



5-1-1986

New Limits on the California Initiative: An Analysis and Critique

Greg M. Salvato

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Greg M. Salvato, *New Limits on the California Initiative: An Analysis and Critique*, 19 Loy. L.A. L. Rev. 1045 (1986).

Available at: <https://digitalcommons.lmu.edu/llr/vol19/iss3/11>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

NEW LIMITS ON THE CALIFORNIA INITIATIVE: AN ANALYSIS AND CRITIQUE

*All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.**

I. INTRODUCTION

The initiative power, the power to propose or reject laws by direct action of the people,¹ is a continual source of controversy in California politics. The typical subjects of recent California initiatives are highly charged, emotion-laden issues that have defied resolution in the normal legislative process; they are not the routine measures that otherwise occupy much of the legislature's time. Precisely because so many current political controversies find public expression through the initiative process, the permissible scope and use of the initiative power is important. Because so many broad and noteworthy measures are proposed as initiatives, a close scrutiny of the case law surrounding the initiative power is warranted.

As it has been employed in California, the initiative has been a potent force on the political landscape. Californians have resorted to the use of the initiative more often than the citizens of any other state.² Although only a small fraction of the laws enacted each year are enacted through the initiative process,³ Californians have used the initiative to

* CAL. CONST. art. II, § 1.

1. The initiative power is reserved to the people of California in article IV, section 1 of the California Constitution: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." CAL. CONST. art. IV, § 1.

The initiative is described in article II, section 8(a) of the California Constitution: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." CAL. CONST. art. II, § 8(a).

2. Between October, 1911 and December, 1984, 573 initiatives (554 direct, 19 indirect) were circulated. Of these, 184 have qualified for the ballot and four qualified for submission to the legislature. Fifty-two initiatives were approved by the voters, one indirect initiative was approved by the legislature. CAL. SEC'Y OF STATE MARCH FONG EU, A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS, Dec. 1984, at 8 (updated annually) [hereinafter cited as HISTORY OF THE CALIFORNIA INITIATIVE]. For a discussion of the indirect initiative in California, see *infra* note 25.

3. For example, 6394 bills were introduced and 3087 bills were enacted by the California Legislature during the 1983-84 legislative session. ASSEMBLY FINAL HISTORY, 1983-84 Reg. Sess., at 34. During the same two year period, 44 initiatives were circulated and nine of these qualified for the ballot. Of the nine, three were enacted by the voters. HISTORY OF THE CALIFORNIA INITIATIVE, *supra* note 2, at 39-41.

adopt major, sweeping measures with dramatic effects.⁴

This use of the initiative power in California has generated a long and lively debate. Vigorous criticism and calls for reform are met by equally staunch defenses. Critics perceive a process captured by special interests and too easily manipulated by misleading advertising and excessive campaign spending.⁵ Supporters defend the initiative as an admittedly flawed but vital recourse for voters against the actions or inaction of an unresponsive legislature.⁶

The initiative power is grounded in the California Constitution.⁷ The constitution, however, provides few limitations on the breadth and scope of this power.⁸ Within the sketchy outline set out in the constitution, courts have shaped the permissible limits of the initiative power. Traditionally, California courts have applied a liberal and expansive construction to the initiative.⁹ The judiciary has been reverential in its praise: the initiative powers have been described as "very favored and

4. Three of the most notable examples are Proposition 8, known as the "Victim's Bill of Rights" initiative, enacted in the June, 1982 election; Proposition 13, the Jarvis-Gann property tax limitation, enacted in the June, 1978 primary election; and Proposition 9, known as the "Fair Political Practices Act," enacted in the November, 1974 general election. As testimony to the fact that politicians are wary of direct legislation, in the 1983-84 legislative session alone, 22 measures were introduced to modify the initiative and referendum power or process. None was successful.

5. See, e.g., LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST?* (1984); Comment, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922 (1975) [hereinafter cited as Comment, *California Initiative Process*]; Montoya, *Government by Initiative is Getting Out of Hand*, L.A. Times, Sept. 9, 1984, pt. IV, at 5, col. 1.

6. See, e.g., Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717 (1966) [hereinafter cited as Comment, *Scope of the Initiative*]; Nielsen, *California's Legislators Asked for Their Comeuppance*, L.A. Times, Oct. 14, 1984, pt. IV, at 5, col. 4; *Letters to the Editor*, L.A. Times, Sept. 21, 1984, pt. II, at 4, col. 3.

7. See *supra* note 1.

8. Other than the brief mention of the initiative power in article IV, *supra* note 1, and in article XVIII, section 3, which provides for amendments to the constitution by initiative, CAL. CONST. art. XVIII, § 3, all constitutional limitations on the initiative power are contained in article II, entitled "Voting, Initiative and Referendum, and Recall." Article II specifies the number of signatures required to propose an initiative, CAL. CONST. art. II, § 8(b), that initiatives may be voted upon at either a general or special election, CAL. CONST. art. II, § 8(c), and that an initiative may not "embrac[e] more than one subject." CAL. CONST. art. II, § 8(d). Initiatives may not name an individual to hold an office, or a private corporation to perform a function or have any power or duty. CAL. CONST. art. II, § 12. Beyond this sketchy outline, the legislature is required to provide for the manner in which initiative petitions shall be circulated, presented, certified and submitted to the voters. CAL. CONST. art. II, § 10(e). The legislature is also directed to establish procedures for the exercise of the initiative and referendum powers at the local level. CAL. CONST. art. II, § 11.

9. See generally Comment, *Scope of the Initiative*, *supra* note 6; Note, *Los Angeles County Transp. Comm'n v. Richmond: Taking the Initiative*, 17 LOY. L.A.L. REV. 937 (1984).

special rights,"¹⁰ as "one of the outstanding achievements of the progressive movement"¹¹ and as an expression of "one of the most precious rights of our democratic process."¹² The California Supreme Court has declared that it is "our duty jealously to guard the sovereign people's initiative power."¹³ Thus, the courts have demonstrated a most deferential attitude toward the initiative. The few limitations recognized by the courts have been procedural, rather than substantive, in nature.¹⁴

In two recent decisions, however, the California Supreme Court has reversed the traditional standard of judicial deference towards the initiative. Substantive limits imposed by the court in these cases on the permissible subjects of initiative measures have narrowed the scope of the people's initiative power. This break with traditional judicial deference is marked by an assertive posture of judicial intervention and characterized by a new and lower threshold of preelection review.

In *Legislature v. Deukmejian*,¹⁵ the court addressed the use of the initiative to enact a reapportionment statute. Popularly known as the "Sebastiani Initiative" after its author,¹⁶ the proposed initiative would have repealed the existing apportionment plans and reapportioned all

10. *Assembly v. Deukmejian*, 30 Cal. 3d 638, 681, 639 P.2d 939, 945, 180 Cal. Rptr. 297, 323 (1982) (Richardson, J., dissenting); see also *Legislature v. Deukmejian*, 34 Cal. 3d 658, 683, 669 P.2d 17, 35, 194 Cal. Rptr. 781, 799 (1983) (Richardson, J., dissenting) ("In short, we have traditionally insisted that an initiative is entitled to *very* special and *very* favored treatment.") (emphasis in original).

11. *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976).

12. *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563, 11 Cal. Rptr. 340, 344 (1961).

13. *Brosnahan v. Brown*, 32 Cal. 3d 236, 242, 651 P.2d 274, 277, 186 Cal. Rptr. 30, 33 (1982).

14. See *infra* notes 43-62 and accompanying text.

15. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983). See *infra* notes 65-139 and accompanying text.

16. Assemblyman Don Sebastiani, Republican from the Eighth Assembly District (containing all or portions of Napa, Lake, Sonoma and Yolo Counties) was the author and named proponent of the initiative. The measure was promoted primarily by the California Republican Party.

The Sebastiani Initiative was the latest episode in a long and bitter partisan struggle between Republicans and Democrats for control of the reapportionment process, the primary battleground for control of the California Legislature. Unlike other initiative attempts to reform the reapportionment *process*, the Sebastiani Initiative would have enacted an actual reapportionment *plan* fixing specific district boundaries. Never before had a reapportionment plan been proposed by statewide initiative. HISTORY OF THE CALIFORNIA INITIATIVE, *supra* note 2, at 12-41.

Moreover, Assemblyman Sebastiani's initiative attempt represented a bold challenge to both the power structure in Sacramento and, initially, his own party leadership. Not only was his plan proposed in an uncommon way, it had been developed outside of the incumbent-protecting, deal-ridden atmosphere typical of past reapportionments. Politically, most incumbents, Republicans and Democrats alike, would have been weakened if the Sebastiani reappor-

new legislative and congressional districts in California.¹⁷ After the initiative qualified for a place on the ballot, Governor George Deukmejian called a special election for the sole purpose of putting the measure to an early vote. The court in *Deukmejian* removed the Sebastiani Initiative from the ballot and enjoined the expenditure of funds for the special election.¹⁸ Use of the initiative power to enact a reapportionment measure was thus effectively barred.

In *AFL-CIO v. Eu*,¹⁹ the supreme court was confronted with an initiative which would have required the California Legislature to petition Congress for a balanced federal budget constitutional amendment.²⁰ The initiative sought to withhold all legislative salaries unless and until the petition was approved. Challengers sought a writ of mandate to enjoin Secretary of State March Fong Eu from expending public funds or taking any action to place the initiative on the ballot.²¹ The supreme court again barred the measure from the ballot and prevented the use of initiatives for this purpose.²²

Both the *Deukmejian* and the *Eu* decisions arose in a highly political context. Each involved fiercely contested partisan issues and each were dramatic attempts to reshape the California political landscape. The *Deukmejian* decision was the first time in thirty-five years that a court had removed a validly qualified statewide initiative measure from the ballot;²³ the *Eu* decision was the second such time. Both decisions will have

tionment plan became law. Even those not directly affected found the initiative's impact extremely disruptive of the normal conduct of business in the state capitol.

17. The existing reapportionment plans were enacted by Cal. A.B. 2 (Alatorre), 1983-84 1st Extra. Sess., ch. 6 (1983) (congressional and board of equalization districts); Cal. A.B. 3 (Boatwright), 1983-84 1st Extra. Sess., ch. 8 (1983) (assembly and senatorial districts). The reapportionment plans are codified at CAL. ELEC. CODE §§ 30000-30044 (West Supp. 1986).

18. 34 Cal. 3d at 681, 669 P.2d at 31, 194 Cal. Rptr. at 795.

19. 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984). See *infra* notes 140-85 and accompanying text.

20. See *infra* note 142 for the text of the Balanced Federal Budget Initiative. Like the Sebastiani reapportionment initiative, the balanced budget initiative was the result of a long partisan effort to achieve through the initiative process what its proponents could not do through the legislature. Numerous proposals to pass a resolution calling for a balanced federal budget had failed in previous years. *Eu*, 36 Cal. 3d at 692, 686 P.2d at 612, 206 Cal. Rptr. at 92.

21. *Id.* at 690-91, 686 P.2d at 611, 206 Cal. Rptr. at 91.

22. *Id.* at 716, 686 P.2d at 629, 206 Cal. Rptr. at 109.

23. HISTORY OF THE CALIFORNIA INITIATIVE, *supra* note 2, at 2-14. See also *Deukmejian*, 34 Cal. 3d at 681, 669 P.2d at 33, 194 Cal. Rptr. at 797 (Richardson, J., dissenting) (citing *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1948) (removal of an initiative constitutional amendment from the ballot for failure to conform to the single subject rule and ban against wholesale revisions to the state constitution), *cert. denied*, 336 U.S. 918 (1949)).

an impact on the scope of the initiative power in California far beyond the extent of their unique factual settings.

This Comment analyzes the supreme court's decisions in these far-reaching initiative cases and their impact on the future scope of the initiative power in California. The Comment begins with a brief description of the initiative power in California and the traditional rules of judicial construction of that power. The reasoning of the majority and dissenting opinions in *Deukmejian* and *Eu* is examined next. An analysis and critique of these decisions and the major issues related to the initiative power follows. Finally, the Comment discusses the impact of these decisions on the permissible use of the initiative in the future and proposes a return to the judicial deference and broad construction of the initiative power in California.

II. THE CALIFORNIA INITIATIVE: THE ORIGINAL UNDERSTANDING

Limitations on the initiative power are a product of express constitutional prohibitions and a seventy-five year history of judicial construction and application of those rules. Judicial deference to the California initiative stems from its populist origins and historical role as a mechanism for governmental reform.²⁴

A. *The Initiative in the California Constitution*

California's broad initiative power came into being in 1911 as an amendment to the state constitution.²⁵ Upon his election in 1910, populist Governor Hiram Johnson promoted the initiative and the other forms of direct legislation, the referendum and recall,²⁶ as part of his governmental reform package. Instituting the power of direct legislation

24. For a comprehensive history of the initiative in California, see HISTORY OF THE CALIFORNIA INITIATIVE, *supra* note 2; see also Comment, *Scope of the Initiative*, *supra* note 6; Comment, *California Initiative Process*, *supra* note 5.

25. The initiative provisions, which became former section 22 of article IV, were approved by the voters in a special election held on October 10, 1911 by a statewide vote of 168,744 to 52,093. HISTORY OF THE CALIFORNIA INITIATIVE, *supra* note 2, at 2. The initiative provisions are now contained in CAL. CONST. art. II. See *supra* note 1.

California presently allows *direct* initiatives. A *direct* initiative enacts a law without an intermediate step, such as approval by the legislature. The *indirect* initiative previously in effect in California required proponents, after securing the necessary signatures, to submit the proposal to the legislature. It would be placed on the ballot only if the legislature failed to enact the measure without change within 40 days. The provision for an *indirect* initiative in the California Constitution was repealed in the 1966 general election after only infrequent use. HISTORY OF THE CALIFORNIA INITIATIVE, *supra* note 2, at 2.

26. Article II of the California Constitution describes the referendum and recall powers as follows:

SEC. 9. (a) The referendum is the power of the electors to approve or reject statutes

was a major plank of the progressive reform movement of the early 1900's and it won acceptance in several other states during that period.²⁷

By providing for direct legislation in the constitution, Hiram Johnson intended to give the electorate direct access to the legislative process and wrest control of the legislative machinery from a state legislature dominated by influential special interests.²⁸ The primary motivation for the initiative process in California was the desire to counter the lobbyist—to create a process that would give the public the ability to enact legislation and thwart special interests.²⁹ As Johnson said in his inaugural speech:

“[W]hile I do not by any means believe the Initiative, the Referendum, and the Recall are the panacea for all our political ills, yet they do give to the electorate the power of action when desired, and they do place in the hands of The People the means by which they may protect themselves.”³⁰

From the beginning, the initiative was intended as a device to counter and override the legislature when it acted contrary to the public's will. The initiative power was to exist in reserve, to be called upon whenever the people found the legislature unable or unwilling to perform in an acceptable manner. The initiative was to be the ultimate check on legislative power.

The language of article IV of the state constitution is significant:

or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

SEC. 13. Recall is the power of the electors to remove an elective officer.

CAL. CONST. art. II, §§ 9, 13.

27. The initiative process was first proposed in the United States at the 1892 convention of the Populist Party in Omaha, Nebraska. Comment, *The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced its Future?*, 27 UCLA L. REV. 433, 433 n.3 (1979).

South Dakota became the first state to adopt the process in 1898, and the practice spread quickly. A total of 22 states now employ some form of direct legislation: Alaska (adopted in 1959), Arizona (1911), Arkansas (1910), California (1911), Colorado (1910), Florida (1968), Idaho (1912), Illinois (1970), Michigan (1908), Missouri (1908), Montana (1911), Nebraska (1912), Nevada (1912), North Dakota (1914), Ohio (1912), Oklahoma (1907), Oregon (1902), South Dakota (1898), Utah (1900), Washington (1912) and Wyoming (1968). *Id.* at 467-70. There is no power of direct legislation on the federal level, although the idea has been proposed. See Note, *The Proposed National Initiative Amendment: A Participatory Perspective on Substantive Restrictions and Procedural Requirements*, 18 HARV. J. ON LEGIS. 429 (1981).

28. Comment, *California Initiative Process*, *supra* note 5, at 923-24.

29. *Id.*

30. A. HICHBORN, STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1911, at 93 n.115 (1911) (quoting Gov. Hiram Johnson), *quoted in* Comment, *Scope of the Initiative*, *supra* note 6, at 1717.

