Senate Select Committee On

CONSTITUTIONAL AMENDMENT REFORM

Rod Smith, Chair
Jeffrey H. "Jeff " Atwater, Vice Chair

Meeting Packet

Tuesday, February 3, 2004
4:15 p.m. – 7:00 p.m.
412 Knott Building

(Please bring this packet to the committee meeting. Duplicate materials will not be available.)

CourtSmart Tag Report

Started: **12/08/2003 08:39:09 AM**
Ends: **12/08/2003 11:16:17 AM** **Length: 02:37:09**

Room: KN 412 **Case:** **Type:**
Caption: Select Committee on Constitutional Amendment Reform

08:39:25 AM	Roll Call
08:39:58 AM	
08:40:08 AM	Sen. Smith: Sen. Webster will be excused from the meeting today.
08:40:09 AM	Sen. Smith, Chairman - Opening Remarks
08:50:07 AM	Wayne Rubinas, Staff Director - Overview
09:12:47 AM	Sen. Smith
09:13:46 AM	Sen. Miller
09:16:33 AM	Sen. Constantine
09:17:27 AM	Sen. Aronberg
09:21:37 AM	Sen. Dockery
09:25:30 AM	Public Testimony
09:25:58 AM	Public Testimony: John Knight, Florida Medical Ass.
09:30:26 AM	Sen. Smith - Wayne Rubinas
09:31:06 AM	Sen. Smith
09:33:26 AM	Sen. Atwater
09:33:34 AM	
09:34:41 AM	Sen. Dockery
09:36:51 AM	Public Testimony: Ben Wilcox, Common Cause
09:44:40 AM	Sen. Constantine
09:46:04 AM	Sen. Campbell
09:49:46 AM	Sen. King, Senate President - Charge to Committee
09:57:41 AM	Public Testimony: Dominic Calabro, Florida Tax Watch President
10:08:50 AM	Sen. Dockery
10:16:41 AM	Sen. Campbell
10:17:48 AM	Sen. Milller
10:20:16 AM	Public Testimony: Paul Ledford, Florida Chamber of Commerce, will take up later
10:21:16 AM	Public Testimony: Charlene Walker, League of Women Voters of Florida
10:29:24 AM	Public Testimony: Dr. Daniel Smith, Assoc. Prof. of Political Science @ U of F
10:34:08 AM	Sen. Campbell
10:52:35 AM	Sen. Atwater
10:57:09 AM	Sen. Campbell
11:00:38 AM	Public Testimony: Paul Ledford, Florida Chamber of Commerce
11:11:13 AM	Public Testimony: Bob Casey, M.D.
11:16:08 AM	Adjourned

CourtSmart Tag Report

Started: **01/05/2004 09:10:47 AM**
Ends: **01/05/2004 11:48:45 AM** **Length: 02:37:59**

Room: KN 412 **Case:** **Type:**
Caption: Senate Select Committee on Constitutional Reform, 412 Knott Building

09:10:56 AM	Roll Call
09:11:22 AM	Sen. Smith, Opening Remarks
09:16:30 AM	Public Testimony: Wade Hopping, Asso., of Fla. Community Development
09:31:46 AM	Sen. Smith
09:38:00 AM	Arthur Simon, Asso. Industries of Fla.
09:45:39 AM	Sen. Smith
10:16:15 AM	Barry Richard
11:00:17 AM	John Sowinski - Initiative Professional
11:23:04 AM	Sen. Webster
11:24:38 AM	Questions & Discussion: Sen. Webster,
11:34:37 AM	Doug Bailey - James Madison Institute
11:48:04 AM	Sen. Smith
11:48:23 AM	Adjourned

Constitutional Amendment Reform
Wednesday, January 14, 2004
6:30 p.m. -- 9:30 p.m.
Orlando City Hall, Orlando, Florida

No.	Time	Speaker/Comments
1.	6:30 – 7:20	Professor Joe Little UF Law Professor
2.	7:20 – 7:25	Robert Roberson Orange Co. Farm Bureau
3.	7:25 – 7:29	Mike Ketchum Orlando Regional Chamber of Commerce
4.	729 – 7:35	Michelle Thatcher Sierra Club
5.	7:35 – 7:45	Andrea Holman Sierra Club
6.	7:45 – 8:20	Susan MacManus Professor of Public Administration & Political Science USF
7.*	Waived Time	Caroline Emmons Schramm League of Women Voters
8.	8:20 – 8:24	Alice Moulton League of Women Voters – Orange County
7.	8:25 – 8:26	Caroline Emmons Schramm League of Women Voters
9.	8:26 – 8:31	Michael Barr Seminole Soil & Water Conservation District
10.	8:31 – 8:56	Doug Guetzloe, President Advantage Consulting
11.	8:56 – 9:03	Susan Eberle (public)
12.	9:03 – 9:05	Eugene Stuccardo
13.	Did not Speak	Marni F. Berger National Women's Political Caucus
14.	9:05 – 9:10	Doug Head Orlando Democrats
15.	Did Not Speak	Van Church

CourtSmart Tag Report

Started: **01/21/2004 04:58:00 PM**
Ends: **01/21/2004 06:47:45 PM** **Length: 01:49:46**

Room: KN 412 **Case:** **Type:** Unofficial Senate Data
Caption: Select Subcommittee on Constitutional Amendment Reform, 01/21/04, 4:45-7:00 p.m.

04:58:12 PM	Roll Call
04:58:53 PM	Sen.Smith- Comments
04:59:04 PM	
05:00:48 PM	Public Testimony on Constitutuional Amendment Reform
05:00:50 PM	
05:01:59 PM	Dane Waters - President & Co-Chairman of the Initiative & Referendum Institute
05:02:01 PM	
05:02:52 PM	
05:12:37 PM	Sen. Smith
05:13:32 PM	
05:23:53 PM	Sen. Smith
05:24:01 PM	
05:28:12 PM	Sen. Aronberg
05:28:17 PM	
05:30:19 PM	Sen.Smith
05:30:22 PM	
05:39:43 PM	Sen. Campbell
05:39:48 PM	
05:48:10 PM	Sen. Aronberg
05:48:14 PM	
05:53:19 PM	Sen. Atwater
05:53:25 PM	
05:56:13 PM	Stephen Turner - Adjunct Professor of Constitutional Law @ FSU
06:09:01 PM	Sen. Dockery
06:09:05 PM	
06:14:51 PM	Sen. Campbell
06:14:55 PM	
06:20:29 PM	Gail Marie Perry - Communications Workers of America Council of FL.
06:20:37 PM	
06:23:56 PM	Barney T. Bishop, III - Asso. Industries of Florida
06:24:07 PM	
06:31:19 PM	Sen. Smith
06:31:24 PM	
06:35:33 PM	Sen. Campbell
06:35:41 PM	
06:37:47 PM	Sen. Dockery
06:37:49 PM	
06:46:30 PM	Sen. Smith
06:46:52 PM	Wayne Rubinas, Staff Director
06:47:00 PM	Adjourned

Constitutional Amendment Reform
Tuesday, January 27, 2004
6:30 p.m. -- 9:30 p.m.
Broward County Commission Chambers, Ft. Lauderdale, FL

