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PRE-ELECTION JUDICIAL REVIEW OF INITIATIVE PETITIONS: AN UNREASONABLE LIMITATION ON POLITICAL SPEECH

I. INTRODUCTION

The history of government in the United States is one of conflict between the radical concepts of republicanism and democracy on one hand, and the pragmatic needs of providing a stable, effective government on the other.¹ "Rule by the people" evokes images of freedom and self-determination, but it also speaks of administrative chaos. Nevertheless, citizens of the United States are the sovereign power from which all government power is derived. This power is usually administered through a delayed reactionary process consisting of election, representation, and accountability. However, sometimes the power of popular sovereignty flows directly into law without the buffer of representation. This direct conduit is the initiative petition.¹

When individuals or groups use the initiative petition to bring a proposed law before the electorate,² they intend to use direct democracy to accomplish what a representative government may be hesitant or unwilling to do.³ Even though elected legislators are ostensibly the agents of their constituencies, other factors play a role in their effectiveness as lawmakers. Political gamesmanship, concerns about alienating a subgroup, and even self-dealing may stand in the way of legislation among elected officials.

However, the initiative process may also run afoul of political and social barriers. Organizers of these petitions expect to encounter

1. The term "initiative petition" refers to "[a]n electoral process whereby designated percentages of the electorate may initiate legislative or constitutional changes through filing formal petitions to be acted on by the legislature or the total electorate." BLACK'S LAW DICTIONARY 784 (6th ed. 1990). Groups propose bills and laws which are approved by signatories to the petition and then by voters at an election. These proposals become law independent of any legislative assembly. *Id.*

A referendum is a particular type of initiative which proposes an amendment to constitutional provisions. *Id.* at 1281.

2. "Electorate" is defined as a "body of people entitled to vote." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 400 (9th ed. 1990).

3. The subjects of initiative petitions tend to be controversial, divisive issues such as abortion, liquor laws, gambling, and congressional term limits.

resistance from the opposition and even apathy among their supporters. The dynamics of direct democracy make such obstacles a natural part of the process. However, neither the theoretical concept of direct democracy nor the procedural model adopted in this state anticipate that an initiative petition could come under the scrutiny and potential disapproval by the Oklahoma Supreme Court.

Judicial review of initiative petitions has been discussed since their inception,⁴ but only in the last twenty years has the highest court in Oklahoma crossed its own boundaries, as well as those dictated by sound judgment, to foray into what may be the most damaging form of judicial advocacy a court could practice.⁵ When a court reviews an initiative during the petition stage, regardless of the auspices used to justify its action, the carefully structured sole example of pure democracy in our system of government loses its meaning.

This comment will examine the history of initiative petitions and judicial review in Oklahoma, focusing on the key decisions where the Oklahoma Supreme Court shifted from judicial restraint. Based on an analysis of the reasoning behind the shift, this comment advocates the court's return to its original policies of judicial restraint regarding initiative petitions.

II. THE INITIATIVE PETITION

A. Background

The initiative petition is an exercise in direct democracy.⁶ To a great extent, the Progressive Movement of the early twentieth century paved the way for the adoption of initiative processes in several state constitutions.⁷ Even though the Progressives were responsible for much of the increased federal involvement in areas of social and economic activity,⁸ the initiative petition reflected their "belief that direct

4. See *infra* notes 49-61 and accompanying text.

5. See discussion *infra* parts III.C-E.

6. William Lawton Teague, Jr., Comment, *Pre-Election Constitutional Review of Initiative Petitions: A Pox on Vox Populi?*, 17 OKLA. CITY U. L. REV. 201, 202 (1992) (citing DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 2 (1984)).

7. *Id.* "During the ten years from 1898 to 1908, seven states incorporated initiative petition provisions in their respective constitutions: South Dakota, 1898; Utah, 1900; Oregon, 1902; Montana, 1906; Oklahoma, 1907; Maine, 1908; Missouri, 1908." *Id.* (citing Jefferson B. Fordham & Russell Leach, *The Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. 495, 496 n.8 (1950)).

8. KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 209 (1989). The most notable examples of the Progressives' impact on the extension of federal power in social and economic relations are the Progressive Amendments to the U.S. Constitution: (1) Sixteenth (granting Congress the power to impose an income tax); (2) Seventeenth (disrupting local party

democracy is preferable to government by politicians and legislators."⁹

Any form of direct democracy faces opposition from a long line of distinguished critics. Most notably, James Madison saw the problem of direct democracy rooted in the tendency of the populace to split into factions among which "common passion or interest will, in almost every case, be felt by a majority of the whole," thus leaving no protection for the minority.¹⁰ Where the populace controlled government directly, there would be an unstable society where property and liberty were in constant peril.¹¹ He also saw the populace, as a whole, unqualified to directly participate in government due to their lack of education and thoughtfulness about important issues.¹² In his view, representative government would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the truest interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."¹³

The Constitution of the State of Oklahoma reflects more of the Progressive influence than the teaching of James Madison. Drafted during a radical shift in American economic and social development, the Oklahoma Constitution places emphasis on the precept that "[a]ll political power is inherent in the people."¹⁴ As a practical manifestation of this ideal, the constitution includes provisions which expressly grant the right to initiative and referendum.¹⁵ Soon after the constitution's adoption, the initiative petition in Oklahoma withstood a claim

control over elections by requiring popular rather than state legislative elections of United States Senators); (3) Eighteenth (prohibiting the sale and transportation of alcoholic beverages); and (4) Nineteenth (prohibiting gender-based discrimination in voting). *Id.*

9. Teague, *supra* note 6, at 202.

10. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 13 (2d ed. 1991) (citing THE FEDERALIST NO. 70 (James Madison)). Throughout the series of documents known as The Federalist Papers, written by James Madison, Alexander Hamilton, and John Jay, the principles of republicanism were expounded during the debate leading up to the Constitution. *Id.* at 7.

11. *Id.*

12. *See supra* text accompanying note 9.

13. STONE, *supra* note 10, at 13 (citing THE FEDERALIST NO. 70 (James Madison)).

14. OKLA. CONST. art. II, § 1. The section continues:

[A]nd 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.

Id.

15. OKLA. CONST. art. V, § 2. The section states

The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per

that it conflicted with article IV, section 4 of the United States Constitution.¹⁶

B. *The Procedure in Oklahoma*

Once proponents of an initiative measure have drafted a petition, they must file it with the Secretary of State.¹⁷ The Secretary of State reviews the form of the petition and prepares copies with signature sheets attached.¹⁸ The proponents have ninety days from the date of filing to circulate these copies and acquire the necessary number of signatures.¹⁹ When an initiative petition proposes a statute, the proponents must collect signatures equal to eight percent of the votes cast at the last general election.²⁰ If the petition proposes an amendment to the constitution, the requirement increases to fifteen percent.²¹

The proponents must submit the signed petitions to the Secretary of State by the end of a ninety day period for verification of the signatures.²² The Secretary of State then makes or causes to be made a physical count of the number of signatures.²³ The Secretary of State

centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the State office receiving the highest number of votes at such election.

