

**LEGISLATIVE POWER AT ODDS: THE
EFFECT OF A REFERENDUM
PETITION IN IDAHO**

COMMENT

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LEGISLATIVE POWERS AT ODDS: THE EFFECT OF A REFERENDUM PETITION IN IDAHO

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I. INTRODUCTION: A CURRENT REFERENDUM ISSUE

2012 marks the 100-year anniversary of referendum in Idaho,¹ so it seems an apt time to analyze its scope. Fortunately, the political system

1. The constitutional provision on referendum was ratified in 1912, but the statute required to outline the process of referendum took more than 20 years to pass. While the

has provided a ripe opportunity: In the spring of 2011, Idaho voters responded to recent education reform by seeking to strike down Senate bills 1108, 1110, and 1184.² The bills were ambitious—among other provisions, ending the extension of renewable contract offers to educators in K–12 levels,³ limiting collective bargaining rights,⁴ basing teachers' compensation on students' standardized testing scores,⁵ giving laptop computers to every tenth grade student,⁶ and requiring high school students to take several courses online.⁷ Such legislative ambition was answered with equally enthusiastic opposition; members of the public who opposed the “education overhaul” filed referendum petitions with the Secretary of State on each of the three disputed bills,⁸ an unprecedented response for Idaho. Prior to 2011, only four referendum petitions had ever been filed in Idaho, corresponding to election years 1936, 1966, 1986, and 2002.⁹ Thus, the fact that the referendum petitions opposing the education reform bills were filed in the same year testifies to the level of active resistance these bills raised.

Filing a petition is just the first step in the referendum process. Although it seems straightforward at first glance, issues arise in the process depending on the circumstances. For example, in Idaho, if the petition is filed during an odd year, as the education reform referenda petitions were, there will be a legislative session interposed between the petition's filing and the biennial election that will decide the bill's fate.¹⁰ This fact raises questions: How do the legislature's power and the referendum power reconcile when invoked concurrently? Once the referendum petition has been filed, may the legislature repeal the referred act? May the legislature enact a new measure on the same subject? If so, is there any limit to how similar the new measure is to the now-repealed, referred act? In other words, may the legislature take legislative action on the subject matter of an act pending referendary vote—whether by repeal, amendment, or enactment of similar law?

This article will focus on whether any changes the legislature makes to the subject matter of a bill pending referendary vote is constitutionally valid—an issue that few states have litigated during a centu-

power technically existed 100 years ago, it could not actually be exercised until later. M. DANE WATERS, *THE INITIATIVE AND REFERENDUM ALMANAC* 181 (2003).

2. Ben Botkin, *Efforts to Overturn Controversial Education Overhaul Face Uphill Battle*, *TIMES-NEWS MAGIC VALLEY* (May 31, 2011 1:00 AM), http://magicvalley.com/news/local/state-and-regional/article_8b04bf08-df3a-5214-bcb7-9958f8686869.html.

3. S.B. 1108, 2011 Leg., 61st Sess. (Idaho 2011).

4. *Id.*

5. S.B. 1110, 2011 Leg., 61st Sess. (Idaho 2011).

6. S.B. 1184, 2011 Leg., 61st Sess. (Idaho 2011).

7. *Id.*

8. Botkin, *supra* note 2.

9. Of these, only the first referendum resulted in a law being repealed. *Idaho Initiative History*, IDAHO SECRETARY OF STATE, <http://www.sos.idaho.gov/elect/inits/inithist.htm> (last visited April 12, 2012).

10. *See* IDAHO CODE ANN. § 34-1803 (2008) (stating that referred measures “shall” be voted on at the biennial regular election).

ry of referenda—but also an issue that may be particularly relevant to Idaho in the near future. For each state that has litigated this issue, this article includes a quick overview of its constitutional and statutory provisions on the referendum power. It then explores the respective court’s opinion(s), focusing on the textual arguments, the prudential arguments, and the court’s perceived purpose of the referendum power. Finally, it examines Idaho’s constitution and statutes and the few cases interpreting the referendum power generally, concluding that the stronger textual arguments are on the side of the states that allow the legislature to make changes to laws awaiting referendary vote and that the good faith test may be imposed as a safeguard should the legislature seek to undermine the will of the electorate through such legislative action.

II. BACKGROUND: ORIGIN AND OVERVIEW OF THE REFERENDUM POWER

Roughly spanning 1890–1920, the Progressive Movement sought social reform through political activism and brought prohibition and women’s suffrage into being through the U.S. Constitution’s Eighteenth and Nineteenth Amendments respectively.¹¹ Lesser-known reforms were sought at the state level. Activists campaigned to grant the electorate more direct power in state government through three methods of popular political control—referendum, initiative, and recall.¹² Most of the states added these rights through state constitutional amendments; states that formed during the movement adopted the provisions through their original constitutions.¹³ Idaho adopted the initiative and referendum power in 1912, at the height of the movement.¹⁴

Although this article concerns referendum petitions, for the sake of context, it is useful to mention all three types of popular political control. The referendum is a legislative power reserved to the people which allows the electorate to strike laws down by vote.¹⁵ The referendum exists as a statewide power in a little less than half of the states.¹⁶ The

11. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 15 (2006); JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN’S L.J. 103, 186 (1994).

12. See WATERS, *supra* note 1, at 3–4.

13. *Id.* at 49, 312.

14. *Id.* at 181.

15. Univ. of S. Cal. Sch. of Law, *What Is I&R?*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstute.org/Quick%20Fact%20-%20What%20is%20I&R.htm#Initiatives> (last updated 2011).

16. See ARIZ. CONST. art. IV, pt. 1, § 1, cl. 1; ARK. CONST. art. V, § 1; CAL. CONST. art. II, § 9, cl. a; COLO. CONST. art. V, § 1, cl. 1; IDAHO CONST. art. III, § 1; ME. CONST. art. IV, pt. 3, § 17; MD. CONST. art. XVI, § 1, cl. a; MASS. CONST. art. XLVIII, c. III, § 3; MICH. CONST. art. II, § 9; MO. CONST. art. III, § 49; MONT. CONST. art. III, § 5, cl. 1; NEB. CONST. art. III, § 3; NEV. CONST. art. XIX, § 1, cl. 1; N.M. CONST. art. IV, § 1; N.D. CONST. art. III, § 1; OHIO CONST. art. II, § 1; OKLA. CONST. art. V, § 2; OR. CONST. art. IV, § 1, cl. 1; S.D. CONST. art. III, § 1; UTAH CONST. art. VI, § 1, cls. 1–2; WASH. CONST. art. II, § 1; WYO. CONST. art. III, § 52,

related initiative power, much more widely utilized than referendum, allows the people to propose new legislation to be approved or rejected by popular vote.¹⁷ Recall empowers the people to remove an elected official from office before her term is complete.¹⁸ Not all referendum states have all three powers,¹⁹ but Idaho does.²⁰

If a state constitution reserves the referendum power, the process for exercising that power can be defined in the constitution, a constitutional amendment, or a state statute. Though the referendum states each have their own details, like time limits, exempted laws, and numbers of voter signatures, the typical process is fairly simple: After a new bill is passed by the legislature and signed by the governor, it is not given effect for a set period of time—often 60 or 90 days.²¹ State residents who oppose the bill's passage must collect a set percentage of voter signatures within that time period to file a referendum petition with the Secretary of State.²² If all is done according to form, the Secretary of State approves the petition and places the law on the ballot for the next election.²³ At that election, a majority vote for either approval or rejection will determine the bill's fate.²⁴

Perhaps the most powerful way that states limit the referendum power is by requiring a large percentage of the electorate to sign the petition. This places a heavy burden on opponents of a bill who wish to begin the referendum process and must collect enormous numbers of signatures within a relatively short timeframe. For example, in order to file a referendum petition, Wyoming requires signatures of qualified voters equal to fifteen percent of the total number that voted in the last general election and fifteen percent of the residents of two thirds of the counties in the state;²⁵ Oregon requires ten percent of all qualified voters;²⁶ and New Mexico requires a hefty twenty-five percent of its electorate.²⁷ Compare those requirements with the more referendum petition-friendly states: Washington requires four percent of the number who voted in the last gubernatorial election;²⁸ Maryland requires three percent;²⁹ Massachusetts requires two percent.³⁰ The rest of the referen-

cls. a–b. Other states only grant referendum power to the people with respect to ordinances in some or all of their cities. *See, e.g.*, KY. REV. STAT. ANN. § 83A.120 (LexisNexis 2011); MINN. STAT. § 410.20 (2010).

17. Univ. of S. Cal. Sch. of Law, *supra* note 15.

18. *E.g.*, IDAHO CODE ANN. § 34-1712 (2008).

19. *See* Univ. of S. Cal. Sch. of Law, *supra* note 15.

20. IDAHO CONST. art III, § 1; § 34-1701.

21. *E.g.*, ARIZ. CONST. art. IV, § 1, cl. 3.

22. *Id.* at cls. 3–4.

23. *Id.* at cl. 10.

24. *Id.* at cl., 13.