No.	Time	Speaker/Comments
	6:35-6:40	Senator Smith, Chair Opening Remarks
	6:40-6:45	Kristen Jacobs, Vice-Mayor, City of Ft. Lauderdale
1	6:45-6:50	Johny Zadek, Tamarac, FL
2	6:50-7:00	Julie Tracy
3	7:00-7:11	Barbara Laxon
4	7:11-7:20	Ben Graber, (representing self) Broward County Commissioner
5	7:20-7:35	Josephus Eggelletion, (representing self) Broward County Commissioner
6	7:35-7:45	John Bennett Prog. Residents of Delray
7	7:45-7:55	Manerva Casanas-Simon, (representing self)
8	7:55-7:58	Nancy Lee
9	7:58-8:02	Andrea Hutchinson
10	8:02-8:10	Jane Gross
11	8:10-8:15	Sara Case
12	8:15-8:25	Mark Herron, (representing self)
13	8:25-8:35	Joyce Tarnow
14	8:35-8:38	Linda Brown
15	8:40-8:45	Charlotte Greenberg
16	8:45-8:52	Cara Campbell, Broward County Green Party
17	8:52-8:53	Daniel K. Adkins, Floridians for a Level Playing Field
18	8:53-9:04	Fred Havenick, Floridians For a Level Playing Field
19	9:04-9:05	Christopher Pollock
20	9:05-9:12	Pam Militello, Save Our Beach
21	9:12-9:15	Judith Smith, Save Our Beach
22	9:15-9:20	Skeet Jerningan
23	9:24-9:26	Harold Hancock
24	9:26-9:28	Poli Papanikoleou
25	9:28-9:30	Judy Herskowitz
26	9:30	Senator Smith, Chair, Closing Remarks

December 8, 2003

Testimony of Daniel A. Smith, Ph.D.,
Associate Professor of Political Science at the University of Florida,
Before the Florida Senate Select Committee on Constitutional Amendment Reform

Mr. Chairman, and Honorable Members of the Florida Senate, I thank you for the opportunity to testify during the Select Committee on Constitutional Amendment Reform hearings. I am Daniel A. Smith, Associate Professor of Political Science at the University of Florida. I have written extensively on process and politics of direct democracy in the American states, authoring two books and over two dozen scholarly articles on the initiative process. I have testified as an expert witness in Colorado on direct democracy legislation, and in the Florida legislature in 2002. I currently serve on the Board of Directors of the Ballot Initiative Strategy Center Foundation (BISCF), and I am a Senior Research Fellow at the Initiative and Referendum Institute, both nonpartisan organizations located in Washington, D.C. Today, I am speaking for myself.

I would like to begin by saying that I fully agree with Senator Smith's position that, "There's a role for direct democracy, but it's a limited role."[1] While the initiative process can potentially increase the democratic participation of Floridians, it is by no means a substitute for representative government. I also agree with members of the committee that there are legitimate concerns about how the initiative process works, for better or worse, in Florida. Like Senator Smith, I too would like to see reforms that would improve Florida's initiative process. That said, I would caution the committee from proposing reforms that would substantially curtail the plebiscitary powers granted to the citizens of the state.

In reforming the initiative process, I think it is of paramount importance that the select committee makes a good faith effort to recommend solutions to the process that match the alleged problems. As I see it, there appear to be four problems with the current process of amending the state constitution in Florida.

First, there is the very real concern that the use of constitutional amendments is harming "the integrity of the Florida Constitution," as Senate President King was quoted as saying recently. I wholeheartedly agree that bullet trains and gestation crates for pregnant pigs do not belong in the state's constitution. But proposing and voting on constitutional amendments is currently the only recourse for the citizens of this state who choose to use the initiative process.

Florida is one of 24 states with some form of the initiative. Sixteen of these two dozen states, including Florida, allow their citizens to *directly* propose and adopt amendments to their state constitutions, bypassing the legislature altogether.[2] Of these 16 states allowing direct constitutional amendment initiatives, only Florida and Illinois do not allow their citizens to also propose statutory initiatives. Of the 21 constitutional initiatives on which Floridians have voted since 1976, many would have been better suited as statutes. Petitioners in 21 of the 24 states allowing the citizen initiative may circulate statutory initiatives. This is currently not an option in Florida (as well as IL and MS).

In terms of solutions to this perceived problem, the committee could consider a couple options to remedy this perceived problem of cluttering the state constitution.

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[1] John Kennedy, "Senate targets citizen changes," *Orlando Sentinel*, November 20, 2003.
[2] Two other states, Massachusetts and Mississippi, allow *indirect* initiatives amending their Constitutions.

- The committee could recommend *allowing citizens to propose and adopt statutory initiatives*. Of course, there would need to be incentives for petitioners to go the statutory route rather than continuing to propose constitutional amendments, namely requiring a higher percentage of signatures to be collected for constitutional amendments than for statutes. Of the 15 states permitting both constitutional amendment and statutory initiatives, only 3 (Colorado, Massachusetts, and Nevada) require the same number of signatures to qualify both kinds of initiatives. When given the option, initiative petitioners in these states naturally tend to propose constitutional amendments rather than statutes, as amendments to the constitution, unlike statutes, cannot be overturned by the state legislature.
- The committee could recommend *increasing the requirements for passage of constitutional amendment initiatives* in exchange for allowing statutory initiatives. While statutory initiatives could pass with a simple majority, *constitutional amendments might have to be adopted with a three-fifths supermajority vote* on election day, which mirrors the three-fifths threshold for referendums voted out of the state legislature. However, except for some narrowly tailored exceptions, including Florida's requirement that any new statewide tax have a two-thirds supermajority vote,[3] supermajority voting requirements on initiatives are unprecedented in the American states.

Second, there is the concern that the number of initiatives on the ballot is reaching "almost epidemic" levels, as Senate President King stated recently. While this may appear to be the case, with the 50 or so measures currently being circulated, I think the claim is overblown. There is little doubt that only a fraction of the circulating ballot measures will qualify for the 2004 ballot. Since 1976, only 21 initiatives have qualified for the statewide ballot, an average of 1.5 per general election. While five measures did qualify for the ballot in 2002, there does not appear to be an upward trend in the use of ballot initiatives in Florida. Indeed, across the country, the number of statewide initiatives on the ballot has been dropping since the high water mark of 93 measures in 1996 (Florida had four initiatives that year).

In terms of solutions to this perceived problem, there are a couple possibilities that the committee could recommend to curtail the number of measures being circulated.

- The committee could recommend *cutting down on the amount of time* (currently four years) *that petitioners have to collect signatures* in order to qualify a ballot measure. Other states have substantially tighter windows to collect valid signatures, though three states (AR, OH, and UT) have no time limit. California's limit is 150 days; Oklahoma's is 90 days.
- The committee could require a *nominal registration fee* administered by the Florida Division of Elections to circulate measures that might have the effect of discouraging unserious petitioners intent on circulating frivolous constitutional amendments.
- The committee could recommend that *petition circulators be Florida residents*; the US Supreme Court in 1999, however, struck down the requirement in some states that petition circulators be registered voters.
- The committee could recommend that *paid petition circulators be required to be compensated by the hour* rather than by a per/signature basis.