Id.

16. *Ex parte Wagner*, 95 P. 435 (Okla. 1908).

17. OKLA. STAT. tit. 34, § 8(A) (Supp. 1993). More precisely, the statute requires that: When a citizen or citizens desire to circulate a petition initiating a proposition of any nature, whether to become a statute law or an amendment to the Constitution, or for the purpose of invoking a referendum upon legislative enactments, such citizen or citizens shall, when such petition is prepared, and before the same is circulated or signed by electors, file a true and exact copy of same in the office of the Secretary of State . . .

Id.

18. Stan P. Guerin, Comment, *Pre-Election Judicial Review: The Right Choice*, 17 OKLA. CITY U. L. REV. 221, 224 (1992) (citing J. Michael Medina, *The Emergency Clause and the Referendum in Oklahoma: Current Status and Needed Reform*, 43 OKLA. L. REV. 401, 408 (1990)).

19. OKLA. STAT. tit. 34, § 8(A) (Supp. 1993).

20. OKLA. CONST. art. V, § 2. The exact number of votes from the last general election is calculated based on the votes "for the state office receiving the highest number of votes at such election." OKLA. STAT. tit. 34, § 8(C)(2) (Supp. 1993).

21. OKLA. CONST. art. V, § 2.

22. OKLA. STAT. tit. 34, § 8(A) (Supp. 1993). The Secretary of State verifies that information required by statute is provided. *Id.* § 6. "The electors shall sign their legally-registered name, their address or post office box, and the name of the county in which they reside. Any petition not filed in accordance with this provision shall not be considered." *Id.* § 8(A).

23. *Id.* § 6.1(A). However, after the Secretary of State certifies the count, "the Supreme Court [makes] the determination of numerical sufficiency or insufficiency of the signatures counted by the Secretary of State." *Id.* § 8(C)(2).

publishes the results of this count, starting a ten day time period during which protests to the petition or objections to the count may be filed.²⁴ If a protest or objection is filed within this time, the supreme court will hear arguments for and against the sufficiency of the motion under the statutes.²⁵ Unless the provisions of section 8 are followed, the court will not consider the protests or objections.²⁶

As part of the procedural level of sufficiency, an initiative must meet three threshold tests.²⁷ The initiative petition must meet the *sine qua non*²⁸ requirements for submission,²⁹ address only a single subject,³⁰ and embrace content appropriate for lawmaking by the people.³¹ Once these threshold requirements have been satisfied, the proposal may be placed on the ballot of the next general election for a vote by the citizens of the state.³²

III. JUDICIAL REVIEW OF INITIATIVE PETITIONS

A. Background

An initiative that has been processed according to the laws of the state and approved by a vote of the people becomes law.³³ At that point, it becomes indistinguishable from laws enacted by the legislature.³⁴ Accordingly, the long-standing tradition of judicial review³⁵

24. *Id.* § 8(C)(2). The statute further states that:

Upon order of the Supreme Court [of the state] it shall be the duty of the Secretary of State to forthwith cause to be published, in at least one newspaper of general circulation in the state, a notice of such filing and the apparent sufficiency or insufficiency thereof and notice that any citizen or citizens of the state may file a protest to the petition or an objection to the count made by the Secretary of State, by written notice to the Supreme Court of the state and to the proponent or proponents filing the petition, said protest to be filed within ten (10) days after publication.

Id.

25. *Id.* § 8(E)-(F). The hearing will be scheduled "not less than ten (10) days [after the filing of the protest]." *Id.* § 8(F).

26. *Id.* § 8(G). One notable provision allows a party to revive an abandoned protest within five days of its withdrawal. *Id.*

27. See, e.g., *In re* Initiative Petition No. 347, State Question No. 639, 813 P.2d 1019, 1039 (Okla. 1991) (Opala, J., concurring) (giving the threshold tests as articulated by Justice Opala).

28. *Sine qua non* is defined as "that without which the thing cannot be." BLACK'S LAW DICTIONARY 1385 (6th ed. 1990).

29. Requirements are defined by statute. See generally OKLA. STAT. tit. 34, §§ 1-25 (1991 & Supp. 1993).

30. *In re* Initiative Petition No. 344, State Question No. 630, 797 P.2d 326, 330 (Okla. 1990); *In re* Initiative Petition No. 342, State Question No. 628, 797 P.2d 331, 333 (Okla. 1990).

31. *In re* Supreme Court Adjudication of Initiative Petitions in Norman, Okla. Numbered 74-1 and 74-2, 534 P.2d 3 (Okla. 1975) [hereinafter *Norman*].

32. OKLA. STAT. tit. 34, §§ 12, 25 (1991).

33. Guerin, *supra* note 18, at 223.

34. Guerin, *supra* note 18, at 223.

35. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

applies just as surely to the law by initiative as it does to the law by legislation.³⁶ If a party brings a complaint alleging the law to be invalid on constitutional grounds, the judicial branch may properly address that claim.³⁷

The law is not nearly as clear when a court attempts to exercise judicial review of the content of an initiative before it has reached the electorate for a vote.³⁸ As discussed in this context, judicial review does not refer to a review of the initiative petition's compliance with procedural rules under the applicable state statutes.³⁹ Instead, the review at issue in this Comment examines the content of an initiative and determines its constitutionality.

A majority of jurisdictions do not allow pre-election judicial review of initiatives on substantive grounds.⁴⁰ These jurisdictions exercise judicial restraint.⁴¹ The exercise of such restraint reflects the fact that an initiative petition is not yet within the purview of either the judicial or executive branches.⁴² Only after the initiative is voted into law does the possibility of judicial review arise.⁴³

In the minority of jurisdictions where pre-election judicial review is practiced or recognized,⁴⁴ the rationales for review include predictability in the review process, prevention of fiscal waste, limiting abuse

36. See *Oklahomans for Modern Alcoholic Beverage Controls v. Shelton*, 501 P.2d 1089, 1095 (Okla. 1972) (Hodges, J., concurring in part and dissenting in part).

37. See discussion *infra* part III.E.2.

38. See, e.g., *Guerin*, *supra* note 18, at 221; *Teague*, *supra* note 6, at 203-04.

39. Review of sufficiency examines the validity of signatures, the number of signatures, form of the petition, filing procedures, and other procedural items addressed by statute. See generally OKLA. STAT. tit. 34, §§ 1-25 (1991 & Supp. 1993).