25. WYO. CONST. art. III, § 52, cl. c, paras. (i)–(ii).

26. OR. CONST. art. IV, § 1, cl. 5.

27. N.M. CONST. art. IV, § 1.

28. WASH. CONST. art. § 1.

29. MD. CONST. art. XVI, § 3, cl. a.

30. MASS. CONST. art. LXXXI, § 4.

dum states—including Idaho, which requires six percent³¹—fall everywhere in between.³²

Another important limitation is making some types of laws ineligible for referendum. Idaho allows referendum on any kind of law.³³ Much more typically, states exempt at least emergency or appropriation bills.³⁴ For instance, California exempts from referendum those types of laws as well as “statutes calling elections, and statutes providing for tax levies.”³⁵

Requiring the referendum vote to be taken at the next general election does not substantively affect the scope of the referendum, but this requirement does have the potential to limit it by placing the legislature in a position wherein it will be tempted to legislate on the subject matter of the act pending referendary vote: The legislature may have a session after the petition’s filing and before the election. Fifteen states, including Idaho, have this requirement.³⁶ Perhaps to lessen the legislature’s temptation, several referendum states provide the option of calling a special election for the purpose of voting on the referendum.³⁷

III. THE OTHER REFERENDUM STATES’ OPINIONS ON THE EFFECT OF A REFERENDUM PETITION

Few states have litigated the issue of what effect a referendum petition has on the lawmaking authority of the legislative body. However, the existing case law is substantial enough to distinguish trends. The cases break the referendum states down into two basic categories—those that prohibit the legislative body from making changes to the subject matter of the law pending referendum [“prohibiting states”] and those that allow such changes [“allowing states”]. The allowing states are further divided into those that apply a good faith test and those that do not require it.

31. IDAHO CODE ANN. § 34-1805 (2008).

32. *E.g.*, S.D. CODIFIED LAWS § 2-1-3 (2011) (requiring five percent of the number who voted in the last gubernatorial election to sign the referendum petition before filing with the Secretary of State); OHIO CONST. art. II, § 1, cl. c (requiring six percent of the state’s electors to sign the referendum petition before filing with the Secretary of State); N.D. CONST. art. III, § 4 (requiring the equivalent of two percent of the general population as of the last federal census to sign the referendum petition before filing with the Secretary of State).

33. *See* IDAHO CONST. art. III, § 1.

34. *E.g.*, ARIZ. CONST. art. IV, § 1, cl. 3.

35. CAL. CONST. art. II, § 9, cl. a.

36. ARIZ. CONST. art. IV, § 1, cl. 10; ARK. CONST. amend. VII; COLO. CONST. art. V, § 1, cl. 4; IDAHO CODE ANN. § 34-1803 (2008); ME. CONST. art. IV, § 17, cl. 3; MD. CONST. art. XVI, § 2; MASS. CONST. art. XLVIII, cl. III, § 3; MICH. CONST. art. II, § 9; MONT. CONST. art. III, § 5, cl. 2; NEB. CONST. art. III, § 3; NEV. CONST. art. XIX, § 1, cl. 2; N.M. CONST. art. IV, § 1; OHIO CONST. art. II, § 1, cl. c; S.D. CODIFIED LAWS § 2-1-3 (2011); WYO. CONST. art. III, § 52, cl. e.

37. CAL. CONST. art. II, § 9, cl. c; MO. CONST. art. III, § 52, cl. b; N.D. CONST. art. III, § 5; OKLA. CONST. art. V, § 2; OR. CONST. art. IV, § 1, cl. 4(c); UTAH CODE ANN. § 20A-7-301(2) (LexisNexis 2011); WASH. CONST. art. II, § 1, cl. d.

A. States That Prohibit the Legislative Body from Making Changes to the Subject Matter of the Law Pending Referendum

Missouri, Oklahoma, and Maine courts agree that once a referendum petition has been filed, the lawmaking body may not legislate on the subject of the act(s) pending referendary vote.³⁸ More precisely stated, these courts hold that the legislature may not repeal a law upon which a referendum petition has been filed and then enact a similar law. Of the three prohibiting states, only Missouri and Oklahoma actually litigated the issue; Maine issued an advisory opinion on the topic.³⁹ All three have statewide referendum powers.⁴⁰ Although the Oklahoma case discusses the actions of a city council with respect to an ordinance, the court analyzes the issue under state law, and its arguments are not specific to local government.⁴¹

The prohibiting states focus on the primacy and purpose of the referendum right. Indeed, the importance these states place on the right is evidenced through the strength of their respective referendum powers. Missouri and Oklahoma have only limited exceptions to which laws are subject to referendum.⁴² Oklahoma and Maine allow referendum on parts of acts.⁴³ Missouri and Oklahoma have low percentages of required petition signatures, and while Maine's is higher, once the petition requirement is met, the people can refer any act or part of any act.⁴⁴ Also key to the opinions discussed below is the broad purpose that the courts interpret the referendum power to serve: curtailing the legislature's power.⁴⁵

1. Missouri

Referendum Clause	"The people reserve power . . . to approve or reject by referendum any act of the general assembly, except as hereinafter provided." ⁴⁶
Statewide Power	Yes. ⁴⁷

38. State *ex rel.* Drain v. Becker, 240 S.W. 229, 233 (Mo. 1922); *In re* Referendum Petition No. 1, 220 P.2d 454, 461 (Okla. 1950); *In re* Op. of the Justices, 174 A. 853, 855 (Me. 1933).

39. *In re* Op. of the Justices, 174 A. 853.

40. ME. CONST. art IV, pt. 1st, § 1; MO. CONST. art. III, § 49; OKLA. CONST. art. V, § 1.

41. See *In re* Referendum Petition No. 1, 220 P.2d 454.

42. *Infra* Table 1; *infra* Table 2.

43. *Infra* Table 2; *infra* Table 3.

44. See *infra* Table 1; *infra* Table 2; *infra* Table 3.

45. State *ex rel.* Drain v. Becker, 240 S.W. 229, 231 (Mo. 1922); *In re* Referendum Petition No. 1, 220 P.2d at 459.

46. MO. CONST. art. III, § 49.

47. *Id.*

Types of Statutes Exempted from Referendum	Emergency acts and appropriation bills. ⁴⁸
Referendum on Parts of Acts	No. ⁴⁹
Time Limit for Filing Petition (Measured from closing of legislative session)	90 days. ⁵⁰
Number of Voters That Must Sign Petition Before Filing	Five percent of legal voters in each of two-thirds of the state congressional districts, ⁵¹ "legal voters" being measured by the total vote for governor at the last general election. ⁵²

Table 1

In *Drain v. Becker*, the leading Missouri case on the issue, the state legislature abolished the judicial circuits then established according to county and designated new circuits.⁵³ After Missouri citizens filed a referendum petition on the act, the legislature held a special session during which it passed a new act to repeal the referred one and to reinstate most of the referred provisions.⁵⁴ The state brought an action seeking mandamus declaring the relator's candidacy for the office of judge in one of the judicial circuits that had been abolished.⁵⁵ The Missouri Supreme Court found that the legislature lacked the power both to repeal the act upon which the referendum petition had been filed and to reenact a similar measure.⁵⁶ Its arguments contrasted the essential nature of the referendum power with the limited nature of the legislature's power and concluded that the people's power to refer was "complete" due to absence of limiting language.⁵⁷

The opinion opened with a vigorous defense of the system of direct democracy in general, as if to assure others that the dilemma it sought to adjudicate was not a sign of the system's inherent unworkability:

The dire results doctrinaires and ultra conservatives predicted would follow its adoption have not materialized. Worshipers of the fetishes of established forms, chilled in the mold of inertia, as reactionaries have always been, contended that any modification of the power of legislation as theretofore exercised would

48. *Id.* § 52, cl. a.

49. *See id.* § 49 (stating that referendum may be used to reject an "act").

50. *Id.* § 52, cl. a.

51. *Id.*

52. *Id.* § 53.

53. *State ex rel. Drain v. Becker*, 240 S.W. 229, 230 (Mo. 1922).

54. *Id.*

55. *Id.* at 229.

56. *Id.* at 230.

57. *Id.* at 230–31.

endanger free government, and as a consequence prove inimical to individual liberty. Experience has demonstrated that these fears were unfounded.⁵⁸

Thus, even before the analysis began, the above tirade indicated the court's position—a strong inclination toward protecting the people's veto. As the court then proceeded to analyze the scope of the referendum power, it highlighted the types of laws exempted from referendum. It reasoned that these exceptions for emergency legislation and appropriation bills were put in place for the well-being of the public and to ensure the competent maintenance of state institutions through comprehensive plans.⁵⁹ In other words, efficiency and congruity—rather than a general need to limit the people's power—compelled the limitations.

According to the Missouri court, the purpose of the referendum right is to restrict the legislature's lawmaking power by subjecting it to more immediate control by the people. Since the people are the "repository of all power,"⁶⁰ it follows that through their adoption of the referendum, they can review laws passed by the legislature.⁶¹ This premise is in line with the fact that the framers of the Missouri Constitution limited the legislative powers of the general assembly in many ways: The legislature could not pay unauthorized contracts, subscribe for stock, release railroad liens, extinguish debts due to the state or local government, pay certain war debt, legalize invalid acts of state officers or agents, or enact special or local laws to repeal a general law.⁶² Thus, it would seem that the Missouri legislature was not intended to have plenary powers, and the referendum, though itself a qualified power, was one among many restrictions on the legislature's lawmaking ability.

