Brosnahan v. Eu, 641 P.2d 200, 201 (Cal. 1982); Gayle v. Hamm, 101 Cal. Rptr. 628, 628 (1972); Wind v. Hite, 374 P.2d 643 (Cal. 1962).

173. W. Hartford Taxpayers Ass'n, Inc. v. Streeter, 462 A.2d 379, 381–82 (Conn. 1983).

174. Gray v. Winthrop, 156 So. 270, 272 (Fla. 1934); Dulaney v. City of Miami Beach, 96 So. 2d 550, 551 (Fla. Dist. Ct. App. 1957).

175. State *ex rel.* Bussie v. Fant, 43 So. 2d 217, 219 (La. 1949).

176. Utz v. City of Newport, 252 S.W.2d 434, 437 (Ky. 1952) (citing to State *ex rel.* Cranfill v. Smith, 48 S.W.2d 891 (Mo. 1932); State *ex rel.* Foote v. Bd. of Comm'rs of City of Hutchinson, 144 P. 241, 243 (Kan. 1914); State *ex rel.* Davies v. White, 136 P. 110 (Nev. 1913); Hodges v. Dawdy, 149 S.W. 656 (Ark. 1912); Att'y Gen. *ex rel.* Hudson v. Common Council of City of Detroit, 129 N.W. 879 (Mich. 1911); Parker v. State *ex rel.* Powell, 32 N.E. 836 (Ind. 1892)).

177. City of Newark v. Benjamin, 364 A.2d 563, 568 (N.J. Super. Ct. Ch. Div. 1976).

178. Wyo. Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 288 (Wyo. 1994).

179. *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 10 (Okla. 1992) ("However, if an unconstitutional measure garners enough signatures to be presented to the people and is challenged on constitutional grounds, pre-submission judicial review is appropriate.").

180. *Id.* at 13 (citing to *In re* Initiative Petition No. 348, State Question No. 640, 820 P.2d 772, 780 (Okla. 1991); *In re* Initiative Petition No. 341, State Question No. 627, 796 P.2d 267, 269 (Okla. 1990); *In re* Initiative Petition No. 315, State Question No. 553, 649 P.2d 545, 547–48 (Okla. 1982)).

181. OKLA. STAT. tit. 34, § 8(c) (2011) ("Upon the filing of a protest to the petition, the Supreme Court shall then fix a day, not less than ten (10) days thereafter, at which time it will hear testimony and arguments for and against the sufficiency of such petition.").

substance of the initiative, but the Oklahoma Supreme Court has interpreted "sufficiency" to include legal sufficiency.[182] Thus, the courts in Oklahoma are not shackled even by a standard that a proposed initiative must be *clearly* unconstitutional before it will review its substance.

Such an unbridled assault by the courts on the legislative will of the people, before that will has been enacted or even implemented, goes against recent United States Supreme Court precedent in *Arizona v. United States*[183]:

> The nature and timing of this case counsel caution in evaluating the validity of § 2(B). The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict . . . .[184]

The Court held that it is "improper to enjoin [a law] before the state courts [have] had an opportunity to construe it" after it has been enacted.[185] In fact, the Supreme Court acknowledged that it has long understood that "state laws will be construed in [a] way" that "avoid[s] doubtful constitutional questions."[186] The Court refused to adjudicate section 2(B) prior to its *implementation*, whereas in the case of a substantive review of proposed initiatives, the courts are striking them down before their *enactment*. This recent decision chastising the federal government for bringing a pre-implementation claim moves the Supreme Court one step closer to disallowing pre-enactment reviews and should dissuade state courts from allowing such challenges to proceed. Such action by a court—asserting itself into the legislative process—will continue to effect courts' credibility and legitimacy in the eyes of the public.[187]

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182. *In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637, 637 ("A protest to the legal sufficiency of an initiative petition must now be heard by this Court in advance of a challenge to the numerical sufficiency of the initiative petition." (citing OKLA. STAT. tit. 34, § 8 (2011))).

183. Arizona v. United States, 132 S. Ct. 2492 (2012).

184. *Id.* at 2510.

185. *Id.* at 2496.

186. Fox v. Washington, 236 U.S. 273, 277 (1915); *see also Arizona*, 132 S. Ct. at 2510.

187. United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

III. SILENCING THE BALLOT—*IN RE INITIATIVE PETITION NO. 349*

A. *General Grant of Pre-Enactment Review in Modern Oklahoma Jurisprudence*

Oklahoma courts have, for the last several decades, conferred upon themselves and exercised the power to engage in pre-enactment review of ballot initiatives.[188] In fact, the Oklahoma Supreme Court actually references its "reverence for the initiative rights guaranteed by the Oklahoma Constitution" for its reasons to engage in this type of review.[189] Nevertheless, this rule generally allowing review of the substance of ballot initiatives in order to "prevent the holding of a costly and unnecessary election"[190] was not the rule followed by Oklahoma courts for the better part of the 20th century.[191]