40. *Guerin*, *supra* note 18, at 221 & n.6 (citing *Broucher v. Engstrom*, 528 P.2d 456, 460 n.13 (Alaska 1974), *overruled on other grounds* by *McAlpine v. Univ. of Alaska*, 762 P.2d 81 (Alaska 1988); *Tilson v. Mofford*, 737 P.2d 1367, 1369 (Ariz. 1987); *City of Rocky Ford v. Brown*, 293 P.2d 974, 976 (Colo. 1956) (en banc); *Bowe v. Secretary of the Commonwealth*, 69 N.E.2d 115, 127 (Mass. 1946); *Leininger v. Alger*, 26 N.W.2d 348, 353 (Mich. 1947); *Anderson v. Byrne*, 242 N.W. 687, 692 (N.D. 1932); *State ex rel. Cramer v. Brown*, 454 N.E.2d 1321, 1322 (Ohio 1983) (per curiam); *Oregon AFL-CIO v. Weldon*, 473 P.2d 664, 667 (Or. 1970); *State ex rel. O'Connell v. Krammer*, 436 P.2d 786, 787 (Wash. 1968) (en banc)).

41. See *infra* note 49 and accompanying text.

42. See James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 304-05 (1989).

43. Even after an initiative becomes law, standing for judicial review requires that the constitutional requirements of standing be met. See discussion *infra* part III.E.2.

44. *Guerin*, *supra* note 18, at 221-22 & n.6 (citing *Holmes v. Leadbetter*, 294 F. Supp. 991, 996 (E.D. Mich. 1968); *Otey v. Common Council*, 281 F. Supp. 264, 279 (E.D. Wis. 1968); *Whitson v. Anchorage*, 608 P.2d 759, 762 n.5 (Alaska 1980); *Fine v. Firestone*, 443 So. 2d 253, 256 (Fla. Dist. Ct. App. 1983), *vacated on other grounds*, 448 So. 2d 984 (Fla. 1984); *Coalition for Political Honesty v. State Bd. of Elections*, 359 N.E.2d 138, 142 (Ill. 1976) (per curiam); *St. Paul Citizens for Human Rights v. City Council*, 289 N.W.2d 402, 405-06 (Minn. 1979); *State ex rel. Dahl v. Lange*, 661 S.W.2d 7, 8 (Mo. 1983) (en banc); *State ex rel. Steen v. Murray*, 394 P.2d 761, 763-64 (Mont. 1964) (per curiam)).

of the system by special-interest groups, protecting minority rights, and promoting judicial economy.⁴⁵ However, as the history of this issue in Oklahoma emphasizes,⁴⁶ and as the majority of jurisdictions practicing judicial restraint must have realized,⁴⁷ the alleged benefits of pre-election review cannot be examined in the abstract. These benefits must be viewed in the larger context of political speech and direct democracy.⁴⁸

B. Threadgill: *Oklahoma's Foundation for Pre-Election Judicial Review*

Oklahoma articulated its initial approach to judicial review of initiative petitions in *Threadgill v. Cross*.⁴⁹ The Oklahoma Secretary of State asserted that a petition proposing an amendment to the constitution was facially invalid; therefore, he did not need to proceed with filing the initiative.⁵⁰ The Oklahoma Supreme Court held that an initiative petition cannot be reviewed for constitutionality by the judicial branch in the pre-election phase of its consideration.⁵¹

The court declared that citizens involved in the initiative petition process "are exercising a legislative power . . . and, while so engaged, they constitute part of the legislative department of the state."⁵² Accordingly, the court must not intrude upon this process since "[a]n act of the [legislature] is clothed with the presumption that it is valid, and its constitutionality will not be considered and determined by the courts as a hypothetical question."⁵³

The *Threadgill* court went on to state that pre-election review of an initiative petition would be a violation of the separation of powers⁵⁴ as mandated in the Oklahoma Constitution.⁵⁵ The separation of

45. Guerin, *supra* note 18, at 232.

46. See *infra* notes 139-52 and accompanying text.

47. See Gordon & Magleby, *supra* note 42, at 304.

48. See *infra* notes 139-52 and accompanying text.

49. 109 P. 558 (Okla. 1910). The Oklahoma Supreme Court issued the decision in a mandamus proceeding to compel the Secretary of State to file initiative petitions so they could be forwarded to a vote of the people. The State argued that the initiative in question would be void upon ratification because it violated the Federal Constitution. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 562. Clearly, Justice Hayes did not propose that citizens so engaged are actually legislators. The statement in the context of his opinion indicates an analogy between the two rather than any attempt to equate them. See also Teague, *supra* note 6, at 204.

53. *Threadgill*, 109 P. at 559. See also Teague *supra* note 6, at 204.

54. See *State ex rel. Bryant v. Akron Metro. Park Dist.*, 166 N.E. 407, 410 (Ohio 1929), *aff'd*, 281 U.S. 74 (1930); see also THE FEDERALIST Nos. 47, 48 (James Madison).

55. OKLA. CONST. art. IV, § 1.

powers doctrine dictates that each branch of government has a distinct role balanced against the roles of the other branches.⁵⁶ A government practicing this doctrine is inherently inefficient since each branch must be allowed to act within the scope of its role before the other branches can step in to provide balance.⁵⁷ Despite this inefficiency, it is the accepted law of the land. Accordingly, even though interference by the judicial branch may help the legislature avoid the wasted time and expense of passing a law that is unconstitutional on its face, our system of government does not allow such expediency.⁵⁸

The Oklahoma Supreme Court reached this same conclusion in *Threadgill* where it held that the judiciary may not take the expedient course of intercepting a facially unconstitutional initiative because it is not the course allowed by our present form of government.⁵⁹ In the present system, the legislative department (or the citizenry acting in its stead) determines what passes into law.⁶⁰ Only when someone asserts that the law affects them and is invalid does the judicial department gain the power to review that law.⁶¹

C. Norman: *The Departure from Precedent and Reason*

The *Threadgill* rule prevailed in Oklahoma law until the early 1970s.⁶² In 1972, *Oklahomans for Modern Alcoholic Beverage Controls v. Shelton*⁶³ marked the final majority decision adhering to the rule from *Threadgill*.⁶⁴ Justice Hodges' dissent in that case⁶⁵ articulated the argument that would soon end an era of judicial restraint

56. See *supra* note 54 and accompanying text.

57. *Threadgill*, 109 P. at 562. The court stated 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 the different departments; but, if so, it must be presumed that the people in adopting the present form of government did so with knowledge of that fact

Id.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The court states that the legislature decides what passes into law "leaving it to the other departments to question or determine the validity of such laws only when they come to be enforced against some one [sic] whose rights they affect." *Id.* at 563.