In resolving the issue of the legislature's repeal of the referred act, the court looked to the language of the state constitution. The main initiative and referendum clause follows the provisions regarding the legislature's powers: "The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly, and also reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided."⁶³ The court noted that because there were no words of limitation on the referendum power, the power must be presumed to be complete.⁶⁴ Then the court addressed the clause following the main initiative and referendum clause, stating that "[t]his section shall not be construed to deprive any member of the legislative assembly of the right to introduce

58. *Id.* at 230.

59. *Id.* at 231.

60. *Id.*

61. *Id.* at 230.

62. *Id.* at 231.

63. MO. CONST. art. III, § 49.

64. *Drain*, 240 S.W. at 231. The phrase "except as hereinafter provided" was ignored by the court, but presumably the court interpreted it to reference the exceptions on types of bills that could be referred, which appear three sections later in the constitution. *See generally* MO. CONST. art. III, §§ 49, 52, cl. a.

any measure.”⁶⁵ It held that that clause could only be construed to mean that the legislative assembly’s right to introduce measures did not extend to measures that would interfere with the referendum right.⁶⁶ In concurring opinion, Justice Graves wrote that the above-quoted provision was an affirmation of the initiative power and was not necessarily related to referendum. In other words, once the people passed a law through the initiative power, it did not hold special status but could be repealed by a measure passed by the legislature.⁶⁷ According to the court, interpreting the clause to grant broader power to the legislature would be to hold that the referendum right was incomplete because the legislature could make the referendary election moot by removing the disputed act from the people’s review.⁶⁸

Finally, the court argued that the legislature and the people share legislative power concurrently and that each should allow the other to exhaust its power without interference in order to keep an orderly form of government.⁶⁹ Since the people must wait until the general assembly passes the act and the governor signs it before challenging the act by referendum petition, then when the people file a referendum petition, the legislature should wait until after the election to pass new laws on the same subject of the referred act.⁷⁰ Because the legislature did not wait, but repealed the referred measure and substituted it with similar legislation, and for the other foregoing reasons, the Missouri court found that the legislature’s response to the referendum petition was invalid for lack of constitutional authority.⁷¹

2. Oklahoma

Referendum Clause	“[T]he people reserve to themselves the power . . . at their own option to approve or reject at the polls any act of the Legislature.” ⁷²
Statewide Power	Yes. ⁷³
Types of Statutes Exempted from Referendum	Emergency measures. ⁷⁴
Referendum on Parts of Acts	Yes. ⁷⁵

65. MO. CONST. art. III, § 52, cl. b.

66. *Drain*, 240 S.W. at 232.

67. *Id.* at 235.

68. *Id.* at 232.

69. *Id.*

70. *Id.*

71. *Id.* at 233.

72. OKLA. CONST. art. V, § 1.

73. *Id.*

74. *Id.* § 2.

75. *See id.* § 4.

Time Limit for Filing Petition (Measured from closing of legislative session)	90 days. ⁷⁶
Number of Voters That Must Sign Petition Before Filing	Five percent of the legal voters, “legal voters” being measured by the total vote for governor at the last general election. ⁷⁷
Other	Expressly provides for referendum at the local level. ⁷⁸

Table 2

In *In re Referendum Petition No. 1*, the leading Oklahoma case on the issue, the court paralleled the Missouri court’s prohibiting arguments. The Oklahoma court agreed that the purpose of the referendum power was to limit the legislature’s power and that the referendum power was “complete.”⁷⁹ However, the Oklahoma court added an argument for when a measure could take effect, implicitly defining “measure” as the act upon which the petition was filed and subsequent similar acts.⁸⁰ The factual backdrop was as follows: The referred law was an ordinance of the city of Sand Springs. The ordinance was passed by a majority of the city council—two of the three members—and pertained to the installation and use of parking meters in the town.⁸¹ After the people of Sand Springs filed a referendum petition on the parking meter ordinance, a protest was filed on their petition. The city clerk conducted a hearing and found the petition insufficient.⁸² Litigation over the petition lasted almost three years. One month before the hearing before the Oklahoma Supreme Court’s referee, the city moved to dismiss the appeal as moot because the city council had enacted a new ordinance repealing the former ordinance.⁸³ Because the Sand Springs charter did not cover initiative and referendum proceedings, the matter was decided by the Oklahoma Supreme Court under state law.⁸⁴

The Oklahoma court found that the purpose of the referendum is to curtail the legislature’s power.⁸⁵ Looking to the Oklahoma Constitution, one can quickly surmise that the people’s legislative power is broad. Perhaps this is because the initiative and referendum were part of the constitutional framework at the state’s founding rather than a later-

76. *Id.* § 3.

77. *Id.* § 2.

78. *Id.* § 5.

79. *In re Referendum Petition No. 1*, 220 P.2d 454, 459 (Okla. 1950).

80. *Id.* at 460.

81. *Id.* at 455.

82. *Id.*

83. *Id.*

84. *Id.* at 457.

85. *Id.* at 459.

reclaimed power granted by amendment.⁸⁶ The Oklahoma referendum process includes a petition-friendly signature requirement, only one excepted type of law, allowance for referral of parts of acts, and the extension of the scheme to local law.⁸⁷ Overall, the system exhibits the state's high esteem for direct democracy.

The court found that the power reserved to the people was "complete" because of the absence of words of limitation in the main referendum clause.⁸⁸ The Oklahoma court's argument paralleled the Missouri court's argument that in light of the people's "complete" power, the legislature should wait until the people's power has been exhausted before repealing and enacting legislation on the same subject.⁸⁹ Further, the Oklahoma court highlighted the constitutional section providing for the date when a referred measure becomes effective: "Any measure referred to the people by the initiative or referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise."⁹⁰ The phrase "and not otherwise" shows that once a measure has been referred, it is incapable of taking effect without a majority vote. Therefore, the city council would have no authority to enact an ordinance identical to the one on which the referendum petition was filed.⁹¹

In reaching its conclusion, then, the court implicitly defined "measure" as legislation dealing with the same specific subject matter. In other words, no matter the legislative session and bill number, if the subsequent act contains the same substance as the referred act, the two are essentially the same measure and therefore incapable of taking effect until approved at the election. Though the court did not mention the following argument, the above reasoning is bolstered by a rather unusual constitutional section providing that "any measure rejected by . . . referendum" cannot be "again proposed" by initiative within three years by less than twenty-five percent of state voters.⁹² The fact that the drafters wrote that a "measure" could be proposed "again" shows that they intended "measure" to be determined not by bill numbers but by substance—textual and conceptual similarities.

3. Maine

Referendum Clause	"[T]he people reserve to themselves power . . . at their own option to approve or reject at the polls any Act, bill, resolve or resolution passed by
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86. *See generally* WATERS, *supra* note 1, at 342.

87. *Supra* Table 2.

88. *In re* Referendum Petition No. 1, 220 P.2d at 459.

89. *Id.* at 459–60.

90. OKLA. CONST. art. V, § 3.

91. *In re* Referendum Petition No. 1, 220 P.2d at 460.

92. OKLA. CONST. art. V, § 6.

	the joint action of both branches of the Legislature ⁹³
Statewide Power	Yes. ⁹⁴
Types of Statutes Exempted from Referendum	None. ⁹⁵
Referendum on Parts of Acts	Yes. ⁹⁶
Time Limit for Filing Petition (Measured from closing of legislative session)	90 days. ⁹⁷
Number of Voters That Must Sign Petition Before Filing	Ten percent of the legal voters, "legal voters" being measured by the total vote for governor at the last general election. ⁹⁸
Other	If a referred law is approved by majority vote, it does not take effect until 30 days after the governor's proclamation of its approval at the polls. ⁹⁹

Table 3

When the Maine legislature passed a bill broadening the definition of intoxicating liquor, the people responded with a referendum petition. The legislature then held a special session during which it introduced an act to repeal the one awaiting referendary election.¹⁰⁰ Before passing that act, the legislature sought the Maine Supreme Court's advice, whose opinion on the matter was very brief. The Maine justices found that the referendum petition suspended the effectiveness of the act in question and relied on the "absolute" nature of the referendum power in its prohibiting arguments.¹⁰¹

Like in Oklahoma, the referendum power in Maine is quite broad. Though the Maine court did not state the referendum power's purpose, in light of the breadth of the power, it seems reasonable to infer that the Maine court would agree with Missouri and Oklahoma—that the pur-

93. ME. CONST. art. IV, pt. 1, § 1.

94. *Id.*

95. *See id.* (reserving the referendum power to be exercised against "any" act); *see also id.* at pt. 3, § 17 (outlining the referendum process without mentioning any exceptions to the type of law that may be referred).

96. ME. CONST. art. IV, pt. 3, § 17, cl. 2.

97. *Id.* § 17, cl. 1.

98. *Id.*

99. *Id.*

100. *In re Op. of the Justices*, 174 A. 853, 854 (Me. 1933).