“The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.”³¹ The exercise of the power of initiative is the exercise by the people of a power reserved by them, rather than of a right granted to them.³² As an express *reservation* of power, the clause recognizes the people as the ultimate source of all legislative power. The California Constitution expresses the concept which is familiar to all students of constitutionalism:

All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.³³

It is well settled that the initiative power is limited ultimately by the United States Constitution.³⁴ Limitations under the California Constitution depend first on whether the initiative is proposed as a statute or as a constitutional amendment.³⁵ An initiative proposed as a *constitutional amendment* would, obviously, propose to amend the state constitution and is limited only by procedural requirements, such as specifications regarding the number of signatures required and time limits for petition circulation. There is also a ban against wholesale constitutional revisions via the initiative.³⁶ On the other hand, an initiative proposed as a *statute* is subject to the express and implied limits of the state constitution. The operation of these limitations depends in part upon the distinction be-

31. CAL. CONST. art. IV, § 1 (emphasis added).

32. *Blotter v. Farrell*, 42 Cal. 2d 804, 270 P.2d 481 (1954); *Martin v. Smith*, 176 Cal. App. 2d 115, 1 Cal. Rptr. 307 (1959).

33. CAL. CONST. art. II, § 1.

34. *Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *aff'd*, 387 U.S. 369 (1967); Comment, *Scope of Initiative Compared to Power of Legislature*, 13 CAL. L. REV. 151, 151 (1925).

35. Before 1966, the distinction between initiative statutes and constitutional amendments was not at all clear. Similar procedural requirements made the difference one of name only, raising the question whether a duly enacted initiative *statute* would be subject to, or alternatively, act as an amendment to, the California Constitution. See Comment, *supra* note 34, at 152. This ambiguity was clarified by the passage of a constitutional amendment in 1966, CAL. CONST. art. II, § 8(b), which changed the number of signatures required for an amendment to eight percent of the voters in the previous gubernatorial election. The number required for an initiative statute remained at five percent.

36. Proposed amendments to the California Constitution by the initiative process are invalid if they “revise” the Constitution instead of merely “amend” it. *Amador Valley Joint Union High School Dist. v. Board of Equalization*, 22 Cal. 3d 208, 227, 583 P.2d 1281, 1288-89, 149 Cal. Rptr. 239, 247 (1978) (while broad in scope, changes made by Proposition 13—the Jarvis-Gann tax limitation initiative constitutional amendment—were “nothing novel to the existing governmental framework in California and thus did not constitute a revision to the Constitution”; the enactment deemed a constitutional “amendment”).

tween the *initiative* and the *referendum*, because the state constitution limits each in a different way.

The *initiative* is described in the constitution simply as "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them."³⁷ There are three express restrictions contained in article II. One is the rule that an initiative cannot contain more than one subject.³⁸ The second and third restrictions apply equally to legislative proposals to the voters and to initiatives: No statute is valid that names any individual to hold any office and no statute can name any private corporation to perform any function or to have any power or duty.³⁹ Courts have expressed the view that the initiative is otherwise subject to the same constitutional restrictions placed upon enactments of the legislature.⁴⁰

The *referendum*, on the other hand, is restricted by express substantive limitations in the constitution. Article II, section 9(a) defines the referendum as "the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State."⁴¹ These three exceptions to the referendum power appear to be designed to prevent harassment of legitimate and ordinary government activities. Referenda are further restricted by article II, section 9(b). This section allows challenges to a statute by referendum only within the ninety days after a statute passes before it becomes effective.⁴² The three categories of statutes exempt from the referendum all take effect immediately upon passage, without the ninety day "incubation period" typical of all other statutes.

Between the initiative and referendum, the initiative appears to be the greater power. Not only can voters propose, adopt and reject laws, there appears to be no substantive limitations on its exercise—beyond those generally placed upon the legislature—in the California Constitution. On the other hand, once a referendum secures enough signatures to qualify for the ballot, the referred statute is stayed pending an affirmative vote of the people. An initiative statute, proposing to repeal a statute enacted by the legislature, has no such effect. The legislative enactment

37. CAL. CONST. art. II, § 8(a).

38. CAL. CONST. art. II, § 8(d). This is a procedural, rather than a substantive, restriction. See *infra* note 51.

39. CAL. CONST. art. II, § 12.

40. See, e.g., *Hays v. Wood*, 25 Cal. 3d 772, 786 n.3, 603 P.2d 19, 31 n.3, 160 Cal. Rptr. 102, 118 n.3 (1979); *Minges v. Board of Trustees*, 27 Cal. App. 15, 148 P. 816 (1915).

41. CAL. CONST. art. II, § 9(a).

42. CAL. CONST. art. II, § 9(b). See *infra* notes 69 & 83.

challenged by an initiative would remain in operation until nullified by vote of the people.

B. *Judicial Limitations on the Initiative*

Against a background of continuing controversy, the courts have defined the permissible scope of the initiative and referendum powers within the frameworks of the state and federal constitutions. As an exercise of legislative power, judicial treatment of the initiative in California has traditionally been one of great deference. To use the language of the California Supreme Court in upholding the recent "Victim's Bill of Rights" Initiative: "Consistent with prior precedent, we are required to resolve any doubts in favor of the exercise of this precious right."⁴³

But the courts also have recognized constitutional limits on the exercise of the initiative and referendum power. Several rules, clearer in their statement than in their application, have been developed to mark the bounds of direct legislation. Judicially created restrictions on the statewide initiative are largely procedural rules. These generally fall into three categories: (1) the "single subject" rule, (2) the administrative/legislative distinction, and (3) the local/state distinction.⁴⁴

1. The single subject rule

The single subject rule operates to limit the contents of an initiative to one subject. The sources of this rule are twofold: First, the constitution expressly limits the number of issues that can be addressed in a single initiative;⁴⁵ and second, as an exercise of legislative power, the initiative is subject to the constitutional restriction that the provisions of the act be "reasonably germane" to the title of the act.⁴⁶

In deference to the legislature, the courts usually do not question the

43. *Brosnahan v. Brown*, 32 Cal. 3d 236, 242, 651 P.2d 274, 277, 186 Cal. Rptr. 30, 33 (1982) (citing *Amador Valley Joint Union High School Dist. v. Board of Equalization*, 22 Cal. 3d 208, 248, 583 P.2d 1281, 1313, 149 Cal. Rptr. 239, 271 (1978)).

44. The propriety of preelection review of initiative measures, another potential judicial limitation, is actually an issue of justiciability and not directly related to the question of the substantive scope of the initiative power.

45. CAL. CONST. art. II, § 8(d). The source of this rule is said to be the infamous "ham and eggs" initiative of 1948 which contained items as diverse as legalized gambling and the regulation of oleomargarine. See *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1948) ("an initiative measure embracing more than one subject may not be submitted to the electors or have any effect"), *cert. denied*, 336 U.S. 918 (1949).

46. See *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979) (the Political Reform Act of 1974, an initiative measure, held not to involve multiple subjects in violation of the California Constitution, since its provisions are all reasonably germane to the subject of political practices), *cert. denied*, 444 U.S. 1049 (1980).

declarations of "germaneness" by the legislators in enacting legislative statutes. Review of the single subject rule as it pertains to the initiative has been a little more rigorous. The rationale usually given is that the public is more likely to need protection against the dangers of log-rolling and confusion caused by the inclusion of multiple subjects in one measure. Because of these dangers, the special nature of the initiative is said to require a narrower construction of the single subject rule than the limitation on legislative bills.⁴⁷

The standards by which a court would judge whether a "rational relationship" exists between the multiple provisions of an initiative, thus making the provisions "reasonably germane" to one another, are rather vague.⁴⁸ They depend entirely on how the "subject" or purpose of the act is defined. Yet this rule's lack of clarity is a source of concern, for an initiative disliked by the court may be said to have a very narrow "subject" indeed. However, the outer limits of the rule would seem to have been set by the legislature. If the initiative power is subject to the same constitutional restrictions as legislative power, the single subject rule should be no more narrowly applied to the initiative than it is applied to the legislature.

As a practical matter, the single subject restriction is only a minor obstacle to drafting the initiative. Since 1946, no initiative has been invalidated because of this rule. That is not to say that it has not had an effect on initiative drafters.⁴⁹ Even so, claims of a violation of the single subject rule are usually a "last ditch" effort when all other arguments have been exhausted.⁵⁰ To date, the rule has not been used to restrict the

47. *Id.* at 50, 599 P.2d at 55-56, 157 Cal. Rptr. at 864-65 (Tobriner, J., concurring).

48. In one challenge to an initiative measure, the initiative met this test because its provisions were "functionally related in furtherance of a common underlying purpose." *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 55, 599 P.2d 46, 63, 157 Cal. Rptr. 855, 872 (1979) (Manuel, J., dissenting) (citing *Schmitz v. Younger*, 21 Cal. 3d 90, 97, 577 P.2d 652, 656, 145 Cal. Rptr. 517, 521 (1978)), *cert. denied*, 444 U.S. 1049 (1980)). In addition, the diverse provisions of the "Victim's Bill of Rights" Initiative shared a common concern, "general object" or "general subject" in promoting the rights of actual or potential crime victims "which fairly disclose[d] a reasonable and common sense relationship among their various components in furtherance of a common purpose." *Brosnahan v. Brown*, 32 Cal. 3d 236, 253, 651 P.2d 274, 286, 186 Cal. Rptr. 30, 40 (1982).

49. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983).

50. *Id.* Challenges on this basis were made unsuccessfully in *Amador Valley Joint Union High School Dist. v. Board of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978) (Proposition 13 Jarvis-Gann Initiative) and *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (Victim's Bill of Rights Initiative) and the issue was not reached by the court in *Legislature v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).

subject matter of an initiative. It remains a procedural and not a substantive restraint on the initiative power.⁵¹

2. The administrative/legislative distinction

The distinction drawn by the courts between administrative and legislative actions operates as a major constraint on the initiative power at the local level.⁵² Only a measure which is legislative in character can be submitted to the voters. Measures characterized as administrative or executive in nature cannot be subject to the local initiative and referendum process.⁵³ This rule is said to derive from the placement of the initiative and referendum in the same article of the constitution which confers state legislative powers and the separation of powers doctrine.⁵⁴ The reason for the rule is that allowing the initiative and referendum to be invoked to hinder or delay executive conduct would destroy the efficiency necessary to the successful administration of the government's business affairs.⁵⁵

This rule is usually invoked when courts review the initiatives and referenda at the local level, where legislative bodies exercise both legislative and administrative functions. There would seem to be no place for such a restriction on the statewide initiative power, since the legislature, by definition, exercises only legislative power. No case has been brought testing this rule as a limitation on the initiative at the state level. Conceivably, the administrative/legislative rule could be invoked when a referendum is proposed for an administrative act. However, any challenge on this basis could probably be forestalled by recasting the referendum as an initiative proposing a change in the statute which authorized the administrative action. The rule, therefore, is one that speaks merely to form, not substance. Thus, the restrictions imposed on the initiative and referendum by this rule are merely procedural and not substantive restrictions.

51. The single subject rule is actually not a limit on what is proposed, but rather how it is presented to the public. If an initiative is successfully challenged on this ground, the initiative proponents could make the same statutory changes with several initiatives instead of just one.

52. Comment, *Scope of the Initiative*, *supra* note 6, at 1734.

53. *Wheelright v. County of Marin*, 2 Cal. 3d 448, 467 P.2d 537, 85 Cal. Rptr. 809, *cert. denied and appeal dismissed*, 400 U.S. 807 (1970).

54. CAL. CONST. art. IV, § 1 ("The legislative power of this state is vested . . ."); *see also* *Hopping v. City of Richmond*, 170 Cal. 605, 150 P. 977 (1915); Comment, *Scope of the Initiative*, *supra* note 6, at 1734.

55. *See* *Martin v. Smith*, 184 Cal. App. 2d 571, 7 Cal. Rptr. 725 (1960); *Simpson v. Hite*, 36 Cal. 2d 125, 222 P.2d 225 (1950); *Hopping v. City of Richmond*, 170 Cal. 605, 150 P. 977 (1915).

3. The local/state distinction

The third judicial restriction on the initiative and referendum power is in reality a variant of the administrative/legislative distinction. Thus far, it has also operated only to limit local initiatives. By statute, the initiative and referendum at the municipal level are excluded from matters of local, non-general concern.⁵⁶ Since local matters will concern only a small portion of the population, the theory is that the general population should not be allowed to interfere in a purely local affair.⁵⁷ Local initiatives have also been prohibited to the extent they deal with non-municipal concerns. A municipal governing body, when functioning as an agency of the state, is beyond the reach of a municipal initiative or referendum election.⁵⁸ When acting pursuant to a specific state directive, the municipality is, in effect, the administrative arm of the state. The application of this rule has produced some curious results,⁵⁹ and the courts have loosened its strict application in later cases.⁶⁰

No equivalent restriction of the statewide initiative has been applied, and the application of this rule to the statewide initiative power has never been tested. Dictum in an early case, however, suggested it might act to prohibit referral of statutes not affecting all citizens of the state.⁶¹ The opportunity for an application of this rule on the statewide level is unlikely to arise: The signature requirements to refer a statute would preclude referral or initiation of a matter affecting only a few citizens. If such an attempt succeeded in obtaining the requisite number of signatures, that fact in itself would probably indicate the issue was more than a local concern.

These constitutional and judicial restrictions indicate that the California Supreme Court, in the past, has been quite hesitant to place substantive restraints on the initiative and referendum powers. For the most part, the court has adhered to the principle that the initiative and referendum should be broadly construed so as to maintain the maximum

56. CAL. ELEC. CODE § 4057 (West 1976).

57. Comment, *Scope of the Initiative*, *supra* note 6, at 1746.

58. *Mervynne v. Acker*, 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (1961); *Simpson v. Hite*, 36 Cal. 2d 125, 222 P.2d 225 (1950). See also Comment, *Scope of the Initiative*, *supra* note 6, at 1746.

59. *Simpson v. Hite*, 36 Cal. 2d 125, 222 P.2d 225 (1950) (construction of a county court house a state, not a local affair—non-referrable); *Hopping v. City of Richmond*, 170 Cal. 605, 150 P. 977 (1915) (construction of a city hall a local affair—referrable).

60. *Farley v. Healey*, 67 Cal. 2d 325, 431 P.2d 650, 62 Cal. Rptr. 26 (1967) (where San Francisco City Charter provisions did not restrict local initiative power to municipal affairs, resolution on foreign policy could be enacted by initiative).

61. *Hopping v. City of Richmond*, 170 Cal. 605, 150 P. 977 (1915).

power in the people.⁶² The restrictions that have been applied to the initiative by the courts are clearly procedural and not substantive in nature. Until the cases at hand, the subject matter of the initiative was believed to be as unlimited as that of enactments of the legislature itself.

III. NEW LIMITS ON THE INITIATIVE POWER

In two decisions less than a year apart, *Legislature v. Deukmejian*⁶³ and *AFL-CIO v. Eu*,⁶⁴ the California Supreme Court has substantially narrowed the scope of the people's initiative power. Both decisions are characterized by a more aggressive review of the challenged initiative, prior to its reaching the ballot, and by highly technical and narrow construction of constitutional and decisional language by which the measures were found invalid.

A. *Legislature v. Deukmejian*

The political question of reapportionment by initiative presented to the court in *Legislature v. Deukmejian*⁶⁵ can best be understood with a brief digression into the background of that case.

In September, 1981, following the 1980 federal census and pursuant to state and federal constitutional directives,⁶⁶ the California Legislature adopted three statutes reapportioning assembly, senate and congressional districts.⁶⁷ This reapportionment plan (Plan I) was severely criticized as blatant gerrymandering designed solely for the protection of incumbents

62. Comment, *Scope of the Initiative*, *supra* note 6, at 1749.

63. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).

64. 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984).

65. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).

66. Article XXI, section 1 of the California Constitution provides, in relevant part:

In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts in conformance with the following standards

CAL. CONST. art. XXI, § 1.

Article I, section 3 of the United States Constitution provides, in relevant part:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.

U.S. CONST. art. I, § 3 (omitted provisions pertaining to representation superseded by U.S. CONST. amend. XIV, § 2).

67. Cal. A.B. 300, 1983-84 Reg. Sess., ch. 537, 1981 Cal. Stat. 2010 (1981) (assembly); Cal. A.B. 301, 1983-84 Reg. Sess., ch. 535, 1981 Cal. Stat. 1905 (1981) (congressional); Cal. S.B. 99, 1983-84 Reg. Sess., ch. 536, 1981 Cal. Stat. 1988 (1981) (senate).

and the majority Democratic party.⁶⁸ Referenda petitions opposing Plan I were circulated within the ninety days before the statutes' effective date.⁶⁹ Proponents of the referenda subsequently secured the signatures necessary to qualify for the primary election ballot on June 8, 1982, thereby staying the effective date of Plan I.⁷⁰

Various members of the State Assembly, Senate and United States House of Representatives challenged the referenda in the California Supreme Court in *Assembly v. Deukmejian*.⁷¹ The court allowed the vote on the referenda to proceed, but refused to stay the operation of the challenged reapportionment statutes, as required by state constitutional referendum provisions.⁷² The court reasoned that (1) the old *congressional*

68. See *Deukmejian*, 34 Cal. 3d at 690, 669 P.2d at 40, 194 Cal. Rptr. at 804 (Richardson, J., dissenting) (calling Plan I a "blatantly gerrymandered reapportionment plan").

