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Judicial Intervention in the Preelection Stage of the Initiative Process: A Change of Policy by the California Supreme Court

The initiative process in California allows the voters to propose and enact laws directly without using the elected representative system of lawmaking.[1] The statutory initiative, like any other form of legislation, is subject to judicial review to ensure compliance with the paramount law of the state and federal constitutions,[2] but unlike other forms of legislation, this review can occur at either of two stages in the lawmaking process.[3] Judicial review of an initiative measure can occur after the proposal has been submitted to the electorate and enacted into law by a majority vote.[4] This postelection review is analogous to judicial review of legislatively enacted laws. In addition, the initiative process is subject to judicial review during the proposal, or preelection, stage.[5] Preelection review, unique to the initiative form of lawmaking, can create barriers to initiative measures not present in a postelection review of an initiative or the review of legislation passed by the legislature.[6]

The influence of the initiative process on California law cannot be disputed. Initiative measures recently have been responsible for change in many areas including taxation[7] and criminal justice.[8] Legislative reform by initiative has proven to be a powerful tool for a dissatisfied electorate. The process, however, may be in danger of erosion due to the most recent decision by the California Supreme Court involving preelection review. This author contends that the decision in

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1. *See* Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1719-24 (1966). *See generally* CAL. CONST. art. II, §8; CAL. ELEC. CODE §§3500-3579. The initiative operates as an independent method of lawmaking by bypassing the legislature entirely and placing the measure directly on the ballot.
2. *See* Comment, *supra* note 1, at 1724.
3. *See id.* at 1724-29.
4. *See id.* at 1724.
5. *See id.* at 1724-29.
6. *Id.*
7. *See* Amador Valley Joint Union High Sch. Dist. v. State Board of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).
8. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

Legislature v. Deukmejian,[9] if given full effect in future cases, could limit the power of the initiative process substantially.

The focus of this comment will be upon the standard of review used by California courts to determine if a preelection review of an initiative measure is justified. The standard requires that opponents of an initiative must make "a clear showing of invalidity"[10] to the court before a preelection review is granted. Specifically, the origin of this standard in the courts,[11] the adoption of the standard by the California Supreme Court,[12] and the most recent expansion and application of the standard in *Legislature v. Deukmejian*[13] will be discussed. This most recent use of the standard demonstrates that the present criteria used by the supreme court are inadequate to maintain the maximum effectiveness of the initiative process.[14] This author contends that the current standard allows the courts to exercise preelection review in too many cases.

Excessive preelection review of initiative measures impairs the initiative process in three respects. First, preelection review restricts one of the fundamental purposes of the initiative power, which is to give citizens who feel their elected representatives have failed to address their concerns, a method of voicing their dissatisfaction.[15] Second, under the present standard, proponents of an initiative measure cannot anticipate the criteria that will be used to determine if "a clear showing of invalidity" could be made.[16] Proponents should be able to ascertain the standards that will be applied by the court in the event of a preelection challenge. The proponents then could embark on the task of drafting and qualifying the measure knowing the risks of preelection litigation. Third, a preelection review requires that an often vast and complex factual record be prepared by the proponents to counter the allegation of a "clear showing of invalidity."[17] Proponents and the courts in a preelection setting may not have the resources nor the time necessary to defend the measure properly because the factual record must be prepared and argued, often not in a trial setting, but in an appellate forum.[18] Appellate courts are not equipped to try issues of fact. The normal procedure in an

9. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).
10. *Id.* at 666, 669 P.2d at 20, 194 Cal. Rptr. at 784.
11. *See infra* notes 19-35 and accompanying text.
12. *See infra* notes 37-43 and accompanying text.
13. *See infra* notes 44-62 and accompanying text.
14. *See infra* notes 91-142 and accompanying text.
15. *See infra* notes 93-105 and accompanying text.
16. *See infra* notes 106-08 and accompanying text.
17. *See infra* notes 109-42 and accompanying text.
18. *See infra* notes 109-42 and accompanying text.

appellate court is an argument at a calendar hearing which is quite unlike the fact finding process of a trial court.

This author will propose a strict standard of preelection review that would remedy the problems outlined above. This proposed standard, in addition to requiring a clear showing of invalidity, would defer judicial review of an initiative measure until after approval by the voters unless the "clear showing of invalidity" can be demonstrated using the authority of previously decided cases which addressed the constitutionality of the measure proposed by the initiative. This standard would maximize the power of the voters to address their concerns while still allowing the court to prevent submission of frivolous proposals to the electorate. Proponents would be able to plan initiatives around existing case law, yet present novel approaches to remedy legislative inaction or to counter undesired legislative action in areas of voter concern. Finally, the proposed standard would obviate the necessity of assembling a complex factual record in appellate courts and would allow the resolution of issues of fact in a trial court after the election has occurred.

Discussion in this comment will focus on preelection review by the California appellate courts using original jurisdiction power to accept constitutional challenges to statewide initiative measures that have qualified procedurally for the ballot. This comment also will be limited to judicial review of initiatives proposing statutory measures and not those proposing constitutional amendments for which judicial review is more limited. This author proposes a return to the traditional high level of judicial deference accorded initiative measures through the use of a strict standard of review. The most recent application of the standard has lowered the level of judicial deference with the resulting expansion of the scope of preelection review. A discussion of the origins of the traditional standard is therefore necessary.

Origin of the Standard of Review

The origin of the clear showing of invalidity standard used by the *Deukmejian* court can be traced to *Gayle v. Hamm,*[19] a 1972 Second District Court of Appeal decision. *Gayle* was not the first decision in which the principles incorporated in the standard were applied, but the opinion was the first to enunciate the standard. In 1982, the *Gayle* standard was adopted by the supreme court in *Brosnahan v. Eu.*[20] *Brosnahan,* in turn, was cited as the authority for the standard

19. 25 Cal. App. 3d 250, 101 Cal. Rptr. 628 (1972).
20. 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982).

used in *Legislature v. Deukmejian,*[21] but the original source is *Gayle.* To understand the impact of the change in the standard by the *Deukmejian* court, *Gayle* and *Brosnahan* necessarily must be considered first.