1. The Original Rule from *Threadgrill*

Threadgill v. Cross provided the original rule that an initiative petition need only meet the *procedural* requirements as set out in the Oklahoma Constitution to qualify for submission to a vote of the people.[192] This would require any initiative whose proponents seek placement on the ballot to comply with the "*sine qua non procedural* requirements for submission," receive the required number of valid signatures, pertain to only a single subject, and concern a subject that has not been explicitly excluded from the people's lawmaking power.[193] Further, this was the rule used by Oklahoma courts from 1910 until 1975.[194] The Court in *Threadgill*, and the proponents

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188. *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 8 (Okla. 1992); *see also In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012); *In re* Initiative Petition No. 348, State Question No. 640, 820 P.2d 772, 780 (Okla. 1991); *In re* Initiative Petition No. 341, State Question No. 627, 796 P.2d 267, 269 (Okla. 1990); *In re* Initiative Petition No. 315, State Question No. 553, 649 P.2d 545, 547–48 (Okla. 1982); *In re* Supreme Court Adjudication of Initiative Petitions in Norman, Okla., 534 P.2d 3, 8 (Okla. 1975).

189. *In re Initiative Petition No. 349*, 838 P.2d at 10.

190. *Id.* at 8.

191. *See* Threadgill v. Cross, 109 P. 558, 562 (1910); *see also In re Petitions in Norman, Okla.*, 534 P.2d at 8.

192. *In re Initiative Petition No. 349*, 383 P.2d at 20 (Opla, J., dissenting).

193. *Id.*

194. *Id.*; *see also In re Petitions in Norman, Okla.*, 534 P.2d at 8.

of the rule promulgated therein, looked to the separation of powers to justify its decision to disallow pre-enactment reviews.[195]

Threadgill presented a problem slightly different than that discussed throughout the majority of this Comment. The controversy brought before the court in that case was not initiated by the *opponents* of the ballot initiative at issue, but rather by its *proponents*.[196] Although the initiative had met the procedural requirements as laid out in the Oklahoma Constitution, the Secretary of State believed that, if ratified, the initiative would conflict with another legislative act and thus be void.[197] Because of this belief, he refused to refer the initiative to the electorate for approval or rejection.[198] Consequently, the proponents brought action against the Secretary and asked the court for a writ of mandamus to compel him to submit the initiative to the electorate.[199] Thus, the court was being asked to actually force an election for the initiative, rather than being asked to forbear on reviewing the substance of the initiative. This is an important distinction because this asks a court to take an even more resolute stance regarding the right of the people to enact a ballot initiative. Some jurisdictions that will generally refrain from entertaining a pre-enactment, substantive challenge to a ballot initiative will not grant a mandamus to compel an election.[200]

The court in *Threadgill*, however, recognized the right of the people to have a procedurally sufficient initiative submitted to the electorate.[201] Further, the court did not allow the Secretary of State to use the constitutionality of the substance of that initiative as a defense in a mandamus proceeding.[202] The court relied on the presumption that "provisions of the state Constitution and statutes are ... valid."[203] Additionally, the court rejected the *parens patriae* argument for standing asserted by the Secretary of State that "[h]e was testing the constitutionality

195. *Threadgill*, 109 P. at 561–62; *see also In re Initiative Petition No. 349*, 383 P.2d at 20 (Opla, C.J., dissenting).

196. *Threadgill*, 109 P. at 558.

197. *Id.*

198. *Id.*

199. *Id.* at 559.

200. *See* State *ex rel.* Bussie v. Fant, 43 So. 2d 217, 219 (La. 1949); *see also* Utz v. City of Newport, 252 S.W.2d 434, 437 (Ky. 1952).

201. *Threadgill*, 109 P. at 563.

202. *Id.* at 559.

203. *Id.*

of the law purely in the interest of third persons, viz., the taxpayers."[204] The court instead would require a personal—not an official—interest[205] asserted by a person who would have wanted an enactment struck down as unconstitutional because "his rights are affected by the alleged invalid act."[206] The court would rather force an official to perform a "purely ministerial" and "mandatory" act[207] than allow for relaxed requirements for standing to challenge legislative acts of the people by presuming some injury.[208]

The court did not simply ignore the argument that the cost of holding an election for an initiative that would likely be proved invalid outweighs the people's right to exercise their legislative authority.[209] Rather than restraining the rights of the people due to costs, the court extolled the Republican system of government by supporting the separation of powers.[210] The court even noted that "[i]t may be that a government all of whose powers are administered by one department may be administered with less expense than a [Republican form of] government."[211] However, it is the proper and constitutional form of government to leave the legislative authority in the hands of those vested with legislative power and allowing the other branches the authority to review those legislative acts only after "they come to be enforced against some one."[212]

Consequently, the court granted the writ of mandamus to compel the election.[213] It justified this decision by invoking certain justiciability issues, such as standing and the doctrine of separation of powers.[214] Ultimately, the court decided that it must compel the Secretary to submit the initiative to the people because "[t]he duty of determining what law shall be enacted and

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204. *Id.* at 561.

205. *Id.*

206. *Id.* at 559.

207. *Id.*

208. *Id.* at 560 ("'A party who seeks to have an act of the Legislature declared unconstitutional must not only show that he is or will be injured by it, but he must also show how and in what respect he is or will be injured and prejudiced by it. Injury will not be presumed. It must be shown.'" (citations omitted)).