69. Article IV, section 8(c) of the California Constitution provides that:

(1) Except as provided in paragraph (2) of this subdivision, a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute and a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed.

(2) Statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the State, and urgency statutes shall go into effect immediately upon their enactment.

CAL. CONST. art. IV, § 8(c).

Article II, section 9 of the California Constitution describes the procedure for challenging a legislative statute by referendum:

(b) A referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to 5 percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors.

(c) The Secretary of State shall then submit the measure at the next general election held at least 31 days after it qualifies or at a special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

CAL. CONST. art. II, § 9(b)-(c).

There were actually three separate petitions circulated, one each for the assembly reapportionment, senatorial reapportionment and congressional reapportionment. Circulators probably felt that separate referenda petitions were necessary to avoid a potential challenge based on the "single subject" rule and because reapportionment plans have traditionally been enacted by separate statutes for each type of district.

70. This was the first time in 30 years that a statewide referendum had qualified for the ballot.

71. 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297, *cert. denied and appeal dismissed*, 456 U.S. 941 (1982). The challenge was based on alleged violations of the initiative circulation procedures. Instructions mailed to petition signers indicated they were to write in the address where they were registered, rather than their residence, making it impossible for the Secretary of State to verify the correct registration under the current verification procedures. *Id.* at 646, 639 P.2d at 947, 180 Cal. Rptr. at 301-02.

72. Article II, section 10(a) of the California Constitution provides:

An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If a

districts could not be used because California had been allocated two more congressmen as a result of the 1980 census,⁷³ (2) allowing the additional two congressmen to run "at large" was inconsistent with federal law,⁷⁴ and (3) the time was too short for the court or the legislature to write a new plan. For these reasons the court had no choice other than to adopt the challenged *congressional* reapportionment for the June, 1982 primary and the November, 1982 general elections.⁷⁵

In addition, the court noted, while the state assembly and senate reapportionment plans retained the same number of districts as they had previously, the districts had become badly misapportioned in the eight years since the last reapportionment, due to population shifts.⁷⁶ Therefore, despite language in the constitution to the contrary, the court adopted the challenged senate and assembly reapportionment plan. The court noted the disruption that would result from staying the challenged plans. There was at least a chance that the plans would be approved. By judicially adopting the challenged reapportionment plans, the court said, it would be taking a course likely to cause less confusion.⁷⁷

On June 8, 1982, the voters rejected the statutes, thereby invalidating Plan I.⁷⁸ The three statutes comprising Plan I thus never went into effect. However, because of the court's decision in *Assembly v. Deukmejian*, primary candidates had been selected and legislators were to be elected from the very districts that had been declared invalid.

An initiative constitutional amendment to create a bi-partisan reap-

referendum petition is filed against a part of a statute the remainder shall not be delayed from going into effect.

CAL. CONST. art. II, § 10(a).

Technically, the court stayed the reapportionment statutes and then, under its equitable powers, judicially adopted them by its decision. *Assembly v. Deukmejian*, 30 Cal. 3d at 665, 639 P.2d at 955, 180 Cal. Rptr. at 313. This was contrary to the approach taken by the supreme court in *Legislature v. Reinecke*, 6 Cal. 3d 595, 492 P.2d 385, 99 Cal. Rptr. 481 (1972), where the existing (old) reapportionment statutes were kept in effect while the new reapportionment plan was put to a vote. See *Assembly v. Deukmejian*, 30 Cal. 3d at 674-75, 369 P.2d at 961-62, 180 Cal. Rptr. at 319.

73. Because of an increase in the state's population between the 1970 and 1980 censuses, California's congressional delegation was increased from 43 to 45.

74. 30 Cal. 3d at 644, 639 P.2d at 955, 180 Cal. Rptr. at 313 (citing 2 U.S.C. § 2c (1982)). The court also feared that an "at large" election for two of these 45 congressmen would violate the United States Constitution's standard of "one-man, one-vote." *Id.* at 665, 639 P.2d at 955, 180 Cal. Rptr. at 313.

75. *Id.* The court said that all parties had agreed that the plan adopted for the June, 1982 primary election would also be used for the November, 1982 general election. *Id.* at 645 n.4, 639 P.2d at 943 n.4, 180 Cal. Rptr. at 301 n.4.

76. *Id.* at 664 n.19, 639 P.2d at 955 n.19, 180 Cal. Rptr. at 313 n.19.

77. *Id.* at 668-69, 639 P.2d at 957-58, 180 Cal. Rptr. at 315-16.

78. CAL. SEC'Y OF STATE, STATEMENT OF VOTE 15 (June 8, 1982).

portionment commission and remove the task of reapportionment from direct control of the legislature, was then qualified to be placed on the November, 1982 ballot.⁷⁹ This proposal would have repealed the existing reapportionment plans and directed the new commission to draft new legislative and congressional districts. This initiative was rejected by the voters, however.⁸⁰

The 1983-84 California Legislature, elected from the voter-rejected districts, took office in December, 1982. Enactment of a new reapportionment plan was the first order of business. In the waning days of his term, Governor Edmund G. Brown, Jr. called an extraordinary session of the California Legislature for this purpose.⁸¹ The legislature enacted a second reapportionment plan (Plan II) in December, 1982, which was signed by Governor Brown on January 2, 1983.⁸² This time, however, the senate and assembly plan was enacted as an "urgency" measure, effectively placing it beyond the reach of another referendum challenge.⁸³

79. Proposition 14, also known as the "Fair Reapportionment Plan," was jointly sponsored by the California Republican Party and Common Cause. The proposed commission was similar to one repealed from the California Constitution in 1966.

80. The vote was 3,065,072 (45.5%) in favor and 3,672,301 (54.5%) opposed. CAL. SEC'Y OF STATE, STATEMENT OF VOTE 48 (Nov. 2, 1982).

81. An extraordinary session can be called by proclamation of the Governor pursuant to CAL. CONST. art. IV, § 3(b). During an extraordinary session, the legislature has power to legislate only on the subjects specified in the Governor's proclamation. *Id.*

An interesting constitutional quirk allows a brief overlap in the term of a lame-duck governor with the terms of newly elected legislators. The California Constitution provides that legislators' terms of office run from the first Monday in December following their election until two years later, for Assembly members, or four years later, for Senators. CAL. CONST. art. IV, § 2(a). The Governor's term of office begins the Monday after January 1 following the election and continues for four years. CAL. CONST. art. V, § 2. Thus, every four years, a newly elected legislature holds office for a one month period (from the first Monday in December to the first Monday in January) with the previously elected Governor. It was during this period that that extraordinary session was called by the soon-to-be-departing Governor Brown.

82. Cal. A.B. 2 (Alatorre), 1983-84 1st Extra. Sess., ch. 6 (1983), adjusted the boundary lines of congressional and board of equalization districts; Cal. S.B. 3 (Boatwright), 1983-84 1st Extra. Sess., ch. 8 (1983), adjusted the boundaries of assembly and senate districts.

83. CAL. CONST. art. II, § 9(a) provides: "The referendum is the power of the electors to approve or reject statutes or parts of statutes *except urgency statutes*, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." (emphasis added).

An urgency measure becomes law immediately upon passage and is one which is "necessary for immediate preservation of the public peace, health, or safety." CAL. CONST. art. IV, § 8(d). Declaration of an urgency measure is a matter usually left to the legislature. Urgency measures, like appropriations, require a two-thirds affirmative vote of each house instead of the simple majority required to enact non-urgency measures. Non-urgency measures take effect on the January 1st of either the year following enactment or the January 1st following ninety days after signature by the Governor, or on the date specified, whichever date is later. In the case of measures enacted during an extraordinary session, however, non-urgency measures take effect on the 91st day after adjournment of the extraordinary session. *Id.*

The congressional and board of equalization reapportionment plan was *not* enacted as an urgency measure. Because of the different effective dates of urgency and non-urgency measures, the legislative portion of Plan II took effect on January 2, 1983 and the congressional portion on the 91st day after the adjournment of the extraordinary session, October 18, 1983.⁸⁴

Opponents of the reapportionment plan responded quickly. A new initiative statute, the Sebastiani Initiative, reapportioning assembly, senate and congressional districts, was submitted to the Attorney General and the Secretary of State on March 7, 1983, and approved for circulation on April 4, 1983. By June 15, 1983, the measure (Plan III) had secured the requisite number of signatures to be placed on the next ballot.⁸⁵ The next available ballot, however, was the primary election to be held on June 6, 1984. Enactment by the voters at that time would prevent the use of the newly apportioned districts during the 1984 elections.

Governor Deukmejian then called a special election to be held on December 13, 1983, for the purpose of submitting the measure to the voters at an early date.⁸⁶ The very next day, opponents of the Sebastiani Initiative filed a petition for writ of mandate with the California Supreme Court.⁸⁷ *Legislature v. Deukmejian* was a challenge to the Governor's order for a special election brought by Democrat members of the legislature and House of Representatives. The California Supreme Court issued a writ of mandate and cancelled the special election, leaving Plan II

84. The First Extraordinary Session of the 1983-1984 California Legislature adjourned on July 19, 1983.

85. As an initiative statute, the measure required at least 393,835 valid signatures. Sponsors of the Sebastiani Initiative submitted 573,129 signatures.

86. The Governor issued the order for a special election on July 18, 1983, after weeks of speculation and a virtual stand-still in the conduct of normal legislative business. The partisan nature of this action was readily apparent. Republican voters are known to have a greater propensity to vote at elections than Democrats and this tendency is especially true at special, single-issue elections. This tendency would be even further enhanced at an election held during the holiday season, when only the most dedicated voters (typically Republican) would likely turn out to vote. On the other hand, a higher than usual Democratic voter turnout could have been expected at the June, 1984 primary, when several Democratic candidates for President would have been actively campaigning in the state. More importantly, by holding the election in December, the new plan, if approved, would have taken effect in time for the 1984 primary and general elections.

87. The suit was a taxpayer suit brought under § 526(a) of the California Code of Civil Procedure. Section 526(a) is a "private attorney general statute" allowing taxpayers to challenge unlawful and wasteful expenditures of public funds. CAL. CIV. PROC. CODE § 526(a) (West 1979). In *Deukmejian*, it was alleged that since the initiative was unconstitutional, the expenditure of approximately \$14 million in public funds for the special election for the purpose of allowing a vote on the measure was an unlawful and wasteful act. 34 Cal. 3d at 666, 669 P.2d at 21, 194 Cal. Rptr. at 785.

in effect.⁸⁸

1. The majority opinion

In *Legislature v. Deukmejian*, the majority⁸⁹ first considered the propriety of reviewing an initiative measure prior to its submission to the voters.⁹⁰ The court noted that "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures *after* an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, *in the absence of some clear showing of invalidity.*"⁹¹ The court held, however, that "where the requisite showing of invalidity has been made, departure from the general rule is compelled."⁹² The majority then concluded that the "clear showing of invalidity" had been made in the principal challenge to the initiative. That challenge was that the initiative attempted to reapportion districts for a second time after the latest decennial federal census and that such an attempt was impermissible as a violation of a constitutionally mandated one apportionment per decade rule.⁹³

The majority asserted that preelection judicial review was justified because of the tremendous cost and disruption that could be avoided by an early determination of the issues. First, if the initiative were allowed to proceed and then later declared invalid, the money expended by state and local election officials to conduct the special election would be wasted. Second, the special election would have a highly disruptive effect upon the conduct of the June, 1984 primary elections if the determination of district boundaries was delayed until December, 1983. While such factors did not make the initiative "clearly invalid," they did indicate that close scrutiny of the initiative was warranted at an early date. Then, having closely scrutinized the initiative and finding it unconstitutional, the court said that there was no need to keep this finding a secret. In fact, to do so would be contrary to the salutary purposes of the one apportionment per decade rule.⁹⁴

88. *Deukmejian*, 34 Cal. 3d at 681, 669 P.2d at 31, 194 Cal. Rptr. at 795.

89. The majority opinion was unsigned. The majority consisted of Chief Justice Bird and Justices Mosk, Kaus, Broussard, Reynoso and Grodin. Justice Richardson was the only dissenter.

90. 34 Cal. 3d at 665, 669 P.2d at 20, 194 Cal. Rptr. at 784.

91. *Id.* (citing *Brosnahan v. Eu*, 31 Cal. 3d 1, 4, 641 P.2d 200, 181 Cal. Rptr. 100 (1982) (citations omitted)) (emphasis added).

92. *Id.* at 665-66, 669 P.2d at 20, 194 Cal. Rptr. at 784.

93. *Id.* at 666-67, 669 P.2d at 21, 194 Cal. Rptr. at 784.

94. *Id.* at 666-67, 669 P.2d at 21, 194 Cal. Rptr. at 785. The purpose ascribed to the "one apportionment per decade" rule was to minimize the political disruption and public confusion that inevitably accompanies a change in political district boundaries. The court noted: "Were

The court then proceeded to discuss its finding that a "clear showing of invalidity" had been made. The majority conceded that there was no express provision in either the state or federal constitution precluding a second reapportionment by initiative during the period between one federal census and another.⁹⁵ Prohibition of a second reapportionment, the majority claimed, was a matter of constitutional interpretation developed in two older cases, *Wheeler v. Herbert*⁹⁶ and *Dowell v. McLees*.⁹⁷ *Wheeler* and *Dowell* both operated to bar a legislative change in district boundaries, ruling that there could be only one apportionment in the ten year period following the federal decennial census. This "one apportionment per decade" rule was purely a product of judicial construction.⁹⁸

The rule in *Wheeler* and *Dowell* was reaffirmed, the *Deukmejian*

we to defer judicial review until after the election, and then hold the initiative invalid on that ground, our ruling would come too late; part of the reason for the existence of the rule would already have been frustrated by default." *Id.*

95. *Id.* at 668, 669 P.2d at 22, 194 Cal. Rptr. at 786. For the text of the relevant portions of the California and United States Constitutions, see *supra* note 66. Except for references to the number of assembly members and senators, article IV, § 6, there is no other mention of reapportionment in the California Constitution.

96. 152 Cal. 224, 92 P. 353 (1907).

97. 199 Cal. 144, 248 P. 511 (1926).

98. In *Wheeler*, a legislative statute provided for a change in boundaries between Fresno and Kings Counties. A portion of Fresno County was to be transferred to Kings County upon an affirmative vote of the affected residents. A taxpayer opposed to this change attacked the statute, claiming that in changing the county boundaries, the statute in question had the effect of realigning senatorial district 26, which was defined by reference to the county line. At issue was a conflict between two portions of the same section of the California Constitution. Article IV, section 6 provided at that time:

For the purpose of choosing members of the legislature, the state shall be divided into forty senatorial and eighty assembly districts . . . In the formation of such districts, no county, or city and county shall be divided, unless it contain sufficient population within itself to form two or more districts; nor shall a part of any county, or of any city and county, be united with any other county, or city and county, in forming any district. The census taken under the direction of the Congress of the United States, in the year one thousand eight hundred and eighty, and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the legislature shall, at its first session after each census, adjust such districts and reapportion the representation so as to preserve them as nearly equal in population as may be.

CAL. CONST. art. IV, § 6 (1879, amended 1980) (superceded by CAL. CONST. art. XXI) (emphasis added). If the legislative districts remained the same and only the county boundaries changed, the resulting cross-over of county boundaries would have violated the first part of section 6. If the legislative district boundaries changed to conform to the new county boundaries, the change in districts would have violated the second part of section 6, the court held. *Wheeler*, 152 Cal. at 235-36, 92 P. at 364.

The *Wheeler* court held that the restriction regarding the combination of counties limited the legislature's general apportionment power but did not restrict the legislature's general grant of power to change county boundaries from time to time. That is, a general grant of legislative power in article I would supersede the specific restriction regarding apportionment in the constitution. 152 Cal. at 237, 92 P. at 358-59 (1907).

While the county boundaries should be changed as intended, the legislative districts

court explained, in *Yorty v. Anderson*.⁹⁹ In *Yorty*, the court held that an exception to the "one apportionment per decade" rule was allowed when a previous plan had been invalidated by the courts or rejected by the people.¹⁰⁰ The court there held that the legislature itself could enact a

should remain as originally drawn. The *Wheeler* court read article IV, section 6 to preclude a second reapportionment in one decade by the legislature. The court explained:

The provisions of section 6 of article IV being construed as limitations, and being mandatory and prohibitory, it follows from their terms, and from the application of the maxim, *expressio unius est exclusio alterius*, that the legislative power to form legislative districts can be exercised but once during the period between one United States census and the succeeding one, and that having been thus exercised in 1901, the districts cannot be again adjusted until the season of 1911 This is a case to which the rule should be applied, since great abuses might follow a too frequent exercise of the power.

