INITIATIVE, COURTS, AND DEMOCRACY

DANNY M. ADKISON
Oklahoma State University

In 1992 Oklahoma's Supreme Court prevented the submission of an initiative petition to the voters on the grounds that it unconstitutionally limited elective abortions. Such pre-submission review is examined in light of constitutional, theoretical, and practical arguments. Several reasons are given for why the Court should adhere to an earlier precedent denying pre-submission review.

When William Jennings Bryan called Oklahoma's Constitution the "best constitution in the United States," one thing he was admiring was the initiative and referendum. In 1907 only four other states had constitutional provisions for these devices. Today, twenty-three other states provide for some form of direct democracy, but Oklahoma is still most liberal in this regard (Eule 1990).

The initiative and referendum were manifestations of a distrust in politicians in general and the state legislature in particular. The authors of the Constitution would probably have viewed the courts as the department least likely to encroach on the will of the people. Yet, in the summer of 1992 the Oklahoma Supreme Court refused to let the people vote on an initiative petition that was, in all respects, procedurally sound.

In 1990 a group called Oklahoma Coalition to Restrict Abortion, Inc., and a clergyman, Fred W. Sellars, Jr. led a circulation drive of an initiative petition concerning abortion. The Petition (No. 349) sought to limit the availability of elective abortions. In fact, except for four specific circumstances, it outlawed them entirely.[1] The petition was challenged in court on procedural grounds, and on constitutional grounds. Then, on June 29 the U. S. Supreme Court delivered its eagerly awaited opinion on abortion (*Planned Parenthood v. Casey*). On July 14, 1992 the state Supreme Court ordered those involved in lawsuits involving Petition No. 349 and the Attorney General to submit briefs addressing the constitutionality of the initiative in light of the *Casey* decision. The next month the Court, in a 5-4 decision, ruled that Initiative Petition No. 349 was unconstitutional, and therefore an election on it would be "useless" (Majority Opinion 1992, 3). The Court's decision raises several questions. First, one could ques-

tion the correctness of the state Supreme Court's view. That is, were the provisions of Initiative Petition No.349 in line with the *Casey* decision? This is traditionally the approach taken when examining court opinions, and not surprisingly, the parties in the case devoted most of their discussion to this question. Yet, there is another question that should precede any discussion of the constitutionality of the Petition. Is it constitutional or appropriate for the courts to rule on initiative petitions prior to their adoption in an election? That is the question on which this paper focuses. The legal issues raised by this question will be discussed first followed by some thoughts on the appropriateness of the Court's actions.

PRE-SUBMISSION JUDICIAL REVIEW

What are the arguments for and against pre-submission review of initiative petitions? First, it should be made clear that we are referring to a particular kind of review. All states permitting initiatives have procedural requirements that must be met before holding an election.[2] Few, if any, question the legitimate power of the courts to review, prior to the election, the correctness in following these procedures. There is no unanimity, however, when it comes to the question of reviewing the constitutionality of a petition *before* submitting it to the people in an election.

One argument favoring such pre-submission review is that to hold an election on an initiative petition that is unconstitutional would be a "fruitless endeavor" (Attorney General 1992, 1), or as the Court described it, an "exercise in futility" (Majority Opinion 1992, 4). It is futile since the people, if they passed such an initiative, would most likely have their efforts rather quickly nullified by the courts.

Another argument made for pre-submission review is that it can save taxpayer dollars.[3] Elections cost money (officials have to be paid, ballots have to be printed, etc.). Why, so the argument goes, use taxpayer money for an election on an initiative that is unconstitutional? Why, as the Court put it, spend taxpayer money on an "elaborate charade?" (Majority Opinion 1992, 21).

It could also be argued that the Constitution specifically allows pre-submission review. It might, in other words, not be wise to conduct such reviews, but the Constitution permits it (Majority Opinion 1992, 13-22).

