

# CHAPTER 4:

## STATE REGULATION OF BALLOT MEASURES

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### I. INTRODUCTION

#### A. NATURE OF BALLOT MEASURES

Many, but not all,<sup>1</sup> states recognize a citizen's right to place measures on the ballot by one or more of the processes known as initiative,<sup>2</sup> referendum, and recall. In some states, these exercises in direct democracy are a reserved power of the people recognized by the state constitution, while in others the ability to propose ballot measures exists only through a legislative grant of authority.<sup>3</sup>

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<sup>1</sup> See INITIATIVE & REFERENDUM INSTITUTE, [http://www.iandrinstitute.org/statewide\\_i&r.htm](http://www.iandrinstitute.org/statewide_i&r.htm) (last visited July 28, 2007) (listing state-by-state information on the initiative and referendum processes available).

<sup>2</sup> An initiative is a voter-proposed statute or constitutional amendment that is placed on the ballot by petition. Citizens use initiatives to bypass their governmental representatives and enact change directly.

<sup>3</sup> See, e.g., *Hoyle v. Priest*, 59 F. Supp. 2d 827, 835 (W.D. Ark. 1999).

The U.S. Constitution does not mandate that states allow their citizens to propose ballot measures,<sup>4</sup> but neither does the Constitution prohibit these powers.<sup>5</sup> If states offer their citizens the right to propose ballot measures, then the right receives federal constitutional protections because it implicates core political speech and any subsequent state regulation of the ballot measure process is subject to due process, equal protection, political association, and free speech-based constitutional challenges.<sup>6</sup> In addition, a state's constitution may offer additional protections.

In general, states regulate ballot measures to further their interests in:

- preventing fraud,<sup>7</sup> and
- promoting electoral integrity

## B. TYPES OF BALLOT MEASURES

States offer up to three types of ballot measures: initiative, referendum, and recall.

Voters can usually use their *initiative* power to propose:

- legislation,
- amendments to existing legislation, or
- amendments—and sometimes revisions<sup>8</sup>--to the state constitution.

Citizens' initiative-based legislative power is frequently considered "coequal, coextensive, and concurrent and of equal dignity" with the state legislature's.<sup>9</sup> Courts that review challenges to these powers generally construe the powers liberally and resolve doubts in favor of granting them to citizens if it is reasonable to do so.<sup>10</sup>

Initiatives are the most common type of ballot measure and the information in this chapter is primarily based on requirements for and challenges to the initiative process.

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<sup>4</sup> *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). See *Pac. States Telephone & Telegraph 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).

<sup>5</sup> See *Pac. States Telephone & Telegraph Co.*, 223 U.S. 118 (1912) (finding legal challenges to state's recognition of ballot measures premised on the Constitution's Guarantee Clause are non-justiciable political questions).

<sup>6</sup> See *Gallivan v. Walker*, 54 P.3d 1069, 1101 (Utah 2002) (Thorne, J., dissenting).

<sup>7</sup> *Buckley v. Am. Constitutional Law Found., Inc.* 525 U.S. 182, 204 n.23 (1999).

<sup>8</sup> See CENTER FOR STATE CONSTITUTIONAL STUDIES, NEW JERSEY CONSTITUTIONAL REFORM BACKGROUND PAPER #1, BACKGROUND ON CONSTITUTIONAL AMENDMENT AND REVISION 3 (2004), available at <http://www.camlaw.rutgers.edu/statecon/njtaxconvpapers/report1.pdf> (discussing the potential legal significance of amendments and revisions being generally considered two separate processes and potential legal significance of the distinction). Amendments alter existing constitutions by adding to or subtract from it while revisions replace an existing constitution with a new one.

<sup>9</sup> *Gallivan*, 54 P.3d at 1080 (citation omitted).

<sup>10</sup> *Legislature of State of Cal. v. Deukmejian*, 669 P.2d 17, 35 (Cal. 1983) (per curiam) (Richardson, J., dissenting).

Citizens use their power of *referendum* to challenge legislative enactments. A successful referendum prevents the targeted legislation from taking effect. If a referendum petition is not filed within the limited time available for it, or if the referendum fails to pass, the legislation becomes effective.

Voters use their *recall* power to hold an election whose goal is unseating an elected official whose term has not yet expired.

## C. STATE REGULATION OF BALLOT MEASURES

States have great leeway in regulating ballot measures to protect the integrity and reliability of the ballot measures.<sup>11</sup> States commonly regulate the process required for the proposed measure to qualify for the ballot. These ballot access regulations are discussed in detail in the next section.

States also commonly specify the amount of electoral support a ballot measure must receive in order to pass. To pass, the ballot measure may need to receive:

- a majority of the total votes cast specifically for or against the ballot measure,
- a super-majority of the votes,
- approval from a majority of voters who voted on any issue or race on the ballot, not necessarily the specific ballot measure or
- approval in two election cycles.