A. Gayle v. Hamm

Gayle v. Hamm involved an initiative that dealt with the ability of Ventura County to operate an airport within the boundaries of any unincorporated city located within the county.[22] Proponents of the initiative gathered the required signatures and presented them to the election officials for certification and submission to the voters. The case was brought before the California Court of Appeal for the Second District after the election officials refused to count and certify the number of signatures on the initiative petitions and place the measure on the ballot.[23] The dispute arose because the county counsel had informed election officials that even if enacted, the measure would be invalid.[24] Both the trial court and court of appeal agreed that a peremptory writ of mandate should be issued to compel the election clerk to proceed.[25] The court of appeal, relying on two previous California Supreme Court decisions, agreed and declined to grant a preelection review to determine the validity of the proposal.[26]

The *Gayle* court combined principles from both of those cases to formulate the standard of review to be used in determining the propriety of this preelection review. The first decision relied upon by the court was the 1948 case of *McFadden v. Jordan.*[27] In that case, the court removed an initiative from the ballot based on the finding that the initiative proposed to revise, not amend, the state constitution.[28] The *McFadden* court found that since the constitution contained an explicit provision giving the requirements needed for a constitutional revision, which could not be satisfied by the initiative process, any attempt by initiative to revise the constitution would clearly make the initiative, if enacted, invalid.[29]

The second case relied upon by the *Gayle* court was a 1967 supreme

21. *Deukmejian,* 34 Cal. 3d at 666, 669 P.2d at 20, 194 Cal. Rptr. at 784.
22. *Gayle,* 25 Cal. App. 3d at 252-54, 101 Cal. Rptr. at 631-32.
23. *Id.* at 252, 101 Cal. Rptr. at 630.
24. *Id.*
25. *Id.* at 252, 258, 101 Cal. Rptr. at 630, 634.
26. *Id.* at 255, 101 Cal. Rptr. at 632.
27. 32 Cal. 2d 330, 196 P.2d 787 (1948).
28. *Id.* at 331, 196 P.2d at 788.
29. *Id.* at 331-32, 196 P.2d at 788.

court case, *Farley v. Healey.*[30] In *Farley,* an initiative measure was proposed that the City and County of San Francisco adopt an anti-Vietnam War resolution.[31] The initiative was challenged on the ground that a foreign policy resolution was beyond the scope of the Charter of the City and County of San Francisco.[32] The supreme court declined to remove the initiative from the ballot because no "compelling showing" had been established justifying interference with the initiative power.[33]

The *Gayle* court then combined the standards from *McFadden* and *Farley* to hold that "the court will not interfere with the reserved right of the people to propose and enact legislation absent a 'compelling showing,' i.e., a showing that is 'clear beyond question' that the proposed ordinance would be invalid if enacted."[34] The court applied this standard to the facts and held that the requisite showing had not been made, and consequently, a preelection review was not justified.[35] Both the standard and the language of *Gayle* were later adopted by the supreme court in *Brosnahan v. Eu.*[36]

B. Brosnahan v. Eu

The initiative at issue in *Brosnahan* was entitled "The Victims' Bill of Rights." This measure was challenged to prevent submission to the voters on three grounds.[37] The first contention was that the initiative proponents had failed to comply procedurally with statutory provisions regarding the number of valid signatures required to qualify a measure for the ballot.[38] The majority of the opinion was devoted to this issue with the court concluding that the requisite number of valid signatures had been obtained to qualify the measure. Second, the measure was attacked on the ground that it violated an explicit constitutional provision limiting an initiative measure to a single subject.[39] Third, the initiative was challenged as being a revision of the constitution rather than an amendment.[40] The court did not address the substantive issues presented by the second and third objec-

30. 67 Cal. 2d 325, 431 P.2d 650, 62 Cal. Rptr. 26 (1967).
31. *Id.* at 326, 431 P.2d at 651, 62 Cal. Rptr. at 27.
32. *Id.*
33. *Id.* at 327, 431 P.2d at 652, 62 Cal. Rptr. at 28.
34. *Gayle,* 25 Cal. App. 3d at 255, 101 Cal. Rptr. at 632.
35. *Id.*
36. *Brosnahan,* 31 Cal. 3d at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101.
37. *Id.* at 2, 641 P.2d at 200, 181 Cal. Rptr. at 100.
38. *Id.* at 2-4, 641 P.2d at 200-01, 181 Cal. Rptr. at 100-01.
39. *Id.* at 2, 641 P.2d at 200, 181 Cal. Rptr. at 100.
40. *Id.*

tions. Instead, the court declined to pass on these issues because petitioners had failed to make "a clear showing of invalidity."[41] Both of the substantive issues were dismissed summarily in two sentences. The court, citing *Gayle* as authority,[42] gave no reason why the standard had not been met other than to dismiss the issues with the following language:

> We do not reach the other issues raised by petitioners. As we have frequently observed, 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.[43]

The court did no more than state the traditional concept of judicial deference given to initiative measures and the basic standard. Because the *Brosnahan* holding was unaccompanied by detailed reasoning of the court, no framework for making future decisions was created. The next major case to address the issue of the propriety of preelection review and to apply the "clear showing of invalidity" standard was *Legislature v. Deukmejian.*

C. Legislature v. Deukmejian

The most recent application of the standard by the California Supreme Court for determining the propriety of preelection review was in a 1983 case, *Legislature v. Deukmejian.*[44] At issue was the validity of the Sebastiani Initiative, a measure proposing a reapportionment plan for the voting districts of the state.[45] To understand the impact of this case upon the preelection standard of review and future initiative measures in general, a brief examination of the reapportionment struggle for this decade in California is necessary.