209. *Id.* at 562.

210. *Id.* at 562–63.

211. *Id.* at 562.

212. *Id.* at 562–63.

213. *Id.* at 563.

214. *Id.*

what law shall not be enacted rests neither upon the executive nor the judicial department."[215]

2. Modern Rule Generally Granting Pre-Enactment Reviews

The Oklahoma Supreme Court broke from this rule in 1975, declaring that it had the authority to "consider the constitutionality of [initiatives] as to procedure form and subject matter, when raised, and if ... such a determination could prevent a costly and unnecessary election."[216] Since then, the Oklahoma Supreme Court has regularly exercised that authority it conferred upon itself.[217] Unlike the jurisdictions that limit this authority to only extreme instances of patent unconstitutionality,[218] Oklahoma declared in *In re Initiative Petition No. 349* that it would hear any and all substantive challenges to a ballot initiative once it had garnered the constitutionally required number of signatures.[219] More recently, it has even expanded this authority to initiatives that have *not* received the requisite number of signatures.[220]

Specifically in *In re Initiative Petition No. 349*, the Oklahoma Supreme Court struck down an initiative that would amend the Oklahoma

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215. *Id.* at 562.

216. *In re* Supreme Court Adjudication of Initiative Petitions in Norman, Okla., 534 P.2d 3, 8 (Okla. 1975).

217. *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 8 (Okla. 1992); *see also In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012); *In re* Initiative Petition No. 348, State Question No. 640, 820 P.2d 772, 780 (Okla. 1991); *In re* Initiative Petition No. 341, State Question No. 627, 796 P.2d 267, 269 (Okla. 1990); *In re* Initiative Petition No. 315, State Question No. 553, 649 P.2d 545, 547–48 (Okla. 1982); *In re* Supreme Court Adjudication of Initiative Petitions in Norman, Okla. 534 P.2d 3, 8 (Okla. 1975).

218. Hessey v. Burden, 615 A.2d 562, 574 (D.C. 1992) ("[W]e stop short of joining the list of jurisdictions which forbid pre-election review of constitutional challenges to proposed initiatives. We agree with the majority of courts which hold that such review is imprudent. But there may be extreme cases in which it would be both appropriate and efficient to decide the constitutionality of a proposed initiative. An initiative proposing to establish an official religion in the District of Columbia, for example, would be patently unconstitutional.").

219. *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 10 (Okla. 1992) ("However, if an unconstitutional measure garners enough signatures to be presented to the people and is challenged on constitutional grounds, pre-submission judicial review is appropriate.").

220. *See, e.g., In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012).

Constitution to limit abortions to a set of defined circumstances.[221] It justified striking the initiative down citing the Supremacy Clause of the United States Constitution,[222] the Supreme Court's holdings in *Planned Parenthood v. Casey*[223] and *Roe v. Wade*,[224] and its own holdings.[225] The court determined that the initiative "was unconstitutional when it was drafted, circulated, and submitted" and that, if it were ratified by the electorate, "the Oklahoma Constitution [would] be repugnant to the [United States] Constitution" in light of *Casey*.[226]

This ruling was not without ardent dissent. One justice characterized the court's decision as an exercise of legislative power and a "flagrant encroachment upon the people's legislative powers."[227] In fact, the dissent pointed out that in order to support its decision, the majority necessarily relied on "erroneous and sensational legal findings" regarding the provisions and effect of the initiative (were it even to be enacted) and the court's own authority in making such adjudications.[228] Despite the impassioned arguments for judicial restraint and adherence to the *Threadgill* rule,[229] *In re Initiative Petition No. 349* and its interpretation of federal abortion jurisprudence has been used as precedent to strike down other initiatives.[230]

B. *Misapplication of Federal Law*

The initiative in *In Re Initiative Petition No. 349* dealt directly with abortion and contained provisions regarding state control of and limiting some access to those services.[231] Thus, an argument might be reasonably made that the initiative in *In re Initiative Petition No. 349* might have adversely affected rights that the Supreme Court has articulated under

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221. *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 7 (Okla. 1992).

222. U.S. CONST. art. VI, cl. 2.

223. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

224. Roe v. Wade, 410 U.S. 113 (1973).

225. *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 7–9 (Okla. 1992).

226. *Id.* at 9–10.

227. *Id.* at 15 (Wilson, J., dissenting).

228. *Id.* at 17 n.12 (Wilson, J., dissenting).

229. *Id.* at 20–28. (Opala, C.J., dissenting).

230. *See, e.g.*, *In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012).

231. *In re Initiative Petition No. 349*, 838 P.2d at 7.