It was also argued in the present case, in what on its face seems somewhat Orwellian, that preventing the election on the initiative was best not only for those opposing the petition but also those supporting it. This was explained in the Attorney General's Brief:

> "...for what good will it do supporters to spend hundreds of thousands of dollars on an election campaign, only to have the law struck down, the first time it is challenged – after passage. It is in the best interest of the petition's supporters to know now, that the law they proposed is unconstitutional, so they can channel their efforts where they can be effective" (Attorney General 1992, 14-15).

The Court also rejected arguments emphasizing the right of the people to "speak" through the initiative.

> "The proponents appear to assert that this absolute right to vote is derived from the First Amendment to the United States Constitution....assuming *arguendo,* the relevance of proponents' 'core speech' argument in this context, it is obvious that these rights are not absolute" (Majority Opinion 1992, 16-17).

Finally, it was argued that pre-submission review can prevent an unnecessary divisive election. The Court agreed with *amici* that it thought pre-submission review could prevent the holding of an election that might not only divide public opinion, but unnecessarily so (Majority Opinion 1992, 14).

CONSTITUTIONAL LIMITATIONS

The appropriate place to begin an examination of the correctness of pre-submission review is the state constitution. Proponents (those favoring a vote on the initiative) pointed out that the constitution gave the people the power to "propose laws...and to enact or reject the same at the polls independent of the Legislature...." (Article V, Section 1). Viewed in this manner, the people are acting as lawmakers and as such were "legislators." Therefore, they argued, pre-submission review of an initiative would unconstitutionally deny this power because the separation of powers provision states that "neither [the legislative, executive, nor judicial departments] shall exercise the powers properly belonging to either of the others" (Article IV, Section 1).

Proponents also relied on Article VI, Section 2 of the Oklahoma Constitution, which states:

> The first power reserved by the people is the initiative, and... voters shall have the right to propose any legislative measure....

For proponents, the key word in this section is "any" (Proponents' Brief 1992, 7). Although not explicitly stating it as such, proponents argument seems

to be that this would include the power of the people to propose laws which are *prima facie* unconstitutional.

Surprisingly, protestants (those against a vote on the initiative) did not cite any constitutional provisions in support of their view (Brief of Protestants 1992). The Attorney General's office did cite the U. S. Constitution arguing that *Casey* was the supreme law of the land and the U. S. Constitution (Article VI, Clause 2) mandates that "Judges in every State shall be bound thereby" (Attorney General 1992, 4). This, of course, begs the question concerning the constitutionality of pre-submission review. The question is not whether state judges are bound by the U. S. Constitution, but, being bound by it, when are they to exercise their review?[4]

In its written opinion the Court *did* rely on the state constitution for justification of its pre-submission review (Majority Opinion 1992, 13-22). Yet, like the arguments made in the brief from the Attorney General's office, the Court relied heavily on federalism for its rationale. First the Court quoted the U. S. Constitution: "the U. S. Constitution, treaties, and laws made in pursuance of the Constitution are the supreme law of the land" (U. S. Constitution, Article VI, Clause 2). Next, the Court quoted the Oklahoma Constitution: "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the U. S. is the supreme law of the land" (Article I, Section 1). This does not, however, answer the question as to *when* state courts and state judges are to exercise deference to the supreme law of the land. Therefore, as with the Attorney General's opinion, these references would seem to beg the fundamental question of pre-submission review.

The same could be said of another constitutional provision cited by a majority of the Court:

> All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it; Provided, such change be not repugnant to the Constitution of the United States (Oklahoma Constitution, Article II, Section 1).

Again, both sides of the issue would have to concede that provisions in both the U. S. and Oklahoma's Constitution recognize that when there is a conflict between the two, the U. S. Constitution preempts the state's constitution. That this cannot be used to support pre-submission review is evident in the fact that this does not prevent Oklahoma courts from routinely ruling on the constitutionality of state laws. If Initiative 349 conflicts with the U. S. Constitution, then it will not stand. About that there is no uncertainty. The real question pre-

sented in this case is one of timing: *when* the court ought to decide the question of the constitutionality of Initiative 349.