## II. STATE REGULATION OF BALLOT MEASURE BALLOT ACCESS

States usually establish a multi-step process that ballot measure proponents must follow to place their proposed measure on the ballot. This section provides a generic overview of the most common requirements to qualify an initiative proposal for the ballot. Referendum or recall proponents may need to follow slightly different processes.

In general, ballot measure proponents must:

1. present election officials with their intent to propose a ballot measure,
2. receive official approval for the proposal, assign a title to the proposed measure, and create a signature petition,
3. meet public support requirements,
4. receive certification for ballot access, and
5. provide election officials with voter education information about the proposal.

Ballot access requirements are challenged on compliance or constitutional grounds. Legal issues specific to a particular ballot qualification requirement are discussed along with the

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<sup>11</sup> *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 (1997), which upheld Colorado's age restriction, six month circulation limit and affidavit requirements on initiative petitions).

requirement. Common general procedural and substantive ballot measure legal challenges are discussed in a later section in this chapter.

## A. PRESENTATION OF INTENT

State statutes commonly require ballot measure proponents to notify election officials of their intent to propose a ballot measure. Proponents may also be required to register the proposal or classify its operation as:

- creating a new law,
- amending the state constitution, or
- amending an existing law.<sup>12</sup>

Because a referendum seeks to void legislative enactments, state statutes governing them typically allow only a short time after the legislation's passage during which its opponents must use the referendum process to overturn the legislation. If the referendum proponents fail to gather and present the requisite number of petition signatures in the allotted time, no referendum is held<sup>13</sup> and the legislation becomes effective as scheduled.

## B. MEASURE APPROVED/TITLE ASSIGNED/PETITION CREATED

Registered ballot measures are given a title that should convey the proposal's function,<sup>14</sup> but generally does not need to outline its every provision. Once the title is assigned, ballot measure proponents create and circulate signature petitions.

State statutes usually specify the signature petitions' format, including their size, structure, wording, layout, and contents. In addition, signature petitions generally must provide prospective signers with enough information about the proposal to allow them to understand what they are being asked to support.<sup>15</sup> Petitions are frequently invalidated if they fail to follow form and contents requirements.<sup>16</sup>

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<sup>12</sup> If ballot measure proponents fail to classify their measure when required to do so, the failure may be fatal to their efforts because the lack of classification prevents petition signers from knowing what they are supporting. See *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).

<sup>13</sup> See *State ex rel. Alexander v. Brown*, 554 N.E.2d 125 (Ohio Ct. App. 1988).

<sup>14</sup> See *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 290 (Wyo. 1994).

<sup>15</sup> See *Stumpf*, 839 P.2d at 124 (holding that proposed state constitutional amendments must be presented to would-be petition signers as amendments and not as "mere laws nor as a loosely worded aggregate of ideas and philosophical ruminations.").

<sup>16</sup> See *State ex rel. Vickers v. Summit County 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).

## C. PETITION CIRCULATION

The power to propose initiative, referendum, or recall measures is meaningless if the proposals never gain ballot access.<sup>17</sup> Circulating petitions to gather voters' signatures is usually an essential step to qualify a ballot measure for the ballot because it is the most common method ballot measure proponents must use to demonstrate the public's support for their proposal. A state's interest in electoral integrity and preventing fraud allow it some latitude to regulate petition circulation. Common petition-related state regulations include those that govern the following:

- circulators,
- signatures, and
- petition witnesses.

State laws that substantially restrict ballot access by imposing burdensome petition requirements are subject to strict scrutiny<sup>18</sup> because petition signature gathering is constitutionally-protected "core political speech."<sup>19</sup> Strict scrutiny requires the state to demonstrate that its regulation is narrowly drawn and the least restrictive means possible to achieve a compelling state interest. State statutes that cannot meet this test are unconstitutional.

### 1. Circulator Requirements

The Constitution protects petition circulation because petition circulators engage in one-on-one political communication when they ask individuals to sign a petition supporting a proposed ballot measure. State regulation of petition circulation that discourages or limits the number of potential petition circulators directly impact the ballot measure proponent's ability to communicate its message,<sup>20</sup> and may be unconstitutional. Courts analyze the impact of a state's petition circulator regulations by considering how many potential petition circulators would be disqualified if the regulation is given its full force and effect.<sup>21</sup>

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<sup>17</sup> See *Gallivan v. Walker*, 54 P.3d 1069, 1081 (Utah 2002) (finding that signing a petition is "inextricably connected" to the voter's right to vote because signing the petition serves a "gate keeping function" on the right to vote).