Casey, assuming it had ever been enacted and implemented. The same cannot be said, however, about initiatives that do not deal directly with abortion,[232] but rather mirror language from legislation that the Supreme Court refused to strike down prior to its implementation. [233]

The Supreme Court has made it clear that a court should not pass upon the constitutional validity of a state law which has not yet been applied to a party in the manner anticipated to cause injury.[234] This is due to the fact that without any "authoritative construction" of the law, "no constitutional question arises."[235] Thus, until the law is "applied to restrict the activities of [a party] in some concrete way" a court should not entertain a review because the court "'is not empowered to decide abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the results as to the thing in issue in the case before it.'"[236]

In *Webster*, the Court was asked to review the preamble of an Act passed by the Missouri Legislature that contained language similar to that found in the initiative struck down by the Oklahoma Supreme Court in *In re Initiative Petition No. 395*.[237] The Missouri Act set forth "findings" that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being."[238] Nevertheless, because the plaintiffs who brought the claim against the statute only alleged that the preamble might cause them injury if implemented a particular way, the Court refused to pass on the constitutionality of the preamble.[239] The Court also emphasized that every State has the authority "'to make a value judgment favoring childbirth over

232. The Oklahoma Supreme Court used the same arguments and logic applied in *In Re Initiative Petition No. 349* to invalidate an initiative that would define a "person" as any human being from the beginning of biological development to natural death. Petition for Writ of Certiorari at 2, *In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012), No. 12-145, 2012 WL 3109490, at *2.

233. Webster v. Reprod. Health Servs., 492 U.S. 490, 490 (1989).

234. *Id.* at 506; *see also* Ala. State Fed'n of Labor, Local Union No. 103 v. McAdory, 325 U.S. 450, 460 (1945).

235. *Webster*, 492 U.S. at 506.

236. *Id.* at 506–07.

237. *Compare Id.* at 490, *with* Petition for Writ of Certiorari, *In re* Initiative Petition No. 395 State Question No. 761, 286 P.3d 637 (Okla. 2012), No. 12-145, 2012 WL 3109490, at *2.

238. MO. REV. STAT. § 1.205.1(1), (2) (1986).

239. *See Webster*, 492 U.S. at 505–07.

abortion'" and that "[t]he preamble can be read simply to express that sort of value judgment."[240]

Additionally, the Supreme Court has repeatedly held that "'[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'"[241] Thus, Oklahoma may very well have the opportunity afforded to it that the Court provided Missouri.[242] In addition to its holding that the preamble of the Missouri law could be read to appropriately express "a value judgment favoring childbirth over abortion,"[243] the Court also held that the preamble could have been used to merely offer "protections to unborn children in tort and probate law."[244] Thus, until it was used to restrict the activities of the plaintiffs in some concrete way, it could not be held facially invalid.[245] Consequently, the Court decided to wait for it to be applied in a manner that actually restricted the activities of the plaintiffs.[246]

Similar to the situation faced by the Court in *Arizona v. United States*,[247] the *Webster* Court was confronted with, but refused to rule on, the substantive constitutionality of legislation prior to its *implementation*.[248] Conversely, in the case of a substantive review of proposed initiatives, state courts are striking them down before their *enactment*.

Oklahoma has blatantly misapplied federal law when it struck down language that mirrored language of the Missouri Act upheld by the Supreme Court in *Webster*.[249] In *In re Initiative Petition No. 395*, the challenged initiative had not even been enacted, much less implemented; thus, it is impossible that it restricted a party's rights in some concrete way.[250] Additionally, the Supreme Court might be able to find a set of circumstances in tort and probate law where that initiative would be

240. *Id.* at 506 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

241. Ward v. Rock Against Racism, 491 U.S. 781, 795–96 (1989) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982)).

242. *See Webster*, 492 U.S. at 506.

243. *Id.* (quoting *Maher*, 432 U.S. at 474).

244. *Id.*; *see also* Roe v. Wade, 410 U.S. 113, 161–62 (1973).

245. *Webster*, 492 U.S. at 506.

246. *Id.* at 506–07.

247. Arizona v. United States, 132 S. Ct. 2492, 2510 (2012).

248. *Webster*, 492 U.S. at 490.

249. Petition for Writ of Certiorari, *In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012), No. 12-145, 2012 WL 3109490, at *2.

250. *In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012).

constitutional, and thus a facial challenge would fail under the *Salerno* standard.[251] Therefore, because the Oklahoma Supreme Court should not be "'empowered to decide . . . abstract propositions, or to declare . . . principles or rules of law which cannot affect the result as to the thing in issue in the case before it,'" the only appropriate thing for the court to do is to wait for an actual case or controversy to be presented to it.[252]

IV. A LIMITED FEDERAL REMEDY

A. *When Federal Review of State Court Activity Is Appropriate*

The Supreme Court has afforded "considerable leeway" to states that provide for ballot initiatives to "protect the integrity and reliability of the initiative process, as they have with respect to election processes generally."[253] It has also stated that "'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions" and that it has yet to come upon a "'substitute for the hard judgments that must be made.'"[254] Nevertheless, "the First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas."[255] The Supreme Court has stated that it "has jurisdiction whenever 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'"[256] Where a state high court relies exclusively on federal law to strike down a ballot initiative, as the Oklahoma Supreme Court did in *In re Initiative Petition No. 349*, federal courts assuredly have jurisdiction to protect the liberty interests at stake involved in the ballot initiative process. [257]

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251. *See* United States v. Salerno, 481 U.S. 739, 745 (1987); *see also* Roe v. Wade, 410 U.S. 113, 161–62 (1973).