The California Constitution requires that after the publication of the federal census each decade, the voting districts of the state be reapportioned to reflect any population changes.[46] In 1981, following the release of the federal census figures, the California Legislature passed a reapportionment plan (hereinafter Plan I).[47] Some citizens, dissatisfied with Plan I, circulated petitions to require that Plan I

41. *Id.* at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101.
42. *Id.*
43. *Id.*
44. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).
45. *Id.* at 663, 669 P.2d at 18, 194 Cal. Rptr. at 782.
46. *See* CAL. CONST. art. IV, §6.
47. *Deukmejian*, 34 Cal. 3d at 667-68, 669 P.2d at 21-22, 194 Cal. Rptr. at 785-86.

be subjected to a referendum vote which would allow the voters to approve or disapprove of the plan. Enough signatures were obtained to qualify the referendum for the June 1982 election, and the supreme court allowed the districts drawn by the legislature to be provisionally used for the June 1982 elections.[48] In the 1982 election, Plan I was rejected by the voters and invalidated.[49]

In response, the legislature enacted a second plan (hereinafter Plan II). Plan II was never subjected to a referendum vote, such as the one which invalidated Plan I, because it was signed into law as an urgency statute by outgoing Governor Brown.[50] Under the California Constitution, legislation signed into law as an urgency measure is exempt from the referendum process.[51] Opponents of both the legislative plans alleged that Plan II, now enacted into law, was substantially the same as Plan I, which the voters had rejected at the polls and was, therefore, not representative of the wishes of the electorate.[52] One avenue of recourse chosen by those opposing this second legislative plan was the proposal of a third reapportionment scheme using the initiative process.

This third reapportionment plan was the Sebastiani Initiative, named after one of the primary proponents of the measure. Initiative petitions were circulated, and enough signatures were gathered to qualify the proposal for the ballot. Governor George Deukmejian called a special election to submit the initiative to the electorate.[53] This special election was never held, however, because the California Supreme Court found, in a preelection review, that the measure was unconstitutional.[54]

In holding that preelection review was proper, the court concluded that the petitioners, who sought to prevent the election, had made the requisite showing of the invalidity of the proposed initiative.[55] Generally, the court will not undertake a preelection review of an initiative measure that is attacked on constitutional grounds, preferring instead a postelection review if the measure passes. The court quoted the *Brosnahan* standard as the standard to be applied in deter-

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48. *Id.*
49. *Id.*
50. *Id.*
51. *See* CAL. CONST. art. II, §9.
52. Brief for Respondent at 18, Legislature v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).
53. *Deukmejian*, 34 Cal. 3d at 664, 669 P.2d at 19, 194 Cal. Rptr. at 783.
54. *Id.* at 658-81, 669 P.2d at 18-33, 194 Cal. Rptr. at 782-97.
55. *Id.*

mining the propriety of the preelection review.[56] In addition, the court stated that the principle of deferring constitutional challenges until after the election, unless a clear showing of invalidity is made, is a salutary principle and "where appropriate we adhere to it."[57] However, the court apparently determined that the circumstances in *Legislature v. Deukmejian* were not appropriate to warrant deference.

In the ensuing explanation of why the circumstances in the case before the court were inappropriate for the traditional high level of judicial deference accorded initiative measures, the court added a new dimension to the "clear showing of invalidity" standard. The court referred to two circumstances which affected the determination of the propriety of a preelection review in *Deukmejian* by lowering the level of deference given to the initiative measure. The first circumstance identified by the court was the considerable monetary cost to the taxpayers of holding a special election.[58] The election was to be held for the sole purpose of voting on the Sebastiani Initiative. The projected cost of the election was $15 million.[59] In the opinion of the court, the substantial cost of the special election warranted intervention.[60]

The second circumstance relied upon by the court as grounds for justifying preelection review was the potential problem that election officials, candidates, and supporters would encounter if the final decision on reapportionment were deferred until after the special election.[61] All of these groups could not prepare for the upcoming general election in June 1984 without knowing what voting districts the reapportionment plan would establish. The court decided that the stability of the system would be jeopardized if the validity of the initiative were not determined promptly.[62]

In sum, the court balanced these circumstances against the historical judicial deference accorded initiative measures, and allowed the perceived consequences to weigh significantly in the determination by the court to exercise preelection review. The court qualified the "clear showing of invalidity" standard, and thus established a two pronged test. The first prong is the traditional approach used by the California courts and is a deferential standard of review. In the absence

56. *Id.* at 666, 669 P.2d at 20, 194 Cal. Rptr. at 784.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

of any special circumstances and resulting serious consequences, the court will give the long-established high level of deference to the initiative process. If this level of deference is applied, the clear showing of invalidity standard is difficult for opponents of an initiative to meet because the court will not strictly scrutinize the issue of invalidity. This usually allows the initiative process to proceed undisturbed by preelection constitutional challenges. The court, however, still has the ability to review the measure after submission to the voters, unless an adverse vote makes the issue moot.

The second prong of the new two part standard, providing for judicial review of initiative measures when justified by special circumstances, appears for the first time in *Legislature v. Deukmejian.* This prong accords less deference to the initiative process in the application of the "clear showing of invalidity" standard. If the court determines that special circumstances exist which would result in serious consequences to the public, then the level of deference traditionally given initiative measures is lowered. The resulting effect is to decrease the showing of invalidity required to justify a preelection review. Both prongs of this new expanded standard, however, still require that a determination of the showing of invalidity be made. This is the area in which the law is least clear.

Determination of a Clear Showing Of Invalidity

The traditional level of deference given the initiative process rarely has required actual application of the clear showing of invalidity standard. The courts simply have exercised restraint and considered judicial interference an unwarranted limitation on the initiative process in virtually all cases.[63] They have relied on this general deference and not on the actual application of the standard to determine the propriety of preelection review.[64] This controlling judicial deference to the initiative process has forestalled the development of case law specifically explaining the application of the clear showing of invalidity requirement.