62. See, e.g., *In re Initiative Petition No. 259*, State Question No. 376, 316 P.2d 139 (Okla. 1957); *In re Initiative Petitions Nos. 112, 114, 117, 118, 153*, 6 P.2d 703 (Okla. 1931); *McAlister v. State*, 221 P. 779 (Okla. 1923).

63. 501 P.2d 1089 (Okla. 1972).

64. *Id.* at 1095 (refusing to hear a petition challenging the constitutionality of an initiative petition).

65. *Id.* (Hodges, J., concurring in part and dissenting in part).

and usher in a continuing struggle to justify unwarranted judicial activism.⁶⁶ He proposed saving the expense of unnecessary elections by conducting pre-election judicial review to invalidate initiatives unconstitutional on their face prior to an election.⁶⁷

Justice Hodges' unconstitutional⁶⁸ yet apparently persuasive view achieved majority status in *In re Supreme Court Adjudication of Initiative Petitions in Norman, Okla. Numbered 74-1 & 74-2*.⁶⁹ The 1975 majority opinion by Justice Lavender declared that the Oklahoma Supreme Court would conduct a content-based pre-election review of proposed initiatives to avoid "a costly and unnecessary election."⁷⁰

The court's justification for this sudden departure from *Threadgill* was the 1973 amendment to section 8 of title 34 of the Oklahoma Statutes.⁷¹ Where this amendment merely replaced "Secretary of State" with "Supreme Court" as the entity responsible for certain administrative duties, the *Norman* court interpreted these changes as legislative permission to exercise full judicial authority.⁷² Under its rationale, the court infers from the amended section 8 the authority to review initiatives prior to election for constitutional substance as well as procedural form.⁷³

The court supports this reading of the 1973 amendment under the separation of powers doctrine.⁷⁴ When the Secretary of State had the

66. See discussion *infra* part III.D.

67. *Shelton*, 501 P.2d at 1095 (Hodges, J., concurring in part and dissenting in part) (giving no reasoning, support, or justification for this view beyond its cost-saving aspect).

68. See Michael J. Farrell, Note, *The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?*, 53 *FORDHAM L. REVIEW* 919, 932 (1985).

69. 534 P.2d 3 (Okla. 1975).

70. *Id.* at 8. Unlike Hodges' proposal, the *Norman* decision did not limit this review to initiatives that were clearly unconstitutional on their face. See also Teague *supra* note 6, at 205 n.42.

71. Initiative and Referendum-Petition-Hearing Act, 1973 Okla. Sess. Laws, ch. 78, § 1 (current version codified at OKLA. STAT. tit. 34, § 8(C)(2), (F)-(H) (Supp. 1993)) (deleting the provisions in section 8 for protest to the Secretary of State and adding provisions for all protests to be before the Supreme Court of Oklahoma).

72. *Norman*, 534 P.2d at 8. In *Norman* the court said:

Under present initiative procedure, 34 O.S.Supp.1973 § 8 [the amended form of OKLA. STAT. tit. 34, § 8], administrative duties formerly placed on administrative officials have been legislated directly to this court. We believe this court is not limited solely to the duties of an administrative officer or act. It may consider the constitutionality of matters to be considered under the initiative and referendum process as to procedure form and subject matter, when raised, and if in this court [sic] opinion such a determination could prevent a costly and unnecessary election.

Id.

73. See *supra* notes 17-32 and accompanying text.

74. See *In re Initiative Petition No. 358, State Question No. 658*, 870 P.2d 782, 785 (Okla. 1994) (stating that the separation of powers doctrine "prevents the Legislature from enjoining purely administrative duties upon this Court").

job of hearing protests, it was as an administrative officer performing an administrative duty.⁷⁵ However, when the court was given this duty, shifting the responsibility from administrative to judicial hands, the *Norman* decision implied a concurrent increase in the review prescribed by section 8.⁷⁶

An analysis of this interpretation of the duties under title 34, section 8 reveals that the court has fabricated its authority from whole cloth. Title 34, section 8 is a narrowly drawn statute which authorizes the Oklahoma Supreme Court to review the form of an initiative petition.⁷⁷ Somehow, "form" has been interpreted to mean "substance."

The *Norman* interpretation also expressly contradicts case law. In *Threadgill*, the court expressly prohibited the Secretary of State from conducting pre-election constitutional review of an initiative.⁷⁸ Therefore, it follows that the amendment to section 8 merely delegated to the court those duties previously allowed to the Secretary of State and carried with it the limitation from *Threadgill*. Moreover, the court in *Threadgill* held that the separation of powers doctrine prohibited an executive officer, the Secretary of State, from doing what the courts could not do, which was to "pass upon the validity of the proposed measure and stay the election."⁷⁹ Nevertheless, the *Norman* court forged ahead into unsubstantiated legal interpretation and bestowed upon itself certain powers; powers expressly denied to the Secretary of State and to the court both by statute and by *Threadgill*.

D. *Post-Norman Rulings: Justifying Constitutional Review*

1. Preventing Costly and Unnecessary Elections

Although the *Norman* court primarily based its departure from *Threadgill* on its interpretation of the amended title 34, section 8 and the separation of powers doctrine,⁸⁰ the justification for pre-election constitutional review of initiative petitions most widely expressed in the subsequent decisions has been to "prevent costly and unnecessary

This interpretation of the 1973 amendment to OKLA. STAT. tit. 34, § 8 under the separation of powers doctrine does not consider that the duties originally given to the Secretary of State resembled judicial rather than administrative acts.

75. *Id.*

76. *Id.*

77. OKLA. STAT. tit. 34, § 8(G) (Supp. 1993) (reading in part: "[a]fter such hearing the Supreme Court of the state shall decide whether such petition be in *form* as required by the statutes.") (emphasis added).

78. *Threadgill v. Cross*, 109 P. 558, 562 (Okla. 1910).

79. *Id.*

80. See *supra* notes 54, 74 and accompanying text.

elections.”⁸¹ For example, in *In re Initiative Petition No. 349, State Question No. 642*,⁸² the majority characterizes the vote on a “facially” unconstitutional initiative as “at best . . . an expensive non-binding public opinion poll.”⁸³

The “costly” argument cited in these decisions does not specify where the cost occurs, does not offer an estimate of how much it will be in dollar figures, and most importantly, does not explain how much cost is required to outweigh the right to petition for an initiative and place it before the electorate for their decision.⁸⁴ As Justice Wilson observed in *In re Initiative Petition No. 349*,⁸⁵ the court states its “costly” justification “without a single allegation nor any evidence.”⁸⁶ Instead, the court relies on “popular information,”⁸⁷ and the unsubstantiated “common wisdom”⁸⁸ that would barely be appropriate in a private debate among colleagues, let alone in a line of majority opinions issued by the highest court of a state.⁸⁹

When an initiative proposal goes before the people in the form of a petition, part of the approval being sought from the electorate is to place the proposal on a ballot.⁹⁰ All that is needed to decide that the voters are prepared to bear the cost of the election is the approval of at least eight percent of the voting public.⁹¹ Since it does not appear in the applicable statutes, further review of the expense of the election becomes yet another aspect of the powers the court has created for itself.⁹²

As for the cost itself, the vote on an initiative proposal can occur at any regular election.⁹³ Therefore, the only expense involving state

81. *In re Supreme Court Adjudication of Initiative Petitions in Norman*, Okla. Numbered 74-1 and 74-2, 534 P.2d 3, 8 (Okla. 1975) (holding that the Court had authority to “consider the constitutionality of matters to be considered under the initiative and referendum process as to procedure form and subject matter, when raised, and if in this court [sic] opinion such a determination could prevent a costly and unnecessary election”).