<sup>18</sup> *Hoyle v. Priest*, 59 F. Supp. 2d 827, 836 (W.D. Ark. 1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988)).

<sup>19</sup> *Meyer*, 486 U.S. 414, 421-22 (1988). *But see Hoyle v. Priest*, 59 F. Supp. 2d at 836 (finding petition requirements that do not 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).

<sup>20</sup> *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999).

<sup>21</sup> See *Meyer*, 486 U.S. 414 (striking down a ban on the use of paid petition circulators under threat of criminal penalty because, among other things, it would limit the number of voices who could speak on behalf of the proposed measure.); *Buckley*, 525 U.S. 182, 193 n.15 (striking down requirements that petition circulators be registered voters and wear name tags because the requirements would limit the pool of potential circulators by 400,000 – 964,000 individuals, and thus the voices who could convey the proponent's message).

Petition circulators are nonetheless subject to some state regulation and can be held personally accountable if they fail to comply with legitimate controls.<sup>22</sup> To date, the Supreme Court has ruled on the following state petition circulation regulations:

- limitations on payments to petition circulators,
- identification requirements, and
- registered voter requirements.

The Supreme Court has ruled that states may not prohibit *all* payment to petition circulators,<sup>23</sup> but has not specifically addressed whether states can prohibit per signature payments. One federal court held a state's per signature payment ban constitutional because it alleviated *known* fraud.<sup>24</sup> Another federal court overturned a state ban on per signature payments because the state could only *speculate* that allowing per signature payment would increase fraud.<sup>25</sup>

Because the First Amendment protects the right to engage in anonymous political speech, states may not require petition circulators to wear name tags.<sup>26</sup>

States cannot require petition circulators to be registered voters.<sup>27</sup> Those who are not, however, cannot sign the petition's validating affidavit if state law requires validation by a registered voter.<sup>28</sup>

States may require petition circulators to be adults because age is a common proxy for maturity, and the circulator's maturity is reasonably related to a state's interest in preserving electoral integrity.<sup>29</sup> In addition, age is a neutral standard that only temporarily postpones an individual's petition circulation opportunities.<sup>30</sup>

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<sup>22</sup> *Buckley*, 525 U.S. at 192 n.11 (1999).

<sup>23</sup> *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).

<sup>24</sup> See *Prete v. Bradbury*, 438 F.3d 949 (9<sup>th</sup> Cir. 2006) (finding the prohibition on per signature payment served the important state interest in preventing forgery and fraud).

<sup>25</sup> See *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).

<sup>26</sup> *Buckley*, 525 U.S. at 197-98 (opining that the desire to engage in anonymous speech is greatest when the ballot proposal is controversial).

<sup>27</sup> *Id.* at 194 (requiring the circulator to be a registered voter diminishes the potential for political speech and the state's interest in deterring lawbreakers among circulators can be accomplished in other ways, but not addressing whether the state could require petition circulators to be state residents because the issue was not raised).

<sup>28</sup> *Stumpf v. Lau*, 839 P.2d 120, 124 (Nev. 1992).

<sup>29</sup> *Buckley*, 525 U.S. at 191 n.10 (noting *Am. Constitutional Found., Inc. v. Meyer*, 120 F.3d 1092 which upheld the state's requirement that petition circulators must be at least eighteen years old was not appealed).

<sup>30</sup> *Id.* at 191 n.10 (noting this portion of *Am. Constitutional Found., Inc. v. Meyer*, 120 F.3d 1092 was not appealed).

## 2. Signature Requirements

State petition signature-related regulations commonly include the following:

- numerical requirements,<sup>31</sup>
- geographic distribution requirements, and
- restrictions on who may sign the petition.

### a. Numerical Requirements

State law specifies how many signatures ballot measure proponents must gather to gain ballot access for their proposal. The number may be fixed, a specified percentage of registered voters, or a percentage of those who voted in a recent election, frequently the last gubernatorial election. Ballot measure proponents may be prohibited from filing amended or supplemental petitions after the initial deadline to submit signatures passes, so it is essential they initially submit the proper number of signatures.

Ballot measure proponents who must submit a number of signatures equal to a percentage of voters who participated in a past election may ask the court to determine the appropriate measuring election when the signature collection period extends over more than one election. One court held that the measuring election was the one that occurred directly preceding the petition submission date, rather than the election held directly preceding the date the petition process began.<sup>32</sup> In this case, voter turnout had significantly increased during the second election, the ballot measure's proponents did not submit enough signatures to meet the higher requirement, and the proposed ballot measure failed to earn ballot access.<sup>33</sup>

### b. Geographic Distribution Requirements

Some states require ballot measure proponents to gather supporting signatures from throughout the area that would be affected by the enacted measure. These geographical distribution requirements are vulnerable to Equal Protection Clause challenges,<sup>34</sup> especially if the signature distribution requirements give sparsely populated rural areas a disproportionate veto power even when the measure enjoys widespread overall support.<sup>35</sup> For example, an Equal Protection violation occurred when ballot measure proponents were required to submit

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<sup>31</sup> The number may be expressed as an absolute number or as a percentage of registered voters or a percentage of voters who voted in a specified prior election.