An example is the treatment by the court of the constitutional issues in *Brosnahan.* The issue concerning the fulfillment of the procedural qualification requirements of California Constitution article II, section 8, comprised the bulk of the opinion while the substantive

63. *See, e.g.*, Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966); Wind v. Hite, 58 Cal. 2d 415, 374 P.2d 643, 24 Cal. Rptr. 683 (1962).
64. *Id.*

challenges of invalidity were dismissed summarily.[65] The court simply stated that the better course would be to wait and review the substantive issues of constitutional validity after the election because postelection review is more appropriate than preelection review in challenges to initiative measures.[66] No reasoning on the assertions of invalidity can be found in the majority opinion.[67] Only an assumption can be made that the requisite showing was not made since a preelection review was not granted.

The determination of whether a showing of invalidity has been made obviously depends upon the subject matter of the initiative measure before the court. A few decisions, however, have enunciated two general principles that provide some guidance in the application of the standard. In *McFadden,* the only case in the thirty-two year period before *Deukmejian* to find that a clear showing of invalidity had been made,[68] the court stressed two points in holding that the standard had been met. First, the invalidity of the initiative measure rested on an *express* constitutional provision.[69] The California Constitution contains explicit guidelines for a revision of the constitution, and while the initiative at issue in *McFadden* was entitled a constitutional amendment, the actual effect would have been a revision.[70] The initiative measure could not satisfy the explicit constitutional requirements and, therefore, was invalid.[71]

The second general principle emphasized in the reasoning of the *McFadden* decision was that preelection review and invalidation must be predicated on the authority of existing case law.[72] The *McFadden* court held that the standard had been met because the constitutional "provisions are not only clear in themselves but have heretofore, in controlling aspects, been the subject of scrutiny and exposition by the court."[73] This language clearly shows the reliance of the court on precedent to determine the showing of invalidity.

This second general principle was incorporated in the decision of the *Gayle* court.[74] The court referred to the *Farley* opinion for elucida-

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65. *Brosnahan*, 31 Cal. 3d at 4, 641 P.2d at 200, 181 Cal. Rptr. at 100.
66. *Id.*
67. *Id.*
68. *Deukmejian*, 34 Cal. 3d at 681, 669 P.2d at 33, 194 Cal. Rptr. at 781 (Richardson, J., dissenting).
69. *McFadden*, 32 Cal. 2d at 331-32, 196 P.2d at 788.
70. *Id.*
71. *Id.*
72. *Id.* at 332, 196 P.2d at 789.
73. *Id.*
74. *Gayle*, 25 Cal. App. 3d at 256, 101 Cal. Rptr. at 633.

tion of the meaning of a "compelling showing."[75] *Farley* had given two examples of cases in which the proper showing of invalidity had resulted in preelection review.[76] The *Gayle* court studied these examples, *Reidman v. Brison*[77] and *Mervynne v. Acker,*[78] and found that the focal issues necessary to the resolution of both cases had been determined previously more than once by the supreme court.[79] Consequently, in *Reidman* and *Brison,* a showing of invalidity was found by using judicial precedent. The *Gayle* court, applying this principle of judicial precedent, and giving the traditional deference to an initiative, refused to find that the showing of invalidity had been made. In the absence of authoritative case law on which a finding of invalidity could be based, the court would not entertain the constitutional challenge to the validity of the airport measure in *Gayle.*[80] The court reasoned that neither the opponents of the measure nor the independent research of the court could produce any dispositive authority that would allow the court to make a simple and speedy determination of the validity of the airport issue, unlike the case in *McFadden.*[81]

In conclusion, the *Gayle* decision qualified the "clear showing of invalidity standard" with the requirement that the invalidity be determined by existing case law authority. *Gayle,* therefore, joined both *McFadden* and *Farley* in enunciating this principle. Unfortunately, in the latest application of the standard in *Deukmejian,* neither case law precedent nor express constitutional provisions were included in the application of the standard by the court. The omission of these principles perpetuates the vagueness and obscurity of the invalidity standard.

A. Recent Application

In *Legislature v. Deukmejian,* the showing of invalidity rested on a judicially evolved limitation that prohibited the enactment of more than one valid reapportionment plan in any decade. This limitation commonly is known as the once-in-a-decade rule.[82] The court determined that the once-in-a-decade limitation not only applies to subsequent legislative attempts to reapportion, but also to reapportionment

75. *Id.* at 255, 101 Cal. Rptr. at 632.
76. *Farley,* 67 Cal. 2d at 327, 431 P.2d at 652, 62 Cal. Rptr. at 28.
77. 217 Cal. 383, 18 P.2d 947 (1933).
78. 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (1961).
79. *Farley,* 67 Cal. 2d at 327, 431 P.2d at 652, 62 Cal. Rptr. at 28.
80. *Gayle,* 25 Cal. App. 3d at 255-58, 101 Cal. Rptr. at 632-34.
81. *Id.*
82. *Deukmejian,* 34 Cal. 3d at 668, 669 P.2d at 22, 194 Cal. Rptr. at 786.

attempts by initiative, because the limitation is constitutional in nature.[83] This reasoning seemed, at first blush, to make the invalidation of the initiative analogous to the *McFadden* case since initiatives are subject to the provisions of the constitution.[84] In *McFadden,* however, the constitutional limitation was stated explicitly in the text of the constitution. The once-in-a-decade rule, unlike the *McFadden* limitation, is created and imposed judicially.[85] In article XXI, the California Constitution provides for reapportionment, but expressly states that only the *legislature* shall reapportion after each census.[86] No language in the text explicitly states the once-in-a-decade rule or suggests a limitation of this kind on the initiative power.[87] The court, in articulating the once-in-a-decade rule as a constitutional limitation, had to rely on the intent of the drafters of the constitution in 1879 to support the conclusion that the constitution precludes reapportionment *by initiative* or the legislature more than once per decade.[88] The weakness in this intent argument is that the initiative process was not created until 1911, some thirty-two years after the drafting of the constitution.[89] Consequently, the finding by the court that the showing of invalidity was justified by a constitutional limitation is not well founded, and the historical application of the standard, as evidenced by *McFadden,* is not satisfied.