The question of when a case should be decided by a court is called ripeness. The courts will generally only decide a case when the case has developed to its fullest, and an individual has exhausted all possible remedies. Only then is the case deemed "ripe" for review. Related to this judicially enforced restraint is another called "standing" which requires that a plaintiff has suffered, or is about to suffer, direct injury. Clearly, these restraints could have been used by the Oklahoma Supreme Court as legal justification for refusing to grant pre-submission review. (These restraints were important in the precedent established by the *Threadgill* case, were frequently mentioned by proponents in this case, and were cited in the dissenting opinions.) Interestingly, the dissenters in the case relied on the same constitutional provisions to support their position. Reliance on the same constitutional language by both sides of the pre-submission issue is probably due to a couple of factors. First, the two sides agree that the court has the authority to act, but differ on the question of when. Second, the state's constitution does not provide explicit language to support either side; hence, the question becomes theoretical in nature. Under these conditions the importance of the Constitution is minimized, with the emphasis becoming once more of what approach is most appropriate.

In his dissent Justice Wilson took a different approach. He reasoned that since the Constitution placed fewer restrictions on the initiative process than the legislative process, this was an indication that the authors of the Constitution did not want to impede the exercise of the initiative.[5] Pre-submission judicial review is an impediment, Wilson argued, and therefore the authors of the constitution would denounce its use.

PRECEDENT

Related to constitutional arguments on pre-submission review is the argument based on available precedent. Again, as with the constitutional arguments, both sides can cite precedents.

The first case dealing with the question of pre-submission judicial review of an initiative occurred in the 1910 *Threadgill v. Cross* decision (26 Okla. 403). There the Court unanimously refused to review a proposed constitutional amendment prior to a vote of the people. The proposed amendment was challenged on grounds that it violated the provisions of the Enabling Act which members of the constitutional convention had accepted and written into the Constitution (Article I, Section 7; repealed in 1959). The Court reasoned that the acts of the legisla

ture, *or* voters at the polls, ought to be presumed to be valid until *properly* brought before the Court, meaning the parties must have "standing." Since legislative acts cannot be brought to the Court until the requirements of standing are met, neither, the Court reasoned, may the legislative acts of the people be heard by the Court until the requirements of standing are met. This is mandated, the Court argued, by the Constitution's recognition of the people as legislators when they exercise the initiative, and it's guarantee of separation of powers.[6]

The *Threadgill* precedent, denying pre-submission review of initiatives, was followed for 65 years. Then, in a 1975 case dealing with the city of Norman, the Court did uphold pre-submission review of two proposed initiative petitions (Norman 1975). Subsequently the Court has, on several occasions, adhered to this recent precedent.

In the *Norman* case the Court held that the initiative petition was unconstitutional because the state's constitution (Article XVIII, Section 4, a) allowed *only* legislative power to be exercised through a municipal initiative. The initiative in this case was deemed to be an exercise in administrative (it established a rate structure for the city's utility service) rather than legislative power, and thus it was unconstitutional. The Court's sole justification for reversing the *Threadgill* precedent was not based on any constitutional language or even constitutional theory, but rather to prevent a "costly and unnecessary election" (Norman 1975, 8). It is to the question of appropriateness, or arguing from a policy or theoretical perspective that we now turn.

MEANINGLESS ACT

Doesn't it just make sense that if an initiative petition is clearly unconstitutional the Court should go ahead and prevent the people from going through the "elaborate charade" of voting on a petition and, if approved, having it subsequently declared void? The majority in this case said yes. Those supporting the initiative argued that *Casey* was not dispositive, and that *Casey* could, and most probably would, be overruled. The Court's response was that they would not base their decision on a guess as to what the future held for abortion cases. " 'Guesses' about the future development of any rule of law have never been an acceptable rule of decision in Anglo-American jurisprudence," wrote the Court's majority (Majority Opinion 1992, 12).