82. 838 P.2d 1 (Okla. 1992), *cert. denied*, 113 S. Ct. 1028 (1993).

83. *Id.* at 12 (noting that “[w]ere we to allow the initiative to be submitted to the people, a costly, fruitless, and useless election would take place”).

84. *See* OKLA. STAT. tit. 34, §§ 1-25 (1991 & Supp. 1993).

85. 838 P.2d 1, 18 (Okla. 1992) (Wilson, J., dissenting in part).

86. *Id.* at n.14.

87. *Id.*

88. *Id.* at 18. The court’s reliance on the “costly” argument without further support is akin to it simply stating “everyone knows it is costly.”

89. *See, e.g., id.* at 12; *In re Supreme Court Adjudication of Initiative Petitions in Norman*, Okla. Numbered 74-1 and 74-2, 534 P.2d 3, 8 (Okla. 1975).

90. *See* OKLA. CONST. art. V, § 2; OKLA. STAT. tit. 34, § 25 (1991).

91. OKLA. CONST. art. V, § 2.

92. *See Norman*, 534 P.2d at 3; discussion *supra* part III.C.

93. OKLA. STAT. tit. 34, § 25 (1991).

funds is the printing of the proposal on the ballot. In the case of *Initiative Petition No. 349*, the ballot proposal was one-hundred and forty-one words.⁹⁴ Granted, printing costs vary, and even the advent of computer-assisted publishing has not eliminated all cost from such a task. However, printing a long paragraph on an existing ballot to be delivered at an already scheduled election does not appear on its face to be a great financial burden for the state.

Perhaps the cost referred to by the court is that borne by the proponents and opponents who will surely advertise and publicize their distinct views in anticipation of an election.⁹⁵ If this is the case, then the court has unquestionably overstepped its bounds and ventured into the mire of paternalism.⁹⁶

The court also seeks to bolster its rationale for pre-election constitutional review of initiative petitions by alleging that the review helps avoid "unnecessary" elections when the court strikes facially unconstitutional initiative proposals.⁹⁷ The court has held that pre-election review under *Norman* "strengthens rather than impairs the initiative process"⁹⁸ by removing from possible consideration any proposals that are contrary to existing constitutional law, and therefore have no potential to be valid law.⁹⁹ Under this view, votes on a proposal that challenges current law would ultimately be "meaningless acts in an elaborate charade."¹⁰⁰

According to the majority view, the same initiative process that is "precious" and one the court is "zealous to preserve to the fullest measure of the spirit and the letter of the law"¹⁰¹ becomes a charade when it challenges existing constitutional doctrines. Based on this reasoning, the court once again becomes the paternalistic guardian of the electorate, not its faithful servant.

Although the express purpose of an initiative petition is to seek the enactment of valid law,¹⁰² it also serves a greater purpose. As a

94. Initiative Petition No. 349, State Question No. 642, filed with the Oklahoma Secretary of State June 29, 1990.

95. See Gordon & Magleby, *supra* note 42, at 306.

96. See Gordon & Magleby, *supra* note 42, at 306.

97. *In re* Supreme Court Adjudication of Initiative Petitions in Norman, Okla. Numbered 74-1 and 74-2, 534 P.2d 3, 8 (Okla. 1975).

98. *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 12 (Okla. 1992) (stating that "voters are assured that their vote on a state question is meaningful"), *cert denied*, 113 S. Ct. 1028 (1993).

99. *Id.* at 11-12.

100. *Id.* at 11.

101. *Id.* at 12.

102. OKLA. CONST. art. V, § 1; OKLA. STAT. tit. 34, §§ 1-25 (1991 & Supp. 1993).

form of direct democracy, the initiative process is potentially the most effective means of communicating core political speech, which is at the heart of the First Amendment of the Federal Constitution.¹⁰³ First Amendment speech, especially core political speech exercised in the pursuit of self-governance, does not have to be utilitarian.¹⁰⁴ Regardless of whether it produces a tangible result, the intrinsic benefit of political debate, especially in the context of direct democracy, occurs in the free exchange of ideas as a proposal is propounded, attacked, defended, and voted upon.

The central tenet of the court's "unnecessary" argument is that a facially unconstitutional proposal cannot become valid law. For example, in reviewing Initiative Petition No. 349, the court cites *Planned Parenthood v. Casey*¹⁰⁵ as controlling constitutional law on the subject of abortion.¹⁰⁶ Because the initiative in question did not support the rights as construed in *Casey*¹⁰⁷ or in *Roe v. Wade*,¹⁰⁸ the Oklahoma Supreme Court ruled that it was an unconstitutional petition.¹⁰⁹ The court's definition of a "useless" or "unnecessary" election, therefore, appears to be one that challenges current constitutional orthodoxy.¹¹⁰

It is ironic that the "law of the land"¹¹¹ used by the court to strike an initiative petition in *In re Initiative Petition No. 349*¹¹² was itself a challenge to the then current state of law. When the Pennsylvania legislature drafted the restrictions on abortion at the heart of *Casey*,¹¹³ the United States Supreme Court had already declared similar restrictions unconstitutional.¹¹⁴ Had the Pennsylvania Supreme Court exercised judicial activism based on the rationale practiced in Oklahoma,

103. See e.g., Teague, *supra* note 6, at 218.

104. See, e.g., Teague, *supra* note 6, at 218.

105. 112 S. Ct. 2791 (1992).

106. *In re Initiative Petition No. 349*, State Question No. 642, 838 P.2d 1, 2-3 (Okla. 1992), *cert denied*, 113 S. Ct. 1028 (1993).

107. *Id.* at 7. *Casey* reaffirms the holding from *Roe v. Wade*, 410 U.S. 113 (1973), that a woman has a constitutionally protected right to make an independent choice to continue or to terminate a pregnancy before viability. *Id.*

108. 410 U.S. 113 (1973).

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

110. See *In re Initiative Petition No. 358*, State Question No. 658, 870 P.2d 782, 790 (Okla. 1994) (Opala, J., concurring in result).