101. *Id.* at 855.

pose is to curtail the legislature's power. The Maine Constitution reserves the right to the people without qualification and without exception¹⁰² and characterizes it as the "people's veto,"¹⁰³ language that hints at the people's direct role in striking down an act—as opposed to merely placing it on the ballot only to have the legislature repeal it. Even after a referred law is approved by majority vote, it does not take effect until thirty days after the governor proclaims such election results.¹⁰⁴

It is this last clause that the court referenced in its opinion, concluding that the legislature does not have power to repeal, much less reenact, the measure that has been referred. The act is in limbo—caught between effectiveness and invalidity: "The operation of this act was suspended by petition . . . but no opportunity has yet been accorded to the electorate to approve or reject it. It has not, therefore, become effective nor has it been finally rendered invalid."¹⁰⁵ The court characterized the right to vote on the referred act as "absolute."¹⁰⁶ Whether "absolute" is the same as Missouri's and Oklahoma's characterization of "complete" was not addressed by the Maine court, but the result of the "absolute" power is the same: Any further action from the legislature is considered an invalid abridgment of the people's legislative power.¹⁰⁷

B. States That Allow the Legislative Body to Make Changes to the Subject Matter of the Law Pending Referendum

Of the states that have litigated this issue, California, Minnesota, Utah, Arizona, and Michigan allow legislative action on the subject matter of a bill pending referendary vote.¹⁰⁸ The courts' interpretation of the purpose of the referendum power as well as the scope and nature of the power under each state's constitution is explored below. Among these "allowing states," California and Minnesota have held that the legislative body may take action with respect to the subject matter of a measure under referendum petition, so long as it does so in "good faith." This means that the measure passed in reaction to the petition must differ from the measure on which the petition was filed.¹⁰⁹ The purpose of the test is to prevent legislative bodies from circumventing the referendum process by repealing the referred act to moot the vote, only to enact the objectionable law as a new measure.¹¹⁰ While the following subsection

102. *Supra* Table 3.

103. ME. CONST. art. IV, pt. 3, § 17, cl. 1.

104. *Supra* Table 3.

105. *In re* Opinion of the Justices, 174 A. at 855.

106. *Id.*

107. *Id.*

108. *Ex parte* Stratham, 187 P. 986, 988 (Cal. Ct. App. 1920); *State ex rel. Megnella v. Meining*, 157 N.W. 991, 992 (Minn. 1916); *Utah Power & Light Co. v. Ogden City*, 79 P.2d 61, 63 (Utah 1938); *McBride v. Kerby*, 260 P. 435, 441 (Ariz. 1927), *overruled in part on other grounds by* *Adam v. Bolin*, 247 P.2d 617 (Ariz. 1952); *Reynolds v. Martin*, 610 N.W. 2d 597, 602 (Mich. Ct. App. 2000).

109. *Ex parte* Stratham, 187 P. at 988; *State ex rel. Megnella*, 157 N.W. at 992.

110. *State ex rel. Megnella*, 157 N.W. at 992.

only addresses the good faith test with respect to city ordinances, it is possible that the test could be applied at the state level. Though it ultimately rejected applying the test to state legislation, the Michigan Supreme Court did address the idea.¹¹¹

1. Allowing States That Follow the Good Faith Test

a. California

Referendum Clause	"[T]he people reserve to themselves the power[] of . . . referendum." ¹¹²
Statewide Power	Yes. ¹¹³
Types of Statutes Exempted from Referendum	Emergency measures, statutes calling elections, acts levying taxes, or appropriation bills for the state's usual current expenses. ¹¹⁴
Referendum on Parts of Acts	Yes ¹¹⁵
Time Limit for Filing Petition (Measured from closing of legislative session)	90 days. ¹¹⁶
Number of Voters That Must Sign Petition Before Filing	Five percent of the electors, "electors" being measured by the total vote for governor at the last gubernatorial election. ¹¹⁷
Other	Expressly allows for referendum at the local level. ¹¹⁸

Table 4

This section explores the limits of the good faith test, as applied by the California courts. Article II of California's constitution begins with the people's power. "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."¹¹⁹ Detailed provisions follow for the initiative, referendum, and recall pow-

111. Reynolds v. Martin, 610 N.W.2d 597, 607 (Mich. Ct. App. 2000).

112. CAL. CONST. art. IV, § 1.

113. *Id.*

114. *Id.* at art. II, § 9, cl. a.

115. *Id.*

116. *Id.* § 9, cl. b.

117. *Id.*

118. *Id.* § 11, cl. a.

119. *Id.* § 1.

ers.¹²⁰ Only after those come the legislature's powers.¹²¹ This juxtaposition is in line with the primacy of the referendum right, as the California courts agree that "it has long been our judicial policy to apply a liberal construction to this power wherever it is challenged If doubts can be reasonably resolved in favor of the use of this reserve power, courts will preserve it."¹²² Perhaps this quote shows the basis for adopting the good faith test—a judicially-created compromise between the legislature and the electorate.

The law before the California Court of Appeals in *Ex parte Stratham* was a city ordinance making it a misdemeanor to solicit patronage from passengers at a particular depot for the transportation of persons and baggage.¹²³ After a referendum petition was filed on the ordinance, the city council repealed the law and reenacted it as an emergency measure so that it would be effective despite the petition. The purported emergency was the lack of legislation on the subject of solicitation at the depot, and the court declined to review the sufficiency of the facts supporting this state of emergency.¹²⁴ It further found that an inadvertent failure to declare an emergency when passing an ordinance could be remedied, as the council there did, through a simple "repeal and re-enactment in proper form" despite the filing of a referendum petition.¹²⁵

Here, the court did not rely on the emergency clause justification for the council's new ordinance but turned to the good faith test instead. Unfortunately, the court did not analyze why it followed this rule but merely stated the test and found that the city council had met it: The council had the power to pass a new ordinance having the same subject matter of the suspended ordinance so long as the new ordinance was "essentially different" from the ordinance pending referendary election "avoiding, perhaps, the objections made to the first."¹²⁶ The court did not weigh the facts against the test, indicating that the test's standard is low. The word "perhaps" implies the inherent agnosticism as to what exactly the people dislike about a given law they have chosen to refer, and that one word gives the city council the freedom to make its best guess as to what the people will find acceptable when it passes the subsequent ordinance.

Two examples, from the same city no less, show the outer limits of the test. In *Reagan v. Sausalito*, the court held that the subsequent measure passed the good faith test. The council had enacted Resolutions 1540 and 1542, which provided that the city would acquire a parcel of waterfront property and lease it—essentially rent free—to a private nonprofit corporation for recreational purposes. The city council,

120. *See id.* §§ 2–20.

121. *Id.* at art. IV.

122. *Mervynne v. Acker*, 11 Cal. Rptr. 340, 344 (Cal. Ct. App. 1961).

123. *Ex parte Stratham*, 187 P. 986, 987 (Cal. Ct. App. 1920).

124. *Id.*

125. *Id.* at 988.

126. *Id.*

through these resolutions, stated that the lease was in keeping with the city's purpose of "protecting the city's scenic beauty and improving its 'unexcelled marine view.'"¹²⁷ These resolutions were referred, and the city council subsequently enacted a new one establishing a policy in favor of acquiring the same land. However, the subsequent resolution eliminated the lease agreement.¹²⁸ The court highlighted the rental provision, implying that the disagreeable term in the original resolutions was the fact of leasing the land, not the acquisition of it.¹²⁹ By eliminating the lease agreement, the city had not acted in bad faith, seeking to circumvent the referendum, but had actually enacted an essentially different measure, which by nature is one that remedies the perceived disfavored provisions of the old measure.¹³⁰

Martin v. Smith gives an example of a measure that failed the good faith test.¹³¹ The California legislature granted the city of Sausalito a parcel of state-owned land subject to a lease. The lessee used the land as a yacht harbor.¹³² A few years later, the lessee entered into a sublease with the city council's consent, manifested in Resolution 1474. The resolution provided that the premises would be used for the construction of a restaurant, bar, motel, swimming pool, and parking area.¹³³ In another resolution, Resolution 1475, the city council approved the 48-year sublease term, expiring in 2007.¹³⁴ Thereafter, the residents of the city filed a referendum petition on the two resolutions.¹³⁵ Under the terms of the city charter, a referendum petition gave the council the choice of either repealing the measure under referendum or submitting the same to the vote of the people.¹³⁶ If repealed, the measure could not be reenacted for a period of one year.¹³⁷ The one-year reenactment restriction also applied if the council submitted the measure to a vote, and the majority of voters disapproved of it.¹³⁸

Rather than choosing one of their two options, the council amended the measures under referendum petition through the passage of Resolution 1485.¹³⁹ It was this resolution that the court of appeals analyzed under the good faith test, comparing the referred measures to the new one. The court found that the council had changed only one provision from the protested resolutions, shortening the sublease term so that it expired in 2002 rather than 2007.¹⁴⁰ The council had also included two

127. Reagan v. Sausalito, 26 Cal. Rptr. 775, 782 (Cal. Ct. App. 1962).

128. *Id.*

129. *See id.*

130. *Id.*

131. *Martin v. Smith*, 1 Cal. Rptr. 307, 311 (Cal. Ct. App. 1959).

132. *Id.* at 308.

133. *Id.* at 309.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 310.

new provisions—one adding more land to the main lease and one changing the rental amount.¹⁴¹ The court reasoned that when the people filed the referendum petition in the first place, they disapproved of the use of the sublet property.¹⁴² Prior to the disputed resolutions, the land had been used as a yacht harbor with other related amenities.¹⁴³ Installing a bar, motel, and parking lot would be a dramatic change to the nature of the beachfront area, and the idea of it understandably incited protest in the form of the referendum petition.¹⁴⁴ Thus, the city council’s response missed the mark: Reducing a 48-year lease by five years could be characterized as an insufficient remedy. Adding more land to the lease was downright provocation.