252. *Webtser*, 492 U.S. at 507 (quoting Tyler v. Judges of Court of Registration, 179 U.S. 405, 409 (1900)); *see also Valley* Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982).

253. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 191 (1999).

254. *Id.* at 192 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974) (citations omitted)).

255. *Id.*

256. Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 171 (2009) (quoting Michigan v. Long, 463 U.S. 1032, 1040–41 (1983)).

257. *See* 28 U.S.C. § 1331.

1. Adequate and Independent Grounds

Generally, issues involved in the state ballot initiative *process* implicate purely state issues. Further, when a state court's judgment relies on "adequate and independent state grounds," the right of the federal courts to review the matter is limited to merely "correct them to the extent that they incorrectly adjudge federal rights."[258] This doctrine requires a two-fold assessment—the *adequacy* of the state basis for decision and its *independence* from federal law.[259] This doctrine strikes a balance between a respect for the independence of state courts that is well ingrained in our federalist system and the right of federal courts to review a state court's judgment when it affects federal interests.[260]

Federal courts will assume that state courts felt that they were bound by federal law if (1) the state court decision "fairly appears to rest primarily on federal law," (2) that decision is "interwoven with the federal law," or (3) "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion."[261] Conversely, state courts may make it clear that they have merely used federal precedent in the same manner as other state courts, thus bolstering the interpretation that an opinion was decided on adequate and independent state grounds, by using a "plain statement in its judgment or opinion that the federal cases [were] used only for the purpose of guidance."[262]

This plain statement acts as a type of mechanical presumption that the state court decision is unreviewable, although such a presumption may be easily overcome with a showing that a federal interest is involved.[263] Despite the availability of this presumption by merely including one sentence, many of the courts that have declared ballot initiatives unconstitutional have not availed themselves of this protection from federal review.[264] Further, even if Oklahoma courts used such a statement, doing so would provide little

258. Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945).

259. CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 30 (Vicki Been et al. eds., 3d ed. 2009).

260. *Long*, 463 U.S. at 1040–41.

261. *Id.*

262. *Id.* at 1041.

263. MASSEY, *supra* note 259, at 31.

264. *See, e.g.*, Hessey v. Burden, 615 A.2d 562, 574 (D.C. 1992); State *ex rel.* Harper v. Waltermire, 691 P.2d 826 (Mont. 1984); Brosnahan v. Eu, 641 P.2d 200, 201 (Cal. 1982); Gray v. Winthrop, 156 So. 270, 272 (Fla. 1934).

protection as Oklahoma courts have blatantly relied upon federal law when declaring certain initiatives unconstitutional prior to their enactment.[265]

Specifically within the context of the ballot initiative process, the Supreme Court has left the door open on whether federal interests in political participation and discussion would justify federal review of these types of pre-enactment reviews.[266] Thus, a state court may find it difficult to claim that federal review of its decision would be precluded by the adequate and independent doctrine because of the strong federal interest in First Amendment rights.

2. Federal Interests Implicated in the Initiative Process

In *Meyer v. Grant*,[267] the Supreme Court found that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"[268] The Court also counseled that the speech at issue in that case was political discourse on a matter of public concern, which is "'at the core of our electoral process and of the First Amendment freedoms'" and was "an area of public policy where protection of robust discussion is at its zenith."[269] Consequently, because the case involved "a limitation on political expression," it was "subject to exacting scrutiny."[270] The Court therefore applied strict scrutiny and determined that Colorado's statute prohibiting the payment of circulators violated the First Amendment.[271]

There, the Supreme Court determined that protecting the exchange of political discourse on a matter of great public concern in the context of a ballot initiative was a worthwhile consideration. The Court again reiterated this concern within the context of ballot initiatives when it stated that the First Amendment requires the Court "to be vigilant in making those

265. *See In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012); *In re* Initiative Petition No. 349, 838 P.2d 1, 7–9 (Okla. 1992).

266. *See* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 192 (1999); Meyer v. Grant, 486 U.S. 414, 421-22 (1988).

267. *Meyer*, 486 U.S. 414 (1988).

268. *Id.* at 421–22.

269. *Id.* at 425 (quoting Buckley v. Valeo, 424 U.S. 1, 39 (1976)) (internal quotation marks omitted).

270. *Id.* at 420 (citing *Buckley*, 424 U.S. at 45).

271. *Id.* at 428.

judgments, to guard against undue hindrances to political conversations and the exchange of ideas."[272]

The interests federal courts have in protecting the rights guaranteed by the First Amendment that extend into the state ballot initiative process may be sufficient to compel federal review of a state court's pre-enactment decision to declare an initiative unconstitutional—especially when that court relies on federal law for its decision.[273] Government restrictions on the initiative right that limit the advocacy of legislation are "wholly at odds with the guarantees of the First Amendment."[274] Thus, the initiative right receives some protection from the federal Constitution to the extent that any state regulation of that right violates core political speech rights, equal protection, due process, right of association, etc.[275] The circuit courts, however, are divided over the review of state ballot initiative decisions.[276]

B. *Circuit Court Split over the Availability of Federal Appeal*

The federal courts of appeal are divided over the review of ballot initiatives and regulations thereof. They disagree as to the nature of the rights implicated when the initiative right is infringed as well as the standard of review to be applied when it occurs. The First and Ninth Circuits recognize the federal interests in the core political speech rights that are implicated in restrictions on the initiative right.[277] On the other hand, the Tenth, Eleventh, and District of Columbia Circuits are more hesitant to recognize the free speech implications with restrictions on and judicial involvement in the ballot initiative process.[278]

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272. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 192 (1999).