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[3] For example, there are four states that require a two-thirds popular vote to approve bond issues. In Florida, as a result of the 1996 initiative Amendment 1, any new or increase in taxes and fees requires a two-thirds supermajority vote. In Utah, following the passage of a legislative referendum amending the constitution, any ballot initiative protecting wildlife must obtain a two-thirds supermajority to pass. A similar wildlife supermajority measure was defeated by the voters in 2000 in Alaska.

- The committee could recommend *changing the geographic distribution requirement for signature gathering*, although Florida already has one of the toughest standards: 8% of the ballots cast in the last presidential election in at least half of the state's 25 congressional districts.
- The committee could recommend *increasing the signature threshold to 10% or higher of a previous statewide vote*.

Third, there is the concern that voters are incompetent, or at least sometimes confused, when voting on ballot measures. While there is virtually no scholarly evidence that this is a problem either in Florida or nationwide, the committee could consider a few reforms that would make it even more likely that voters make informed voting decisions on ballot questions.

- The committee could recommend that rather than the proponents, *a drafting board (perhaps comprised of a nonpartisan legislative staffing agency, the Attorney General, and the Secretary of State) write the title and summary of the proposed initiative*, thereby clarifying the language of the proposed measure.
- The committee could recommend that *public hearings be required prior to the circulation of ballot measures*. Five states currently require hearings on all proposed initiatives prior to their circulation.
- The committee could recommend *mailing to all registered voters "voter guides" that provide the ballot number, official title, ballot language, full text, neutral fiscal statements, neutral summaries of the pro and con arguments, as well as rebuttals by the proponents and opponents of the initiatives*. Fifteen states currently provide registered voters with these voter pamphlets. While the costs vary (from less than $300,000/election in Colorado to more than $4 million in California), these voter guides are regularly cited by voters as the primary source of information that they use to inform their decisions.

Fourth, there is the legitimate concern that special or "narrow" interests are using the initiative process to bypass the state legislature. While this may be true, it is not a new phenomenon. Since the initiative process was adopted during the Progressive Era, special interests have been using the process while veiling their vested interests with populist sounding rhetoric in states permitting the process. Since the US Supreme Court has ruled that states may not limit the amount of money spent in the process, campaign finance disclosure is the best remedy for this alleged problem. Fortunately, Florida already has a very good system of campaign finance disclosure when it comes to the initiative process, and I do not see any need to make reforms in this area.

In conclusion, I commend the efforts of the Select Committee on Constitutional Amendment Reform to improve the initiative process in Florida. While the process may never be perfect, the process could be modified, though I do not foresee citizens of Florida adopting any wholesale reforms that would curtail their right to use the citizen initiative.

Thank you for the opportunity to testify today. At this time, I would be happy to address any questions that you may have.

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Research Report

December 2003

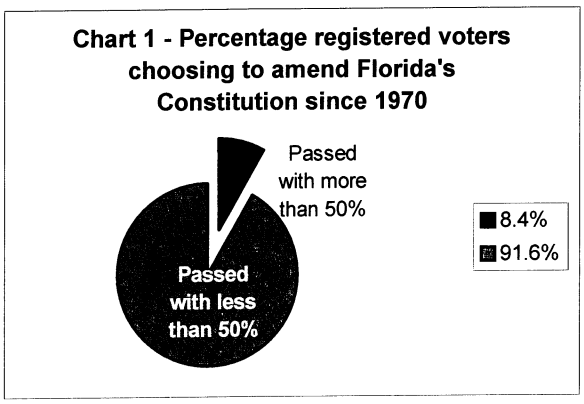
Florida TaxWatch

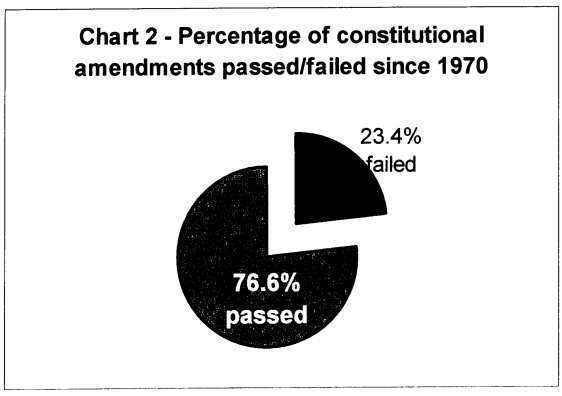
106 N. Bronough St. ♦ P. O. Box 10209 ♦ Tallahassee, FL 32302 ♦ (850) 222-5052 ♦ FAX (850) 222-7476

Constitutional Revision: Protecting All Floridians from Minority Rule

Florida TaxWatch has released several reports, beginning in 1994, urging the implementation of a higher threshold before an amendment can be added to the Florida Constitution. Over the past nine years, a number of proposals to do just that have been introduced in the Florida Legislature but ultimately failed.

The recent influx of proposed constitutional amendments again brings the need for a higher standard to the forefront, and perhaps now this serious issue can receive the attention that it deserves. This debate is a longstanding and serious one. *Federalist Paper No. 10* argued in favor of representative government as the cure for factional politics. In it James Madison wrote, "By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." It is this issue—the will of the majority being disregarded due to the fervor of a few—that provides the strongest reason to increase the threshold for adding amendments to Florida's Constitution. This is clearly documented by the percentage of the state's registered voters that voted affirmatively to pass an amendment after the constitutional revision of 1968.





Currently a simple majority of those voting on an amendment can pass it into law. As the Chart 1 (above left) shows, of the 95 amendments that passed only eight (or 8.4%) of them were supported by more than 50% of the state's registered voters. Yet a majority of the amendments placed on the ballot (76.6%) passed into law (above right). And remarkably, five (or 4.3%) passed with the support of less than 20% of those registered to vote.

Ten amendments were on the ballot in the 2002 General Election, and all but one passed under the current threshold. Florida's Constitution now is amended to require the limiting of cruel and inhumane confinement of pigs during pregnancy as well as a number of other issues that, while important, do not rise to the level of "organic law" but are ensconced in "constitutional concrete".

The Florida Division of Elections currently lists 49 active initiatives that may be on a ballot near most voters in 2004. They range from one aiming to lower the voting age to 16 to another requiring the labeling of foods that are genetically engineered and another that would legalize marijuana.

A state constitution is intended to serve as an outline of the general construct for a government. It should include provisions to protect the rights of its citizens, direct its government in the procedure of its duties and assign and limit power. To adapt to the changing needs of the population it serves, a state constitution must also be an organic document, allowing for thoughtful, deliberate revision—that is, with safeguards to ensure that any revision fulfills a need for change in the general procedural instructions and guidelines for its government. Constitutional revision is not intended to serve merely as a response to the passing political emotions of the moment or serve as a means to an end desired by a limited group.