In other portions of its opinion, however, the Court did seem to be willing to engage in a guessing game of sorts. The Court was "guessing" that the U. S.

Supreme Court would follow the precedent of *Casey* and strike down Initiative Petition 349 (Majority Opinion 1992, 21). The Court was also "guessing" in each of the following descriptions of what might happen were the election on Initiative Petition 349 to be held: (1) it would be a divisive election (Majority Opinion 1992, 14), (2) if it passed it would be struck down within months (Majority Opinion 1992, 21), (3) a meaningful vote on the initiative was impossible (Majority Opinion 1992, 21), and (4) the election would be expensive (Majority Opinion 1992, 14, 21).

In none of the briefs, nor in the opinions of the Justices, was there mention of a way in which an election on an initiative, even one viewed as clearly unconstitutional, could be more than a meaningless charade. Yet, constitutional arguments aside, there is at least one possible benefit from holding such an election: education of the voters. Justice Opala touched on this in his dissenting opinion when he argued that pre-submission review in this case infringed on political speech. Proponents made the same point, and there would seem to be a great deal to this argument given the rationale behind the initiative.

But, voters can learn about the issues surrounding abortion without an initiative election. What they probably will not learn without going through the exercise is the importance of understanding a petition before they sign it. Particularly one for which they, with their tax dollars, will have to pay. If the Court is always there to stop what it considers to be an "exercise in futility," then why should voters take the time to study any initiative before signing it? Why even have signature requirements? Why not have those wanting to propose an initiative submit it to the court before going to all the trouble of obtaining thousands of signatures?

Let the voters see what happens when they sign and are allowed to vote on a clearly unconstitutional petition and perhaps, in the process, they might learn something. What might they learn? They might learn that voters in Oklahoma did not desire a strict abortion law. They might learn that voters wanted to send a message that they wanted a strict abortion law, even if they knew the courts would subsequently declare it unconstitutional. Or, they might think they could pass a strict abortion law without interference by the courts, only to learn afterwards that any student of constitutional law, not to mention judge, could clearly predict that the proposed law was unconstitutional, and, some might thus argue, a waste of taxpayers money.

The first two seem entirely appropriate under the rationale for having the initiative in the first place. The third lesson, the one the court in this case would not allow, might be the medicine voters need to take initiative proposals seriously.

REPUBLICAN GOVERNMENT

The dissenting Justices in this case (Opala and Wilson) emphasize the commitment the authors of the Oklahoma Constitution had to direct democracy. Opala writes, "Today's opinion impermissibly imposes the rigidity of the current constitutional orthodoxy on the use of initiative process and prevents the people from having access to that genre of lawmaking as a legitimate means of testing the continued popularity of current political values to effect their legitimate change" (Opala Dissent 1992, 13). Wilson scolded the majority writing, "I refuse to join in this flagrant encroachment upon the people's legislative powers" (Wilson Dissent 1992, 1).

The majority, while repeatedly referring to the initiative as a constitutional right and expressly stating their "reverence for initiative rights," argue that constitutional rights are not absolute (Majority Opinion 1992, 17). This is a *non sequitur* concerning the issue of pre-submission review. As already pointed out, the Oklahoma Constitution explicitly restricts the lawmaking process, but the courts do not allow review of laws passed by the legislature prior to their going into effect. Just as laws passed by the legislature can be declared void in violation of the U. S. Constitution, so too can laws passed by the voters. The idea of constitutionalism is ingrained in our American governmental experience. Granting this, it does not necessarily follow that the Courts may or must exercise judicial review *before* the legislature or the voters have acted.