273. *See supra* note 24.

274. *Meyer*, 486 U.S. at 428 (quoting *Buckley*, 424 U.S. at 50).

275. *Election Law Manual*, *supra* note 17, at 4-2; *see also* Gallivan v. Walker, 54 P.3d 1069, 1101 (Utah 2002) (Thorne, J., dissenting).

276. *See generally* Angle v. Miller, 673 F.3d 1122, 1133 (9th Cir. 2012); Initiative and Referendum Institute v. Walker, 450 F.3d 1082, 1094 (10th Cir. 2006) (en banc); Wirzburger v. Galvin, 412 F.3d 271, 276 (1st Cir. 2005); Biddulph v. Mortham, 89 F.3d 1491, 1497–98 (11th Cir. 1996).

277. *Wirzburger*, 412 F.3d at 276; *Angle*, 673 F.3d at 1133.

278. *See* Initiative and Referendum Institute v. Walker, 450 F.3d 1082, 1094 (10th Cir. 2006) (en banc) (affirming a decision to strike down a ballot initiative prior to its enactment because pre-submission review of a ballot initiative does not restrict First Amendment Rights); Marijuana Policy Project v. United States, 304 F.3d 82, 85 (D.C. Cir. 2002) (holding that certain *procedural* requirements, such as a single subject limitation, are not so restrictive that they implicate the First Amendment); Biddulph v. Mortham, 89 F.3d 1491, 1497–98

In *Angle v. Miller*,[279] proponents of an initiative challenged the constitutionality of a Nevada rule that required a minimum number of signatures be collected from each district in Nevada before the initiative could receive placement on the ballot. The Ninth Circuit held that "as applied to the initiative process, . . . ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot."[280]

In *Wirzburger v. Galvin*,[281] the provision in the Massachusetts constitution prohibiting an initiative relating to public financing for private, religiously-affiliated schools was challenged on the grounds of free speech, free exercise of religion, and equal protection.[282] There, the court explained that ballot initiatives "provide[] a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative."[283] Citing *Meyer*, the court found that "the process involved in proposing legislation by means of initiative involves core political speech."[284]

The *Wirzburger* court also noted, however, that the state initiative procedure also includes regulations aimed at "*non-communicative impact*."[285] Because the regulations in that case were directed at this non-communicative aspect, the First Circuit concluded that intermediate scrutiny was the appropriate standard to apply.[286] The First Circuit did note, however, that where the government action "involved direct regulation of the petition *process* itself[,]" strict scrutiny would apply.[287]

In *Initiative & Referendum Institute v. Walker*,[288] the Tenth Circuit held that there was no violation of the First Amendment even where an initiative

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(11th Cir. 1996) (finding that there had not been a substantial restriction of political discussion).

279. Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012).

280. *Id.* at 1133 (finding in favor of the state because the court determined that the restrictions did not significantly inhibit proponents from placing the initiative on the ballot).

281. Wirzburger v. Galvin, 412 F.3d 271 (1st Cir. 2005).

282. *Id.* at 274.

283. *Id.* at 276.

284. *Id.*

285. *Id.* at 275 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 at 790 (2d ed.1988)).

286. *Id.* at 279 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

287. *Id.* at 277.

288. Initiative and Referendum Inst. v. Walker, 450 F.3d 1082 (10th Cir. 2006) (en banc).

was struck down as unconstitutional in a pre-enactment ruling by a state supreme court.[289] The court stated that "the Oklahoma Supreme Court had 'done nothing to restrict speech'" because no one had "been silenced by pre-submission content review."[290]

That court relied on an earlier case[291]—*Skrzypczak v. Kauger*.[292] There, the Tenth Circuit dismissed the plaintiff's challenge for lack of standing.[293] The Oklahoma Supreme Court had ruled that an initiative proposing a state constitutional amendment violated the federal constitution.[294] The plaintiff, however, was not even one of the proponents of the initiative that had been struck from the ballot.[295] She nevertheless asserted a First Amendment right to have the issue placed on the ballot.[296] Unsurprisingly, the court rejected that claim.[297]

The Eleventh Circuit declined to provide the kind of protection hinted at by the Supreme Court in *Meyer v. Grant*, where it ruled that ballot initiatives implicate "core political speech."[298] Rather, the Eleventh Circuit has held that "[a]bsent some showing that the initiative process substantially restricts political discussion . . . *Meyer* is inapplicable" in the context of a procedural challenge to rules such as a single-subject rule or a rule governing ballot titles.[299] Additionally, in *Marijuana Policy Project v. United States*,[300] the D.C. Circuit held that a restriction on the subject

289. *Id.* at 1100–01.

290. *Id.* at 1094 (quoting Skrzypczak v. Kauger, 92 F.3d 1050, 1053 (10th Cir. 1996)).