The Florida Constitution is, and rightly should be, an organic document. Clearly, serving the needs of the current population of Florida (nearly 16 million according to the US Census data from 2000) is dramatically different than serving the needs of the pioneer citizenry of Florida in 1838 (54,477 in 1840). As a result of the changing needs of Floridians, the Florida Constitution has been completely rewritten five times from its original incarnation drafted in 1838. A striking example of the need for these revisits and reconstructions and evolving needs of Florida is the fact that the original constitution affirmed slavery, prohibited the emancipation of slaves and forbade freed slaves from entering Florida. These provisions were a reflection of the times, but few, if any, today would contend that they were incorrectly removed from the Constitution.

Fundamental changes in the structure of government must be allowed when necessary, but it is imperative that they be based on a broad consensus of the governed. When they are not, an intense minority can tyrannize majority rights. In Florida, there are currently five different methods of proposing an amendment to the constitution:

- Proposal by State Legislature (69 of the 95 amendments passed since 1970);
- Proposal by Citizen Initiative (16 of the 95 amendments passed since 1970);
- Proposal by the Constitution Revision Commission (8 of the 95 amendments passed since 1970);
- Proposal by the Taxation and Budget Reform Commission (2 of the 95 amendments passed since 1970); and
- Proposal by Constitutional Convention (0 of the 95 amendments passed since 1970).

Unfortunately, in recent years public dissatisfaction with government has led to the proposal of drastic measures by a very vocal minority. It is important to note that while only 16 initiative-driven amendments have been added to Florida's Constitution since 1970, 9 of these were passed

in 2002. This resorting by the Florida electorate to single-issue, hyper-democracy threatens the viability of representative government if left unchecked. Although some direct voter controls are sound in concept and a fundamental right of a citizenry, if carried to the extreme, they can have dire consequences for all concerned. This is especially true when constitutional revision by initiative is dominated by special interests and used in lieu of statutory revision to bring about issues that are not fundamental to constitutional law.

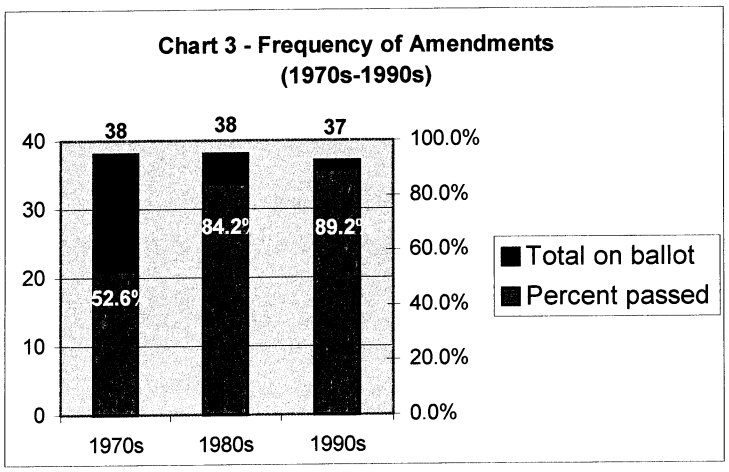
Supermajority Vote to Amend the State Constitution

Currently, a simple majority of those voting on an amendment can fundamentally change the state constitution. Turnout of registered voters has been as low as 58% in non-presidential election years, and less than 80% of those voters actually vote on constitutional amendments that are placed before them. Alarmingly, less than 20% of Florida's registered voters have enacted some constitutional amendments. This scenario is increasingly common, leaving the door to minority rule open. The potentiality for increasing mischief by minority rule is so great Florida voters need to seriously consider requiring supermajority approval in order for the state constitution to be changed. A supermajority vote could range from 3/5 to 2/3 of voters voting on each proposed amendment or even a simple majority of the total of all persons who vote in an election (as opposed to a majority of those voting on the amendment). Although the latter requirement is not a supermajority by definition, it does raise the bar higher than what currently exists.

> *A simple majority, particularly a simple majority of a quorum, can mask unresolved conflict between the electorate and a lack of real acceptance of the law by the public.*

U.S. Constitution Amended 27 Times in Over 215 Years - Florida Constitution Amended 95 Times in Just Over 30 Years

Most Floridians likely would agree that changes in the foundation and structure of government should be based on a broad consensus of the governed. However, since 1970, the Florida Constitution has often been amended by less than a majority of those voting on election day. The ease of placing amendments on Florida ballots by citizen initiative and legislative directive, compared to the difficulty of amending the federal constitution, has resulted in the state constitution being amended 95 times (out of 124 proposed) since 1970—an astonishing 76.6% success rate (the rate is 88.6% over the last ten years.) Between 1890-1966, 212 amendments appeared on the ballot, 148 of which were adopted for a success rate of 69.8%. By comparison, the U.S. Constitution, the oldest written constitution in the world, has been amended



only 27 times in 215 years. Ten of the 27 formed the Bill of Rights, and two (Amendments XVIII and XXI on prohibition) mitigated one another. The U.S. Constitution requires that an amendment must pass each house of the Congress by 2/3 and then be approved by 3/4 of states. Chart 3 illustrates that although the number of amendments reaching the ballot has been consistent over the last three decades, the success rate has changed dramatically.

Impact of Supermajority Requirements on Constitutional Amendments Since 1970

Table 1

	Type of vote required			
	Current law (simple majority of those voting on amendment)	3/5 of those voting on amendment (60%)	2/3 of those voting on amendment (66.67%)	Simple majority of those voting in election*
# that would have passed	95	77	59	65
# that would have failed	29	47	65	58
% passed	76.6%	62.1%	47.6%	52.8%

Source: Department of State Division of Elections, Bureau of Elections Records and Florida TaxWatch, November 2003

*The number of people voting in the Special Election of 1971 was unavailable; therefore the percentage of those voting on one amendment is unknown.

Table 1 shows the impact that a supermajority requirement would have had on the previously noted 124 amendments to Florida's Constitution. While 76.6% of the amendments were actually approved by the voters since 1970, a 3/5 or 2/3 supermajority requirement would have resulted in 62.1% and 47.6%, respectively, being passed. The actual numbers would have undoubtedly been slightly different because, if a higher threshold had been in place, sponsors presumably would have campaigned differently.

Had a higher threshold of 3/5 or 2/3 of those voting on the amendment been in place, the highly controversial amendment to build a statewide high-speed monorail and the amendment to reduce class size doubtless would not be in Florida's Constitution today. In 2000, the high-speed rail amendment passed with the approval of 52.7% of those choosing to vote on the amendment and only 47.2% of those voting in the election. The popular sounding "Save Our Homes" amendment, that passed in 1992, was similarly approved by 53.6% of those voting on the amendment, but only 45.9% voting in the election overall.

Other States

According to the National Conference of State Legislatures, a number of states employ a supermajority and/or more stringent requirements for ballot measures. Some examples include:

- Illinois requires an affirmative vote by 3/5 of those voting on the measure (60%), or a majority of those voting in the election;

- In Nevada, an initiative constitutional amendment must receive a majority vote in two successive general elections in order to pass;
- Mississippi requires a majority vote, provided that the total number of votes cast on the initiative equals at least 40% of the total votes cast in the election.