The facts indicate that the council, in passing Resolution 1485, did so directly to circumvent the referendum process.¹⁴⁵ The intent of circumvention is what gives the good faith test its name. Through the test, a legislative body is limited in its law-making power from using loopholes to undermine the people’s will. Here, the council was given the choice to repeal or submit their disputed resolutions to a vote of the people. They chose neither option. Further, in passing the new resolution, they failed to “avoid[] . . . perhaps, the objections made to the first” resolutions.¹⁴⁶

While the *Martin* court was passing judgment on a city ordinance through construction of the city charter’s referendum power, its analysis could be applicable at more than just the local level. For instance, the court opens the analysis portion of the opinion by showing the referendum power to be one reserved rather than granted to the people by the legislature, implying a law-making power at least on par with the legislature’s. Then the court cites the California Constitution and holds that “it is the duty of the courts to jealously guard this right of the people and to prevent any action which would improperly annul that right.”¹⁴⁷ Further, its use of generalized language, referring to “legislative bod[ies]” rather than a city council, suggests that the good faith test may be applied at the state level as well.¹⁴⁸

b. Minnesota

Minnesota does not have a statewide referendum right.¹⁴⁹ However, because it is one of the few states that has litigated the issue of the ef-

141. *Id.*

142. *Id.* at 311.

143. *Id.* at 308.

144. *Id.* at 309.

145. *See id.* at 311.

146. *Id.* at 310 (quoting *Ex parte Stratham*, 187 P. 986, 988 (Cal. Ct. App. 1920)).

147. *Id.* at 309.

148. *Id.* at 311.

149. While there have been several promising attempts to pass a constitutional amendment passed that would allow statewide referendum, each attempt has failed because of the requirement of a super-majority to approve constitutional amendments. Univ. of S. Cal. Sch. of Law, *Minnesota*, INITIATIVE & REFERENDUM INST., <http://iandrinstute.org/Minn>

fect of a referendum petition, and because the Minnesota Supreme Court seems to have coined the good faith test, it is included in this analysis. The Minnesota legislature granted to city charter commissions the option to provide its city residents with the referendum right, leaving it to each commission to choose the period before an ordinance could take effect and the percentage of the city's electors required to file a petition.¹⁵⁰

In *State ex rel. Megnella v. Meining*, the city had passed an ordinance making it a criminal offense to operate an automobile for hire as a common carrier without a permit.¹⁵¹ The people filed a referendum petition, and, under the charter, the city council had the choice of either repealing the ordinance or submitting it to the vote of the people.¹⁵² The council repealed the ordinance and passed a new one, which the Minnesota Supreme Court found to be valid because of its essentially different nature. While both ordinances regulated permits in order to remedy the same public transportation problem, the second measure allowed for a broader class of liability insurance carriers, substantially lowering the price of the required insurance. Because insurance cost was the main objection to the original ordinance, the court found that the city council had enacted the second ordinance in good faith.¹⁵³ Like the California court, the Minnesota court required the legislative body to remedy "perhaps" the objections to the first measure, resulting in a seemingly deferential standard: "[The council] may, if it acts in good faith and with no intent to evade the effect of the referendum petition, pass an ordinance covering the same subject matter that is essentially different from the ordinance protested against, avoiding perhaps, the objections made to the first ordinance."¹⁵⁴

c. Utah

<p>Referendum Clause</p>	<p>"The Legislative power of the State shall be vested in: [the legislature] and the people of the State of Utah as provided in Subsection (2). The legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may . . . require any law passed by the Legislature . . . to be submitted to the voters of the State, as provided by statute, before the law may take effect."¹⁵⁵</p>
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esota.htm (last updated 2011).

150. MINN. STAT. § 410.20 (2010).

151. *State ex rel. Megnella v. Meining*, 157 N.W. 991, 992–93 (Minn. 1916).

152. *Id.*

153. *Id.*

154. *Id.*

155. UTAH CONST. art. IV, § 1, cl. 1–2. The Utah Constitution reserves the right to the people but mostly leaves the details to the legislature's discretion.

Statewide Power	Yes. ¹⁵⁶
Types of Statutes Exempted from Referendum	Bills that have been passed by a two-thirds majority vote of the legislature. ¹⁵⁷
Referendum on Parts of Acts	Yes. ¹⁵⁸
Time Limit for Filing Petition (Measured from closing of legislative session)	40 days. ¹⁵⁹
Number of Voters That Must Sign Petition Before Filing	Ten percent of the electors, total electors measured by the total number of votes cast at the last general election at which a President was elected so long as there were signatures from at least fifteen counties that equal at least ten percent of the total number of votes cast in each of those counties in such election. ¹⁶⁰
Other	The Utah Constitution expressly provides that “[t]he Legislature may amend any laws approved by the people at any legislative session after the law has taken effect.” ¹⁶¹

Table 5

While the issue of the effect of a referendum petition on the legislature’s power has been addressed by the Utah Supreme Court, the court only generally approved and adopted the reasoning of the California, Minnesota, and Arizona courts.¹⁶² All three are allowing states, but California and Minnesota follow the good faith test, and Arizona does not.¹⁶³ Unfortunately, the Utah court did not reference its state constitution or make prudential arguments.¹⁶⁴ Thus, while it is somewhat helpful to know that Utah sides with the allowing states, we are left to guess why

156. *Id.*

157. *Id.*

158. *See* UTAH CODE ANN. § 20A-7-303 (LexisNexis 2011) (indicating in the standard form referendum petition that if only a part of a legislative act is referred, such part must be specified).

159. *Id.* § 20A-7-306(1)(a).

160. *Id.* § 20A-7-301.

161. *Id.* § 20A-7-311.

162. *Utah Power & Light Co. v. Ogden City*, 79 P.2d 61, 63–64 (Utah 1938).

163. *Ex parte Stratham*, 187 P. 986, 988 (Cal. Ct. App. 1920); *State ex rel. Megnella v. Meining*, 157 N.W. 991, 992 (Minn. 1916); *McBride v. Kerby*, 260 P. 435, 438 (Ariz. 1927) (recognizing that the referendum petition does not limit the legislature’s “ordinary constitutional powers”).

164. *Utah Power & Light Co.*, 79 P.2d at 63–64.

that is and whether Utah places limitations on the legislature's ability to enact similar legislation to that awaiting referendary vote.

2. Allowing States That Do Not Follow the Good Faith Test

a. Arizona

Referendum Clause	"[T]he people reserve . . . for use at their own option, the power to approve or reject at the polls any Act, or item, section, or part of any Act, of the Legislature." ¹⁶⁵
Statewide Power	Yes. ¹⁶⁶
Types of Statutes Exempted from Referendum	Emergency acts, measures for the support and maintenance of state institutions. ¹⁶⁷
Referendum on Parts of Acts	Yes. ¹⁶⁸
Time Limit for Filing Petition (Measured from closing of legislative session)	90 days. ¹⁶⁹
Number of Voters That Must Sign Petition Before Filing	Five percent of qualified electors, ¹⁷⁰ "qualified electors" being measured by the total vote for governor at the last general election. ¹⁷¹
Other	Expressly allows for referendum for city laws. ¹⁷²

Table 6

Arizona became an allowing state because of its presumption in favor of the legislature's power and rejection of the prohibiting states' implicit definition of "measure."¹⁷³ Further, the Arizona Supreme Court held that prohibiting legislative action on an act awaiting the referendum vote allows interest groups consisting of only five percent of the electorate to suspend the legislative process, possibly against the will of

165. ARIZ. CONST. art. IV, § 1, cl. 1.

166. *Id.*

167. *Id.* at cl. 3.

168. *Id.* at cl. 1.

169. *Id.* at cl. 3.

170. *Id.*

171. *Id.* at cl. 7.

172. *Id.* at cl. 8.

173. *McBride v. Kerby*, 260 P. 435, 437 (Ariz. 1927).

the majority, and such suspension is the type of manipulation the referendum provision was enacted to prevent.¹⁷⁴

In 1927, when the Arizona Supreme Court decided the issue of a referendum petition's effect, it had the benefit of the prior Missouri opinion, *Drain v. Becker*, discussed above, but rejected its reasoning and deemed the issue a matter of first impression.¹⁷⁵ This was not because the Arizona court valued the referendum power less than the Missouri court did; rather, the value of direct democracy has a strong showing in the Arizona Constitution's statewide referendum provisions.¹⁷⁶ A unique strength of the referendum power in Arizona is that once a law has been repealed through the referendum vote, the legislature may not repeal that repeal.¹⁷⁷ As to amendment of such act, the legislature's changes must "further the purpose" of the people's referendum, and the legislative vote must be a seventy-five percent supermajority.¹⁷⁸

The situation before the court in *McBride v. Kerby* was as follows: The state legislature had passed chapter 78 in 1925, which established a system of automobile title registration and provided that the Secretary of State would administer it.¹⁷⁹ In 1927, the legislature passed chapter 99, which repealed the title registration act and provided no affirmative legislation.¹⁸⁰ The people filed a referendum petition on chapter 99, and the legislature, in special session, passed the Highway Code as an emergency measure.¹⁸¹ The Highway Code was "extremely voluminous," and the court found that it was intended to provide a complete system for state highway construction and maintenance, the regulation of automobiles using those highways, and the provision of revenue for the state highway department's needs.¹⁸² Most importantly, the Highway Code repealed and amended many sections of the state statutes—including chapter 78.¹⁸³ The issue, then, was this: Since the referendum petition kept chapter 99 from becoming effective, chapter 78 was revived. If the people were to strike down chapter 99 by majority vote, they would, in effect, be approving chapter 78. Thus, when the legislature enacted the Highway Code, it was questionable whether it exceeded its authority because the Code's subject matter embraced that of chapter 78.¹⁸⁴

The court ultimately concluded that the legislature had the power to legislate on the subject matter of a measure awaiting referendary election.¹⁸⁵ It began its analysis with a summary of the referendum pow-

174. *Id.* at 438.