291. *Id.*

292. Skrzypczak v. Kauger, 92 F.3d 1050 (10th Cir. 1996).

293. *Id.* at 1053 ("We hold that Skrzypczak lacks standing because her complaint fails to allege an injury in fact.").

294. *Id.*

295. *Id.* at 1051.

296. *Id.*

297. *Id.*

298. Meyer v. Grant, 486 U.S. 414, 421–22 (1988); Biddulph v. Mortham, 89 F.3d 1491, 1497–98 (11th Cir. 1996).

299. *Biddulph*, 89 F.3d at 1497–98 (distinguishing between "regulation of the circulation of petitions—which is 'core political speech—and a state's general initiative regulations," which are not subject to heightened scrutiny); *see also* Gibson v. Firestone, 741 F.2d 1268, 1272–73 (11th Cir. 1984) ("The state, having created such a procedure, retains the authority to interpret its scope and availability.").

300. Marijuana Policy Project v. United States, 304 F.3d 82 (D.C. Cir. 2002).

matter of a proposed ballot initiative "restricts no speech"[301] and, therefore, "does not implicate the First Amendment."[302]

The confusion of the lower courts is evidenced by the differing standards applied to complaints by citizens seeking to exercise fundamental rights. This diversity of opinions underscores the need for the Supreme Court to resolve the conflict.[303] While most of the focus of these federal decisions revolved around limitations in the process, there have been very few decisions actually discussing pre-enactment reviews and subsequent declarations of unconstitutionality.[304] Other than in the Tenth Circuit, it would stand to reason that the courts would find pre-enactment declarations of the unconstitutionality of initiatives to be violative of the First Amendment because it constitutes a substantial restriction on political discussion.[305] Further, the Supreme Court's ruling in *Meyer* clearly indicates that the federal courts have an interest in protecting the "core political speech" rights that are implicated in the ballot initiative process.[306]

It may be argued that federal courts would be bound by an abstention or other doctrine that would require the court to refuse hearing the case;[307] however, no abstention doctrine would bar federal courts from reviewing a state court's decision to strike down an initiative if that state court relied on federal law to do so or if a federal interest is implicated. For example, the *Pullman* abstention doctrine[308] "allows federal courts to refrain from

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301. *Id.* at 85.

302. *Id.* at 86.

303. Specifically, the Court should address the tensions between (1) this state-created initiative right, (2) a state court judgment which may rely on federal substantive law, (3) the adequate and independent state grounds doctrine, and (4) the federal interests implicated in such an impediment to the people's ability to enact legislation.

304. *See* Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012) (discussing the constitutionality of the procedural signature requirement); Wirzburger v. Galvin, 412 F.3d 271 (1st Cir. 2005) (discussing the constitutionality of the exclusion of certain topics within the initiative right); Marijuana Policy Project v. United States, 304 F.3d 82 (D.C. Cir. 2002) (determining that procedural restrictions on the initiative right do not "substantially restrict[] political discussion"); Biddulph v. Mortham, 89 F.3d 1491, 1497–98 (11th Cir. 1996) (discussing general, procedural restrictions on the initiative right). *But see* Initiative and Referendum Inst. v. Walker, 450 F.3d 1082 (10th Cir. 2006) (en banc) (ruling that no speech was restricted even where an initiative was struck down as unconstitutional in a pre-election ruling by a state supreme court).

305. *See, e.g.*, Biddulph v. Mortham, 89 F.3d 1491, 1497–98 (11th Cir. 1996).

306. Meyer v. Grant, 486 U.S. 414, 421–22 (1988).

307. *See, e.g.*, Biddulph v. Mortham, 89 F.3d 1491, 1495 n.1 (11th Cir. 1996).

308. *See generally* Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).

deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions."[309] In this context, however, the state court has already had a full opportunity to hear the case. Thus, *Pullman* abstention would be inapplicable because a state court ruling would moot or narrow the constitutional issues implicated.[310] Further, *Burford* abstention[311] allows federal courts to abstain where the state courts likely have greater expertise in a particularly complex area of state law.[312] However, where a state court relies on federal law, as the Oklahoma Supreme Court did in *In re Initiative Petition No. 349*,[313] or where important federal interests are implicated, these abstention doctrines do not bar a federal court from reviewing the decision.

These federal interests should compel review of state court decisions to prematurely strike down ballot initiatives, especially where, as in Oklahoma, federal law provides the primary basis for that decision. The Supreme Court should resolve the conflict among the state and federal courts regarding the restriction of political discussion and the stifling of the legislative process through pre-enactment reviews of ballot initiatives. If it is consistent with its recent decision in *Arizona v. United States*,[314] the Court must determine that the issues of justiciability and general disfavor towards facial attacks would preclude such reviews in nearly all situations.[315] Proponents of ballot initiatives that have been faced with substantive challenges to those initiatives prior to their enactment should pursue a federal remedy where the state court has struck down that initiative primarily because of federal law or where core political speech has been stifled.

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309. San Remo Hotel v. City & Cnty. of San Francisco, 145 F.3d 1095, 1104 (9th Cir. 1998).