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

112. *Id.*

113. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

114. See generally *Thornburgh v. Am. C. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), *overruled by Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), *overruled by Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

Casey would never have been an issue because the legislation would have been declared "useless" or "unnecessary."

However, the *Casey* analogy emphasizes one key difference between the Pennsylvania legislation and Initiative Petition No. 349: the statute at issue in *Casey* was passed by a legislature while the proposed law at issue in Oklahoma was an initiative of the people.¹¹⁵

2. States' Rights

The majority decision in *In re Initiative Petition No. 349* states the proposition that First Amendment protections of core political speech do not necessarily apply to the initiative process because that process is a creation of the state, not the federal government.¹¹⁶ The court cites the provision of the Oklahoma Constitution which recognizes a general right to initiative and referendum,¹¹⁷ construing the provision to mean that what Oklahoma has granted to the people (i.e. the right to initiative), Oklahoma can take away (through pre-election judicial review), regardless of First Amendment interests in political speech.¹¹⁸ This argument is encompassed in the idea of "states' rights."¹¹⁹

The United States Supreme Court addressed the states' rights argument in *Meyer v. Grant*.¹²⁰ The State of Colorado contended that "because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right."¹²¹ Rejecting this argument, the Court held that freedom of speech is "among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."¹²² Accordingly, the state lacks the power to limit political discussion

115. See *In re Initiative Petition No. 349*, 838 P.2d at 1.

116. *Id.* at 9 (stating that "[i]t seems self-evident that the exercise of a non-federal right can be conditioned by the same state constitution that creates and confers it").

117. OKLA. CONST. art. 2, § 1 (providing that "[a]ll political power is inherent in the people . . . and they have the right to alter or reform the [government] whenever the public good may require it").

118. See *infra* notes 119-27 and accompanying text.

119. See generally *Meyer v. Grant*, 486 U.S. 414 (1988) (discussing restriction of states' limitation on free speech).

120. *Id.*

121. *Id.* at 424. The State of Colorado had prohibited proponents of a petition from paying persons to circulate the initiative petitions. Petitioners challenged this regulation on the grounds that it interfered with the process of initiative and therefore, adversely affected the forum for political debate. *Id.*

122. *Id.* at 420 (citing *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940)).

within the forum of the initiative process simply because it created the forum.¹²³

When a petitioner placed the pre-election constitutional review question squarely within the context of *Meyer*,¹²⁴ Oklahoma avoided the United States Supreme Court's holding on states' rights by distinguishing its pre-election review from the controls exercised by the State of Colorado.¹²⁵ Based on the concern for the free exercise of "unfettered" political speech evinced in the *Meyer* decision, it seems that the issue of pre-election constitutional review is in accord with the holding of the Supreme Court.¹²⁶ When the United States Supreme Court held that the state creation of a power of initiative did not include "the power to limit discussion of political issues raised in initiative petitions,"¹²⁷ it issued a directive to the states that the initiative process is part of the privileged political speech which cannot be burdened or cut short based on content.

3. Striking Proposals Repugnant to the Constitution

The language of article 2, section 1 of the Oklahoma Constitution, that changes enacted through initiative cannot be "repugnant to the Constitution of the United States,"¹²⁸ has been used by the court to strike at the content of an initiative petition.¹²⁹ The court construes this limitation to mean that the Supreme Court of the state may review the petition for content that is "repugnant" under article 2, section 1.¹³⁰ The court does not explain how the language grants the court authority to strike an initiative prior to its enactment as a "repugnant" law.¹³¹ Rather, the court adds this argument to its list of justifications, using it to squelch political debate among the people on the grounds that "the people have imposed upon themselves a restriction by approving Art. 2, § 1."¹³² A more reasonable view dictates

123. *Id.* at 425.

124. *In re Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 10 (Okla. 1992), cert. denied, 113 S. Ct. 1028 (1993).*

125. *Id.* (arguing that "[h]ere, the procedural issue of paying circulators is not presented. The manner in which the petition was circulated is not at issue").

126. *Meyer v. Grant, 486 U.S. 414, 420-21 (1988).*

127. *Id.* at 425.

128. OKLA. CONST. art. II, § 1.

129. *In re Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 14 (Simms, J., concurring).*

130. *Id.*

131. *Id.* at 15-28 (Wilson, J., dissenting in part; Opala, J., dissenting).

132. *Id.* at 14 (Simms, J., concurring).

that the people approved the restriction believing that it would be applied in conjunction with the other limitations on government action, namely separation of powers and judicial restraint. Unfortunately for political speech and its proponents, that belief was undermined by the court's extension of its own power.

4. The Court's Duty to Conduct Pre-Election Review

Perhaps as a means of sidestepping such criticism, the court has adopted the argument that it is not only exercising the authority to conduct pre-election review of initiative proposals but it is also fulfilling a responsibility to do so.¹³³ This argument implies that the court has no choice but to engage in pre-election constitutional review of initiatives.¹³⁴ The court declares that its "constitutional duty" stems from the decision in *Ralls v. Wyland*.¹³⁵ However, the doctrine expressed in *Ralls* not only fails to justify the rampant judicial activism practiced by the Oklahoma Supreme Court, it prohibits it.¹³⁶ The language quoted in *In re Initiative Petition No. 349* instructs the court to adhere to the constitution as it protects the power of the people to engage in direct democracy.¹³⁷ The court has taken a very different course of action. Since the *Norman* decision, the court has focused on protecting the current state of the constitution by sacrificing core political speech.¹³⁸

133. *Id.* at 8 (stating that where "a ruling on the issue would prevent a useless election resulting in the enactment of an unconstitutional statute, this Court has the authority, as well as the responsibility, to decide the matter").

134. *Id.*

135. 138 P. 158, 160 (Okla. 1914). The court held that:

The powers of the initiative and the referendum reserved to the people occupy a prominent place in the Constitution and laws of this state, and their act, when invoking such powers, should be guarded by the courts, to the end that whatever is their due is kept inviolate. In the exercise of such powers, it is necessary that the provisions of the Constitution should be adhered to.

Id.

136. *Id.*

137. *In re Initiative Petition No. 349*, 838 P.2d at 8.

138. See generally *id.* at 1; *In re Supreme Court Adjudication of Initiative Petitions in Norman*, Okla. Numbered 74-1 and 74-2, 534 P.2d 3 (Okla. 1975).