175. *Id.* at 437.

176. *Supra* Table 6.

177. ARIZ. CONST. art. IV, § 1, cl. 6, para. (B).

178. *Id.* para. (C).

179. *McBride*, 260 P. at 436.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *See id.* at 436–37.

185. *See id.* at 441.

er as set forth in the state constitution. The court particularly noted one rule of constitutional construction: “The legislature has all power not expressly denied it or given to some other branch of the government.”¹⁸⁶ Stated differently, there is a presumption of the legislature’s power to pass laws. Then the court defined the referendum power by looking to the main referendum provision: The people have the right to refer “any measure, or item, section, or part of any measure, enacted by the Legislature.”¹⁸⁷ The power allows the people to strike down a “measure” they disapprove of. The constitution does not state that the referendum right may be exercised against subject matter that happens to be contained in the act the people refer. Only if the court found that “measure” actually means “subject” would the legislature lack the power to enact law embracing the same subject matter as the act awaiting referendary vote.¹⁸⁸ Not only does the diction of the constitution—“measure”—imply otherwise, but the presumption in favor of the legislature’s power gives force to the argument as well. This interpretation is also bolstered by the Arizona statute that requires a referendum petition to include the title of the entire act to be referred or the specific language of the act if only part is to be referred.¹⁸⁹

The court then looked to the clause following the referendum provisions:

This section shall not be construed to deprive the Legislature of the right to enact any measure except that the legislature shall not have the power to adopt any measure that supersedes, in whole or in part . . . any referendum measure decided by a majority of the votes cast thereon unless the superseding measure furthers the purposes of the . . . referendum measure and at least three-fourths of the members of each house of the Legislature . . . vote to supersede such . . . referendum measure.¹⁹⁰

Since the general rule that the legislature’s power is not limited by the referendum is followed directly by a single exception limiting the legislature’s power with respect to acts that have been struck down, the court found that the specificity of the exception does not leave room for another unspoken exception. In other words, if the framers were conscientious enough to include an exception to the legislature’s power with respect to acts that had been struck down, why did they not also include an exception for acts upon which a petition was filed? The answer, according to the court, is that providing a second exception was not the framers’ intent.¹⁹¹

186. *Id.* at 437.

187. *Id.* (quoting ARIZ. CONST. art. IV, § 1, cl. 1).

188. *Id.*

189. *See* ARIZ. REV. STAT. § 19-101 (2011).

190. *McBride*, 260 P. at 438; ARIZ. CONST. art. IV, § 1, cl. 14.

191. *McBride*, 260 P. at 438.

Also, since measures struck down through referendum are accorded this special status with respect to repeal and amendment, it follows that the status should be conferred with caution. This is especially true in light of the court's perception of the referendum purpose. The court argued that the initiative and referendum powers were put in place to protect powerful minority interest groups from "browbeat[ing]" legislators into passing laws for such minorities' selfish interests.¹⁹² Through the direct democracy reforms, the people could voice objections when these minorities unduly influenced state policy. Thus, the purpose of the referendum power, according to the court, is to ensure that the state law reflects the majority of state citizens' wishes—whether those wishes are expressed through the legislature or the referendum.¹⁹³ This purpose is furthered by the interpretation that the referendum petition does not limit the legislature's power to pass law on the same subject matter as the law under petition because only five percent of the electorate is required to file a petition. Therefore, if the petition limited the legislature's power to pass laws on the same subject matter, a very small minority—five percent of voters—would be "browbeating" the legislature.¹⁹⁴ The case before the court highlighted this concern because chapter 78 was such a comprehensive act, creating a system for the state highways. If the court were to find a limitation on the legislature's power to enact law on the same subject matter, the proponents of the petition would be taking that whole legislative subject hostage.¹⁹⁵ On the other hand, if the court did not infer a new limitation on the legislature's power, there would be flexibility. During the time leading up to the election, the legislators and their constituents could meet and try to persuade each other.¹⁹⁶ If the referendum proponents were to change their minds, then the legislators would be free to enact the wishes of their constituents. But if the legislature's power was limited by the petition, the legislators' hands would be tied—regardless of any second thoughts the referendum proponents might have.¹⁹⁷

The court conceded that if the legislature's power is not curtailed by a referendum petition, there is a danger that the legislature and the referendum proponents will continue to enact new law on the same subject matter and file successive petitions respectively. However, the court also recognized that there is no constitutional limit on the number of statutes that can be passed or the number of petitions that may be filed.¹⁹⁸ While this may be literally true, it may not be so clear when applied. Because the Arizona referendum right cannot be exercised on an emergency measure,¹⁹⁹ the legislature can avoid a new referendum peti-

192. *Id.*

193. *Id.*

194. *Id.* at 438–39.

195. *Id.*

196. *Id.* at 439.

197. *Id.* at 438–39.

198. *Id.* at 439–40.

199. *Supra* Table 6.

tion by adding an emergency clause to its act—even if the first act, the one awaiting referendary vote, had no such clause. That was the situation in this case.²⁰⁰ While this emergency clause exception seems to leave room for the legislature to strong arm its own way, the court believed that legislators are “anxious to obey” their constituents’ wishes.²⁰¹ So if the legislature believed that the referendum petition represented the majority’s inclinations, the legislature would not enact new measures on the same subject to preempt the referendum vote.²⁰²

b. Michigan

Referendum Clause	“The people reserve to themselves . . . the power to approve or reject laws enacted by the legislature” ²⁰³
Statewide Power	Yes. ²⁰⁴
Types of Statutes Exempted from Referendum	Bills making appropriations to state institutions and measures seeking to remedy deficiencies in state funds. ²⁰⁵
Referendum on Parts of Acts	No. ²⁰⁶
Time Limit for Filing Petition (Measured from closing of legislative session)	90 days. ²⁰⁷
Number of Voters That Must Sign Petition Before Filing	Five percent of the registered electors, “registered electors” being measured by the total vote for governor at the last general election. ²⁰⁸

Table 7

In *Reynolds v. Martin*, the Michigan Court of Appeals found that the legislature had the authority under the state constitution to enact essentially the same measure that previously had been subject to referendum.²⁰⁹ The dispute was over Michigan’s Bingo Act, which up until 1994 had allowed “qualified organizations” to obtain bingo licenses. In

200. See ARIZ. CONST. art. IV, § 1, cl. 3; *McBride*, 260 P. at 436.

201. *McBride*, 260 P. at 440.

202. *Id.*

203. MICH. CONST. art. II, § 9.

204. *Id.*

205. *Id.*

206. *See id.*

207. *Id.*

208. *Id.*

209. *Reynolds v. Martin*, 610 N.W.2d 597, 599 (Mich. Ct. App. 2000).

PA 118, the legislature changed the definition of “qualified organizations” to expressly exclude political candidate committees.²¹⁰ The people filed a referendum petition on PA 118, but there was a dispute as to the validity of some of the signatures. The signature validity litigation lasted just over a year.²¹¹ During that time, the legislature passed PA 275, which only made one substantive change to the Bingo Act—a change in the definition of “fraternal organization” that affected fraternal organizations’ tax status.²¹² While this was the only substantive change, PA 275 encompassed the entire section providing that “qualified organizations” did not include political candidate committees. Thus, the legislature reenacted the same text contained in the bill awaiting the referendum vote.²¹³ The next year, the referendum was certified on PA 118, and the people struck the bill down in the election. However, PA 275 was still on the books.²¹⁴

The court advanced a textual argument, a procedural argument, and a prudential argument to support its finding that the legislature had the power to enact PA 275 while the referendum proceedings were pending on PA 118. In its opinion, it approvingly quoted large portions of the leading Arizona case, *McBride v. Kerby*, highlighting the argument in which the Arizona court interpreted the constitutional language “measure, or item, or section.”²¹⁵ The Michigan court agreed that, for referendum purposes, legislatures do not pass general principles or subjects but rather measures or acts.²¹⁶ Therefore, when the state constitution reserves the referendum right to the people to exercise against legislature-made law, the court should interpret that to mean a discrete bill.²¹⁷ The Michigan court implicitly extended the Arizona court’s argument, however, because the Michigan Constitution does not reserve the power to be exercised against a “measure,” as the Arizona Constitution dictates. Rather, the Michigan Constitution is less precise, only referring to “law.”²¹⁸

The court then turned to its procedural analysis of the situation—admittedly a unique one compared to the other cases examined in this article. The court found that PA 275 did not repeal PA 118. PA 275 did not state that it repealed the former act, and the legislature was required to restate the entire section to be amended in the new bill.²¹⁹ Thus, by finding it necessary to change one tiny provision in PA 118, the legislature was required to reenact the measure in its entirety, including the provisions that had triggered the referendum petition. Because

210. *Id.* at 600.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 601.