Conclusion

Florida TaxWatch continues to strongly recommend and support requiring a greater consensus of Florida voters to pass constitutional amendments. Of the two options, Florida TaxWatch concludes that a 3/5 to 2/3 supermajority of those voting on proposed changes to the Constitution would be more desirable than the present simple majority of those voting on amendments.

Florida TaxWatch has long held[1] that a supermajority requirement is beneficial for numerous reasons, but three stand out:

- First, the State Constitution should be a fundamental document that contains the root guidelines (organic law) from which Florida should be governed. It should not be an instrument for redress of statutory issues that the Legislature refuses to tackle or a compendium of special interest provisions put forth to the public in petition drives that use flowery language and high-powered advertising campaigns to gain support from a ruling minority of voters. Moreover, the body of law encompassed in the State Constitution should be a product of dialogue and consensus generated by deliberation. It should not involve "logrolling," which hides special interest issues under a coating of popular prescriptions and seemingly attractive attributes often designed to mislead voters.

- Second, if a supermajority vote is required to amend the State Constitution, it would be more difficult for special interest groups to effectuate changes that benefit their narrowly defined priorities at the expense of the majority of voters and taxpayers. Many powerful interest groups have the money to run well-financed campaigns that may misrepresent or deceive voters. Such efforts attempt to induce a positive perception of an amendment, but not necessarily an understanding of the issue or its potential impact. A supermajority vote would help ensure that passing constitutional amendments requires greater consensus and acceptance by a greater number of Florida's diverse demographic and social groups.

- Third, requiring a supermajority vote would force those endorsing controversial amendments to campaign differently—hopefully more openly. The greater degree of consensus required to pass amendments would ensure that the concerns of more Floridians are heard. In short, a more stringent method of ratification would help prevent narrowly focused, time-bound amendments from being forced into the Constitution by a vocal minority, thereby limiting the flexibility of the document and its durability over time.

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[1] See Research Report: *Supermajority Voters on Taxes and Constitutional Amendments Will Promote Public Consensus and Voter Confidence While Slowing the Trend Toward Governing by Referendum*, July 1998.

Implementing a supermajority requirement to pass constitutional amendments would put Florida at the forefront among states in the struggle to limit the influence of special interests and help restore the electorate's confidence in our democracy and republican form of government.

Florida's current initiative process lacks the checks and balances necessary to achieve majority consensus and ensure that initiatives supported by a vocal few do not hobble the durability Florida's Constitution for years to come.

This *Research Report* was written by Research Analysts Brea Gelin and Deborrah Harris, with and under the Direction of Keith G. Baker, Ph.D., Senior Vice President & COO. Barney Barnett, Chairman, and Dominic M. Calabro, President, Publisher and Editor. Florida TaxWatch Research Institute, Inc.

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About Florida TaxWatch

Florida TaxWatch is the only statewide organization entirely devoted to protecting and promoting the political and economic freedoms of Floridians as well as the economic prosperity of our state. Since its inception in 1979, Florida TaxWatch has become widely recognized as the watchdog of citizens' hard-earned tax dollars. The nationally distributed *City and State* magazine (now *Governing* magazine) published a poll of the nation's statewide taxpayer research centers. Based on this poll, the publication cited Florida TaxWatch as one of the six most influential and respected government watchdogs and taxpayer research institutes in the nation.

In recent years, news stories about Florida TaxWatch have run in all Florida newspapers, *The Wall Street Journal*, *The New York Times* and *The Washington Post* and *Fortune* magazine. In addition, Florida TaxWatch has been featured on the prestigious *MacNeil/Lehrer News Hour.*

Florida TaxWatch is a private, non-profit, non-partisan research institute supported by voluntary, tax-deductible membership contributions and philanthropic foundation grants. Membership is open to any organization or individual interested in helping to make Florida competitive, healthy and economically prosperous by supporting a credible research effort that promotes constructive taxpayer improvements. Members, through their loyal support, help Florida TaxWatch to bring about a more effective, responsive government that is accountable to the citizens it serves.

Florida TaxWatch is supported by all types of taxpayers -- homeowners, small businesses, corporations, professional firms, labor unions, associations, individuals and philanthropic foundations -- representing a wide spectrum of Florida's citizens.

Florida TaxWatch's empirically sound research products recommend productivity enhancements and explain statewide impact of economic and tax and spend policies and practices. Without lobbying, Florida TaxWatch has worked diligently and effectively to build government efficiency and promote responsible, cost-effective improvements that add value and benefit taxpayers. This diligence has yielded impressive results: through the years, three-fourths of TaxWatch's cost-saving recommendations have been implemented, saving taxpayers over $6.2 billion (according to an independent assessment by Florida State University). That translates to approximately $1,067 in added value for every Florida family.

With your help, we will continue our diligence to make certain your tax investments are fair and beneficial to you, the taxpaying customer who supports Florida's government. Florida TaxWatch is ever present to ensure that taxes are equitable, not excessive, that their public benefits and costs are weighed, and that government agencies are more responsive and productive in the use of your hard-earned tax dollars.

The Florida TaxWatch Board of Trustees is responsible for the general direction and oversight of the research institute and safeguarding the independence of the organization's work. In his capacity as chief executive officer, the president is responsible for formulating and coordinating policies, projects, publications and selecting the professional staff. As an independent research institute and taxpayer watchdog, the research findings, conclusions and recommendations of Florida TaxWatch do not necessarily reflect the view of its members, staff or distinguished Board of Trustees.