<sup>32</sup> See *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281 (Wyo. 1994) (finding the ballot measure proponents failed to meet higher petition signature requirements because the date of final petition submission controlled the election to which the signature requirement was benchmarked, which here enjoyed greatly increased voter turnout).

<sup>33</sup> See *id.*

<sup>34</sup> The state constitution may provide greater Equal Protection guarantees than the U.S. Constitution.

<sup>35</sup> See *Idaho Coal. United for Bears v. Cenarrussa* 342 F.3d 1073 (9<sup>th</sup> Cir. 2003); *Gallivan v. Walker*, 54 P.3d 1069, 1095 (Utah 2002).

supporting petitions from half the state's forty-four counties, notwithstanding the fact that sixty percent of the state's population was concentrated in only nine counties.<sup>36</sup>

When reviewing geographic signature distribution requirements for potential constitutional violations, a court analyzes:

- the number of political subdivisions that must be represented,
- the signature requirements for each subdivision compared to the total statewide requirement, and
- the state's population distribution.<sup>37</sup>

### c. Restrictions on Who May Sign the Petition

States commonly require petition signers to be legal voters. Courts may be asked to determine the qualifications a legal voter must possess. One court held that a newly registered voter was not a legal voter until the permanent voter registrar received and acknowledged the voter registration form.<sup>38</sup> Under this definition, individuals who signed a petition at the same time they completed their voter registration applications were not legal voters, hence their petition signatures were invalid.<sup>39</sup> Another court held that a voter who moved without updating his voter registration application was not qualified to sign a petition because he was no longer a "registered qualified voter." Although registered at his old address, he was no longer qualified to vote there and though he was qualified to vote in his new precinct, he was not registered there.<sup>40</sup>

## 3. Witness/Attestation Requirements

Individual petition signatures or the petition as a whole may need to be witnessed or attested. State statutes may set qualification requirements for the individual who serves as a witness. Failure to comply with these requirements may invalidate individual signatures or the entire petition.<sup>41</sup>

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<sup>36</sup> *Idaho Coal. United for Bears*, 342 F.3d 1073. See also *Gallivan*, 54 P.3d at 1088 (finding state Equal Protection and uniform operation of laws violations in a petition signature requirement that gave disproportionate power to lightly populated rural counties).

<sup>37</sup> See *Anderson v. Spear*, 356 F.3d 651 (6<sup>th</sup> Cir. 2004) (finding no valid distinction between ballot access for a candidate and ballot access for an initiative measure when determining if an equal protection violation exists).

<sup>38</sup> See *Hoyle v. Priest*, 59 F. Supp. 2d 827, 830 (W.D. Ark. 1999).

<sup>39</sup> See *id.*

<sup>40</sup> See *Schaaf v. Beattie*, 265 Cal. App. 2d 904, 910 (Ct. App. 1968) (noting voter's remedy was to register in his precinct and then to sign the petition).

<sup>41</sup> See *State ex rel. Newell v. Tuscarawas County Bd. of Elections*, 757 N.E.2d 1135, 1142 (Ohio 2001) (per curiam) (Douglas, J., dissenting) (holding where wife signed petition for her husband, witness's claim to have witnessed both signatures was incorrect and entire part-petition was stricken for failure of proper witnessing); *Stumpf v. Lau*, 839 P.2d 120, 124 (Nev. 1992) (finding where a petition circulator did not have to be a registered voter, but all "signers" did, when circulator signed the validating affidavit, his signature invalidated the entire petition).



## D. CERTIFICATION FOR BALLOT ACCESS

If timely submitted petitions meet all format, content, circulator, signature, attestation, and other requirements, then the ballot measure should be certified and placed on the ballot.

## E. REQUIRED BALLOT INFORMATION

Voters must have information about the ballot measure before they vote on it. State laws usually specify the information voters must receive. States generally require this information to be printed on the ballot and posted or otherwise available at the polling place.

# III. COURT INVOLVEMENT IN BALLOT MEASURE ISSUES

Ballot measure-related challenges come before the court as procedural or substantive challenges. Before courts evaluate ballot measure challenges, however, they must first consider whether review is appropriate.<sup>42</sup> In general, pre-election review of procedural challenges is appropriate. Many courts take a different approach to pre-election review of substantive challenges, although the majority of them conduct pre-election review under some circumstances.