215. *Id.* at 604.

216. *Id.*

217. *Id.*

218. *Compare* ARIZ. CONST. art. IV, § 1, cl. 1, *with* MICH. CONST. art. II, § 9.

219. *Reynolds*, 610 N.W.2d at 604–05.

PA 118 was not repealed, it made it to the polls, and the people were able to strike it down. Therefore, the court argued, the people were able to exercise their referendum right: They struck down the referred law. In other words, the referendum right consists of the ability to go to the polls to express disagreement with a legislative act.²²⁰

Finally, the court turned to the same prudential concern raised in *McBride v. Kerby*. If the court were to find that the legislature lacked the power to enact legislation on the same subject as that awaiting referendary vote, then a five-percent minority would have the power to suspend the legislature's lawmaking power on a particular subject and so defeat majority interests between the time of the petition's filing and the election.²²¹ The court found that absent "clear constitutional authority," it would not grant minority interest groups such power.²²² To mitigate the possible harshness of its finding, the court reminded plaintiffs that they could file a referendum petition on PA 275 or seek constitutional amendment.²²³

The court also expressly rejected the good faith test that California and Minnesota follow as being without constitutional basis and amounting to an exercise in deciding nonjusticiable political questions.²²⁴

IV. HOW IDAHO SHOULD PROCEED

A. Scope of the Referendum Power in Idaho

Referendum Clause	"The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature . . . legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection." ²²⁵
Statewide Power	Yes. ²²⁶
Types of Statutes Exempted from Referendum	None. ²²⁷
Referendum on Parts of Acts	No. ²²⁸

220. *Id.* at 603, 605.

221. *Id.* at 607.

222. *Id.*

223. *Id.*

224. *Id.*

225. IDAHO CONST. art. III, § 1.

226. *Id.*

227. Idaho State AFL-CIO v. Leroy, 718 P.2d 1129, 1134-35 (1986).

Time Limit for Filing Petition (Measured from closing of legis- lative session)	60 days. ²²⁹
Number of Voters That Must Sign Petition Before Filing	Six percent of Idaho voters. ²³⁰

Table 8

The Idaho Supreme Court has emphasized the strength of the referendum power in Idaho, calling it “much more comprehensive and inclusive than its counterpart in our sister states.”²³¹ One element of its strength is the fact that any type of statute may be referred to the people’s vote.²³² This is unusual among the referendum states.²³³ In Idaho, the only difference between a regular act and an emergency act, with respect to the filing of a referendum petition, is that an emergency act remains in effect until struck down at the referendary election,²³⁴ while a regular act’s effectiveness is stayed until approved at the referendum election.²³⁵ Overall, Idaho’s referendum law indicates its high estimation of its citizens’ direct legislative power.²³⁶

B. Idaho Is Probably An Allowing State

While the referendum right in Idaho is strong, a desire to protect this right, on its own, does not justify the conclusion that the legislature should be prohibited from legislating on the subject matter of an act awaiting referendary vote. The allowing states have the better textual arguments, which also apply to the Idaho Constitution.²³⁷ In addition, the Idaho Supreme Court likely would not agree with the prohibiting states’ perceived purpose of the referendum power.²³⁸

One of the leading Idaho cases, *Johnson v. Diefendorf*, in which the Idaho Supreme Court found that the referendum power extends to emergency acts, states that “[o]ur constitutional provision for referendum differs from all others we have examined . . . [other states’ referendum provisions] differ so materially from ours that decisions interpreting and applying them are of no help to us.”²³⁹ While that could put a damper on this article’s comparative approach, *Johnson v. Diefendorf*’s context indicates that it should not. Granted, with respect to the scope

228. See IDAHO CONST. art. III, § 1.

229. IDAHO CODE ANN. § 34-1803 (2008).

230. *Id.* § 34-1805.

231. Idaho Water Res. Bd. v. Kramer, 548 P.2d 35, 66 (1976).

232. *Supra* Table 8.

233. *E.g., supra* Tables 1–2, 4–7.

234. Idaho State AFL-CIO v. Leroy, 718 P.2d 1129, 1136 (1986).

235. IDAHO CODE ANN. § 34-1803 (2008).

236. See generally *supra* Table 8.

237. See *infra* Part IV.B.1.

238. See *infra* Part IV.B.2.

239. *Johnson v. Diefendorf*, 57 P.2d 1068, 1074 (1936).

of the types of referendum-eligible acts, Idaho's provision is fairly unusual.²⁴⁰ On the other hand, even if the court meant its statement to have broader application, at the very least, the other courts' opinions, in their totality, raise the necessary issues that must be addressed to reconcile the legislature's and people's powers when a referendum petition has been filed.

1. Textual Arguments

The main textual argument posed by the allowing states was the meaning of the word "act" or "measure." They especially focused on this argument, as it is probably the clearest point in their favor. As the courts argued, the ability of the people to exercise the referendum power against "acts" or "measures" indicates a discrete bill. The legislature passes "acts" and "measures," not "subjects."²⁴¹ Thus, when the referendum petition is filed against an act of the legislature, it follows that the only thing bound by the petition is the specific bill on which it was filed. If a new bill is passed on the same subject matter while the former bill is awaiting the election, the new bill is unaffected by the referendum petition because it is a different bill. Even Michigan relied on this textual argument²⁴² despite the fact that its constitution allows the people to exercise the referendum right against "laws," a more general term than "act" or "measure."²⁴³

However, just as compelling as the argument itself is the fact that the prohibiting states did not attempt to address it. The prohibiting states instead focused on the opening of their respective referendum provisions, concluding that the lack of limiting language indicated that the referendum power was "complete," meaning that once the referendum petition was filed on an act, the legislature could not amend or repeal that act. The act would be frozen as it was, out of the reach of the legislature in a netherworld between effectiveness and repeal. However, if the prohibiting states were to take their argument further, they might find that they actually agreed with the allowing states: The words "act" or "measure" are the words of limitation that the prohibiting states claim do not exist. Once these limitations are acknowledged, it follows that the referendum power is not "complete." Therefore, the legislature is not automatically restrained from repealing the act on which the petition was filed.

Idaho's referendum provision conforms to the allowing states' textual argument, since it opens with a general, unqualified power followed by the limiting language specifying that the people may exercise the referendum power against an "act" or "measure."²⁴⁴ Then, even more limit-

240. Idaho does not limit the types of laws that may be referred. *Supra* Table 8. However, neither does Maine. *Supra* Table 3.

241. *E.g.*, *McBride v. Kerby*, 260 P. 435, 437 (Ariz. 1927).

242. *Reynolds v. Martin*, 610 N.W.2d 597, 601 (Mich. Ct. App. 2000).

243. MICH. CONST. art. II, § 9.

244. *Supra* Table 8.

ing language follows: The section specifies that the referendum power is to be exercised “under such conditions and in such manner as may be provided by acts of the legislature.”²⁴⁵ Because the referendum provision is expressly not self-executing, the legislature has been vested with the power to restrict the people’s right.²⁴⁶ From there, it is not a far leap to conclude that the legislature has the power to repeal an act on which a referendum petition has been filed. After all, if the legislature can define the limits of the power, why could it not also take legislative action on the subject matter of an act awaiting referendary vote?

Further, the Idaho Supreme Court has held that initiated measures and legislative measures are on equal footing because the initiative and referendum clause did not place a limitation on the legislature’s power to repeal or amend initiated acts.²⁴⁷ The court reasoned that the word “reserve” indicates that the two legislative powers are derived from the same source, so the people’s reserved power is not greater than the legislature’s. The legislature’s acts are subject to amendment and repeal in future legislative sessions, and since initiated acts are on equal footing with legislative ones, initiated acts are also subject to repeal and amendment at future sessions.²⁴⁸ Likewise, the referendum power is derived from the same legislative power as the legislature’s power. The same word, “reserve,” marks the source of the referendum right.²⁴⁹ Under the equal footing principle, then, referred measures would have no special status and therefore are not accorded any immunity from legislative action, including outright repeal.

Finally, the Idaho Supreme Court has held that the state legislature has all the legislative authority except as restrained under the state or federal constitutions.²⁵⁰ In other words, there is a presumption in favor of the legislature’s law-making power. This presumption smooths the way for the legislature to repeal and reenact the bill on which a referendum petition is filed.

2. Perceived Purposes of the Referendum Power

While the textual arguments are the most important part of a constitutional analysis like this one, the way the other courts viewed the purpose of the referendum power seemed to drive their opinions. It is unclear exactly what the Idaho Supreme Court would hold the purpose of the referendum power to be, but it seems that the court would not adopt the prohibiting states’ perceived purpose. The referendum states litigating this issue have projected a spectrum of perceived purposes of the referendum power yielding this observation: The broader the perceived purpose, the greater the scope of the people’s power. The greater

245. *Id.*

246. *Idaho State AFL-CIO v. Leroy*, 718 P.2d 1129, 1135 (1986).