Florida TaxWatch
106 North Bronough Street
P.O. Box 10209
Tallahassee, FL 32302

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File

Total Who Voted in Election	Year	Amendment	For	Against	Total	Source (*)	Percent of Voters Voting to Amend	Approval by Percent of Registered Voters	Approval by Percent of Those Voting In Election	Passed by 2/3 of those Who Voted on the Amendment	Passed by 3/5 of those Who Voted on the Amendment	Approval by a simple majority of those voting in the election	Passed by 2/3 of those Who Voted in the Election	Passed by 3/5 of those Who Voted in the Election
1,730,813	1970													
		1 Amendment to 18 year Old Voting	501,764	754,282	1,256,046		39.9%	17.90%	29.00%	No				
		2 Amendment to 18 Year Old Majority	422,450	799,885	1,242,335		34.0%	15.09%	24.42%	No				
		3 Amendment to Judiciary	503,992	526,328	1,030,320		48.9%	18.00%	29.10%	No				
		4 Amendment to pollution abatement	819,629	331,250	1,150,879	L	71.2%	29.30%	47.36%	Yes	Yes	No	No	No
		5 Amendment to Land Sales	680,223	429,917	1,110,140	L	61.3%	24.32%	39.30%	No	Yes	No	No	No
Not Available	1971 (Special Election)													
		1 Amendment to Article VII Tax on Corporations	841,433	355,023	1,196,456	L	70.3%	30.08%	N/A	Yes	Yes	N/A	N/A	N/A
2,028,526	1972 (Presidential Preference Primary)													
		1 Amendment to Article V, Judicial	969,741	401,861	1,371,602	L	70.7%	34.67%	47.81%	Yes	Yes	No	No	No
		2 Amendment to Article VII Student Loan	877,346	467,525	1,344,871	L	65.2%	31.37%	43.25%	No	Yes	No	No	No
2,583,283	1972 (General Election)													
		1 Amendment to Chapter 259, F.S. Endangered Lands	1,256,292	509,679	1,765,971	L	71.1%	36.02%	48.63%	Yes	Yes	No	No	No
		2 Amendment to XII Natural Resources	1,284,817	474,514	1,759,331	L	73.0%	36.84%	49.74%	Yes	Yes	No	No	No
		3 Amendment to Article XI, Initiative	1,157,648	476,165	1,633,813	L	70.9%	33.19%	44.81%	Yes	Yes	No	No	No
		4 Amendment to Article XII Public Schools and Jr. Colleges	1,191,118	531,520	1,722,638	L	69.1%	34.15%	46.11%	Yes	Yes	No	No	No
		5 Amendment to Article X Devise of Homestead	1,137,735	555,426	1,693,161	L	67.2%	32.62%	44.04%	Yes	Yes	No	No	No
1,828,392	1974													
		1 Amendment to Article XII Gross receipt taxes	846,071	447,599	1,293,670	L	65.4%	23.36%	46.27%	No	Yes	No	No	No
		2 Amendment to Article XII Bonds for Transportation Facilities	547,435	695,523	1,242,958		44.0%	15.18%	29.90%	No			No	
		3 Amendment to Article VIII Property Appraiser	722,889	534,071	1,256,960	L	57.5%	19.96%	39.54%	No	No	No	No	No
		4 Amendment to Article IV, Game and Freshwater Fish Commission	859,517	366,965	1,226,482	L	70.1%	23.74%	47.01%	Yes	Yes	No	No	No
		5 Amendment to Article V Judicial Qualifications Commission	946,006	264,161	1,210,167	L	78.2%	26.12%	51.74%	Yes	Yes	Yes	No	No
		6 Amendment to Article VII Electrical Energy Generating or Transmission Facilities	658,790	517,926	1,176,716	L	56.0%	18.19%	36.03%	No	No	No	No	No
		7 Amendment to Article I Prohibiting Discrimination Based Upon Physical Handicaps	974,892	300,633	1,275,525	L	76.4%	26.92%	53.32%	Yes	Yes	Yes	No	No
3,150,631	1976													
		1 Amendment to Article II, Section 8 Sunshine Amendment	1,765,626	461,940	2,227,566	I	79.3%	43.12%	56.04%	Yes	Yes	Yes	No	No
		2 Amendment to Article V, Section 3,10,11 Retention of Judges	1,600,944	527,056	2,128,000	L	75.2%	39.10%	50.81%	Yes	Yes	Yes	No	No
		3 Amendment to Article V, Section 12 Discipline of Judges	1,514,623	564,441	2,079,064	L	72.9%	36.99%	48.07%	Yes	Yes	No	No	No
		4 Article VII, Section 2 Bond for Community Redevelopment								No				
		5 Article VII, Section 16 Bonds for Housing Related Facilities												
		6 Article II Number of State Employees												
		7 Article I, Section 18 Administrative Procedures Act												
		8 Article X, Retirement System	1,254,413	756,043	2,010,456	L	62.4%	30.64%	39.81%	No	Yes	No	No	No
		9 Article IV Cabinet and Massive Commission												

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2,530,468	1978													
	None passed													
		1 Basic Document Revision of Florida Constitution												
		2 Revision of Article I, Section 2, Declaration of Rights												
		3 Revision of Article II, Section 16 Legislative, Single Member Districts and Reapportionment Commission												
		4 Revision of Article IV, Section (g) 3, 4, 5, 6, 8 (a) and Article XI, Section 2, Executive (Cabinet)												
		5 Revision of Article IV, Section 10, Public Service Commission and Public Counsel												
		6 Revision of Article V, Sections 10 and 11 (a) and (b) Judiciary												
		7 Revision of Article VII, Article X, Section 12 (b) Finance and Taxation												
		8 Revision of Article IX Education												
		9 Article, Section 15 Casino Gambling												
1,827,694	1980 Runoff													
		1 Tax Exemption	1,042,685	347,766	1,390,451	L	75.0%	21.68%	57.05%	Yes	Yes	Yes	No	No
		2 Bonds for Housing	826,742	618,694	1,445,436	L	57.2%	17.19%	45.23%	No	No	No	No	No
		3 Ad Valorem Taxation, Article VII, Section 3	916,043	541,630	1,457,673	L	62.8%	19.05%	50.12%	No	Yes	Yes	No	No
		4 Ad Valorem Taxation, Article VII, Sections 6 and 8	1,251,096	289,620	1,540,716	L	81.2%	26.01%	68.45%	Yes	Yes	Yes	No	No
		5 Ad Valorem Taxation, Article VII, Section 4	1,003,979	442,386	1,446,365	L	69.4%	20.87%	54.93%	Yes	Yes	Yes	No	No
2,068,180	1980 (Presidential Primary)													
		1 Homestead Exemption	1,088,921			L	69.6%	22.64%	52.65%	Yes	Yes	Yes	No	No
		2 Modified Jurisdiction of Supreme Court	940,300			L	67.1%	19.55%	45.47%	Yes	Yes	No	No	No
3,703,485	1980 General Election													
		1 Article II, Section 5, Article XI, Sections 4 and 5, Abolish Constitution Revision Commission												
		2 Right of Privacy	1,722,987	1,120,302	2,843,289	L	60.6%	35.82%	46.52%	No	Yes	No	No	No
		3 Passage of Bills	1,763,624	873,211	2,636,835	L	66.9%	36.67%	47.62%	Yes	Yes	No	No	No
		4 State Bonds for Water Facilities	1,826,026	899,906	2,725,932	L	67.0%	37.97%	49.31%	No	Yes	No	No	No
		5 Second Gas Tax	1,498,801	1,195,483	2,694,284	L	55.6%	31.16%	40.47%	No	No	No	No	No
2,688,566	1982													
		1 Searches and Seizures	1,440,523	828,571	2,269,094	L	63.5%	29.61%	53.58%	No	Yes	Yes	No	No
		2 Pretrial release and detention	1,412,269	917,092	2,329,361	L	60.6%	29.03%	52.53%	No	Yes	Yes	No	No
4,180,051	1984													
		1 Exemption of Homestead and personal property / forced sale	2,766,516	734,785	3,501,301	L	79.0%	49.63%	66.18%	Yes	Yes	Yes	No	Yes
		2 Disbursement of State Funds	2,467,025	919,675	3,386,700	L	72.8%	44.26%	59.02%	Yes	Yes	Yes	No	No
		3 Procedures of Judicial Nominating Commission	2,720,297	590,960	3,311,257	L	82.2%	48.80%	65.08%	Yes	Yes	Yes	No	Yes
		4 Speech or Debate Privilege Article III, Section 2												
		5 Election of County Commissioners	2,150,510	1,195,654	3,346,164	L	64.3%	38.58%	51.45%	No	Yes	Yes	No	No
		6 Eligibility to be a County Court Judge	2,529,436	823,219	3,352,655	L	75.4%	45.38%	60.51%	Yes	Yes	Yes	No	Yes
		7 Bonds for State Capital Projects	2,095,916	1,109,900	3,205,816	L	65.4%	37.60%	50.14%	No	Yes	Yes	No	No
		8 Public Education Capital Outlay Bonds, PECO	2,553,332	778,114	3,331,446	L	76.6%	45.80%	61.08%	Yes	Yes	Yes	No	Yes
3,429,839	1986													
		1 State Wide Prosecutor	2,168,701	811,122	2,979,823	L	72.8%	38.51%	63.23%	Yes	Yes	Yes	No	Yes
		2 Article x, Section 15 Casino Gambling												
		3 Art. VII, Section 6, Art. XII, Sec. 29, Homestead Tax Exemption												
		4 Supreme Court Opinion, proposed initiatives	1,988,841	759,691	2,748,532	L	72.4%	35.32%	57.99%	Yes	Yes	Yes	No	No
		5 State operated lotteries	2,039,437	1,168,858	3,208,295	I	63.6%	36.22%	59.46%	No	Yes	Yes	No	No
4,412,839	1988													
		1 Impeachments of County Court Judges	2,840,296	1,085,751	3,926,047	L	72.3%	49.69%	64.36%	Yes	Yes	Yes	No	Yes
		2 Rights of Victims of Crime	3,629,963	394,617	4,024,580	L	90.2%	63.50%	82.26%	Yes	Yes	Yes	Yes	Yes
		3 Assessment of High Water Recharge Lands	2,423,783	1,187,303	3,611,086	L	67.1%	42.40%	54.93%	Yes	Yes	Yes	No	No
		4 Bonds for acquisition of property for state roads or for constructing bridges	2,141,987	1,602,965	3,744,952	L	57.2%	37.47%	48.54%	No	No	No	No	No