Id. Thus, the constitutional ban against a second reapportionment was held to take precedence over the constitutional rule against district boundaries crossing county lines. The court said that the challenged statute should not be declared unconstitutional unless it can be shown beyond a reasonable doubt that it conflicts with fundamental law and no reconciliation with the constitutional language is possible. *Id.*

A similar situation was presented in *Dowell*. At that time, the 79th Assembly District was defined by statute as all of that territory within the City of San Diego; the 80th Assembly District as all that portion of San Diego County not within the San Diego city limits. When the city annexed two county areas pursuant to a state statute, the two assembly districts were thereby realigned. The *Dowell* court, relying on *Wheeler*, construed the constitutional language to prohibit a second reapportionment by the legislature. 199 Cal. at 145-46, 248 P. at 511. In reaching this conclusion, the *Dowell* court stated:

In fixing and readjusting the boundaries of assembly districts the legislature acts pursuant to the provisions of section 6 of article IV of the constitution. Under that section, which is mandatory and prohibitory, the power to form legislative districts can be exercised but once during the period between one United States census and the succeeding one (*Wheeler v. Herbert*, 152 Cal. 224), and by the terms of the section, until the legislative power is exercised as therein provided, assemblymen shall be elected by the districts as theretofore established.

Id. at 146, 248 P. at 511-12. The annexation would be valid, the court said, but the district boundaries could not change. As a result, the 80th Assembly District was to include the newly annexed portions of the City of San Diego. *Id.*

99. 60 Cal. 2d 312, 384 P.2d 417, 33 Cal. Rptr. 97 (1963). In *Yorty*, petitioners challenged a second reapportionment plan developed by the legislature to be used in the event the courts ruled a previously-enacted plan invalid. Petitioners argued that the Reapportionment Commission which existed at that time should draft the second reapportionment plan because the one apportionment per decade rule barred the legislature from doing so. *Id.* at 316-17, 384 P.2d at 426, 33 Cal. Rptr. at 100.

100. *Id.* The *Yorty* court said:

The views expressed herein are not inconsistent with the position taken by this court in [*Wheeler* and *Dowell*], that the power to form legislative districts under section 6 (as it read prior to the 1926 amendment) could be exercised but once during the period between one federal census and the succeeding one. It is apparent that the statements in the opinions related to the effect of a *valid* reapportionment, not one which is inoperative because of a violation of the Constitution, and there is nothing in those decisions which would preclude the Legislature from making a second reapportionment after nullification of its first effort by the courts or by referendum.

Id. (emphasis in original).

second plan if the first plan had been nullified.¹⁰¹ The *Deukmejian* court thus concluded that while a second reapportionment in one decade would be allowed if the first had been declared invalid or rejected, a second reapportionment would not be allowed as long as the first plan was still valid law.¹⁰²

While the court recognized that the once a decade rule as expressed in *Wheeler, Dowell* and *Yorty* applied only to reapportionment of state legislative districts, it explained that the rule should be applicable to congressional reapportionment as well.¹⁰³ And, because voters had amended the California Constitution in 1980 with virtually no changes in the reapportionment provisions, the court concluded that the people intended to adopt the judicial interpretation of that language as well, absent evidence of a contrary intention.¹⁰⁴

The court then addressed two arguments against the one apportionment per decade rule. First, the initiative proponents argued that the rule should apply only to acts of the *legislature*, and not to acts by the people through the initiative. Since the people are the source of all legislative power, the constitution should be interpreted in a way that protects and enhances that power. An exception should be made to the one apportionment per decade rule, proponents argued, because of the initiative's paramount status.¹⁰⁵

The majority dealt with this first objection by citing numerous instances where the legislative power exercised by the people was held to be "coterminous" with legislative power exercised by the legislature.¹⁰⁶ The court stated that state and federal constitutional provisions act to restrict

101. *Id.* This, in fact, is what allowed the legislature to enact Plan II, after Plan I had been invalidated by the voters in November, 1982.

102. 34 Cal. 3d at 671, 669 P.2d at 24, 194 Cal. Rptr. at 788. As the *Deukmejian* court said, "that rule [of *Dowell* and *Wheeler*] did not preclude the legislature from enacting a second statute if the first one had been invalidated by judicial decision or nullified by referendum." *Id.*

103. *Id.* (citing Reapportionment, Op. Leg. Counsel of Cal. No. 5177 (1951), 1 Assembly J. 1796 (1951 Reg. Sess.); 18 Op. Cal. Att'y Gen. 11, 15 (1951)). See *infra* note 229.

104. *Id.* at 672-73, 669 P.2d at 25, 194 Cal. Rptr. at 789 (citing *In re Jeanice D.*, 28 Cal. 3d 210, 216, 617 P.2d 1087, 168 Cal. Rptr. 455 (1980); *Perry v. Jordan*, 34 Cal. 2d 87, 93, 207 P.2d 47 (1949)). The 1980 constitutional amendment, which proposed to modify and simplify the constitutional language without changing the meaning, was enacted by Proposition 6.

105. *Id.* at 673-74, 669 P.2d at 25-27, 194 Cal. Rptr. at 789-90.

106. *Id.* at 673-74, 699 P.2d at 26, 194 Cal. Rptr. at 790 (citing *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 737 (1964); *Hays v. Wood*, 25 Cal. 3d 772, 786 n.3, 603 P.2d 19, 25 n.3, 160 Cal. Rptr. 102, 108 n.3 (1979); *Mulkey v. Reitman*, 64 Cal. 2d 529, 533, 413 P.2d 825, 828, 50 Cal. Rptr. 881, 884 (1966), *aff'd*, 387 U.S. 369 (1967); *Weaver v. Jordan*, 64 Cal. 2d 235, 241, 411 P.2d 289, 293, 49 Cal. Rptr. 537, 541, *cert. denied*, 385 U.S. 844 (1966); *Blotter v. Farrell*, 42 Cal. 2d 804, 810, 270 P.2d 481, 487 (1954); *Wallace v. Zinman*, 200 Cal. 585, 592, 254 P. 946, 949 (1927); *Fair Political Practices Comm'n v. Personnel Bd.*, 77 Cal. App. 3d

both the statutory initiative and the legislature's enactments in the same way. Different treatment of the people's legislative power was not warranted: The constitutional restrictions on legislative power apply with equal force whether that power is exercised by the people or the legislature.¹⁰⁷ Since the legislature itself was prohibited from enacting a second reapportionment, so were the people by statutory initiative.¹⁰⁸

Proponents of the initiative argued in the alternative that even if the "one apportionment per decade" rule applied to initiatives, the Sebastiani Initiative should be allowed to remain on the ballot because Plan II was not yet "effective."¹⁰⁹ Proponents argued that Plan II was not yet effective because it had not yet been used; that is, no election had been held under its provisions. Because Plan II was not yet "in effect," they asserted that it should not be considered the single valid decennial reapportionment permitted under article XXI of the California Constitution. Therefore, it could be revised prior to its effective date. The Sebastiani Initiative, they argued, was the people's attempt to revise Plan II.¹¹⁰ The court rejected this argument as well.¹¹¹

Finally, the court addressed the claim that holding the Sebastiani Initiative unconstitutional would effectively exclude the people from the reapportionment process and give the legislators uncontrolled power in an area in which they had a conflict of interest.¹¹² The majority noted that the legislature regularly preempted the public in numerous other

52, 56, 143 Cal. Rptr. 393, 396 (1978), *disapproved on other grounds*, Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 192, 624 P.2d 1215, 1229, 172 Cal. Rptr. 487, 501 (1981)).

107. *Id.* at 676-77, 669 P.2d at 28, 194 Cal. Rptr. 792.

108. *Id.* at 675, 669 P.2d at 26-27, 194 Cal. Rptr. at 790-91. *See also* 18 Op. Cal. Att'y Gen. 11, 16 (1951) ("after a districting statute has become effective, the lawmaking power of the state may not make a second revision, whether by means of a legislative enactment or an initiative statute"). Of course, had the initiative been proposed as an initiative constitutional amendment which granted authority for the people to enact a second reapportionment law, the supreme court would have been faced with a different issue.

109. *Deukmejian*, 34 Cal. 3d at 676-77, 669 P.2d at 28, 194 Cal. Rptr. 792.

110. *Id.*

111. *Id.* at 678, 669 P.2d at 29, 194 Cal. Rptr. at 793. The majority found *Sloan v. Donoghue*, 20 Cal. 2d 607, 127 P.2d 922 (1942), upon which the proponents relied, inapplicable. In *Sloan*, the supreme court held that a reapportionment plan was not "effective" at the time the governor had proclaimed a special election. The election had been called to fill a vacancy in a congressional seat when the incumbent had died prior to the expiration of his term. The *Sloan* court held that the deceased congressman's district boundaries should continue intact for the remainder of the term. The new reapportionment plan was intended to apply beginning with the next General Election—it was not "effective" until that time. *Id.*

The *Deukmejian* majority limited the *Sloan* decision to its peculiar facts. *Deukmejian*, 34 Cal. 3d at 681, 669 P.2d at 33-34, 194 Cal. Rptr. at 797-98. Justice Richardson, dissenting, must have also recognized the uniqueness of the fact pattern in *Sloan* because he did not invoke the effective date argument.

112. 34 Cal. 3d at 678-79, 669 P.2d at 29-30, 194 Cal. Rptr. at 793-94.

situations. The court suggested that the public's preemption in the reapportionment area was not unusual, and probably beneficial. In any event, the court said, the argument that the public was "preempted" in this case "is more theoretical than real."¹¹³ The court noted that the *congressional* reapportionment statute, which had not been enacted as an urgency measure, had not been challenged by referendum. Neither had there been a "cognizable" challenge to the declaration of urgency for the Assembly and Senatorial reapportionment statute. Therefore, no real attempt to directly intervene in the reapportionment process, prior to this initiative, had been preempted by the legislature.¹¹⁴

The court stated that preemption of the people by the legislature occurs in other contexts and is a feature of the balance between popular control and representative government reflected in the California Constitution.¹¹⁵ It explained that the fact that the legislature could foreclose use of a referendum through a declaration of urgency is an inherent feature of our constitutional system. The majority concluded that "[t]he existence of this limitation upon the referendum is not a justifiable basis for extending use of the initiative into areas not permitted by the Constitution."¹¹⁶

2. The dissent

The dissent in *Legislature v. Deukmejian*¹¹⁷ first took issue with the majority's decision to hear a challenge to the Sebastiani Initiative prior to the election.¹¹⁸ In Justice Richardson's view, it did not meet the "threshold rule of deference to the people's franchise," the "clear showing of invalidity."¹¹⁹ In fact, the measure was plainly constitutional and valid, Justice Richardson said, citing an opinion to that effect by the Legislative Counsel.¹²⁰ Even if the majority had *grave doubts* as to the constitutionality of the initiative measure, the dissent argued, a determination of its validity prior to its submission to the electorate is not compelled.¹²¹ In

113. *Id.* at 680 n.18, 669 P.2d at 30 n.18, 194 Cal. Rptr. at 794 n.18.

114. *Id.*

115. *Id.* at 680, 669 P.2d at 30, 194 Cal. Rptr. at 794. Preemption occurs, the court said, in cases of immediate expenditures of funds, for example, and in a number of other legislative actions that "cannot effectively be undone by a subsequent initiative measure and that can be prevented, if at all, only by referendum." *Id.* at 679-80, 669 P.2d at 30, 194 Cal. Rptr. at 794.

116. *Id.* at 680, 669 P.2d at 30, 194 Cal. Rptr. at 794.

117. Justice Richardson was the sole dissenter.

118. *Id.* at 681, 669 P.2d at 33-34, 194 Cal. Rptr. at 797-98 (Richardson, J., dissenting).

119. *Id.* (Richardson, J., dissenting).

120. *Id.* (Richardson, J., dissenting) (citing Op. Leg. Counsel of Cal. (1983)).

121. *Id.* at 681, 669 P.2d at 34, 194 Cal. Rptr. at 798 (Richardson, J., dissenting) (citing *Gayle v. Hamm*, 25 Cal. App. 3d 250, 256, 101 Cal. Rptr. 628, 633 (1972)).

Justice Richardson's view, neither "clear invalidity" nor "grave doubts" had been demonstrated.

Justice Richardson was also critical of the majority's discussion of factors such as cost and election disruption as the basis for preelection determination of the controversy. Justice Richardson argued that "[a]s a matter of principle, the financial cost of the election should be entirely irrelevant to the legal issue before us."¹²² He noted that such costs are incurred for every special election, yet do not provide a basis for preelection review. Moreover, as to the disruptive effect on election schedule deadlines, the court had previously exercised its equitable powers to waive or extend deadlines to assure an orderly conduct of the election.¹²³

Like the majority, Justice Richardson based his position on his view of the strength of the one apportionment per decade prohibition.¹²⁴ Noting that the state constitution contained no express prohibition against a second reapportionment,¹²⁵ he distinguished the *Wheeler*¹²⁶ and *Dowell*¹²⁷ cases relied upon by the majority. Justice Richardson explained that *Wheeler* was decided before the constitutional provisions for the initiative and referendum power were adopted.¹²⁸ Therefore, its one apportionment per decade rule could apply only to actions of the legislature. Similarly, Justice Richardson concluded that *Dowell*, by its own terms, applied only to *legislative* acts, as it relied "wholly on former article IV, section 6, which is confined exclusively to the Legislature's authority."¹²⁹ If the public had wanted to place this restriction on the initiative power as well, they would have expressly included such language in the 1980 amendments to the reapportionment provisions, when article XXI was substituted for former article IV, section 6.¹³⁰

The dissent argued that *Yorty v. Anderson*¹³¹ made it clear that the "once-every-decade" principle was not absolute even as to the legislature

122. *Id.* at 682, 669 P.2d at 34, 194 Cal. Rptr. at 798 (Richardson, J., dissenting).

123. *Id.* (Richardson, J., dissenting) (citing *Assembly v. Deukmejian*, 30 Cal. 3d 638, 678-79, 639 P.2d 939, 964, 180 Cal. Rptr. 297, 322, *cert. denied and appeal dismissed*, 456 U.S. 941 (1982); *Legislature v. Reinecke*, 10 Cal. 3d 396, 406-07, 516 P.2d 6, 12-13, 110 Cal. Rptr. 718, 724-25 (1973)).

124. *Id.* at 686-87, 669 P.2d at 37, 194 Cal. Rptr. at 801 (Richardson, J., dissenting).

125. *Id.* (Richardson, J., dissenting). *See also supra* note 95 and accompanying text.

126. 152 Cal. 224, 92 P. 353 (1907). *See supra* note 98.

127. 199 Cal. 144, 248 P. 511 (1926). *See supra* note 98.

128. 34 Cal. 3d at 687, 669 P.2d at 38, 194 Cal. Rptr. at 802 (Richardson, J., dissenting). *Wheeler* was decided in 1907. CAL. CONST. art. IV, § 6, providing for the initiative and referendum power, was enacted in 1911.

129. 34 Cal. 3d at 687, 669 P.2d at 38, 194 Cal. Rptr. at 802 (Richardson, J., dissenting).

130. *Id.* at 688, 669 P.2d at 38, 194 Cal. Rptr. at 802 (Richardson, J., dissenting).

131. 60 Cal. 2d 312, 384 P.2d 417, 33 Cal. Rptr. 97 (1963). *See supra* notes 99-104 and accompanying text.

where the previous reapportionment had been invalidated or nullified.¹³² Thus, if the existing plan was no longer valid, even the legislature was not restricted by the one apportionment per decade rule.¹³³ On this point the majority and dissenting opinions agreed. Where they parted company, however, was on the question whether the existing plan could be changed again by the initiative.

Recognizing that Plan II was made necessary only by the earlier public rejection of Plan I, Justice Richardson questioned the seemingly illogical result of the majority's decision. "If the people can, as here, *indirectly* through referendum, mandate the Legislature to adopt a *second* reapportionment plan within the same decennial census period, why may not the same people, *directly* through the initiative achieve the same result?"¹³⁴

Justice Richardson claimed that the application of the one apportionment per decade rule had the effect of freeing the legislature from the restraints which the majority had imposed upon the people themselves. But, he asserted, "there is no reason to hold that the people's power is more limited than that of the Legislature Surely, if . . . the constitutional power of the people is not paramount, it cannot be *less* than that of their own creation, the Legislature."¹³⁵ He concluded that the majority opinion would make it just that.