## A. PROCEDURAL CHALLENGES

Procedural challenges to a state's ballot measure ballot access process generally take one of two forms:

1. disputes over whether the proponents met the compliance requirements, and
2. constitutional challenges to the requirements themselves.

A ballot measure's proponents or opponents<sup>43</sup> may file a compliance-based procedural challenge to an administrative decision permitting or denying initial approval of a ballot measure or a subsequent decision on ballot access.<sup>44</sup> During procedural challenges, ballot measure proponents usually claim that the ballot measure satisfied all applicable requirements for approval or ballot access, but was nonetheless denied a spot on the ballot. The ballot measure's opponents, on the other hand, claim the ballot measure failed to qualify for ballot

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<sup>42</sup> 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 *Tilson v. Mofford*, 737 P.2d 1367 (Ariz. 1987) (en banc) (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).

<sup>43</sup> In some states, any registered voter may object to a ballot measure. See *Ellis v. Roberts*, 725 P.2d 886, 889 (Or. 1986) (noting that because the potential plaintiff pool exceeded one million registered voters, determining if any individual plaintiff had standing was a waste of time).

<sup>44</sup> In addition to the procedural steps outlined earlier in this chapter, any additional procedures the state requires can also provide the basis for a compliance-based challenge.

access and should be denied ballot access or removed from the ballot.<sup>45</sup> Unless election officials' decision to grant or deny ballot access to a ballot measure is administratively unreviewable, states may require plaintiffs to exhaust all administrative review avenues before filing a compliance-based lawsuit. Occasionally, even if all administrative review is exhausted, court review may be limited or unavailable.<sup>46</sup>

Ballot measure compliance-based procedural challenges may be subject to laches, even when they are filed before the election. Laches arises when the plaintiff's delay in suing prejudices another party.<sup>47</sup> For example, a court applied laches to dismiss a lawsuit because the plaintiff waited more than two months before challenging election officials' decision that his referendum petition contained too few valid signatures to qualify for the ballot.<sup>48</sup> In addition, compliance-based procedural disputes may be mooted if they are not filed until after the election.<sup>49</sup>

Courts may issue a writ of mandamus to compel ballot access for a measure that was wrongfully denied it, or issue an injunction or a writ of mandamus to compel denial of approval or removal of a measure from the ballot where approval was granted in error.

A second type of procedural challenge attacks the constitutionality of the procedural requirements. Constitutional challenges to specific requirements are addressed in the discussion of individual ballot measure ballot access requirements, above.<sup>50</sup>

## B. SUBSTANTIVE CHALLENGES

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<sup>45</sup> Note that opponents sue the state officer, generally the Secretary of State, who authorized the ballot measure, and not the ballot measure proponents, although they may be able to intervene.

<sup>46</sup> See *Hoyle v. Priest*, 59 F. Supp. 2d 827, 831 (W.D. Ark. 1999) (finding that the court could not review the decision of the Secretary of State to deny to the petition on insufficient signature grounds because the court only had authority to do so after the petition was fully certified in all respects, including signature requirements and ballot title, and that the court could not offer the requested relief).

<sup>47</sup> Laches occurs when the plaintiff's delay in bringing a lawsuit prejudices—harms—another party. In an election context, prejudice may occur when election deadlines pass. See *State ex rel. Fidanque v. Paulus*, 688 P.2d 1303, 1307-08 (Or. 1984) (expressing a wariness of last minute challenges because of prejudice to the defendant and petition circulators and the unreasonable burden placed on the court, which is placed in the position of having to “steamroll” through “delicate legal issues,” so the deadline for fixing the ballot can be met) (citation omitted). See *infra* Chapter 10: Statutes of Limitations and Laches for additional information on laches.

<sup>48</sup> See *State ex rel. Alexander v. Brown*, 554 N.E.2d 125, 127-28 (Ohio Ct. App. 1988) (finding the ballot creation deadlines and immovable election date justified laches).

<sup>49</sup> *Quarles v. Kozubowski*, 507 N.E.2d 103 (Ill. App. Ct. 1987) (noting the validity of petitions is supposed to be challenged pre-election so that the trouble and expense of an election is spared if the petition fails and to ensure the challenger does not gamble on the outcome of the election). But see *Quarles*, 507 N.E.2d 103 (determining the post-election challenge to a liquor control petition post-election was not moot because its passage damaged the challenger by depriving him of his liquor license and the case had substantial public interest).

<sup>50</sup> See *Montero v. Meyer*, 13 F.3d 1444, 1448 (10<sup>th</sup> Cir. 1995) and *Dobrovolny v. Moore*, 126 F.3d 1111 (8<sup>th</sup> Cir.1997) *Hoyle v. Priest*, 59 F. Supp. 2d 827, 837 (W.D. Ark. 1999) (finding no federal constitutionally protected right to have one's own ballot title used).