The *Deukmejian* court also disregarded the second general principle used in the application of the standard developed by *Farley, McFadden,* and *Gayle.* The court did not cite any dispositive case authority applying the once-in-a-decade rule to an initiative measure. The cases cited by the court to support the once-in-a-decade rule were authority only for the application of the rule to legislative bodies.[90]

If the standard, as it existed before *Deukmejian* and now the first prong of a two part test, had been applied strictly to the Sebastiani Initiative, a preelection review clearly would have been found inappropriate. The two major principles in the historical determination

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83. *Id.* at 675, 669 P.2d at 27, 194 Cal. Rptr. at 791.
84. *McFadden,* 32 Cal. 2d at 331, 196 P.2d at 788.
85. *Deukmejian,* 34 Cal. 3d at 686-88, 669 P.2d at 36-38, 194 Cal. Rptr. at 800-02 (Richardson, J., dissenting).
86. *Id.*
87. Article XXI of the California Constitution replaced former article IV, section 6, in 1980. The text of the new article while rephrased, still requires only the *legislature* to reapportion after every federal census.
88. *Deukmejian,* 34 Cal. 3d at 669, 669 P.2d at 22, 194 Cal. Rptr. at 786.
89. *Id.* at 686, 669 P.2d at 37, 194 Cal. Rptr. 801 (Richardson, J., dissenting).
90. *See* Wheeler v. Herbert, 152 Cal. 224, 92 P. 353 (1907); Yorty v. Anderson, 60 Cal. 2d 312, 384 P. 2d 417, 33 Cal. Rptr. 97 (1963).

of a clear showing of invalidity—explicit constitutional provisions and dispositive case authority—were not satisfied. Additionally, under the traditional analysis, review of the constitutionality of the measure would have been deferred until after the election on the initiative had taken place. The *Deukmejian* court did not adhere to the historical application of a clear showing of invalidity. Moreover, the application of the newly created second prong of the standard by the *Deukmejian* court raises a serious concern about the effect on the initiative process of this less restrained judicial intervention in the preelection stage of an initiative measure.

Adverse Effects of Less Restrained Preelection Intervention on the Initiative Process

The traditional level of judicial deference accorded initiative measures, and the limited application of the "clear showing of invalidity" standard used by the California Supreme Court in the past, indicated the underlying judicial policy that courts are to maximize and protect the power of the initiative process. During the seventy years since the inception of the initiative by constitutional amendment in 1911, the initiative process has been proclaimed judicially to be one of the most precious rights of our democratic process.[91] In addition, the policy of the court has maintained that the initiative power be liberally construed to promote the democratic process.[92] Historically, the presence of this pervasive policy has been manifested in the decisions of the court through restraint in the use of the power of judicial intervention when presented with a preelection challenge to an initiative.

Deukmejian, however, has signalled a change in adherence by the court to this underlying policy. The court, instead of yielding to the tradition of judicial restraint in considering preelection challenges, chose to review and invalidate the measure prior to submission to the voters. This attitude change on the part of the court creates three major concerns for the future of initiative measures.

A. Judicial Frustration of the Initiative Purpose

California created the initiative process in 1911 by constitutional amendment to provide the electorate with access to the legislative pro-

91. *Mervynne,* 189 Cal. App. 2d at 563-64, 11 Cal. Rptr. at 345.
92. *Id.*

cess after influential lobbyists achieved domination of the legislature.[93] Historically, the justification for the importance of the initiative was that the process would serve as a check on the legislative branch.[94] If legislators failed to respond to the will of the people, the people could bypass the legislature and enact laws directly through the initiative process.[95] The initiative has been used successfully to accomplish reform in many areas, including taxation[96] and criminal justice.[97] It also has been upheld as a tool for the people to voice views on public policy considerations such as the involvement of the United States in the Vietnam War.[98] While the primary purpose is the enactment of laws, an important corollary effect of any initiative is the ability of the electorate to voice concerns not adequately addressed by the legislature.[99] The facts of the reapportionment struggle that culminated in *Deukmejian* exemplify the importance of both the primary purpose and corollary effect of the initiative process and how the decision of the court defeated both.

As discussed above, after Plan I was rejected by the voters in the referendum election, Plan II, alleged by opponents to be substantially similar to the first plan, was enacted as an urgency statute. This prevented the voters from rejecting Plan II at the polls as they had rejected Plan I. Effectively, the electorate was precluded from any participation in the determination of the voting districts to be used in the state for the rest of the decade.[100] The only way the voters could participate or could voice their disapproval of not being able to participate by the use of the referendum process was through an initiative.

The decision in *Deukmejian* prevented the purposes of the initiative process from being fulfilled. The primary purpose was not fulfilled because the court, in limiting the initiative process using the once-in-a-decade rule, prevented the voters from enacting a plan of their own. Also, voters were prevented from conveying to the elected represen-

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93. *See* Comment, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 922-24 (1975).

94. *Id.*

95. *Id.*

96. *See* Amador Valley Joint Union High Sch. Dist. v. State Board of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

97. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

98. *Farley*, 67 Cal. 2d. 325, 431 P.2d 650, 62 Cal. Rptr. 26. In *Farley*, the supreme court upheld against a constitutional challenge the right of the voters of San Francisco to propose and adopt an anti-war resolution.

99. *See* Comment, *supra* note 84, at 923-24.

100. *See supra* notes 46-54 and accompanying text.

tatives their dissatisfaction with the legislative action by casting their votes in favor of an alternative plan. Notwithstanding that at postelection invalidation of the Sebastiani Initiative could have occurred using the same constitutional limitation, a majority vote at the polls for the initiative and against the legislative plan would have communicated the displeasure of the electorate to the legislature.