310. *Id.*

311. *See generally* Burford v. Sun Oil Co., 319 U.S. 315 (1943).

312. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 725 (1996).

313. *In re* Initiative Petition No. 349, 838 P.2d 1, 7–9 (Okla. 1992).

314. Arizona v. United States, 132 S. Ct. 2492 (2012).

315. In *Arizona*, the Court ruled that "[t]he Federal Government [had] brought suit against a sovereign State to challenge the provision even before the law [had] gone into effect." *Id.* at 2510. The Court refused to strike down the challenged section of the Arizona law because "[t]here is a basic uncertainty about what the law means and how it will be enforced." *Id.* If challenging the constitutionality of law after its *enactment* but prior to its *enforcement* was inappropriate, the Court would be hard pressed to justify allowing a state to challenge and declare ballot initiatives unconstitutional even prior to its *enactment*.

These proponents may petition a federal court of appeals for review[316] or even go directly to the United States Supreme Court.[317] They might even file a new lawsuit in federal district court under 42 U.S.C. § 1983 if a particular official, such as a Secretary of State, has refused to place the initiative on the ballot.[318] Regardless of the avenue taken by the proponents of an initiative, when a state has improperly impeded the people's right to enact legislation, the federal courts have an interest in entertaining a review if the state court has relied on federal law in its decision or if federal interests are implicated.

V. CONCLUSION

The American political order demands compliance with the simple axiom that "the legislature makes the laws, the executive enforces the laws, and the judiciary interprets and applies the laws."[319] In an effort to comply with this sentiment the Supreme Court has held that it is "improper to enjoin [a law] before the state courts [have] had an opportunity to construe it" after it has been enacted.[320] Further the Court has traditionally construed state laws in such a way that "avoid[s] doubtful constitutional questions."[321]

When a state court decides to entertain a pre-enactment review of a ballot initiative and strike it down as unconstitutional, it disregards and violates numerous traditions and concepts of American justice. This kind of action disregards the principle of self-government and the idea that political power inherently resides in the people.[322] It discounts principles of standing

316. *See generally* Petition for Writ of Certiorari, Initiative and Referendum Inst. v. Walker, 450 F.3d 1082 (10th Cir. 2006), No. 06-534, 2006 WL2985280.

317. *See generally* Petition for Writ of Certiorari, *In re* Initiative Petition No. 395 State Question No. 761, 286 P.3d 637 (Okla. 2012), No. 12-145, 2012 WL 3109490.

318. Biddulph v. Mortham, 89 F.3d 1491, 1494–95 (11th Cir. 1996). This last option, however, would require the proponents to prove that the *Rooker-Feldman* abstention doctrine is inapplicable. *See id.* at 1495 n.1; *see also* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 480–82 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923). The *Rooker-Feldman* doctrine generally provides that federal courts have no authority to review final judgments of state courts. *Biddulph*, 89 F.3d at 1495 n.1. To avail themselves of an exception to this doctrine, the proponents would have to prove that they had no "reasonable opportunity to raise [their] federal claim in state proceedings." *Id.* (quoting Powell v. Powell, 80 F.3d 464, 467 (11th Cir.1996)).

319. Collett, *supra* note 12, at 347.

320. *Id.* at 2496.

321. Fox v. Washington, 236 U.S. 273, 277 (1915); *see Arizona*, 132 S. Ct. at 2510.

322. Baker v. Carr, 369 U.S. 186, 222 n.48 (1962).

and ripeness[323] because legislation that has yet to be enacted cannot "restrict [a party's rights] in some concrete way."[324] It ignores the doctrine of the separation of powers[325] and amounts to an advisory opinion.[326] It removes the legislative authority from those vested with legislative power,[327] and fails to provide courts an opportunity to actually construe and apply the language of the initiative should it be enacted.[328]

Further, the Supreme Court has long understood that "public confidence" is "vitally critical to [the judiciary and] may well erode if self-restraint is not exercised in the utilization of the power to negate" the will of the people.[329] That public confidence is based upon a belief that "the people have authorized the judiciary to rule upon disputes based upon the law and that the court rulings are unbiased applications of existing law. Destroy confidence in either of these propositions, and the authority of the court disappears."[330] If the courts continue to ignore canons of justiciability,[331] lower the standards so that facial attacks may be brought more often and succeed with greater ease,[332] misapply federal law,[333] and trample on First Amendment speech,[334] they will continue to, in the eyes of the public, become more of a political branch that asserts its own legislative will.

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323. *See supra*, Part II.B.1.a.

324. Webster v. Reprod. Heath Servs., 492 U.S. 490, 506 (1989).

325. *See supra* Part II.B.1.b.

326. *See supra* Part II.B.1.c.

327. Threadgill v. Cross, 109 P. 558, 562–63 (1910); *see supra* note 212.

328. *See Webster*, 492 U.S. at 507; Roe v. Wade, 410 U.S. 113, 161–62 (1973); *see also supra* note 252.

329. United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

330. Collett, *supra* note 12, at 347.

331. *See supra* Part II.B.1.

332. *See supra* Part II.B.2.

333. *See supra* Part III.B.

334. *See supra* Part IV.A.2.