Many states do not allow their citizens to propose initiatives on the full range of issues addressable by state legislators. States that restrict their citizens' legislative authority frequently impose subject matter requirements that limit initiatives to defined arenas, such as enacting laws or proposing constitutional amendments, or limit proposals to a single subject or amendment. Substantive challenges usually allege that the ballot measure's topic or function oversteps these state-imposed boundaries. Although ballot measures should generally receive ballot access if their proponents satisfied all necessary procedural requirements, the measure's substantive validity may be considered separately and ballot access may be denied for substantive flaws.<sup>51</sup>

Unlike most other areas of election law where pre-election review is universally favored, pre-election review of an initiative's substance may be disfavored. In many, but not all, states substantive or content-based challenges are commonly reserved for post-election review,<sup>52</sup> unless the measure is clearly invalid<sup>53</sup> or serious consequences "will result" if the review were postponed until after the election.<sup>54</sup>

A measure may be clearly invalid because its proposal is unconstitutional under the state or federal constitution or because the proposal strays outside the recognized topics for ballot measures.<sup>55</sup> Thus, courts may deny ballot access to ballot measures that do not propose laws, constitutional amendments, or referenda, especially where the proposed measure is designed to allow voters to "express themselves"<sup>56</sup> in a straw poll.<sup>57</sup>

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<sup>51</sup> See *State ex rel. Fidanque v. Paulus*, 688 P.2d 1303, 1307 (Or. 1984); *Lowe v. Keisling*, 882 P.2d 91, 99 (Or. Ct. App. 1994) (en banc); *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 286 (Wyo. 1994) (finding pre-enactment challenges are justiciable "if the initiative addresses subject matter that is excluded from or proscribed by the initiative process as delineated in the constitutional measure"); *Foster v. Citizens for Union Avenue*, 790 P.2d 1, 4 (Or. 1990) (finding proper compliance alone is insufficient to place a measure on the ballot where it is otherwise legally insufficient to qualify, here because the measure proposes an administrative, and not a legislative, matter).

<sup>52</sup> See *Tilson v. Mofford*, 737 P.2d 1367, 1370 (Ariz. 1987) (en banc) (noting that a procedural violation must be reviewed pre-election, while substantive legality is reviewable only post-election and then only when it is an issue in a specific case).

<sup>53</sup> *Legislature of the State of Cal. v. Deukmejian*, 669 P.2d 17, 33 (Cal. 1983) (per curiam) (Richardson, J., dissenting); *Am. Fed. of Labor-Congress of Indus. Orgs. v. Eu*, 686 P.2d 609, 615 n.11 (Cal. 1984) (finding that although the court based its review on the grounds that the initiative exceeded the people's initiative powers, other cases have suggested that under its equitable discretion powers, courts may conduct a pre-election review "upon a compelling showing that the substantive provisions of the initiative are clearly invalid.") (citations omitted). Note that the majority rule allows pre-election review under these circumstances. See also *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 286 (Wyo. 1994) (noting that courts with a history of denying ballot access to proposed initiatives because the electorate has no right to enact an unconstitutional law may review proposed initiative on that basis alone).

<sup>54</sup> See *Legislature of the State of Cal.*, 669 P.2d at 20-21 (noting that if review of the proposed redistricting plan was postponed until post-election, upcoming elections based on the redistricting plan would be significantly impacted, the special election called to vote on the plan would cost fifteen million dollars and the proposed changes would be difficult to implement and publicize in time for orderly elections).

<sup>55</sup> See *Am. Fed. of Labor-Congress of Indus. Orgs.*, 686 P.2d at 615.

<sup>56</sup> See *Stumpf v. Lau*, 839 P.2d 120, 122 (Nev. 1992) (holding term limits initiative did not fall into proper subject matter and thus was not qualified to appear on the ballot); *American Federal of Labor-Congress of*

Courts that conduct pre-election substantive reviews of proposed initiatives sometimes highlight the distinctions between the initiative process and the legislative process to distinguish why the court will conduct a pre-enactment review of the initiative although it would defer a pre-enactment review of pending legislation. For example, once an initiative has been submitted to the voters, its language is unalterable, but legislation can be amended at any point in the legislative process until it is enacted.<sup>58</sup> In addition, courts may justify pre-election review because of institutional concerns, particularly when the initiative is advanced as a “straw poll.”<sup>59</sup>

When courts defer their review until after the election, they commonly justify their preference on the following grounds:

- a pre-election opinion would be advisory only,<sup>60</sup>
- judicial economy is preserved by waiting to see if the measure passes before reviewing it, or
- separation of powers requires the court to limit its pre-election review of initiatives just as the court does not conduct a pre-enactment review of the legislature’s actions.<sup>61</sup>

The most frequently alleged substantive violations of the citizenry’s initiative power are discussed below.