247. *Luker v. Curtis*, 136 P.2d 978, 979 (1943).

248. *Id.*

249. IDAHO CONST. art III, § 1.

250. *Koelsch v. Girard*, 33 P.2d 816, 817 (1934).

the people's power, the lesser the legislature's. The prohibiting states agree that the purpose of the referendum power is an expansive one—curtailing the legislative power.²⁵¹ It is no wonder that those courts do not allow their legislatures to change the subject matter of a referred act.

The allowing states have other ideas. California and Minnesota, the allowing states following the good faith test, did not expressly state the purpose of referendum. However, it can be gleaned from the courts' arguments. Both courts recognized that the good faith test is in place to prevent legislative bodies from circumventing the referendum process.²⁵² They noted that legislative bodies do not have the right to frustrate the referendum process by repealing the act pending referendary vote and subsequently enacting a measure essentially the same as the one they just repealed.²⁵³ However, if the legislative body repeals and subsequently enacts a measure essentially different, seeking to change the provisions that incited the referendum petition in the first place, the courts hold that the referendum purpose is served.²⁵⁴ Thus, it can be deduced that the good faith allowing states perceive the purpose of the referendum power to be to ensure the striking down of particular legal propositions and/or outcomes—regardless of what bill they are embodied in and which legislative authority effects the repeal—if the majority of voters truly disapproves of them. Arizona and Michigan, both allowing states that do not follow the good faith test, have different perceptions of the referendum purpose. The Arizona court found that the purpose was to avoid “browbeating” in the lawmaking process—to protect majority interests from powerful minorities.²⁵⁵ Finally, the Michigan court asserted the most narrowly constructed purpose—to allow the electorate to vote to approve or reject a bill.²⁵⁶ Thus, so long as voters punched a hole in a ballot card, the referendum purpose was served—a far cry from Missouri's and Oklahoma's assertion that the referendum purpose was generally to curtail the legislature's power.

Where in the perceived purpose spectrum does Idaho fall? This is not clear from existing case law. However, one point does stand out: It is not likely that the court would agree that the purpose is to curtail the legislature's power—an additional check and balance in government—because the Idaho Supreme Court has stated that the legislature has the power to restrict the referendum,²⁵⁷ while the prohibiting states

251. *State ex rel. Drain v. Becker*, 240 S.W. 229, 231 (Mo. 1922); *In re Referendum Petition No. 1*, 220 P.2d 454, 459 (Okla. 1950).

252. *See Ex parte Stratham*, 187 P. 986, 988 (Cal. Ct. App. 1920); *State ex rel. Megnella v. Meining*, 157 N.W. 991, 992 (Minn. 1916).

253. *Ex parte Stratham*, 187 P. at 988; *State ex rel. Megnella*, 157 N.W. at 992.

254. *See Ex parte Stratham*, 187 P. at 988; *State ex rel. Megnella*, 157 N.W. at 992.

255. *McBride v. Kerby*, 260 P. 435, 438 (Ariz. 1927).

256. *See Reynolds v. Martin*, 610 N.W. 2d 597, 605 (Mich. Ct. App. 2000).

257. *Idaho State AFL-CIO v. Leroy*, 718 P.2d 1129, 1135 (1986).

have self-executing referendum powers.²⁵⁸ Thus, the Idaho referendum power's dependency on the legislature prevents it from curtailing the legislature's power. Any of the other perceived purposes have led the other courts to the conclusion that the legislature does, indeed, have the power to take action on the subject matter of bills pending referendary vote.

3. Prudential Arguments

While some courts have imposed the good faith requirement on the legislature in order to avoid the "referendum cycle," the good faith test is grounded in prudential reasoning—not textual analysis. So, while it is an option other courts have chosen, the Idaho Supreme Court is certainly not compelled to adopt it—nor does the court seem likely to do so in light of the acknowledged presumption in favor of the legislature's power.²⁵⁹

The foremost prudential concern the prohibiting states raised was that a cyclical referendum process could result: (1) The state legislature passes a bill that the people disagree with; (2) the people file a referendum petition; (3) the legislature repeals the bill and enacts one similar to the original; (4) the people file a new referendum petition. Repeat (3) and (4) until one or the other group gives up.²⁶⁰ It seems that if the referendum process actually devolved into this war of attrition, the legislature would be the victor. It has the advantage of being a smaller group, professionally organized, and practiced—whereas the protesting electorate must circulate petitions among thousands of people on its own time. Of course, this scenario begs the question: What does it mean to win? While the legislature's measure would probably be the last act standing, its members may not get re-elected for the following term if they were to disregard the will of the electorate as expressed through the petition. On the other hand, such disregard could be a risk legislators are willing to take. The fact of a referendum petition's filing only necessarily means that six percent of voters disapprove of the act in question. If the petition only reflects that number, then countering the intent of the petition may not offend enough people to affect whether or not a legislator will win his seat back for another term. But even apart from this possibility, the allowing states dismissed the referendum cycle argument with only cursory analysis. The Arizona court did so with the claim that the legislature would not perpetuate the cycle because legislators are "anxious to obey" their voters.²⁶¹ However, we have seen evidence to the contrary. The issue in *Luker v. Curtis* arose because the

258. The referendum power and process are defined in detail in the constitutions of Missouri, Oklahoma, and Maine—unlike the statutory scheme in Idaho. *Compare supra* Table 1, *supra* Table 2, *supra* Table 3, *with supra* Table 8.

259. *See Koelsch v. Girard*, 33 P.2d 816, 817 (1934).

260. *See, e.g., State ex rel. Drain v. Becker*, 240 S.W. 229, 232 (Mo. 1922).

261. *McBride v. Kerby*, 260 P. 435, 440 (Ariz. 1927).

legislature repealed—in its very next legislative session—an initiative passed into law by a majority of Idaho voters.²⁶²

While the referendum cycle is possible, it is only a prudential argument and so cannot be dispositive to the analysis under Idaho law. As indicated above, the textual arguments weigh in favor of Idaho's joining the allowing states, and this is, after all, a discussion of a constitutional power. Some allowing states have inserted the good faith test to mitigate the possible ongoing clashes between the legislature's and the people's power. However, neither California nor Minnesota revealed the constitutional text from which the test arose, so it seems to be a judicially-created compromise. The Michigan court disparaged the test's usage because it subjected the legislature to a guessing game and placed the judiciary in an awkward position.²⁶³ Still, the test may be useful, as it seems to keep the spirit of the referendum alive: It requires the legislature to keep the people's will in mind.

4. Idaho's 1966 Referendum

Incidentally, the Idaho legislature has faced a similar situation before. In 1965, a referendum petition was filed on the controversial Sales Tax Act.²⁶⁴ Like the current situation, the petition filing fell during an odd year, and the general election was not held until the end of the next even year.²⁶⁵ The legislature called a special session in 1966 in which it amended the Sales Tax Act.²⁶⁶ It changed the sales tax reporting date for retailers from the fifteenth to the twenty-fifth of the month and declared an emergency on the amended section.²⁶⁷ It does not appear that this action on the part of the legislature was challenged, and the legislative history for the special session is silent as to motive.²⁶⁸ However, it is worth noting that the legislature has done it before: It has amended an act pending referendary vote.

V. CONCLUSION

The Idaho legislature should be allowed to legislate on the subject matter of bills on which a referendum petition has been filed. The textual arguments advanced by the allowing states are truer to the constitution's plain language: An "act" means a discrete bill, the one listed in the referendum petition by its number. Interpreting "act" to mean not only that bill but also any bill that follows it containing the same language is too slippery a definition to be workable. Under this slippery definition, "act" would mean the substance of the act or its subject matter, and

262. *Luker v. Curtis*, 136 P.2d 978, 979 (1943).

263. *See Reynolds v. Martin*, 610 N.W.2d 597, 607 (Mich. Ct. App. 2000).

264. *See Idaho Initiative History*, *supra* note 9.

265. *See id.*

266. Act of Mar. 10, 1966, ch. 6, sec. 1, § 63-3623, 1966 Idaho Sess. Laws 17 (1966).

267. *Id.* at sec. 1-2.

268. H. REVENUE & TAXATION COMM., H. COMM. MINUTES, 1ST SPEC. SESS. (Idaho 1966).

prohibiting the legislature from making changes to the subject matter of an act awaiting referendary vote is simply too restrictive—especially considering that a referendum petition only requires the signatures of six percent of Idaho’s voters. That means that the legislature could be bound by a very small minority’s wishes. Not only might the legislature be so bound, but this prohibition would last until the next general election—a span of a year and a half if the petition is filed in an odd year.

While recognizing the legislature’s authority to repeal an act on which a referendum petition has been filed and subsequently enact a similar measure may seem to undermine the people’s legislative power, it is the stronger textual interpretation. The Idaho Supreme Court could imply a good faith requirement in order to prevent the otherwise possible cyclical referendum process from occurring, safeguarding the people’s right to have struck down—whether by electorate vote or legislature repeal—a measure to which the people object. And there is also the option of amending the Idaho Constitution to expressly address whether the legislature has the power to repeal and/or enact measures similar to those on which a referendum petition has been filed.

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