Justice Richardson saw the controversy in broad constitutional terms. He criticized the majority holding as founded upon a "technical argument" based on a dubious interpretation of article XXI of the constitution, the article dealing with reapportionment. He argued that the majority's position was a misconception of the true constitutional origin of the people's right to reapportion. Justice Richardson explained that the right to redistrict the state by initiative did not come from any grant of power originating in article XXI, but rather from the reservation of *all* political and legislative power to the people contained in article II and article IV. In other words, it was not the provisions relating to reapportionment that gave the people this right, but that part of the constitution describing the power of initiative and referendum.¹³⁶ Based upon the

132. *Deukmejian*, 34 Cal. 3d at 687, 669 P.2d at 38, 194 Cal. Rptr. at 802 (Richardson, J., dissenting).

133. *Id.* (Richardson, J., dissenting).

134. *Id.* at 687-88, 669 P.2d at 38, 194 Cal. Rptr. at 802 (Richardson, J., dissenting) (emphasis in original).

135. *Id.* at 688, 699 P.2d at 38, 194 Cal. Rptr. at 802 (Richardson, J., dissenting) (quoting *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 42, 599 P.2d 46, 51, 157 Cal. Rptr. 855, 860 (1979)).

136. *Id.* at 687, 669 P.2d at 38, 194 Cal. Rptr. at 801 (Richardson, J., dissenting).

court's traditional insistence that "an initiative is entitled to *very* special and *very* favored treatment," any reasonable doubts should be resolved in support of the initiative.¹³⁷

In Justice Richardson's view, the reapportionment struggle revealed why, from a policy standpoint, it is so *essential* that the people retain their constitutional initiative power over reapportionment, even if both a legislative and an initiative plan have been adopted in the same census period.

If the people are denied any right to approve or disapprove a blatantly gerrymandered reapportionment plan, then there is absolutely no check on the Legislature's abuse of power. The concept of a Legislature perpetuating its tenure by devising a reapportionment plan wholly immune from review or revision by the people themselves is dangerous and repugnant to constitutional principles.¹³⁸

Finally, Justice Richardson cautioned,

[w]hile the initiative and referendum may not fit into a given philosopher's democratic model, and while these powers may, like any others, be misused from time to time, one would hope the courts will not fall prey to the elitist argument that the people do not know what is best for them and therefore need someone else to tell them.¹³⁹

B. AFL-CIO v. Eu

The question presented to the court in *AFL-CIO v. Eu*¹⁴⁰ was similar to the question presented in *Legislature v. Deukmejian*:¹⁴¹ whether an initiative measure which had secured the required number of signatures could be validly placed on the ballot. *Eu* involved a challenge to

137. *Id.* at 683, 669 P.2d at 25, 194 Cal. Rptr. at 799 (Richardson, J., dissenting) (emphasis in original).

138. *Id.* at 690, 669 P.2d at 40, 194 Cal. Rptr. at 804 (Richardson, J., dissenting). As Justice Richardson said:

This is but the latest chapter in a very unhappy period in California political history. Realignment of voting boundaries, congressional and legislative, has become so volatile, so heavily laced with partisan wrangling and self-interest, that the periodic process has become something painfully to be endured. This has been going on for years. Doubtless there must be a better way. However, it is not for a court to fashion one, but rather for the people, groping for some equitable resolution, to choose the appropriate alternative.

Id. at 685, 669 P.2d at 36, 194 Cal. Rptr. at 800 (Richardson, J., dissenting).

139. *Id.* at 691, 669 P.2d at 40, 194 Cal. Rptr. at 804 (Richardson, J., dissenting) (quoting Comment, *Scope of the Initiative*, *supra* note 6, at 1747-48).

140. 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984).

141. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).

the proposed balanced federal budget initiative sponsored by Lewis K. Uhler. Uhler was an activist Republican citizen tax reformer in the style of Howard Jarvis, and the head of the National Tax Limitation Committee. The balanced federal budget initiative also received the active support of the California Republican Party.

Frustrated by the numerous unsuccessful attempts to pass a balanced budget amendment resolution through the Democratically-controlled legislature, this proposal sought to circumvent the legislature via the initiative process. The Balanced Federal Budget (BFB) Initiative, like the Sebastiani Initiative, was proposed as an initiative *statute*. Like the Sebastiani proposal, this proposal sought to achieve by initiative what it could not achieve through legislation.

The BFB initiative called for a national constitutional convention for the sole and limited purpose of proposing an amendment to the United States Constitution.¹⁴² The proposed amendment would require

142. The Balanced Federal Budget Initiative read, in relevant part, as follows:

"INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE VOTERS

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

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

That application is hereby made to the Congress of the United States, pursuant to Article V of the Constitution of the United States, to call a convention for the sole purpose of proposing an amendment to the Constitution of the United States to require, with certain exceptions, that the federal budget be balanced; and

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

This application shall be deemed null and void, rescinded and of no effect in the event that such convention not be limited to such specific and exclusive purposes; and

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

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

Section Two. The following is added to sections 8901 through 8903 and section 9320 of the Government Code and shall modify, amend or control any other laws or regulations of the State of California similar in subject matter, heretofore or hereinafter enacted:

... If the California Legislature fails to adopt the resolution set forth in Section One of [this] initiative measure and submit same to the Congress of the United States, as required therein, on or before the end of the twentieth (20th) legislative day after approval by the people of the said initiative measure, or if the legislature ad-

the federal budget to be balanced by the year 1995. The initiative would propose the balanced budget amendment in alternative and dramatic ways. Section One required the California Legislature to adopt a resolution which would (1) urge Congress to propose a balanced budget amendment and (2) apply to Congress to call a convention for that purpose pursuant to article V of the United States Constitution.¹⁴³

Section Two of the proposed initiative would withhold all salary, benefits, expenses and perquisites to all members of the legislature if the

journals or recesses during the regular session prior to the twentieth (20th) legislative day without adopting said resolution, or having adopted same, repeals, rescinds, nullifies or contradicts said resolution, all payments, compensation, benefits, expenses, perquisites and any other payments to any member of the California Legislature made pursuant to this Section shall be suspended as to each and every legislator until such time as the California Legislature adopts such resolution

Section Three. (a) The people of the State of California hereby adopt the resolution set forth in Section One of this initiative measure; and (b) If the California Legislature fails to adopt the resolution set forth in Section One of this initiative measure within forty (40) legislative days of the approval of this initiative measure, the Secretary of State of California shall transmit the resolution adopted pursuant to this Section to the President and Secretary of the United States Senate and the Speaker and Clerk of the House of Representatives of the Congress of the United States.

Section Four. [Limits legislative amendment of the initiative.]

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

36 Cal. 3d at 692-94, 686 P.2d at 612-13, 206 Cal. Rptr. at 92-93 (quoting Balanced Federal Budget Initiative).

143. See *supra* note 142. Article V of the United States Constitution provides, in relevant part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by Congress

U.S. CONST. art. V.

At the time of the decision in *Eu*, 32 of the necessary 34 states had applied to Congress, pursuant to article V of the United States Constitution, to call a convention for the purpose of enacting a balanced budget amendment. *Eu*, 36 Cal. 3d at 692, 686 P.2d at 611-12, 206 Cal. Rptr. at 91-92.

It is interesting to note that each of the 26 amendments to the Constitution to date have been proposed by Congress. None has been proposed by constitutional convention. Although there have been many attempts to call a convention, each attempt fell short of the necessary two-thirds approval among the states. Twenty-five of the 26 amendments were ratified by the states; the 21st amendment was ratified by state conventions. *Id.* at 691, 686 P.2d at 611, 206 Cal. Rptr. at 91.

legislature did not pass the resolution proposed in Section One.¹⁴⁴

In Section Three the same resolution was proposed and adopted by an affirmative vote of the people, with instructions to the Secretary of State to transmit the resolution to Congress if the legislature failed to do so within forty days. The initiative also contained provisions prohibiting a legislative amendment of its terms and providing for severability of each of the substantive sections.¹⁴⁵

In March, 1984, Secretary of State March Fong Eu certified that the measure had received enough signatures to qualify for a place on the General Election ballot in November, 1984. Meanwhile, the idea of a balanced budget amendment had garnered an impressive list of adversaries.¹⁴⁶ The organizations and individuals opposed to the initiative filed an original action in the California Supreme Court for a writ of mandate to enjoin the Secretary of State from expending any funds or taking any action to place the measure on the ballot.¹⁴⁷ The supreme court scheduled a special hearing to decide the matter before any money would be spent for the election. As it had done one year earlier in *Deukmejian*, the court issued a writ enjoining the election.¹⁴⁸

1. The majority opinion

Justice Broussard, writing for the majority in *AFL-CIO v. Eu*,¹⁴⁹ first considered why it was again necessary for the court to determine the validity of an initiative prior to a vote of the people.¹⁵⁰ Citing the court's decision in *Deukmejian*,¹⁵¹ he offered a more careful explanation of the

144. *See supra* note 142.

145. *See supra* note 142.

146. Petitioners were a veritable politician's dream of interest groups:

American Federation of Labor-Congress of Industrial Organizations; American Association of University Women, California State Division; American Civil Liberties Union (ACLU) of Northern California; ACLU Foundation of Southern California; American Federation of State, County and Municipal Employees; American Jewish Committee; Americans United for Separation of Church and State; B'nai B'rith International; General Board of Church and Society, United Methodist Church; National Association for the Advancement of Colored People, Inc.; National Conference of Catholic Charities; National Council of La Raza; National Council of Senior Citizens; National Farmers Union; National Organization for Women; Office for Church in Society, United Church of Christ; Service Employees International Union and several individuals. *Eu*, 36 Cal. 3d at 694 n.7, 686 P.2d at 613 n.7, 206 Cal. Rptr. at 93 n.7.

147. *Id.* at 694, 686 P.2d at 613, 206 Cal. Rptr. at 93.

148. *Id.* at 716, 686 P.2d at 629, 206 Cal. Rptr. at 109.

149. The majority opinion was signed by Chief Justice Bird and Justices Mosk, Reynoso and Grodin. Justice Kraus wrote a separate concurring opinion and Justice Lucas was the sole dissenter.

150. *Id.* at 695-97, 686 P.2d at 614-15, 206 Cal. Rptr. at 94-95.

151. *See supra* notes 90-116 and accompanying text.

court's new rule on preelection review.¹⁵²

Justice Broussard cited the separate concurrence of Justice Mosk in *Brosnahan v. Eu*¹⁵³ for the general rule that "inhibiting preelection review 'applies only to the contention that an initiative is unconstitutional because of its substance. If it is determined that the electorate does not have the power to adopt the proposal in the first instance . . . the measure must be excluded from the ballot.'"¹⁵⁴ The majority went on to note that "the challenge goes to the power of the electorate to adopt the proposal in the first instance The question raised is, in a sense, jurisdictional."¹⁵⁵ Since the present action challenged the power of the people to propose the initiative in the first instance, the court concluded that preelection review was appropriate. The court further reasoned that an invalid initiative would steal time, attention and money from the valid measures on the ballot. Moreover, a post-hoc determination would engender voter confusion and frustration and result in the overall degeneration of the initiative process.¹⁵⁶

In justifying the majority's position, Justice Broussard first had to leap the hurdle presented by the *amicus curiae* briefs of former United States Attorney General Griffin Bell, former Senator Sam Ervin and Professor John Noonan. These *amici* contended that none of the federal issues was justiciable; the amending process described in article V of the United States Constitution is entirely political in nature. The issue presented was a political question to be left to Congress.¹⁵⁷ Justice Broussard determined that the political question doctrine of *Coleman v. Miller*¹⁵⁸ was not controlling in light of later cases under article V.¹⁵⁹ All that was needed, he asserted, was judicial construction of the provi-

152. 36 Cal. 3d at 695, 686 P.2d at 614, 206 Cal. Rptr. at 94 (citing *Legislature v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983)).

153. 31 Cal. 3d 1, 6, 641 P.2d 200, 202, 181 Cal. Rptr. 100, 102 (1982) (Mosk, J., concurring and dissenting).

154. 36 Cal. 3d at 695, 686 P.2d at 614, 206 Cal. Rptr. at 94 (1984) (quoting *Brosnahan v. Eu*, 31 Cal. 3d 1, 6, 641 P.2d 200, 202, 181 Cal. Rptr. 100, 102 (1982) (Mosk, J., concurring and dissenting)).

155. *Id.* at 696, 686 P.2d at 614, 206 Cal. Rptr. at 94 (citing *Legislature v. Deukmejian*, 34 Cal. 3d 658, 667, 669 P.2d 17, 21, 194 Cal. Rptr. 781, 785 (1983)).

156. *Id.* at 696-97, 686 P.2d at 614-15, 206 Cal. Rptr. at 94-95.

157. *Id.* at 697-98, 686 P.2d at 615-16, 206 Cal. Rptr. at 95-96.

158. 307 U.S. 433 (1939). In *Coleman*, the United States Supreme Court refused to rule on the validity of Kansas' ratification of a proposed Child Labor Amendment, holding that it was a political question within the exclusive authority of Congress and hence, non-justiciable. *Id.* at 450-51.

159. *Eu*, 36 Cal. 3d at 698-99, 686 P.2d at 616-17, 200 Cal. Rptr. at 96-97 (citing *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975)).

sions of that article. He concluded that the federal issues were indeed justiciable.¹⁶⁰

The court then turned to the issues which made the BFB Initiative invalid. Justice Broussard first addressed the conflict between the initiative and article V of the United States Constitution. He pointed out that article V specifies that "the *Legislatures* of two thirds of the several states"¹⁶¹ were to apply to Congress for a convention. No reported case had expressly determined whether application could be made by initiative. Two earlier decisions, however, had ruled that the use of the word "Legislatures" in the context of amendment ratification excluded direct referendum action by the people.¹⁶² A later opinion of the California Attorney General had similarly concluded that amendments to the federal Constitution are not subject to the initiative or referendum process in California.¹⁶³ The *Eu* court thus concluded that the BFB Initiative's direct application to Congress for a constitutional convention was invalid under article V.¹⁶⁴

The court then turned to the compulsory provisions of the BFB Initiative. Section Two of the proposal called for a suspension of legislative pay and benefits if the application to Congress was not approved.¹⁶⁵ The mandatory provisions were challenged as violative of both article V of the United States Constitution and article II of the California Constitution. The court noted that the issue presented was one of first impression.¹⁶⁶

Against similar challenges, a 1922 United States Supreme Court decision had upheld the ratification of the nineteenth amendment to the federal Constitution by the states of Missouri and Tennessee.¹⁶⁷ Both Missouri and Tennessee had provisions in their state constitutions which restricted the right of the state legislature to ratify the amendment.

160. *Id.* at 699, 686 P.2d at 617, 206 Cal. Rptr. at 97.

161. U.S. CONST. art. V (emphasis added). See *supra* note 143.

162. *Hawke v. Smith*, 253 U.S. 221 (1920); *Barlotti v. Lyons*, 182 Cal. 575, 189 P. 282 (1920). In *Hawke*, the United States Supreme Court held unconstitutional a provision of the Ohio Constitution which declared that legislative ratification of a federal constitutional amendment was incomplete until approved by popular referendum. 253 U.S. at 231.

In *Barlotti*, the California Supreme Court struck down a *referendum* petition which attempted to force a popular vote on the legislature's resolution which approved the eighteenth amendment to the United States Constitution. The court held that the legislature's ratification was conclusive under article V of the United States Constitution. 182 Cal. at 583, 189 P. at 285.

163. 58 Op. Cal. Att'y Gen. 830 (1975).

164. 36 Cal. 3d at 703, 686 P.2d at 622, 206 Cal. Rptr. at 100.

165. See *supra* note 142.

166. 36 Cal. 3d at 704, 686 P.2d at 622, 206 Cal. Rptr. at 100.

167. *Leser v. Garnett*, 258 U.S. 130 (1922).

When the legislatures in each state nevertheless ratified the nineteenth amendment, the ratifications were challenged as being violative of those state constitutional provisions. The Supreme Court held that the ratification action by a state "is a federal function derived from the Federal Constitution and it transcends any limitations sought to be imposed by the people of a State."¹⁶⁸ Thus, Justice Broussard in *Eu* concluded that since a state cannot constitutionally prohibit a legislature from proposing or ratifying a constitutional amendment, by implication it cannot compel the legislature to do so.¹⁶⁹

The court then turned to the issue of whether the BFB Initiative was valid under the California Constitution. The majority concluded that the provisions of article II limited the initiative power to the adoption or rejection of *statutes*.¹⁷⁰ A statute does not include a *resolution*, which is not a law but merely expresses the wishes of the legislature.¹⁷¹ The reserved powers of initiative and referendum do not encompass all possible action of a legislative body. Thus, although it was proposed as an initiative statute, the BFB Initiative was actually a resolution and beyond the powers of the people to enact by initiative. The initiative power did not extend to resolutions which merely declared policy or entreated action, since such enactments did not constitute the exercise of legislative power to create statutory law.¹⁷²

Although the court admitted that the distinction between an initiative which *enacts* a statute and one which *commands* the legislature to do so is "a narrow one,"¹⁷³ the court found the distinction constitutionally significant. In effect, the court declared that the people could not command the legislature to do that which the people could not do themselves.¹⁷⁴

2. The dissent

In answer to the majority's declaration of the initiative's invalidity, the dissent by Justice Lucas¹⁷⁵ called for broad and expansive construction of the initiative power. In Justice Lucas' view, the majority, "acting

168. *Id.* at 137.