In the area of reapportionment, the decision to exercise judicial review not only has frustrated this purpose of the Sebastiani Initiative, but it has made the initiative power to reapportion inferior to that of the legislature. The court has created a race to reapportion at the beginning of each decade.[101] The winner will be whichever lawmaking body—the legislature or the people—can succeed in enacting the first valid reapportionment plan.[102] The enactment of a plan by one body in effect will preclude the other body from also acting because only one plan per decade is now constitutionally permissible. The legislature,[103] however, will always win the race because lengthy time requirements for proposal of an initiative measure are imposed by statute.[104] If, as with Plan II, the governor decides to sign a reapportionment bill into law as an urgency measure, the voters can be precluded from participation by way of the referendum process as well.[105]

The decision in *Deukmejian* could signal a change in the judicial policy applied to initiatives in general. If so, the purpose and scope of the initiative power to counteract legislative action or inaction may be restricted in future use. In light of the constitutional origin of the initiative power, any restriction would seem to be made more appropriately, not by the judicial process, but by constitutional amendment. The judiciary, however, can effect changes in the treatment by the courts of initiative measures to make review more predictable.

B. Predictability of Preelection Review

The traditional treatment by the court of initiative measures made the risk of preelection review for constitutional validity a minimal one. In the past thirty-six years, only once prior to *Deukmejian*, in *McFadden*, has a duly qualified statewide initiative measure been

101. Brief for Respondent at 18, Legislature v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).

102. *Id.*

103. The decision in *Deukmejian* held that only one valid plan, whatever the source, will be permitted.

104. *See* CAL. ELEC. CODE, §§3500-3579.

105. CAL. CONST. art. IV, §8 (urgency statutes are effective immediately upon the signing of the bill by the governor and no referendum is allowed).

removed from the ballot.[106] In all other cases of constitutional challenges, the court has deferred review until after the election.

This policy of restraint made the process of preelection review predictable. Basically, the drafters of any reasonable initiative proposed and qualified could anticipate presentation of the measure to the voters at the polls. Reasonable initiatives could be defined as those measures not contrary to express constitutional provisions or judicial precedent. One example of an unreasonable initiative measure would be an attempt to revise the constitution by the initiative process, as in *McFadden.*[107] Another example would be an initiative that did not comply with the specific constitutional provisions for an initiative measure. One of these constitutional rules is found in article II of the California Constitution and prohibits an initiative containing more than one subject from being submitted to the voters.[108]

Proponents of initiatives before the *Deukmejian* decision rarely had to calculate among the risks involved in their proposal the risk of judicial intervention that would prevent submission to the voters. *Deukmejian*, however, by lowering the deference given initiatives and by placing more reliance on the application of the standard of review, increases the risk of litigation and judicial intervention at the preelection stage. This increase in risk may deter the full use of the initiative power. The failure of the courts to rely on case law in determining a clear showing of invalidity gives no guidance to proponents as to the risks of preelection litigation. Those proponents with novel ideas may hesitate to propose them or may modify them to come within any possible legislative limitation that could be applied by the court. In essence, the increased risk of preelection review may have a chilling effect on the process and result in a decrease of the free use of the initiative process to solve governmental problems. In addition, another undesirable effect of preelection review is an increase of fact finding made at the appellate level.

C. Increased Determinations of Factual Disputes at the Appellate Level

The policy of less restrained judicial intervention during the preelection stages of the initiative process, as signalled by the *Deukmejian*

106. *Deukmejian*, 34 Cal. 3d at 681, 669 P.2d at 33, 194 Cal. Rptr. at 797 (Richardson, J., dissenting).

107. *See supra* notes 27-29 and accompanying text.

108. *See* CAL. CONST. art. II, § 8(d). *See generally,* Comment, *The California Initiative Process: The Demise of the Single Subject Rule*, 14 PAC. L.J. 1095, 1099 (1983). The single

decision, will increase the number of measures reviewed in an appellate forum. Previously, when the review of a measure was deferred until after the election, the factual determinations were made in the setting of a trial court[109] either because actions were filed in the trial courts or were referred there by appellate courts. The actions proceeded up the normal legal channels.[110] This is a desirable procedure because the trial setting, unlike an appellate forum, is designed for the fact finding process.[111] However, because of the urgent nature of preelection challenges to initiative review, most preelection challenges are brought directly in appellate courts as writ proceedings. As more measures are shifted from a postelection review to a preelection review, the inevitable result will be greater instances of factual determinations at the appellate level. The undesirability of this shift can be better understood if the legal framework of a preelection challenge and the existing judicial attitude toward fact finding at the appellate level are examined briefly.

1. The Judicial Framework of a Preelection Challenge to an Initiative Measure

A preelection challenge to the validity of an initiative measure is raised by bringing an action in equity.[112] The equitable remedy sought is the issuance of a writ of mandate by the court to compel ministerial officers, in this case election officials, to submit or withhold the initiative from the voters.[113] The petition for writ of mandate can be brought in an appellate forum as an original proceeding because of the equitable nature of the action.[114]

The party seeking the equitable relief files a petition for the writ of mandate.[115] Opponents to the writ, the respondents, file a return or answer that may include factual allegations supporting their view.[116] The factual allegations in the return must be accepted as true unless controverted by the petitioners.[117] If the petitioners do present counter

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subject rule is an explicit constitutional limitation on the initiative. This rule has been used often to challenge initiative measures.

109. *See* Morris v. South San Joaquin Irr. Dist., 9 Cal. 2d 701, 704, 72 P.2d 154, 156 (1937).

110. *Id.*

111. *See* McCarthy v. Talley, 46 Cal. 2d 577, 581, 297 P.2d 981, 984 (1956).

112. *See* Yorty v. Anderson, 60 Cal. 2d 312, 317, 384 P.2d 417, 420, 33 Cal. Rptr. 97, 100 (1963).

113. *Id.*

114. CAL. CIV. PROC. CODE §1085.

115. *Id.*

116. *Id.* §1089.