E. *Post-Norman Rulings: Inherent Flaws Beyond the Court's Justifications*

1. The Prudential Rule

The courts have no authority to hear constitutional challenges to legislation before it becomes law.¹³⁹ This is a doctrine known as the prudential rule of necessity.¹⁴⁰ The prudential rule dictates that courts will not address constitutional issues *in vacuo*:¹⁴¹ there must be a law to review for facial unconstitutionality or a case or controversy to review for unconstitutionality as applied.¹⁴² Accordingly, the court should have no authority to review an initiative before it has been voted into law. Such was the rule of *Threadgill* before it was unceremoniously abandoned by the court in *Norman*.¹⁴³

One aspect of the prudential rule is its foundation in the legislative process.¹⁴⁴ Judicial deference to the internal workings of another branch of government may have more support than similar deference to an initiative process among the people.¹⁴⁵ The legislative process includes several levels of internal review whereby a proposal must gain the approval of legislators in committees, hearings, debates, and ultimately, in a vote by each house.¹⁴⁶ In contrast, a law passed through initiative petition does not pass through the same legislative process.¹⁴⁷ The court has argued that this renders the initiative susceptible to pre-election review.¹⁴⁸ Other commentators have gone so far as to suggest that pre-election constitutional review is necessary to protect individual rights "against the tyranny of the majority."¹⁴⁹

139. *In re Initiative Petition No. 348*, State Question No. 640, 820 P.2d 772, 782 (Okla. 1991) (Opala, J., concurring in result).

140. *Id.* Under the prudential rule of necessity, constitutional issues must not be resolved in advance of strict necessity. *Id.* at 782 n.4 (citing *Smith v. Westinghouse Elec. Corp.*, 732 P.2d 466, 467 n.3 (Okla. 1987); *INS v. Chadha*, 462 U.S. 919, 937 (1983); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

141. *Smith v. Westinghouse Elec. Corp.*, 732 P.2d 466, 467 n.3 (Okla. 1987).

142. *See In re Initiative Petition No. 348*, 820 P.2d at 782 (Opala, J., concurring in result).

143. *Id.*

144. *Teague*, *supra* note 6, at 214.

145. *Teague*, *supra* note 6, at 214.

146. *Teague*, *supra* note 6, at 214.

147. *Teague*, *supra* note 6, at 214.

148. *In re Initiative Petition No. 349*, State Question No. 642, 838 P.2d 1, 11 (Okla. 1992) (stating that "many of the hurdles built into our legislative structure do not apply to initiatives and referenda . . . [initiative petitions and the legislative process] are two very different processes"), *cert. denied*, 113 S. Ct. 1028 (1993).

149. *Teague*, *supra* note 6, at 215 (citing Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 28-29 (1978)).

Regardless of the differences between the legislative and initiative processes, the latter includes safeguards which serve to protect against oppressive or ill-considered petitions.¹⁵⁰ These include the *sine qua non* requirements in the statutes and the single subject requirement,¹⁵¹ which prevents potentially undesirable proposals from being hidden from the voter within a forest of other proposals.¹⁵²

2. Standing

Another aspect of the prudential rule is the related concept of standing.¹⁵³ A court cannot review the constitutionality of an issue until a claimant appears with a legally cognizable interest and an actual or threatened injury.¹⁵⁴ Furthermore, the interest must be "direct, immediate, and substantial."¹⁵⁵ When applied to a constitutional claim, the threshold is one of justiciability, asking whether the plaintiff has asserted a case or controversy.¹⁵⁶

As Justice Opala has pointed out to the court, "[n]o showing of actual or threatened injury can be made [by] a measure that is not law."¹⁵⁷ Specifically in the context of protests to initiative petitions, Justice Opala has challenged pre-election review on the grounds that the protestants are not plaintiffs with standing to bring a constitutional claim.¹⁵⁸ Such a plaintiff must have a personal interest threatened by

150. Teague, *supra* note 6, at 215.

151. *In re* Initiative Petition No. 344, State Question No. 630, 797 P.2d 326, 330 (Okla. 1990); *In re* Initiative Petition No. 342, State Question No. 628, 797 P.2d 331, 333 (Okla. 1990).

152. Such "piggybacking" of proposals is common practice in legislative procedures and lends credence to the sanctity of the initiative process.

153. "Standing" is the legal right of a person to challenge the conduct of another in a judicial forum." State *ex rel* Cartwright v. Oklahoma Tax Comm'n, 653 P.2d 1230, 1232 (Okla. 1982); *In re* Adoption of Baby Boy D, 742 P.2d 1059, 1062 (Okla. 1985), *cert. denied*, 484 U.S. 1072 (1988).

154. *In re* Initiative Petition No. 348, State Question No. 640, 820 P.2d 772, 783 (Okla. 1990) (Opala, J., concurring in result).

155. *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 21 & n.15 (Okla. 1992) (Opala, J., dissenting) (citing *Underside v. Lathrop*, Okla., 645 P.2d 514, 517 (Okla. 1982); *Democratic Party v. Estep*, 652 P.2d 271, 274 n.13 (Okla. 1982)), *cert. denied*, 113 S. Ct. 1028 (1993).

156. *Id.* at 22.

157. *Id.* at 21.

158. *Id.* at 22-24.

the state.¹⁵⁹ Arguably, when the court addresses substantive constitutional issues in the pre-election state of a proposal, it is rendering an advisory opinion rather than adjudicating a constitutional claim.¹⁶⁰

F. *The Line of Defense Wavers*

Beginning with his call for a return to the “abandoned case law of yesteryear” in 1982,¹⁶¹ Justice Opala has been a steady voice of reason in the post-*Norman* era of pre-election constitutional review.¹⁶² Much of the valuable commentary and criticism directed toward the majority decisions regarding pre-election constitutional review has taken place in Justice Opala’s concurrences and dissents.¹⁶³

159. *Id.* at 24 (citing *Oklahoma City News Broadcasters Ass’n v. Nigh*, 683 P.2d 72, 78 n.2 (Okla. 1984)) (Opala, J., concurring in result) (stating that “[i]n a suit [against the Governor] for accounting [of expenditures from his legislative mansion allowances] petitioners [news reporters] would occupy the status of so-called ‘non-Hohfeldian’ plaintiffs, i.e. persons whose interest tendered for judicial vindication is neither personal nor proprietary”) (alterations in original).

160. Teague, *supra* note 6, at 216 & n.123 (citing *Graham v. Hudgins, Thompson, Ball and Assocs., Inc.*, 540 P.2d 1161, 1165 (Okla. 1975)). The court is not to engage in issuing advisory opinions under its own ruling.

161. *In re Initiative Petition No. 315, State Question No. 553*, 649 P.2d 545, 554 (Okla. 1982) (Opala, J. concurring).