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		5 Property tax exemption for widowers	3,415,074	593,913	4,008,987	L	85.2%	59.74%	77.39%	Yes	Yes	Yes	Yes	Yes
		6 Taxation and Budget Reform Commission	2,111,320	1,538,470	3,649,790	L	57.8%	36.94%	47.84%	No	No	No	No	No
		7 Art. V, Section 10 Terms of Office for Trial Court Judges												
		8 Civil Traffic Hearing Officers	2,736,373	1,147,126	3,883,499	L	70.5%	47.87%	62.01%	Yes	Yes	Yes	No	Yes
		9 Department of Veterans Affairs and Elderly Affairs	2,723,848	1,225,915	3,949,763	L	69.0%	47.65%	61.73%	Yes	Yes	Yes	No	Yes
		10 Art. I, Section 21 Limitation of Non-Economic Damages in Civil Actions												
		11 English is the Official Language of Florida	3,457,039	664,861	4,121,900	I	83.9%	60.48%	78.34%	Yes	Yes	Yes	Yes	Yes
3,622,569	1990													
		1 Regular Legislative Sessions	2,615,449	513,970	3,129,419	L	83.6%	43.37%	72.20%	Yes	Yes	Yes	Yes	Yes
		2 Three day waiting period for Handgun Purchases	2,840,912	522,248	3,363,160	L	84.5%	47.10%	78.42%	Yes	Yes	Yes	Yes	Yes
		3 Laws affecting local government expenditures or ability to raise revenue or receive state tax revenue.	2,031,557	1,140,745	3,172,302	L	64.0%	33.68%	56.08%	No	Yes	Yes	No	No
		4 Open Government	2,795,784	392,323	3,188,107	L	87.7%	46.36%	77.18%	Yes	Yes	Yes	Yes	Yes
5,438,612	1992													
		1 Emergency Suspension or Delay of General Election	3,369,416	1,337,284	4,706,700	L	71.6%	51.51%	61.95%	Yes	Yes	Yes	No	Yes
		2 Access to public records and meetings	3,883,617	793,229	4,676,846	L	83.0%	59.37%	71.41%	Yes	Yes	Yes	Yes	Yes
		3 Historic preservation ad valorem tax exemption	2,908,730	1,752,480	4,661,210	L	62.4%	44.46%	53.48%	No	Yes	Yes	No	No
		4 Budget Reform	3,815,541	796,462	4,612,003	TBRC	82.7%	58.33%	70.16%	Yes	Yes	Yes	Yes	Yes
		5 Taxpayers Bill of Rights	4,258,422	472,324	4,730,746	TBRC	90.0%	65.10%	78.30%	Yes	Yes	Yes	Yes	Yes
		6 Art. VII, Sect. 9 Authorizing Municipalities and Counties to Levy a 1-cent sales tax with local voter approval												
		7 Art. XII, Section 9, Bonds for the construction of educational Faciliti	3,089,042	1,461,429	4,550,471	L	67.9%	47.22%	56.80%	Yes	Yes	Yes	No	No
		8 Limited political terms in certain elective offices	3,625,500	1,097,127	4,722,627	I	76.8%	55.42%	66.66%	Yes	Yes	Yes	Yes	Yes
		9 Homestead Valuation Limitation	2,493,742	2,154,747	4,648,489	I	53.6%	38.12%	45.85%	No	No	No	No	No
4,305,340	1994													
		1 Start of Regular Sessions of the Legislature	2,713,189	955,223	3,668,412	L	74.0%	41.36%	63.02%	Yes	Yes	Yes	No	Yes
		2 Limitation on State Revenue Collections	2,182,411	1,489,268	3,671,679	L	59.4%	33.27%	50.69%	No	No	Yes	No	No
		3 Limiting Marine Net Fishing	2,876,091	1,135,110	4,011,201	I	71.7%	43.85%	66.80%	Yes	Yes	Yes	Yes	Yes
		4 Revenue Limits: May Peoples Amendments Limiting Government Revenue Cover Multiple Subjects?	2,167,305	1,560,635	3,727,940	I	58.1%	33.04%	50.34%	No	No	Yes	No	No
		5 Article X, Section 7 Limited Casinos												
5,444,245	1996													
		1 Tax Limitation	3,372,915	1,497,485	4,870,400	I	69.3%	41.75%	61.95%	Yes	Yes	Yes	No	Yes
		2 Constitution Revision Commission	2,733,993	1,720,193	4,454,186	L	61.4%	33.85%	50.22%	No	Yes	Yes	No	No
		3 Judiciary	3,436,753	1,153,367	4,590,120	L	74.9%	42.55%	63.13%	Yes	Yes	Yes	No	Yes
		4 Fee on Everglades Sugar Production	2,328,016	2,774,806	5,102,822		45.6%			No				
		5 Responsibility for Paying Costs of Water Pollution	3,397,286	1,594,175	4,991,461	I	68.1%	42.06%	62.40%	Yes	Yes	Yes	No	Yes
		6 Everglades Trust Fund	2,825,819	2,108,286	4,934,105	I	57.3%	34.96%	51.90%	No	No	Yes	No	No
4,070,262	1998													
		1 Historic Property Tax Exemption and Assessment	1,970,419	1,646,069	3,616,488	L	54.50%	24.00%	48.40%	No	No	No	No	No
		2 Preservation of the Death Penalty;US Supreme Court Interpretation (	2,676,043	1,002,043	3,678,086	L	72.80%	32.60%	65.70%	Yes	Yes	Yes	No	Yes
		3 Additional Homestead Tax Exemption	2,560,979	1,180,341	3,741,320	L	68.50%	31.20%	62.60%	Yes	Yes	Yes	No	Yes
		4 Recording of Instruments in Branch Offices	2,540,872	887,999	3,428,871	L	74.10%	30.90%	62.40%	Yes	Yes	Yes	No	Yes
		5 Conservation of Natural Resources and Creation of Fish & Wildlife C	2,630,674	1,007,905	3,638,579	CRC	72.30%	32.00%	64.60%	Yes	Yes	Yes	No	Yes
		6 Public Education of Children	2,623,889	1,069,406	3,693,295	CRC	71.00%	31.90%	64.50%	Yes	Yes	Yes	No	Yes
		7 Local Option for Selection of Judges and Funding of State Courts	2,028,165	1,536,523	3,564,688	CRC	56.90%	24.70%	49.80%	No	No	No	No	No
		8 Restructuring the State Cabinet	1,950,311	1,562,234	3,512,545	CRC	55.50%	23.70%	47.90%	No	No	No	No	No
		9 Basic Rights	2,416,324	1,230,683	3,647,007	CRC	66.30%	29.40%	59.40%	No	Yes	Yes	No	No
		10 Local and Municipal Property Tax Exemptions and Citizen Access to	1,754,747	1,766,490	3,521,237		49.80%	21.50%	43.10%	No			No	