117. Lotus Car Ltd. v. Municipal Court, 263 Cal. App. 2d 264, 268, 69 Cal. Rptr. 384, 387 (1968).

allegations, a question of fact arises.[118] The discretionary powers of the court sitting in equity include the ability to make factual determinations in the dispute necessary to the decision.[119] Any question of fact raised by the answer is heard in the same manner as any other trial, and findings of fact on the part of the court are required unless waived by the parties.[120] Appellate courts, however, are not equipped to try issues of fact.[121] Precedent in California, acknowledging this inadequacy of fact finding at the appellate level, has exhibited a preference that appellate courts are not the appropriate forums for the resolution of disputed fact issues.[122]

2. *Existing Judicial Attitude Toward Factual Determinations at the Appellate Level*

This preference for the avoidance of factual resolution in a court of review is evidenced by the attitude of the supreme court in one of the few cases in which the power to make factual determinations at the appellate level was exercised. The decision, *Mooney v. Pickett*,[123] limited the use of the discretionary fact finding power by the court to the specific facts of the case. In *Mooney*, a 1971 supreme court case, a petition for mandamus was made to compel county officials to grant general assistance welfare payments to unemployable single men.[124] The court denied the respondents' request in the mandamus proceeding for a factual hearing, but nevertheless made original factual findings in the decision.[125]

Three grounds were given for the propriety of the exercise of the fact finding power. First, the case involved the eligibility of a group of needy people for general welfare assistance.[126] Second, the respondents requesting the factual hearing had already been given an opportunity for resolution of the factual questions in a separate but related suit in the superior court.[127] Third, the respondents did not repudiate the stipulations of facts made in the lower court and request a factual hearing at the earliest opportunity in the appellate

118. *Id.*
119. *Id.*
120. *Id.*
121. 5 B. WITKIN, CALIFORNIA PROCEDURE, *Extra-Ordinary Writs*, §167 (2nd ed. 1971).
122. *Id.*
123. 4 Cal. 3d 669, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971).
124. *Id.* at 670, 483 P.2d at 1232, 94 Cal. Rptr. at 280.
125. *Id.*
126. *Id.* at 682-83, 483 P.2d at 1240-41, 94 Cal. Rptr. at 288-89.
127. *Id.*

court.[128] The court reasoned that a factual finding by an appellate court under these circumstances was not unfair.[129] This, however, was not the attitude taken by the *Deukmejian* court in addressing the complex factual questions presented by the reapportionment fight.

3. *Issues of Disputed Fact in* Deukmejian

The factual disputes in *Deukmejian* centered around the validity of both the initiative and legislative reapportionment plan. The proponents of the initiative charged the legislative plan was invalid, and the proponents of the legislative plan charged the initiative plan was invalid.[130] The once-in-a-decade rule could not be applied to limit the initiative measure unless the court factually held that the legislative plan was valid. If the plan was proper, then a valid plan had been enacted for the decade and any other attempts to reapportion were precluded. If the plan was found to be invalid, however, the constitutional limitation would not apply and the Sebastiani Initiative could be submitted to the voters.

The major factual dispute arose in conjunction with the determination of the validity of the legislative plan by the court. The respondents, in opposing the petition for the writ of mandate, presented factual allegations that the plan was invalid.[131] Because allegations in the answer are presumed to be true,[132] the court had only two choices: (1) proceed upon the assumption that the legislative plan was invalid, or (2) assume that the petitioners disputed the answer, in which case issues of fact were created, the determination of which would be necessary to the decision by the court.

The factual issues involved complex constitutional requirements for reapportionment. Among the questions raised were the following: (1) whether the plan adopted by the legislature had excessive population deviations, (2) whether the plan diluted minority voting strength by splitting minority communities, and (3) whether the plan violated article XXI of the California Constitution because the districts created were not contiguous and compact, or because the plan unnecessarily divided cities and counties.[133]

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128. *Id.*
129. *Id.*
130. *Deukmejian*, 34 Cal. 3d at 664-65, 669 P.2d at 19-20, 194 Cal. Rptr. at 783-84.
131. Brief for Respondents at 31-42, Legislature v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781.
132. *See supra* note 102 and accompanying text.
133. Brief for Respondents at 31-42, Legislature v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781.

The traditional options for resolving factual disputes were available to the court. Since the validity of the legislative plan was already the subject of a pending unrelated suit in federal district court,[134] the supreme court could have deferred any resolution of the case until that court had made the factual findings. A second option would have been to send the case to a state trial court to make the factual findings. Thirdly, the court could have appointed a referee to hold a factual hearing.[135] The respondent in the case had requested a hearing in the answer.[136] A last alternative, not supported by precedent, would have been for the supreme court to make original fact findings. This would be the least desirable of the three options available to the court because of the complex nature of the factual questions involved. In addition, none of the factors given by the court in the *Mooney* decision was present to justify the action.[137]

The supreme court, indirectly, did use the last alternative. The court held that the legislative plan was valid, in essence determining that the factual allegations of the respondents were not true. This was accomplished by finding that the legislative plan was *presumptively* valid.[138] This irrebuttable presumption of validity arose, according to the supreme court, simply because the law had been duly enacted.[139] The result of this finding by the court was to prevent the initiative proponents from factually defending the measure.