The majority asserts, "The Oklahoma drafters were careful to frame a constitution which was in harmony with the Constitution written by the founding fathers" (Majority Opinion 1992, 17). If the majority means that Oklahoma's drafters were looking over their shoulder to make sure they did nothing to contravene the U. S. Constitution which might jeopardize approval of their work, they are correct. If, however, they mean that Oklahoma's Constitution not only does not contravene the "democratic" elements of the U. S. Constitution, but it does not go beyond it, they are very mistaken. Both the founding fathers and Oklahoma's drafters feared tyranny. Separation of powers and checks and balances, found in the documents they wrote, are clear evidence of this. The founding fathers, however, also feared "*demos* getting what *demos* wanted" in every instance. Oklahoma's drafters had this fear also (why else have a Bill of Rights?), but to a much lesser degree. There was, in short, less of a fear of majority tyranny. Some would go so far as to say that the founding fathers' fear of majority tyranny was so strong that they forbade direct democracy in the states by guaranteeing a republican form of government in every state.[7] The fact is that the founding fathers used the word "republic" differently on various occasions. Madison, himself, used the word on one occasion as equivalent to majority rule,

while on another occasion he used it synonymously with indirect or representative democracy.[8] It is noteworthy that the founding fathers *did* reject pre-submission review of state laws by the Congress (Madison 1987, 88-89, 92, 304-305, 518).

COST TO TAXPAYERS

It is difficult to read the majority's opinion in the present case without concluding that the primary reason for granting pre-submission review is to spare the taxpayer the cost of an election. Were we, however, to follow this logic, we would be transforming our courts from the Clark Kent image Hamilton had of them to "super budget cutters," able to stop democracy with a single opinion.[9]

"The decision of how much money to spend on direct legislation is a political question" (Gordon and Magleby 1989, 311). Should the Court be permitted to halt a legislative hearing on a bill because the bill, if passed, would be unconstitutional? The expense for an initiative election "is no more useless than the time and money expended on other legislative proceedings that may ultimately produce an infirm law" (Farrell 1985, 932). As stated in the *Threadgill* decision:

> It may be that a government all of whose powers are administered by one department may be administered with less expense than a government of the kind existing in this state and in the other states of the Union, in which the powers are exercised by different departments; but, if so, it must be presumed that the people in adopting the present form did so with knowledge of that fact.... (p. 415).

CONCLUSION

There is no explicit provision in the Oklahoma Constitution allowing pre-submission judicial review of initiative petitions. In *Threadgill,* a case contemporaneous with the writing of the Constitution, the Supreme Court decided that pre-submission review was unauthorized by the Constitution and furthermore unwise. Sixty-five years later, the state Supreme Court overruled *Threadgill.* The Court's sole justification for doing so was to prevent costly and unnecessary elections.

A decision concerning whether or not the taxpayers want to forgo the expense of an election is a political decision. The Courts should follow the re-

straints of standing, ripeness, and not deciding constitutional questions unless the resolution of a case demands it.

Judges should show the same respect for direct democracy that they do for indirect democracy (Eule 1990). It may be, most likely will be, that an initiative will be defeated at the polls. The voters may know exactly what they are doing when they vote for a clearly unconstitutional petition. They may not. Such elections may be meaningful in spite of the courts failure to recognize them as such. They may not.

Clearly Oklahoma's drafters looked upon direct democracy favorably, as can be witnessed in the provisions regarding the initiative and referendum. In this capacity the people can serve as legislators. Just as the courts show deference to the lawmaking process of the legislature, so too, it would seem to follow, they should allow the people to vote on an initiative or referendum, and as stated in *Threadgill*, "then, and not until then, will the judicial and executive departments have the power and duty devolving upon them to determine its validity and enforce its provisions" (p. 415).

NOTES

1. The initiative stipulated:
"Abortion shall not be a crime under the following circumstances:
(A) (1) The abortion was necessary to save the life of female or to avoid grave impairment of the female's physical or mental health;
(2) For the purpose of determining grave impairment of a female's mental health in Section 5 (A) (1), impairments or stresses produced by an unwanted birth, social stigma or embarrassment, interruption of life plans, or lack of financial resources, which have not resulted in psychosis or major depressive illness, shall not constitute grave mental impairment;
(B) The pregnancy resulted from rape as defined by Title 21, Section 1111 of the Oklahoma Statues;
(C) The pregnancy resulted from incest as defined by Title 21, Section 885 of the Oklahoma Statutes; or
(D) The unborn child would be born with a grave physical or mental defect."