## 1. Single Issue

States frequently require that initiative proposals create a single statute or constitutional amendment.<sup>62</sup> Single-issue<sup>63</sup> requirements prevent logrolling by allowing voters to separately approve or reject each proposition or amendment.<sup>64</sup> Single-issue rule violations occur when multiple amendments or statutes masquerade as one. A single-issue rule violation is suggested when a proposed amendment or statute’s subparts:

- do not need to stand or fall as a whole,
- do not add to the consistency or workability of the entire constitution, or

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*Indus. Orgs.*, 686 P.2d at 613 (noting that initiatives are the means to enact legislation and are not public opinion polls).

<sup>57</sup> BLACK’S LAW DICTIONARY 1461 (8<sup>th</sup> ed. 2004) (defining a straw poll as a “nonbinding vote, taken as a way of informally gauging support or opposition but usu. without a formal motion or debate”).

<sup>58</sup> See *Wyo. Nat’l Abortion Rights Action League*, 881 P.2d at 289 (noting the amendment processes and compromises inherent in the legislative process that are missing in an initiative because once the initiative has been enacted by the voters, its language is immutable).

<sup>59</sup> See *Stumpf*, 839 P.2d at 126.

<sup>60</sup> *Wyo. Nat’l Abortion Rights Action League*, 881 P.2d at 286; *Lowe v. Keisling*, 882 P.2d 91, 99 (Or. App. 1994) (en banc); *Foster v. Citizens for Union Avenue*, 790 P.2d 1, 4 (Or. 1990).

<sup>61</sup> See *Tilson v. Mofford*, 737 P.2d 1367, 1369 (Ariz. 1987) (en banc).

<sup>62</sup> See *id.* at 1370 (state constitution contains a single-issue requirement). Note that closely related subparts may be included in the proposal.

<sup>63</sup> Sometimes known as “single subject” requirements.

<sup>64</sup> *Tilson*, 737 P.2d at 1370; *McFadden v. Jordan*, 196 P.2d 787, 797 (Cal. 1948) (en banc). Logrolling combines dissimilar propositions into a single statute or amendment in the hopes that voters will support the whole because they favor one distinct part of it.

- do not appear likely to gather equal voter support if separately presented.<sup>65</sup>

Some states allow pre-election review for single-issue violations<sup>66</sup> and some do not.<sup>67</sup> In states that allow review, courts can order initiative proposals that violate single-issue requirements kept off or removed from the ballot.

## 2. Constitutional Amendment vs. Revision

Citizens can generally use their initiative power to amend, but not revise, the state constitution.<sup>68</sup> Amendment and revision are two distinct procedures.<sup>69</sup> Amendments operate “within the line” of the original constitution<sup>70</sup> by bringing changes that must logically stand or fall as a whole and make the amended constitution consistent and workable in its entirety.<sup>71</sup> Amendments improve or better carry out the constitution’s original purpose.<sup>72</sup> Constitutional revisions, in contrast, operate “beyond the line” of the existing constitution<sup>73</sup> by substantially altering the original constitution’s purpose or objective.<sup>74</sup>

The court may need to determine whether a proposed initiative would amend or revise the state constitution. One court determined a challenged proposal—which ran to fifty-six pages—was either a revision or a new constitution and not an amendment because the proposal thoroughly overhauled the existing constitution and was a complete constitution in itself.<sup>75</sup> Another court determined a challenged proposal was not an amendment in part because the proposal would have entirely repealed or substantially altered fifteen of the twenty-five articles in the existing constitution.<sup>76</sup>

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<sup>65</sup> *Id.* at 1370.

<sup>66</sup> *See* *Or. Educ. Ass’n v. Roberts* 721 P.2d 833, 834 (finding that a change in the wording of the state constitution now requires the Secretary of State to determine whether an initiative complies with the single subject rule before voters adopt it).

<sup>67</sup> *See* *Tilson*, 737 P.2d at 1369 (stating court’s power to enjoin an initiative proposal is limited to cases where the petition 1) is defective in form, 2) contains an insufficient number of signatures, or 3) procedure was not followed).

<sup>68</sup> Special rules may also apply when the state legislature wants to revise the constitution.

<sup>69</sup> *McFadden*, 196 P.2d at 797-98 (noting that the electorate may vote on amendments presented by initiative, but that constitutional revisions must first be articulated and ratified by a constitutional convention before they are presented to the electorate for final approval).

<sup>70</sup> *Id.* at 799.

<sup>71</sup> *Tilson*, 737 P.2d at 1370.

<sup>72</sup> *McFadden*, 196 P.2d at 799.