169. *Eu*, 36 Cal. 3d at 704, 686 P.2d at 622, 206 Cal. Rptr. at 100.

170. *Id.* at 708, 686 P.2d at 623, 206 Cal. Rptr. at 103.

171. *Id.* at 712 n.23, 686 P.2d at 626 n.23, 206 Cal. Rptr. at 106 n.23.

172. *Id.*

173. *Id.* at 714, 686 P.2d at 627, 206 Cal. Rptr. at 107.

174. *Id.*

175. Newly appointed Associate Justice Malcolm Lucas filled the shoes of retired Justice Frank Richardson as the sole dissenter in this case, just as Justice Richardson had dissented alone in *Deukmejian*.

both precipitously and prematurely, ha[d] once again deprived the sovereign people of their precious initiative right.”¹⁷⁶ They erred, he said, in at least three respects.

First, Justice Lucas argued against the decision to review the initiative prior to an election as contrary to the long established precedent of deferring judicial review. He called it “a disturbing trend of this court to reach out and prematurely decide constitutional issues which might have been rendered entirely moot by the results of the forthcoming election, and which in any event readily could be addressed *after* the election has been held.”¹⁷⁷ Justice Lucas also cited the beneficial aspects of public debate on the balanced budget issue, as well as the political question doctrine, as reasons for deferring a decision on the merits.¹⁷⁸

Second, Justice Lucas took issue with the holding that article V of the United States Constitution required the court to invalidate this measure. He distinguished this case from *Hawke v. Smith*¹⁷⁹ and *Barlotti v. Lyons*,¹⁸⁰ in which the question was whether a vote of the people could *undo a prior* legislative act. The concern of article V, that the application process be made by a state legislature, was entirely satisfied by the BFB Initiative.¹⁸¹ Here, the initiative process was being used to assure that the application to Congress finally would be undertaken by the legislature.

Third, Justice Lucas disagreed that the initiative was invalid under the California Constitution. He sharply criticized the majority’s determination that the measure was not considered a statute and asked:

Would it have made any difference if our measure had recited that its text would be formally incorporated into a new section of the Government Code? Surely such formalism cannot prevail over the people’s right to be heard on matters of grave importance to them. Indeed, our prior cases require us to resolve all doubts in favor of the exercise of the initiative power, especially where the subject matter of the measure is of public interest and concern.¹⁸²

The dissent accused the majority of applying an overly narrow con-

176. *Eu*, 36 Cal. 3d at 717, 686 P.2d at 629, 206 Cal. Rptr. at 109 (Lucas, J., dissenting).

177. *Id.* at 717-18, 686 P.2d at 630, 206 Cal. Rptr. at 110 (Lucas, J., dissenting) (emphasis in original).

178. *Id.* at 718-19, 686 P.2d at 630-31, 206 Cal. Rptr. at 110-11 (Lucas, J., dissenting).

179. 253 U.S. 221 (1920).

180. 182 Cal. 575, 189 P. 282 (1920).

181. *Eu*, 36 Cal. 3d at 719-20, 686 P.2d at 631-32, 206 Cal. Rptr. at 111-12 (Lucas, J., dissenting).

182. *Id.* at 722, 686 P.2d at 633, 206 Cal. Rptr. at 113 (Lucas, J., dissenting).

struction of the scope of the initiative power. According to Justice Lucas, such a narrow construction "is directly contrary to the teachings of prior decisions . . . which require a *liberal* construction favoring the exercise of the initiative power."¹⁸³ He felt that the initiative, unlike the limited referendum power, is not confined by any state constitutional restrictions upon its scope or use. Nothing in the state constitution forbids use of the initiative power to direct the legislature to apply for a constitutional convention, he pointed out.¹⁸⁴

Finally, Justice Lucas would have held the initiative severable as to its various sections. The severability provision within the initiative itself led him to "see no reason why the initiative may not be given effect, at least to the extent it directs the legislature to apply for a constitutional convention."¹⁸⁵

IV. LIMITATIONS ON THE INITIATIVE POWER: A CRITIQUE

The questions presented in *Legislature v. Deukmejian*¹⁸⁶ and *AFL-CIO v. Eu*,¹⁸⁷ thrust the California Supreme Court squarely into the political process. It is not surprising that the decisions were ultimately political ones. A legal realist explanation of the *Deukmejian* and *Eu* decisions would focus upon the political background of each justice and their ties to the Democratic Party. To be sure, the decisions in both cases were split along partisan lines.¹⁸⁸

The reapportionment plan challenged by the Sebastiani Initiative was designed to maintain the incumbents in office and retain the Demo-

183. *Id.* at 720-21, 686 P.2d at 632, 206 Cal. Rptr. at 112 (Lucas, J., dissenting) (emphasis in original) (citing *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); *Gayle v. Hamm*, 25 Cal. App. 3d 250, 101 Cal. Rptr. 628 (1972); *Mervynne v. Acker*, 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (1961); *Martin v. Smith*, 176 Cal. App. 2d 115, 1 Cal. Rptr. 307 (1959)).

184. *Id.* at 722, 686 P.2d at 633, 206 Cal. Rptr. at 113 (Lucas, J., dissenting). See CAL. CONST. art. II, §§ 8-9.

185. 36 Cal. 3d at 723, 686 P.2d at 634, 206 Cal. Rptr. at 114 (Lucas, J., dissenting).

186. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983). See *supra* notes 65-139 and accompanying text.

187. 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984). See *supra* notes 140-85 and accompanying text.

188. The six justices voting in the majority in each case are all Democrats and all were appointed by Democratic governors: Chief Justice Bird and Justices Broussard, Grodin, Kaus and Reynoso were appointed by Democratic Governor Edmund G. Brown, Jr., and Justice Mosk was appointed by Democratic Governor Edmund G. Brown, Sr. Justice Richardson, a Republican appointed by Republican Governor Ronald Reagan, was the sole dissenter in *Legislature v. Deukmejian*. Justice Lucas, a Republican appointed by Republican Governor George Deukmejian, was the sole dissenter in *AFL-CIO v. Eu*. See K. ARNOLD, CALIFORNIA COURTS AND JUDGES HANDBOOK (4th ed. 1985).

cratic control of the legislature. The challenged plan had been created only after the previous plan had been rejected by the public. And, it was created by legislators who had been elected from districts rejected by the public.

The Sebastiani Initiative, conversely, would have given an electoral advantage to the Republicans. It was a blatant attempt by Republican activists to achieve political advantage through the initiative after that success had proven elusive at the polls. Throughout the course of the reapportionment process, neither the Republicans nor the Democrats had exhibited any example of civic responsibility. The Sebastiani Initiative, and the *Deukmejian* lawsuit which resulted, were nothing less than a struggle for political control of the California Legislature.

Similarly, in *Eu*, the partisan battle was a familiar one. The balanced budget proposal is a traditional favorite of the Republican Party. It is usually opposed by Democrats, who see it as a mechanism for cutting social programs. Again, the partisan division on the court can explain the six to one vote against allowing the initiative to proceed.

Faced with a novel question in each case, the majority based their opinions on narrow and technical grounds. In *Deukmejian*, the application of the one apportionment per decade rule, when the public was barred from challenging Plan II by referendum, is highly questionable. The political history of the challenged plan, and in particular, the legislative maneuvering that preempted participation of the public in the reapportionment process, casts the decision in a revealing light. The *Deukmejian* court, after all, applied the one apportionment per decade rule to uphold a *second* reapportionment (Plan II) in the same decade, against the repeal provisions of a *third* reapportionment (Plan III).

In *Eu*, the supreme court again read the initiative provisions very narrowly to bar the initiative from an entire area of legislative policy making. The court further declined to recognize the BFB Initiative as a statute because it was directed at the legislature and not the public at large. The court imposed an artificial and overly restrictive interpretation of the initiative power in complete disregard of its populist origins. In contrast, the dissenters in both *Deukmejian* and *Eu* would have decided the cases upon a broad and expansive interpretation of the constitutional provisions for initiatives.

The supreme court's willingness to intervene in these highly politicized cases and to become embroiled in partisan controversies is surprising. The court's option for an early, preelection determination of the merits is a clear change in judicial policy. But the court's new policy on preelection judicial intervention is only part of a change in attitude

toward the initiative. The supreme court expressed its doubt that an initiative can validly be used to enact a reapportionment plan. Similarly, resolutions, as a form of expressing the people's will, have now been declared off limits to the people through the initiative. For the first time, the California Supreme Court has begun an overt substantive review of the broad initiative power. In both *Deukmejian* and *Eu*, the groundwork has been laid for future courts to place new substantive limits on the initiative power.

A. Preelection Review of Initiatives

In asserting that a preelection review of the challenge to the Sebastiani Initiative was justified, the majority in *Legislature v. Deukmejian* correctly stated the rule of a long line of precedent, but did not correctly apply it. The rule expressed in *Brosnahan v. Eu*¹⁸⁹ is that it is more appropriate to review challenges after an election in the absence of some clear showing of invalidity of the ballot measure in question.¹⁹⁰ In other words, it is not a "clear showing of invalidity" that will cause the removal of an initiative measure from the ballot, but rather such a showing is necessary to trigger judicial intervention. Without a "clear showing of invalidity," the court should not sustain such a challenge.¹⁹¹

The threshold test for judicial review as applied by the *Deukmejian* court, in effect, required it first to determine the constitutional validity of the measure and then decide whether it should be reviewed. Given this approach, the court's observation—that, having determined its invalidity, "[t]here seems little reason in law or in policy for keeping that conclusion a secret"¹⁹² until after the election—makes some sense. Although the court's approach may have some beneficial aspects, it represents a significant change from prior law.¹⁹³

Instead of correctly applying the "clear showing of invalidity" test, the majority offered several reasons why early determination of the issue would be beneficial.¹⁹⁴ But, as pointed out by the dissent, considerations of potential disruption and cost are clearly inappropriate as a rationale

189. 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982).

190. *Id.* at 4, 641 P.2d at 202, 181 Cal. Rptr. at 102.

191. *Id.*

192. *Deukmejian*, 34 Cal. 3d at 667, 669 P.2d at 21, 194 Cal. Rptr. at 785.

193. See Comment, *Judicial Intervention in the Preelection Stage of the Initiative Process: A Change in Policy by the California Supreme Court*, 15 PAC. L.J. 1127 (1984) [hereinafter cited as Comment, *Judicial Intervention*]; Note, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CAL. L. REV. 1216 (1983) [hereinafter cited as Note, *Preelection Judicial Review*].

194. 34 Cal. 3d at 665-67, 669 P.2d at 21-22, 194 Cal. Rptr. at 784-85.

for early judicial intervention. The high cost of a statewide special election may be a valid argument against the initiative process itself. Indeed, a similar rationale could be advanced for early judicial review of all initiative measures, whether or not subject to a legal challenge. Such a review would have the beneficial effect of avoiding a "needless" expenditure of funds by opponents wishing to defeat the measure, if a review were to unearth some constitutional defect and result in invalidation.¹⁹⁵

In *Deukmejian*, the potentially disruptive effect of the Sebastiani Initiative was a matter of at least some doubt. The argument appears more likely motivated by political considerations than by legal ones. The Democratic leadership of the Senate and Assembly, at whom the Sebastiani Initiative was aimed, had refused to allow the measure to be placed on the November municipal ballot.¹⁹⁶ The previous year, in *Assembly v. Deukmejian*,¹⁹⁷ the supreme court had taken notice of the fact that the Secretary of State had instructed county election officials to be prepared to conduct an election under alternative sets of reapportionment plans. In this way, officials would be able to meet all of the election deadlines, regardless of which plan the court chose.¹⁹⁸ The majority did not discuss why a similar approach would not be appropriate in the Sebastiani Initiative situation.

Likewise there was no examination of the possibly partisan motives of the Secretary of State in asserting the disruption the initiative would cause. The rationale offered by the majority thus seems insufficient to make early judicial review appropriate. Neither consideration reaches the "clear invalidity" test.

A correct application of the "clear invalidity" test requires that the initiative must be unconstitutional *on its face* in order to trigger judicial intervention. As the majority admitted, the Sebastiani attempt to reapportion legislative and congressional districts through the initiative process was novel in the history of California.¹⁹⁹ But while *Deukmejian* was a case of first impression at the supreme court, an appellate court ruled a similar attempt to reapportion *local* supervisorial districts by initiative

195. Surprisingly, such an argument has been made with just this justification. See Note, *Preelection Judicial Review*, *supra* note 193, at 1233.

196. *Deukmejian*, 34 Cal. 3d at 682, 669 P.2d at 34, 194 Cal. Rptr. 798 (Richardson, J., dissenting).

197. 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297, *cert. denied and appeal dismissed*, 456 U.S. 941 (1982).

198. *Id.* at 645, 639 P.2d at 943, 180 Cal. Rptr. at 301.

199. *Deukmejian*, 34 Cal. 3d at 663, 669 P.2d at 18, 194 Cal. Rptr. at 782.

was constitutional in *Ortiz v. Madera County Board of Supervisors*.²⁰⁰ The *Ortiz* decision indicates that an attempt to reapportion by initiative on the state level is, at least, not *clearly* invalid. In *Deukmejian*, there was enough precedent demonstrating the measure's validity that preelection judicial review was inappropriate.

The *Deukmejian* majority characterized the challenge to the initiative as "jurisdictional."²⁰¹ The court said that the challenge "goes to the power of the electorate to adopt the proposal in the first instance."²⁰² Although called a "jurisdictional" limitation on the initiative power, the majority ruling in reality created a *substantive* limitation on the statewide initiative. Such a limitation represents the first time the statewide initiative power has been narrowed in this way and represents a significant break with precedent.²⁰³ The previous judicial limitations on the initiative could be characterized as procedural in nature.²⁰⁴

The majority's approach in *Deukmejian* belies the confusion in this area and the need for clearer standards of judicial review. Ideally, these standards would strike a balance between competing considerations. On the one hand, voters should be protected from confusion and deception, illegal attempts to qualify an initiative or false expectations from clearly unconstitutional measures. On the other hand, the judicial system should be shielded from unnecessary or excessive involvement in political questions and the wrath of voters angered by a determination that a popular measure was invalid. An early review of initiatives, prior to the official certification for signature circulation, would be clearly preferable to the present confused approach. If confined to procedural matters, such a review would enhance rather than restrict the initiative power, leaving time for the initiative proponents to correct whatever procedural fault had been identified.

B. The "One Apportionment Per Decade" Rule in *Deukmejian*

The principal challenge to the Sebastiani Initiative in *Legislature v. Deukmejian* was that it unconstitutionally attempted to reapportion legislative and congressional districts a second time after the decennial fed-

200. 107 Cal. App. 3d 866, 166 Cal. Rptr. 100 (1980).

201. 34 Cal. 3d at 667, 669 P.2d at 21, 194 Cal. Rptr. at 785.

202. *Id.*

203. See generally Comment, *Judicial Intervention*, *supra* note 193. See also Note, *Preelection Judicial Review*, *supra* note 193, at 1226.

204. See *infra* notes 43-62 and accompanying text. See also Note, *Preelection Judicial Review*, *supra* note 193, at 1228. But see *Gayle v. Hamm*, 25 Cal. App. 3d 250, 256-57, 101 Cal. Rptr. 628, 633-34 (1972) (suggesting that the court's exercise of its "equitable discretion" would permit it to reach and decide constitutional issues before the election).

eral census.²⁰⁵ The state and federal constitutions, petitioners argued, allow only one valid reapportionment per decade.²⁰⁶ But the rule upon which the court based its holding has dubious origins.

While conceding an express basis for this claim could not be found in either the state or the federal Constitutions, the majority relied on two cases, *Wheeler v. Herbert*²⁰⁷ and *Dowell v. McLees*.²⁰⁸ But both *Wheeler* and *Dowell* are not applicable to the Sebastiani Initiative because neither involved the initiative process. The dissent in *Deukmejian* saw both *Wheeler* and *Dowell* as inapplicable to the present case. Justice Richardson noted that *Wheeler* was decided prior to the placement of the initiative power in the constitution.²⁰⁹ The court in *Dowell*, as in *Wheeler*, spoke only of the legislature being constrained and made no reference to the initiative power.²¹⁰ Furthermore, in neither decision is there any indication that the legislature was consciously attempting to reapportion a second time. In both decisions the change in district boundaries appeared to be inadvertent and incidental.