In addition to the apparent unfairness in denying the litigants the right to a trial-like factual determination, a second objection can be made. By giving the plan enacted by the legislature a presumption of validity, despite respondents' factual allegations to the contrary, the court prevented the initiative measure from having the same chance as the legislative plan to obtain an identical presumption at the polls. If the initiative measure had been enacted into law at the polls, then in any subsequent suit, both the legislative and the initiative plans would have the benefit of the presumption of validity accorded a duly enacted law. In those circumstances, any challenge to either measure would have to be decided on the merits and not on the fact that one plan had had the opportunity to be enacted and the other did not. To allow the use of a legislative presumption of validity to pre-

134. *Id.* at 31.
135. Holt v. Kelly, 20 Cal. 3d 560, 562, 574 P.2d 441, 443, 143 Cal. Rptr. 625, 627 (1978).
136. Brief for Respondents at 33, Legislature v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. at 781.
137. *See supra* notes 123-29 and accompanying text.
138. *Deukmejian,* 34 Cal. 3d at 678, 669 P.2d at 29, 194 Cal. Rptr. at 793.
139. *Id.*

vent an initiative plan from gaining the same presumption results in the power of the initiative being subordinated to that of the legislature, which is contrary to constitutional allocation of power.

This use of the legislative presumption to limit the initiative process, again, signals a change in policy on the part of the present court in finding preelection review proper. This change in attitude will impact substantially on the future use of the initiative power. Among the undesirable effects of less restrained intervention in the preelection stage will be an increase in judicial frustration of the purpose for which the initiative was created.[140] Additionally, the predictability of judicial review in constitutional challenges will decrease,[141] and the number of factual determinations at the appellate level will increase.[142] Because of these negative effects, the parameters of preelection review need to be redefined to ensure the continued vitality of the initiative power.

Recommendations

The *Deukmejian* court considered the consequences that would result if a review of the constitutionality of the measure were not held before the submission of the measure to the voters. The two consequences were as follows: (1) the substantial cost of the special election to the taxpayers, and (2) the problems that candidates and election officials would face in preparing for the election without knowing which reapportionment plan would be in effect.[143] The court, however, could have mitigated these results effectively without proceeding with the preelection review. Both of these consequences would have been avoided if the court had removed the measure from the special election ballot, in effect cancelling the costly election, and ordered the apportionment plans of the legislature to be used temporarily for the 1984 elections. The initiative could have been placed on the ballot at the regular election in June 1984 and the initiative reapportionment plans, if approved, could have been used beginning in 1986.

The court should avoid preelection reviews when possible, and if alternatives can be used, they should be implemented. The mitigation of consequences instead of preelection invalidation will allow the initiative process to proceed with as little judicial intervention as possible. The court, however, still could grant a preelection review in those

140. *See supra* notes 93-105 and accompanying text.
141. *See supra* notes 106-08 and accompanying text.
142. *See supra* notes 109-11 and accompanying text.
143. *See supra* notes 58-62 and accompanying text.

instances in which the consequences are very serious and no means to avoid them exist.

Additionally, to reduce the need for preelection review the court also should make the process more predictable.[144] This could be accomplished by adoption of the general principles set out in *McFadden* and *Gayle*. The *McFadden* principle, invalidation only upon a violation of an express constitutional provision, would allow initiative proponents to use the constitution as a guide in planning the measures. The *Gayle* principle,[145] invalidation only if supported by precedent, would allow the proponents to use case law as a guide in formulating and drafting initiatives. This would result in a predictable application of the equitable power of the court and allow the initiative power to be maximized. Finally, the court should defer until after the election review of any measure when the showing of invalidity rests on factual issues.[146] This would ensure the proponents of the measure will have a complete and fair factual determination in an appropriate forum, the trial court, because the appellate courts will have the time to send the cases there.

CONCLUSION

The decision in *Deukmejian*, if given full effect in future cases, will increase judicial intervention during the preelection stage of the initiative process. The traditional attitude of judicial restraint in granting preelection reviews was qualified to allow the court to consider special circumstances surrounding the particular initiative measure at issue. If the court finds that the circumstances may result in serious consequences, then the level of deference accorded the initiative process is lowered. By this qualification, the court has abandoned the traditional application of the *Gayle* clear showing of invalidity standard and the case law principles that clarified how a clear showing of invalidity was determined. The *Gayle* standard, incorporating the ideas of both the *McFadden* and *Farley* cases, required that opponents of an initiative measure seeking preelection review make a showing to the court that the measure, if enacted, would be invalid. In determining the propriety of a preelection review prior to the *Deukmejian* decision, courts relied heavily on the policy of according initiative measures high levels of judicial deference. In addition, two general

144. *See supra* notes 106-08 and accompanying text.
145. *Id.*
146. *See supra* notes 123-42 and accompanying text.

principles evolved from the *McFadden, Farley* and *Gayle* decisions to guide the courts in determining whether the requisite showing of invalidity had been made. First, a clear showing could be made only if the invalidity was based on an explicit limitation in the constitution. Second, the authority for any showing of invalidity must have come from case law in which the limitation previously had been applied to an initiative measure.

The *Gayle* clear showing of invalidity standard was applied by the supreme court in *Brosnahan*. The *Brosnahan* decision gave no reasoning or guidance on the application or fulfillment of the standard. *Deukmejian*, citing *Brosnahan* as authority, qualified the standard into a two prong test. The first prong is the traditional highly deferential standard that will be used in the absence of any special circumstances. The second prong, used to invalidate the initiative measure in *Deukmejian*, allows the court to consider any special circumstances that will result in consequences the court finds detrimental. The consequences the court found serious enough to lower the level of deference in *Deukmejian* were the cost of the special election and the disruption of the political system.

The outcome of the *Deukmejian* decision will be an increase in the number of preelection reviews granted by the court. This author has demonstrated that as more reviews are shifted from a postelection trial setting to the preelection appellate forum, the effect will be threefold. First, the purposes behind the initiative power will be frustrated. Second, preelection judicial intervention will not be predictable, and third, more factual determinations will be made at the appellate level. These consequences will result in a decrease in the power of the initiative. To counter this effect, the court should return to a strict standard of review that includes the high level of deference given the initiatives process in the past. This standard should base the showing of invalidity on an express constitutional provision or existing case law and in the presence of serious consequences, the court should seek mitigating alternatives. If this is done, instead of lowering the level of deference from the high traditional level and granting preelection review based on whatever the court deems to be a serious consequence, the future vitality of the initiative process in California will be ensured.

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