2. Eight percent of the legal voters of the state can propose a legislative initiative; fifteen percent can propose a constitutional amendment. Five percent of the legal voters can require a referendum on a law passed by the legislature. See, the Constitution of Oklahoma, Article 5, Section 2.

3. See, for example, *in re Initiative Petition No. 349*, Majority Opinion, pp. 3, 14; *Attorney General's Brief*, p. 14; and *Brief of Amici Curiae United States Senator David Boren, United States Representative Dave McCurdy, United States Representative Mike Synar, The Honorable Carl Albert, and Professors Bruce Ackerman, Paul Brest, Guido Calabresi, Walter Dellinger, Geoffrey Stone, and Laurence Tribe in Support of Protestants*, p. 7.

4. See, *Fletcher v. Peck*, 6 Cranch 87 (1810), Supreme Court invalidated a state law; *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816), Supreme Court reviewed state court judgment in civil case, and *Cohens v. Virginia*, 19 U. S. 264 (1921), Supreme Court reviewed state court judgment in criminal case.

5. *In re Initiative Petition No. 349*, Wilson Dissent, p. 3. For example, the governor cannot veto an initiative, and the effective dates of laws enacted by the people are not subject to the constitutional limitations placed on those of the legislature.

6. The petition was entitled: "An act proposing an amendment to the Constitution of the state of Oklahoma, by amending section 7, article 1, of the Constitution, repealing the separate article of said Constitution relating to prohibition, submitted by the Constitution Convention to the people of the proposed state of Oklahoma at the election held on September 17, 1907, and adopted by the people."

7. "Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislation by Initiative," *Southern California Law Review* 61:733-76 (1988); See Article IV, Section 4 of the U. S. Constitution.

8. Madison uses republic synonymously with "majority rule" in his "Vices of the Political System of the United States," and in *Federalist* No. 10 where he writes, "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." In that same essay, he defines republic as indirect democracy: "A republic, by which I mean a government in which the scheme of representation takes place...."

9. James D. Gordon III and David B. Magleby, "Pre-Election Judicial Review of Initiatives and Referendums," *Notre Dame Law Review* 64:298-320. In *Federalist* No. 78 Hamilton describes the judicial branch as "the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."

REFERENCES

Attorney General's Brief Addressing the Impact of *Planned Parenthood v. Casey* on the Constitutionality of Initiative Petition No. 349 and Its Ballot Title, 1992.

Brief of Protestants Janet M. Taliaferro, Pam Fleischaker and Andrew Tevington on the United States Supreme Court's Decision in Planned Parenthood of Southeastern Pennsylvania v. Casey July 24, 1992.

Eule, J. N. 1990. Judicial Review of Direct Democracy. *Yale Law Journal 99:*1503-90.

Farrell, Michael J. 1985. The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections. *Fordham Law Review 53:*919-935.

Gordon, James D., and David B. Magleby. 1989. Pre-Election Judicial Review of Initiatives and Referendums. *Notre Dame Law Review* 64:298-320.

In re Initiative Petition No. 349. Majority Opinion, 4 August 1992.

In re Initiative Petition No. 349. Opala Dissent, 4 August 1992.

In re Initiative Petition No. 349. Proponents' Brief, 14 July 1992.

In re Initiative Petition No. 349. Wilson Dissent, 4 August 1992.

In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma, 8 Okla. 3 (1975).

Madison, James (1787) 1987. *Notes of Debates in the Federal Convention of 1787.* N.Y.: W. W. Norton & Company.

Planned Parenthood v. Casey, ____U. S.____ (1992).

Threadgill et al. v. Cross, Secretary of State, 26 Okla. 403 (1910).

ARTICLES

DATA SECTION