There is a third objection to the use of the *Wheeler* and *Dowell* decisions as precedent. The *Dowell* and *Wheeler* courts did not need to reach the "one apportionment per decade" issue. Article IV of the California Constitution, as originally drafted, only placed constraints on the legislature in forming legislative districts.²¹¹ Since the statutes at issue in *Wheeler* and *Dowell* were not enacted for the purpose of forming legislative districts, but rather to adjust the boundaries of political subdivisions, it is questionable whether article IV should even apply to those cases. Therefore, in *Wheeler* and *Dowell*, the legislature should have been permitted to make an incidental change in a legislative district through a change in political boundaries. Absent a direct inconsistency between constitutional provisions, courts should interpret the provisions in a manner that avoids potential inconsistency.²¹² Since the rule was unrec-

205. 34 Cal. 3d at 664-65, 669 P.2d at 20, 194 Cal. Rptr. at 784. See *supra* notes 3-87 and accompanying text. The initiative was also challenged on the grounds that it violated the due process and equal protection clauses of the United States and California Constitutions, that it failed to provide for redistricting of the legislature in 1991, that it violated the "single-subject" rule of initiatives contained in the state constitution and that it failed to meet the "one man, one vote" standard of equal representation. *Id.* at 665, 669 P.2d at 20, 194 Cal. Rptr. at 784. These challenges were not discussed by the court.

206. *Id.* at 664-65, 669 P.2d at 20, 194 Cal. Rptr. at 784.

207. 152 Cal. 224, 92 P. 353 (1907). See *supra* note 98.

208. 199 Cal. 144, 248 P. 511 (1926). See *supra* note 98.

209. *Deukmejian*, 34 Cal. 3d at 687, 669 P.2d at 38, 194 Cal. Rptr. at 802 (Richardson, J., dissenting).

210. *Id.* (Richardson, J., dissenting).

211. See *supra* note 98.

212. 34 Cal. 3d at 676, 669 P.2d at 27-28, 194 Cal. Rptr. at 791-92. See Clean Air Constitu-

essary to the holding in each case, it is questionable whether the "once-per-decade" apportionment rule as formulated in *Wheeler* and *Dowell* should even be applicable to the Sebastiani Initiative.

Moreover, the rule of *Yorty v. Anderson*²¹³ offers a reason *not* to apply the once-per-decade rule to the Sebastiani facts. The dissent in *Deukmejian* cited *Yorty* as justifying an exception to the one apportionment per decade rule.²¹⁴ There the court held that the legislature was free to enact a second reapportionment plan in anticipation of, and to be effective only upon, the nullification of their first plan. If the Sebastiani Initiative had been approved by the voters, it too would have repealed the existing reapportionment plan. Since Plan II would then have been nullified, the people were free, under the *Yorty* rule, to enact a plan of their own choosing.²¹⁵

To hold that the Sebastiani Initiative could not effectively repeal the existing Plan II would deny the people's right to enact and repeal statutes under the initiative power. As the dissent in *Deukmejian* complained: "The Legislature's role in reapportionment cannot rise to a higher level than that of its source, the people, nor can it, a creation of the people, constitutionally preempt the public."²¹⁶ The majority, in effect, would be allowing the legislature to *preempt* the public. The legislature and the people were therefore engaged in a race to enact the first reapportionment statute. Because of procedural obstacles in the initiative qualification process, this is a race the public will always lose.²¹⁷

In refusing to recognize an exception to the one apportionment per decade rule for initiative measures, the court cut significant inroads into the people's initiative power. The rationale that the people's legislative power can be no greater than the legislature's legislative power is disingenuous. The restrictions imposed by the constitution on initiatives and legislative enactments differ in several significant respects. The procedural requirements are undeniably different. In addition, absent express language authorizing legislative amendment, an initiative statute cannot

ency v. Air Resources Bd., 11 Cal. 3d 801, 813-14, 114 Cal. Rptr. 577, 584-85 (1974); Serrano v. Priest, 5 Cal. 3d 584, 596, 487 P.2d 1241, 96 Cal. Rptr. 601, 609, *cert. denied*, 432 U.S. 907 (1971); Select Base Materials v. Board of Equalization, 51 Cal. 2d 640, 645, 335 P.2d 672, 675-76 (1959).

213. 60 Cal. 2d 312, 384 P.2d 417, 33 Cal. Rptr. 97 (1963).

214. *Deukmejian*, 34 Cal. 3d at 687, 669 P.2d at 38, 194 Cal. Rptr. at 802 (Richardson, J., dissenting).

215. *Id.* at 687-88, 669 P.2d at 38, 194 Cal. Rptr. at 802 (Richardson, J., dissenting).

216. *Deukmejian*, 34 Cal. 3d at 688, 669 P.2d at 37, 194 Cal. Rptr. at 802 (Richardson, J., dissenting).

217. *Id.*

be amended by the legislature.²¹⁸ Also, the people have the right to amend the constitution by majority vote, while the legislature can only suggest constitutional changes by a two-thirds vote.²¹⁹ In many respects, it is not unreasonable to view the initiative power as the greater of the two. Enhancing the initiative power would be consistent with the prior standard of judicial deference and broad construction.²²⁰

Unfortunately, recent decisions by other jurisdictions on the one apportionment per decade rule proved unpersuasive for the court. The majority cited numerous older cases from other states in support of the one apportionment per decade rule formulated in *Wheeler*.²²¹ Two more modern cases, where the "once-per-decade" rule was a matter of first impression, found no such rule applicable to legislative statutes reapportioning congressional districts. In *In re Initiative Petition No. 317*,²²² a legislative statute setting boundaries for Oklahoma's six congressional districts was challenged by initiative. The Oklahoma initiative, like the Sebastiani Initiative, would have repealed the legislative statute and enacted a new set of political boundaries. Opponents of the initiative challenged it on the basis of a putative one apportionment per decade rule.²²³

The Oklahoma Supreme Court held that neither the United States Constitution nor federal statutory law contained any prohibition against a second valid congressional reapportionment within the ten-year period.²²⁴ Neither did the Oklahoma State Constitution restrict the initiative's use to challenge a legislative congressional reapportionment.²²⁵

Similarly, in *Exon v. Tiemann*,²²⁶ the federal District Court of Nebraska held that there is no federal constitutional limitation on congressional reapportionment more than once in a decennial period.²²⁷ Thus,

218. The California Constitution provides in pertinent part: "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." CAL. CONST. art. II, § 10.

219. *Id.*

220. See *supra* notes 9-13 and accompanying text.

221. *Deukmejian*, 34 Cal. 3d at 669, 669 P.2d at 22, 194 Cal. Rptr. at 787. See *Wheeler*, 152 Cal. 224, 240, 92 P. 353, 362 (1907).

222. 648 P.2d 1207 (Okla. 1982).

223. *Id.* at 1212.

224. *Id.* (citing U.S. CONST. art. I, § 2; 2 U.S.C. § 2a(c) (1976)).

225. *Id.* The court said: "We hold that the electorate of Oklahoma are entitled to invoke the initiative against a legislative congressional redistricting act even though the initiative and the legislative enactment occur during the same ten (10) year period and are based upon the same federal census." *Id.*

226. 279 F. Supp. 603 (D.C. Neb. 1967).

227. *Id.* at 608. The court noted, however, that the Nebraska State Constitution prohibited

under both of these authorities, an initiative challenging and rewriting a *congressional* reapportionment is clearly permissible.

Given these cases *directly on point*, albeit only of persuasive and not mandatory precedential value to the California Supreme Court, the *Deukmejian* majority clearly erred. The Sebastiani challenge to the congressional districting plan, if not the legislative districting plan, should have been allowed to proceed. The majority recognized that there was no express prohibition in the federal constitution against a second reapportionment in one decade.²²⁸ The majority also must have recognized that, by its own terms, the separate provisions of the Sebastiani Initiative were severable. The part of the Sebastiani Initiative relating to congressional reapportionment could have been allowed to stand, even if the legislative reapportionment provisions were found constitutionally defective. Despite persuasive authority in support of upholding at least a portion of the initiative, the majority failed to liberally construe the initiative power "to promote the democratic process."²²⁹

C. *The Statutory Role of Initiatives in Eu*

The challenge to the BFB Initiative in *AFL-CIO v. Eu* was based on an alleged violation of both the state and the federal Constitutions. Petitioners argued, and the majority agreed, that the federal Constitution specified that the application to Congress had to be made by a *legislature*; it could not be made by the people through the initiative.²³⁰ Neither could the people compel the legislature to make such application. The majority also asserted that the BFB Initiative violated the initiative provisions of the state constitution as well. The balanced budget proposal was simply beyond the power of the people to enact via the initiative

reapportionment of *legislative* districts more than once per decade. There was no such limitation in the Nebraska Constitution on *congressional* districting. *Id.*

228. See *supra* note 95 and accompanying text.

229. *Amador Valley Joint Union High School Dist. v. Board of Equalization*, 22 Cal. 3d 208, 219, 583 P.2d 1281, 1291, 149 Cal. Rptr. 239, 248 (1978). The majority claimed instead that *In re Initiative Petition No. 317*, 648 P.2d 1207 (Okla. 1982) did not address the question of the effect of a *state* constitutional "once-a-decade" limitation on districting by initiative, and "thus provides no authority or guidance on this point." *Deukmejian*, 34 Cal. 3d at 676 n.16, 669 P.2d at 32 n.16, 194 Cal. Rptr. at 791 n.16. But the Oklahoma Supreme Court *did* address that very point, insofar as the Oklahoma Constitution affected congressional districting. See *supra* note 225 and accompanying text.

The *Deukmejian* majority, it appears, assumed its way to a conclusion on this point: "Although former article IV, section 6, by its terms applied only to legislative districts, it was assumed that the once-a-decade rule of *Wheeler* and *Dowell* applied to congressional districts as well." *Deukmejian*, 34 Cal. 3d at 671, 669 P.2d at 24, 194 Cal. Rptr. at 788. See *supra* note 103 and accompanying text.

230. *AFL-CIO v. Eu*, 36 Cal. 3d 687, 703, 686 P.2d 609, 620, 206 Cal. Rptr. 89, 100 (1984).

process.²³¹

Article II of the California Constitution defines the initiative as the “power of the electors to propose *statutes* and *amendments* to the Constitution and to adopt or reject them.”²³² The majority in *Eu* narrowly construed the scope of the initiative powers in light of this language. Since the BFB proposal was neither clearly a “statute” nor an “amendment,” it was not a permissible subject of the initiative.

The majority’s holding can be criticized on at least three grounds. First, the majority has changed the standards of review applicable to the initiative power. Instead of applying a liberal construction to the initiative provisions in the constitution, as prior cases had instructed,²³³ the majority read the constitutional language quite narrowly. A less literal interpretation of the word “statute,” that is, one which includes *all* legislative acts, is probably closer to the intent of Hiram Johnson and the originators of the initiative power. Under a liberal construction of the people’s initiative power, as the dissent pointed out, the people clearly would have the authority to direct the legislature to apply for a constitutional convention.²³⁴ It is entirely reasonable to call such an attempt a proposal to enact a “statute.”

Second, the majority refused to read the BFB Initiative’s directive to the legislature as a statute. The majority found the initiative to be “*in form* neither a statute nor a resolution.”²³⁵ It simply mandated the legislature to adopt a resolution. For the majority, the distinction between an initiative which enacts a statute and one which commands the legislature to do so was constitutionally significant. The majority held that if the people could not enact a measure directly through the initiative, they should not be permitted to do so indirectly. Since the resolution to be enacted by the legislature does not create a law but merely expresses the will of the legislature, it was not a statute within the meaning of article II of the California Constitution. As such, it was beyond the initiative power.²³⁶

However, the majority in *Eu* chose to ignore a crucial fact. The BFB Initiative expressly provided for the amendment of the California

231. *Id.* at 706, 686 P.2d at 622, 206 Cal. Rptr. at 102.

232. CAL. CONST. art. II, § 8(a) (emphasis added).

233. 36 Cal. 3d at 708, 686 P.2d at 623, 206 Cal. Rptr. at 103. See *supra* notes 9-13 and accompanying text.

234. 36 Cal. 3d at 720-21, 686 P.2d at 632-33, 206 Cal. Rptr. at 112-13 (Lucas, J., dissenting).

235. *Id.* at 714, 686 P.2d at 627, 206 Cal. Rptr. at 107 (emphasis added).

236. *Id.*

Government Code.²³⁷ Legislative pay and benefits would be made conditional upon the enactment of an application to Congress. This amendment to the Government Code cannot be seen in any way other than as a "statute."

Third, the majority failed to apply the holding of the case it cited which developed a test in California for determining whether an enactment was a statute or a resolution. In *Hopping v. City of Richmond*,²³⁸ the supreme court declared that the *referendum* under state law applied only to acts passed in the form of a statute.²³⁹ The city ordinance at issue in *Hopping* had been passed as a resolution. The court said there that as a resolution, the ordinance would not be subject to the power of referendum. The court found that in actual effect, however, the ordinance was a law and not a resolution because it fixed the means to accomplish the stated purpose. Therefore, although nominally a resolution, the city ordinance was subject to the referendum. The rule in *Hopping* is thus that it is the substance and not the form which controls. If a resolution does in fact enact a law, it is subject to the referendum and, by implication, to the initiative.²⁴⁰

In *Eu*, the court should have looked at the substance of the BFB Initiative. The BFB Initiative's section two expressly compels the legislature to enact the proposal specified in section 1.²⁴¹ The provisions of section 2 clearly constitute a "statute," in substance if not in form.

D. Preemption by the Legislature

By enacting Plan II as an urgency measure, the legislature forestalled another reapportionment challenge by referendum to the assembly and senate redistricting plans.²⁴² As the dissent in *Legislature v. Deukmejian* pointed out, by this action the legislature managed to thwart the people's ability to review its action, thereby assuring that the legislature would have the final word.²⁴³ By striking the Sebastiani Initiative from the ballot, the supreme court endorsed the legislature's preemption

237. See *supra* note 142.

238. 170 Cal. 605, 150 P. 977 (1915).

239. *Id.* at 613-15, 150 P. at 980-81.

240. *Id.*

241. See *supra* note 142.

242. Only the senate and assembly district plan was adopted as an urgency measure. The congressional and board of equalization districts plan was adopted as a regular, non-urgency statute. See *supra* notes 81-84 and accompanying text.

243. 34 Cal. 3d 658, 687, 669 P.2d 17, 36, 194 Cal. Rptr. 781, 800 (Richardson, J., dissenting).

action and ensured that Plan II would remain in existence until after the next decennial census.

In approving the legislature's preemption of the people, the supreme court continued a well established precedent of almost absolute deference to legislative declarations of urgency. Had the court wanted to review the declaration of urgency, authority exists for judicial intervention into legislative procedural affairs to protect substantial rights. In *Stockburger v. Jordan*²⁴⁴ the court heard such a challenge. The court in *Stockburger* held that it would not interfere with a legislative declaration of urgency unless it was clear that the facts constituting the putative emergency were false. Where, as in that case, the legislative declaration appeared to have some merit, the court would not interfere.²⁴⁵

In *Deukmejian*, a *Stockburger*-like review should have been undertaken. The declaration of urgency in chapter 8 does not ring true.²⁴⁶ The fact that the legislature failed to make a similar determination that the same facts applied to chapter 6 is inconsistent with their actions regarding chapter 8, because both bills would impact the June, 1984 election in exactly the same way.

On the local level, several cases have reviewed declarations of urgency to make ordinances effective immediately. In particular, judicial scrutiny has been especially rigorous when it was obvious such action was taken solely to prevent a referendum challenge.

Given this precedent, proponents of the Sebastiani Initiative may have erred in not challenging the urgency appellation given to chapter 8. If such a challenge had been successful, chapter 8 would not have become effective until October 18, 1983, more than a month after the court's decision in the present case.²⁴⁷ The majority could well have decided to let the Sebastiani Initiative proceed, under this scenario, be-

244. 10 Cal. 2d 636, 76 P.2d 671 (1938).

245. *Id.* at 642, 76 P.2d at 673-74.

246. The statute's urgency clause read as follows:

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order that the Secretary of State and the several county clerks may have sufficient time to prepare for the 1984 elections, and in order to comply at the earliest possible time with the California Supreme Court ruling, ordering the Legislature to adopt an essentially different plan in time for the 1984 elections, it is necessary that this act take effect immediately.

Cal. S.B. 3 (Boatwright), 1983-84 Extra. Sess., ch. 8 (1983).