162. See *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1, 18 (Okla. 1992) (Opala, J., dissenting), *cert. denied*, 113 S. Ct. 1028 (1993); *In re Initiative Petition No. 348, State Question No. 640*, 820 P.2d 772, 781 (Okla. 1991) (Opala, J., concurring in result); *In re Initiative Petition No. 347, State Question No. 639*, 813 P.2d 1019, 1037 (Okla. 1991) (Opala, J., concurring); *In re Initiative Petition No. 342, State Question No. 628*, 797 P.2d 331, 334 (Okla. 1990) (Opala, J., dissenting); *In re Initiative Petition No. 341, State Question No. 627*, 796 P.2d 267, 275 (Okla. 1990) (Opala, J., concurring in result); *In re Initiative Petition No. 332, State Question No. 598*, 776 P.2d 556, 559 (Okla. 1989) (Opala, J., dissenting); *In re Initiative Petition No. 315*, 649 P.2d at 554 (Opala, J., concurring in result).

163. See, e.g., *In re Initiative Petition No. 349*, 838 P.2d at 18 (Opala, J., dissenting). The most notable new voice speaking against the current state of pre-election judicial review of initiative petitions also appeared in *In re Initiative Petition No. 349* in the dissenting opinion of Justice Wilson. *Id.* at 15 (Wilson, J., dissenting in part). Even though the majority opinion did not address the issue directly, Justice Wilson’s dissent focused on the separation of powers doctrine embodied in the constitution. *Id.* at 16.

Justice Opala has repeatedly voiced arguments against the use of pre-election constitutional review of initiative petitions.¹⁶⁴ In the recent Supreme Court review of initiative petitions,¹⁶⁵ Justice Opala carried on this tradition of support for prudence in his separate opinions.¹⁶⁶ He reaffirmed his call for a return to *Threadgill*,¹⁶⁷ declared any judicial review invalid except for compliance with procedure,¹⁶⁸ and renounced the majority's imposition of "constitutional orthodoxy on the lawmaking process."¹⁶⁹

However, in a paragraph which recurs in two opinions, almost as an afterthought to the bulk of his argument, Justice Opala conceded a critical point to the majority.¹⁷⁰ The statement by Justice Opala that the court is justified in reviewing and striking a proposed measure where "constitutional jurisprudence" of a "firmly settled" nature "absolutely condemns" it,¹⁷¹ is tempered by the admonition that such review could only occur where "the protestants have standing to

164. See *In re Initiative Petition No. 349*, 838 P.2d at 18 (Opala, J., dissenting) (citing the prudential rule, standing, the primary jurisdiction over the controversy belonging to the Court of Criminal Appeals, and the invalid imposition of a standard of constitutional orthodoxy upon proponents of initiative petitions); *In re Initiative Petition No. 348*, 820 P.2d at 781 (Opala, J., concurring in result) (arguing for a return to the prudential rule, alleging that the plaintiff in question had no standing to challenge the pre-election petition, arguing that the guarantee clause in question is not justiciable by even the United States Supreme Court); *In re Initiative Petition No. 347*, 813 P.2d at 1037 (Opala, J., concurring) (arguing for a return to the prudential rule as held in *Threadgill*, alleging the pre-election review of initiative petitions delays and burdens the initiative process, stating three categories for permissible review, none of which involve reviewing the content of a petition prior to enactment); *In re Initiative Petition No. 342*, 797 P.2d at 334 (Opala, J., dissenting); *In re Initiative Petition No. 341*, 796 P.2d at 275 (Opala, J., concurring in result) (reaffirming his call for a return to the holding in *Threadgill*); *In re Initiative Petition No. 332*, 776 P.2d at 559 (Opala, J., dissenting) (reasserting his arguments from *In re Initiative Petition No. 315*); *In re Initiative Petition No. 315*, 649 P.2d at 554 (Opala, J., concurring in result) (arguing that the controversy was not justiciable due to lack of standing).

165. *In re Initiative Petition No. 358*, State Question No. 658, 870 P.2d 782 (Okla. 1994).

166. *Id.* at 788 (Opala, J., concurring in result).

167. *Id.*

168. *Id.*

169. *Id.* at 791 (Opala, J., concurring in result).

170. *Id.* Justice Opala writes:

Only in the clearest case of *firmly settled* and *stable* constitutional jurisprudence that *absolutely* condemns a proposed measure as facially impossible of enforcement, application or execution—and then *only if the protestants have standing to complain* of constitutional infirmity—should this court ever undertake to trump an initiative petition that is on its journey to the ballot box.

Id.

This language is an exact restatement of a paragraph from his dissent in *In re Initiative Petition No. 349*, State Question No. 642, 838 P.2d 1, 19 (Okla. 1992) (Opala, J., dissenting), *cert. denied*, 113 S. Ct. 1028 (1993).

171. *In re Initiative Petition No. 358*, State Question No. 658, 870 P.2d 782, 791 (Okla. 1994) (Opala, J., concurring in result).

complain of constitutional infirmity.”¹⁷² For the most part, this argument is consistent with those related to standing and prudential review.¹⁷³ However, when Justice Opala concedes that facial impossibility under the constitution will justify the pre-election constitutional review of an initiative petition,¹⁷⁴ he severely diminishes the argument which his dissents and concurrences have so eloquently kept alive since *In re Initiative Petition No. 315, State Question No. 553*.¹⁷⁵ It does not matter that he surrounds the concession with the “standing” proviso¹⁷⁶ and qualifiers such as, “only . . . firmly settled and stable constitutional jurisprudence.”¹⁷⁷ The concession evinced in this statement is that core political speech in the form of an initiative petition may be called in for review. Some commentators on the issue have always contended that this is the proper result.¹⁷⁸ Nevertheless, the principle that political speech in an initiative process must be free from content-based interference by the state has been upheld by the United States Supreme Court¹⁷⁹ and should be practiced by the Supreme Court of Oklahoma.

IV. CONCLUSION

Pre-election constitutional review of initiative petitions is an unnecessary and costly burden on core political speech. The United States Supreme Court has held this to be true,¹⁸⁰ and the well-founded principles of judicial restraint and separation of powers doctrine support its validity. Nevertheless, in the Oklahoma Supreme Court’s poorly justified zeal to protect the citizenry from “costly and unnecessary” elections, and to protect the Constitution from the citizenry, the sanctity of the initiative process has been lost to judicial activism. As long as the Oklahoma Supreme Court continues to engage in this practice, initiative petitions cannot fully serve their function as our government’s only form of direct democracy.

M. Sean Radcliffe

172. *Id.*

173. See discussion *supra* part III.E.

174. *In re Initiative Petition No. 358*, 870 P.2d at 791 (Opala, J., concurring in result).

175. 649 P.2d 545, 554 (Okla. 1982) (Opala, J., concurring in result).

176. *In re Initiative Petition No. 358*, 870 P.2d at 791 (Opala, J., concurring in result).

177. *Id.*

178. See generally *Guerin*, *supra* note 18.

179. *Meyer v. Grant*, 486 U.S. 414 (1988).

180. *Id.*