<sup>73</sup> *Id.* at 796 (noting that where fifteen of the twenty-five articles in the existing state constitution would be entirely repealed or substantially altered by the proposed amendment, at least four new topics would be added, and both the judicial and legislative branches would have powers extensively curtailed, the proposition was not an amendment as was claimed, but a wholesale revision of the state constitution that could not be presented via initiative).

<sup>74</sup> *Id.* at 799.

<sup>75</sup> *Holmes v. Appling*, 392 P.2d 636, 639 (Or. 1964) (en banc).

<sup>76</sup> *McFadden v. Jordan*, 196 P.2d 787, 796 (Cal. 1948) (en banc).

### 3. Measure Exceeds Legislative Authority

Many states limit their citizen's legislative power. Depending on an individual state's constitution and statutes, a proposed initiative may exceed the citizenry's legislative ability when it:

- appropriates funds,<sup>77</sup>
- performs administrative tasks,<sup>78</sup>
- expresses wishes rather than directly enacts legislation,<sup>79</sup>
- renders an administrative decision,<sup>80</sup>
- adjudicates a dispute,<sup>81</sup> or
- seeks to repeal or rescind existing legislation.<sup>82</sup>

In states that recognize pre-election administrative or judicial review of an initiative to ensure it remains within legal limits, courts can remove a non-complying measure from the ballot or uphold an administrative decision denying ballot access.

### 4. Constitutionality

State courts differ in whether they have the authority to conduct a pre-election review of a proposed ballot measure's constitutionality. Although a majority of courts will only review the constitutionality of an initiative after it has been enacted,<sup>83</sup> other courts have decided they will:

- review, but allow the ballot measure to appear on the ballot even if the court believes the ballot measure to be unconstitutional in whole or in part,<sup>84</sup>

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<sup>77</sup> *Dorsey v. D.C. Bd. of Elections & Ethics*, 648 A.2d 675 (D.C. 1994) (seeking to reduce parking fines and providing amnesty for other parking violations).

<sup>78</sup> *Foster v. Citizens for Union Avenue*, 790 P.2d 1 (Or. 1990) (renaming a street). Although it may be difficult to distinguish legislative from administrative matters, as a rule, legislative matters make permanent laws of general applicability while administrative matters implement the general rules.

<sup>79</sup> *Am. Fed. of Labor-Congress of Indus. Orgs v. Eu*, 686 P.2d 609, 623 (Cal. 1984) (ordering the state legislature to apply for a constitutional convention). If the topic can be enacted directly through an initiative, citizens should do so directly rather than utilize an initiative to order the legislature to act on their behalf.

<sup>80</sup> *Id.* at 627.

<sup>81</sup> *Id.*

<sup>82</sup> *Schaefer v. Vill. Bd. of Vill. of Potosi, Grant County*, 501 N.W.2d 901, 902 (Wis. Ct. App. 1993) (using referendum powers that were no longer available to the electorate).

<sup>83</sup> 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-election challenges to an initiative's constitutionality are not justiciable).

<sup>84</sup> See *Greater Las Vegas Chamber of Commerce v. Del Papa*, 802 P.2d 1280, 1281 (Nev. 1990) (noting the court has never voided a ballot measure because it might violate the U.S. Constitution in the future); *Wyo. Nat'l Abortion Rights Action League*, 881 P.2d at 289 (finding proposed ballot measure needed to be unconstitutional *in toto* before it would be enjoined from the ballot, especially where it had a severability clause); *Stumpf v. Lau*, 839 P.2d 120, 127 (Nev. 1992) (Steffen, J., dissenting) (finding that the court's own prior decisions hold that it *may* enjoin the measure when it is unconstitutional, "nugatory," or "incapable of being made operative," but is not required to do so) (emphasis in original).

- review and prohibit a *clearly* unconstitutional ballot measure from appearing on the ballot,<sup>85</sup>

Whether courts may review a proposal's constitutionality may also depend on whether it is alleged to violate the state or the federal constitution.<sup>86</sup>

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<sup>85</sup> See *Wyo. Nat'l Abortion Rights Action League*, 881 P.2d at 286 (listing cases in which state courts have allowed pre-election constitutional challenges because the electorate has no right to enact unconstitutional laws).

<sup>86</sup> *Stumpf*, 839 P.2d at 122 (review federal and state); *Legislature of State of Cal. v. Deukmejian*, 669 P.2d 17, 26 (Cal. 1983) (per curiam) (review federal and state); *Wyo. Nat'l Abortion Rights Action League*, 881 P.2d at 288 (review federal and state); *Greater Las Vegas Chamber of Commerce v. Del Papa*, 802 P.2d 1280, 1281-82 (Nev. 1990) (review state only as it is "unwise" to void a ballot measure that might be in violation of the federal constitution).