247. See *supra* notes 83-84 and accompanying text. The court handed down its decision in this case on September 15, 1983.

cause of the clear precedent of *Yorty v. Anderson*.²⁴⁸ Even after *Legislature v. Deukmejian* was decided, an effort to obtain enough signatures for a referendum challenge was theoretically possible, even if somewhat impractical.²⁴⁹

When opponents of a governmental enactment have failed to challenge it by referendum, authority exists for allowing use of an initiative to accomplish the same objective. An initiative may repeal by implication provisions of conflicting general statutes.²⁵⁰ In addition, failure to assert a referendum petition within the time allowed by law does not foreclose the power to seek a change in legislative policy by the initiative process.²⁵¹

Several appellate courts have stated the rule that the initiative cannot be used as an indirect or backhanded technique to invoke the referendum process where that process is unavailable.²⁵² However, a more recent appellate court ruling rejected that rule. In *Carlson v. Cory*,²⁵³ the First District Court of Appeal held that the initiative can be used to circumvent constitutional prohibitions on the use of the referendum.²⁵⁴

If the *Deukmejian* court had seen the initiative as a substitute for the

248. 60 Cal. 2d 312, 384 P.2d 417, 33 Cal. Rptr. 97 (1963). See *supra* notes 99-102 and accompanying text.

249. If proponents had acted on the day after the decision, they would have had 32 days to secure 393,835 signatures. In qualifying the Sebastiani Initiative, proponents gathered 573,129 signatures within a 71-day period.

250. *People v. Fowler*, 32 Cal. App. 2d Supp. 737, 84 P.2d 326 (1938); *People v. Schuster*, 122 Cal. App. Supp. 790, 10 P.2d 204 (1932). See also *Duran v. Cassidy*, 28 Cal. App. 3d 574, 104 Cal. Rptr. 793 (1972); *Blotter v. Farrell*, 42 Cal. 2d 804, 270 P.2d 481 (1954).

251. *Duran v. Cassidy*, 28 Cal. App. 3d 574, 582, 104 Cal. Rptr. 793, 798 (1972).

252. *Gibbs v. Napa*, 59 Cal. App. 3d 148, 130 Cal. Rptr. 382 (1976); *Campen v. Greiner*, 15 Cal. App. 3d 836, 93 Cal. Rptr. 525 (1971); *Myers v. City of Pismo Beach*, 241 Cal. App. 2d 237, 50 Cal. Rptr. 402 (1966).

253. 139 Cal. App. 3d 724, 189 Cal. Rptr. 185 (1983).

254. *Id.* at 731, 189 Cal. Rptr. at 188-89. *Carlson* involved a postelection challenge to two initiative statutes, Propositions 5 and 6, repealing the state's gift and inheritance tax laws, enacted in the June 8, 1982 statewide election. Petitioners claimed that since the state constitution forbade challenges to tax measures by referenda, see *supra* notes 18-19 and accompanying text, the same effect could not be accomplished by way of an initiative. *Id.* at 727-28, 189 Cal. Rptr. at 186. The *Carlson* court noted that "[i]n the context of local elections [the cases cited] have stated the 'rule' that '[a] proposed initiative ordinance cannot be used as an indirect or backhanded technique to invoke the referendum process' where that process is not available." *Id.* at 731, 189 Cal. Rptr. at 189 (quoting *Daye v. Lockport*, 12 Cal. App. 3d 864, 91 Cal. Rptr. 124 (1970)). However, the court asserted, "[t]his 'rule' . . . has never been approved by our Supreme Court and, in almost all of the above-cited cases, was merely dictum." *Id.* The court thus declined to adopt such a rule, thereby allowing proponents to do by initiative what they were precluded from doing by referendum. The court concluded that the real import of the cases cited was that neither the initiative nor the referendum may be used "in a manner which interferes with a local legislative body's responsibility for fiscal management." *Id.*

referendum, it could justifiably have allowed the measure to proceed to a vote. Several factors support this conclusion: the state constitution describes the initiative power as the power to "adopt or reject" laws.²⁵⁵ The Sebastiani Initiative contained a repeal provision in section 1.²⁵⁶ Despite the designation as an initiative, the interpretation of the measure as a *repeal* statute is the only one which would have upheld the public's right to express its views in, and participate in, the reapportionment imbroglio.

Alternatively, the Sebastiani Initiative contained provisions for severability.²⁵⁷ Thus, the court could have severed section 1 (calling for repeal of chapters 6 and 8) from the rest of the initiative, which contained Plan III. While logically strained, this choice would have been in keeping with the rule of liberal construction and upholding severed portions of a statute that are capable of standing alone. Of course, had the court recognized the Sebastiani Initiative as a repeal statute, there would have been no reason to sever the new plan. Under *Yorty*, the power to enact a new plan would remain once the existing plan (Plan II) was determined to be inoperative.²⁵⁸

In endorsing the legislature's preemption of the public, the court significantly narrowed the scope of the initiative and referendum in California. By declining to take the several options open to them, the court implied that the public had no right to enact a reapportionment plan and the initiative power should be curtailed for use in this subject area.²⁵⁹

E. Reapportionment by Initiative

In addressing reapportionment, the court in *Legislature v. Deukmejian* faced the thorniest of political issues. Reapportionment implicates the most basic of constitutional values in our representative system—the right to a meaningful and equal vote. As a political problem, it is as intractable as it is controversial. For over two decades in California the reapportionment controversy has consumed the passions and labors of the legislature and embroiled the courts in a partisan miasma.²⁶⁰ Yet at the same time, as critical as the reapportionment question is to the

255. CAL. CONST. art. II, § 8(a) (emphasis added).

256. SEC'Y OF STATE OF CAL. SEBASTIANI INITIATIVE.

257. *Id.*

258. *See supra* text accompanying notes 42-44.

259. *Deukmejian*, 34 Cal. 3d at 681, 685, 669 P.2d at 33, 36, 194 Cal. Rptr. at 791, 800 (Richardson, J., dissenting) (citing the majority opinion at 34 Cal. 3d at 673, 679, 669 P.2d at 26, 30, 194 Cal. Rptr. at 790, 794).

260. This is not to say that reapportionment has not been a controversial issue ever since California's first constitution was enacted. Although numerous reapportionment issues were

determination of all other political issues, it is beyond the ken of most citizens. It is neither easily explained nor readily understood.

The Sebastiani Initiative was the first attempt in California to enact a statewide reapportionment plan through the initiative process.²⁶¹ Although numerous other initiative measures have addressed the topic of reapportionment, each was concerned with the method, procedure or criteria with which reapportionment should be conducted.²⁶² None of them attempted the adoption of actual district boundaries.

A fundamental question at the heart of the *Deukmejian* decision is whether the people, acting through the initiative process, could enact a reapportionment plan. That is, even absent a prior enactment by the legislature, is the power of direct legislation a constitutionally permissible tool to redraw the state's 165 political districts?

Quite clearly, the dissent in *Deukmejian* answered that question in the affirmative. The majority opinion implied that there is at least some doubt. Twice, in fact, the majority suggested it would have answered negatively.²⁶³ The majority opinion did not, however, reach this question in arriving at its conclusion. But one cannot help but surmise that the majority holding was colored by the belief that the enactment of a reapportionment plan could not practically and constitutionally be achieved by direct legislation.

litigated prior to that time, the courts became most actively involved in supervising the reapportionment process in 1961.

261. *Id.* at 663, 669 P.2d at 18, 194 Cal. Rptr. at 787 ("an attempt—novel in the history of this state").

262. The subject of reapportionment has been a very popular topic among the initiative measures proposed. Each measure has proposed a change in the reapportionment *process*, rather than proposed a reapportionment plan like the Sebastiani Initiative. Prior reapportionment measures and their official titles are, in chronological order: 1922, Legislative Districts—Changes Method of Selecting Members of the Legislature (failed to qualify); 1924, Legislative Districts—Reapportionment (failed to qualify); 1926, Reapportionment Commission (Prop. 20) (rejected by voters), Legislative Reapportionment (Prop. 28) (approved by voters); 1946, Reapportionment of Senatorial Districts (failed to qualify); 1948, Senate Reapportionment (Prop. 14) (rejected by voters); 1960, Senate Reapportionment (Prop. 5) (rejected by voters); 1962, Senate Reapportionment (Prop. 23) (rejected by voters); 1982, Reapportionment—Legislative Districts (failed to qualify), Reapportionment by Districting Commission or Supreme Court (Prop. 14) (rejected by voters); 1983, Reapportionment of Assembly, Senate and Congressional Districts (Sebastiani Initiative) (qualified but removed from the ballot by the supreme court); 1984, Reapportionment (Prop. 39) (rejected by voters). HISTORY OF THE CALIFORNIA INITIATIVE, *supra* note 2, at 14.

263. *See id.* at 673, 669 P.2d at 26, 194 Cal. Rptr. at 790 ("Assuming, but not deciding, that redistricting by initiative is permissible . . ."); *id.* at 679, 669 P.2d at 30, 194 Cal. Rptr. at 794 ("First, assuming that the initiative is generally available in the redistricting process notwithstanding the command of article XXI that '[i]f the Legislature shall adjust the boundary lines . . .'" (emphasis added by majority opinion)).

Yet, the supreme court on several occasions has stated that an act reapportioning the state legislature is a proper subject of the initiative and referendum powers.²⁶⁴ In *Assembly v. Deukmejian*,²⁶⁵ the court rejected a claim that reapportionment statutes are exempt from the referendum power because they might be deemed "statutes calling elections."²⁶⁶ While it is obvious that reapportionment statutes *relate* to elections, the court found it equally clear that "such statutes do not *call* elections."²⁶⁷ If reapportionment is a proper subject for a referendum, it can equally be subject to the initiative power. As we have seen earlier, the initiative power is equal to if not greater than the referendum power in that the initiative encompasses a wider breadth of subjects.²⁶⁸ Thus, while an actual district redrawing has never before been proposed by initiative, it is hard to see how it could not be included within the initiative's scope.

There is precedent for this conclusion on the local level. In *Ortiz v. Madera County Board of Supervisors*,²⁶⁹ the Fifth District Court of Appeal upheld the right to realign county supervisorial districts by initiative. An ordinance redistricting county supervisorial districts in *Ortiz* was challenged by an initiative. The county claimed that such an attempt was invalid as the districting ordinance had been made immediately effective. In upholding the right to challenge the measure by initiative, the court in *Ortiz* stated that a "[c]hange in supervisorial district boundaries is a legislative function and thus subject to the referendum."²⁷⁰ Furthermore, the court reasoned that "because the nature of the initiative and referendum are identical insofar as the power reserved is concerned, any discussion in the decisional law regarding the initiative also applies to the referendum."²⁷¹

In *Harnett v. County of Sacramento*,²⁷² the court assumed that the people had the right to enact a valid ordinance redrawing supervisorial district lines. In that case though, an attempt to do so was enjoined for failing to conform to equal representation standards established by state

264. *Assembly v. Deukmejian*, 30 Cal. 3d 638, 654, 639 P.2d 939, 949, 180 Cal. Rptr. 297, 307, cert. denied and appeal dismissed, 456 U.S. 941 (1982); *Boggs v. Jordan*, 204 Cal. 207, 220, 267 P. 696, 701 (1928).

265. 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297, cert. denied and appeal dismissed, 456 U.S. 941 (1982).

266. *Id.* at 654, 639 P.2d at 949, 180 Cal. Rptr. at 307. CAL. CONST. art. II, § 9(a) exempts statutes calling elections from the referendum.

267. 30 Cal. 3d at 654, 639 P.2d at 949, 180 Cal. Rptr. at 307 (emphasis added).

268. See *supra* notes 12-19 and accompanying text.

269. 107 Cal. App. 3d 866, 166 Cal. Rptr. 100 (1980).

270. *Id.* at 872, 166 Cal. Rptr. at 104 (emphasis added).

271. *Id.* at 870 n.3, 166 Cal. Rptr. at 103 n.3.

272. 195 Cal. 676, 235 P. 445 (1925).

law. The reapportionment plan there was held void because the resulting districts were grossly disproportional and "the reservation of the initiative power to the electors of the counties does not authorize any legislation . . . in contravention of any statute passed by the state legislature."²⁷³

The *Harnett* court's decision assumed that the authority to reapportion was present; the defect lay in the substantive provisions of the reapportionment plan. According to this rule, the same plan, if proposed by the supervisors themselves, would have the same defect and would likewise be found invalid. By contrast, the *Deukmejian* majority seemed to deny the people's authority to enact a reapportionment plan, regardless of its substantive provisions, once the legislature had acted. While the Sebastiani Initiative might well have been found deficient on other constitutional grounds,²⁷⁴ it was not accorded the same presumption of validity usually given to legislative enactments.

There are, of course, numerous policy reasons for denying the right to reapportion through the initiative process. The *nature* of reapportionment offers special problems. Reapportionment statutes are not easy to read. They often are comprised of little more than row upon row of census tract numbers designating the individual assembly districts. Senate and congressional district plans typically consist of combinations of assembly districts and census tracts. Rarely do the statutes include a map depicting the outlines of the districts; and accurate maps are usually unavailable to the public for months after the statute passes. Yet one can be sure that the legislators themselves are quite aware of the combinations of voting blocs that make up the individual districts.

The reapportionment *process* is also not readily adaptable to public initiative campaigns. Because of the highly political nature of the process, and the fact that equi-populous districts are so susceptible to partisan-motivated manipulations, reapportionment plans are usually the product of months of "horse-trading" and negotiating. In contrast, voters would be given only the simple choice of "Yay" or "Nay" on a particular plan. No rational public discourse can take place concerning the virtues of one set of census tracts over another. In short, the subject matter of reapportionment is not one that readily lends itself to the petition-signing and circulating procedures of the initiative process. The entire process of reapportionment is not one that lends itself to multi-media publicity campaigns or, alternatively, any kind of coherent public debate.

273. *Id.* at 681, 235 P. at 447.

274. *See supra* note 205.

Indeed, it is only fair to wonder whether *any* kind of legislation lends itself to modern-day statewide initiative campaigns!

Regardless of how one answers that question, the fact remains that, for better or for worse, the initiative power exists in the California Constitution. It can and will be a potent force for change—sometimes dramatic change. Equally true is the fact that the legislature constantly deals with issues just as intractable and just as incapable of reduction into single-issue media campaigns as the issue of reapportionment.

The *Deukmejian* decision can be seen as an attempt to limit the scope of the initiative in an area with which the public is, arguably, ill-equipped to deal. Yet, in an area as critically important to the outcome of legislation—and indeed, the legitimacy of our democracy—as reapportionment, it seems anomalous to limit the public's access to that process. As Justice Richardson wrote in his dissent:

The people can make mistakes, so can legislatures, and so can courts, but mistakes can be corrected. History has demonstrated repeatedly that in the long run, the people's judgment is ultimately to be trusted. If not, then whose?²⁷⁵

V. CONCLUSION

*Legislature v. Deukmejian*²⁷⁶ and *AFL-CIO v. Eu*²⁷⁷ were both highly political decisions. *Deukmejian* was the first time the supreme court had addressed an attempt to reapportion statewide legislative and congressional districts by statutory initiative. The court dealt with the controversy by choosing the option most likely to avoid disruption of the electoral process and provide a brief respite from continual reapportionment squabbles. However, the court's holding was based on a narrow, technical argument of constitutional interpretation. Against the backdrop of political events leading up to this case, including the legislature's actions to preempt the public, that holding was inappropriate.

Similarly, in *Eu*, the supreme court reached for a narrow, technical basis in voiding a dramatic attempt to impose the people's will on a recalcitrant legislature. The history of the initiative in the constitution and the court's traditional deference to the initiative power suggest a contrary result.

The supreme court's decisions in *Deukmejian* and *Eu* narrow the

275. 34 Cal. 3d at 691, 669 P.2d at 40, 194 Cal. Rptr. at 804 (Richardson, J., dissenting).

276. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983). See *supra* notes 65-139 and accompanying text.

277. 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984). See *supra* notes 140-85 and accompanying text.

scope of the initiative power, contrary to its past pronouncements. Instead of "jealously guard[ing]"²⁷⁸ "one of the most precious rights of our democratic process,"²⁷⁹ the court constricted its use. Substantive limitations have been placed upon the initiative power where merely procedural restraints stood before. Since the initiative is the ultimate check against abusive legislative power, the *Deukmejian* and *Eu* holdings should be limited to their unique facts and narrow grounds. Future courts, as those in the past have done, should "apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled."²⁸⁰

Greg M. Salvato

278. *Martin v. Smith*, 176 Cal. App. 2d 115, 117, 1 Cal. Rptr. 307, 309 (1959).

279. *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563-64, 11 Cal. Rptr. 340, 344 (1961).

280. *Id.* at 563, 11 Cal. Rptr. at 344.