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	11	Ballot Access, Pulic Campaign Financing, and Election Process Revi	2,239,607	1,253,150	3,492,757	CRC	64.10%	27.20%	55.00%	No	Yes	Yes	No	No
	12	Firearms Purchases; Local Option for Criminal History Records Chec	2,655,010	1,033,020	3,688,030	CRC	72.00%	32.30%	65.20%	Yes	Yes	Yes	No	Yes
	13	Miscellaneous Matters and Technical Revisions	1,869,111	1,530,833	3,399,994	CRC	55.00%	22.70%	45.90%	No	No	No	No	No
6,138,765	2000													
	1	FL Transportation Initiative for Statewide High Speed Monorail, Fixe	2,900,253	2,607,495	5,507,748	I	52.70%	33.10%	47.20%	No	No	No	No	No
5,002,816	2002													
	1	Amending Art. I, Sect. 17	3,110,477	1,351,434	4,461,911	L	69.70%	33.40%	62.10%	Yes	Yes	Yes	No	Yes
	2	Economic Impact Statements for Proposed Constitutional Amendmer	3,515,070	991,561	4,506,631	L	78.00%	38.00%	70.30%	Yes	Yes	Yes	Yes	Yes
	3	Miami-Dade Home Rule Charter	1,938,345	2,122,408	4,066,753		47.70%	20.80%	38.80%	No			No	
	4	Laws Providing Public Records or Meeting Exemptions	3,403,776	1,045,004	4,448,780	L	76.50%	36.60%	68.00%	Yes	Yes	Yes	Yes	Yes
	6	Health Hazards, Second-Hand Smoke, Prohibiting Workplace Smoki	3,424,811	1,412,788	4,837,599	I	70.80%	36.80%	68.50%	Yes	Yes	Yes	Yes	Yes
	7	Exemption for Construction of Living Quarters for Parents of Grandp	3,146,156	1,527,945	4,674,101	L	67.30%	33.80%	62.90%	Yes	Yes	Yes	No	Yes
	8	Voluntary Universal Pre-K Education	2,706,906	1,892,854	4,599,760	I	58.80%	29.10%	54.10%	No	No	Yes	No	No
	9	Reduced Class Size	2,533,389	2,253,025	4,786,414	I	52.90%	27.20%	50.60%	No	No	Yes	No	No
	10	Animal Cruelty (pregnant pigs)	2,553,762	2,122,277	4,676,039	I	54.60%	27.20%	50.60%	No	No	Yes	No	No
	11	Local Trustees & Statewide Governing Board to Manage Florida's Un	2,750,229	1,810,474	4,560,703	I	60.30%	29.60%	55.00%	No	Yes	Yes	No	No

* L = Legislature, I = initiative, TBRC = Taxation and Budget Reform Commission, CRC = Constitutional Revision Commission

Source : Department of State Division of Elections, Bureau of Election Records and Florida TaxWatch, November 2003

(unedited)

Barry Richards Testimony

Barry Richards: Thank you Mr. Chairman, ladies & gentlemen of the Committee, I appreciate this opportunity to be here.

I'd like to begin by telling you what my interest is in this appearance. Regrettably, nobody is paying me to be here today. I represent no client. And while the Senate President's office asked me to appear, they asked me to appear only for the express purpose of expressing to the same views that I voluntarily expressed to the Senate President's Office.

These are views that have developed over the years during which I've had the privilege of serving both the Legislative and executive branches during which I have had the opportunity to litigate quite a number of the initiative petitions that have gone before the Supreme Court. In fact, what I'm going to purpose to you today is contrary to my personal interest since it would result in the loss of a fairly consistent stream of fees by persons who have hired me to either support or challenge initiative petitions. I am here because with those years of experience that have spanned together, regrettably, one to thirty years, I have come to believe that our system is currently, seriously flawed.

Most constitutional scholars, thank you, believe the United States constitution is one of the most brilliant and far sighted documents that were conceived of the human mind. That document makes no provision for the initiation of its amendment by petition process or the ratification of its amendments by public referendum. That option was considered by the constitutional Convention, the Constitutional Congress and was rejected. Was rejected for any number of reasons but one in particular I'd like to comment on, and it is this. The constitution is supposed to be the document that sets forth the basic structure of government the fundamental relationship between the government and the governed. Any amendment to that document carries with it the prospect of ramifications that are both widespread and long standing that effect a multitude of different issues that are not the issues directly being considered at the time of its adoption.

The problem is, when a Constitutional Amendment is submitted for the voters consideration they necessarily see it with myopic vision when a voter enters the voting booth, the voter sees only that proposition unlike a collegiate body such as the Legislature, Constitutional Convention, Constitutional Revision Commission which has before it the opportunity to view the proposed amendment within the context of all the other issues that might be affected it and the time to vigorously debate it. The voter sees only the amendment. And the problem that that creates is characterized by the increasing incidents that we have seen, the proposition, the most vigorously supported and best funded proposition in fact, that on the one hand imposes new fiscal requirements on the state and on the other hand would significantly restrict the ability of the state to raise revenue. The combination can create a strangle hold on the state and brings it virtually to a halt. Not because the public is responsible because the public is not in position to consider the true impact, the context of a constitutional amendment, at the time that the voter is casting a ballot the bottom line is this and I believe, those far more intellectually superior individuals, who drafted the United States Constitution and virtually every state constitution patterned after it believed that the initiative process is not the proper way to amend the fundamental document. Does nothing to do with the belief of democracy does

nothing to do with the belief that the people should have the ultimate right to determine how they are governed it has to do with the fact that it is not a process that is conducive to what you must do to be sure you are not creating more problems than the problems you are seeking to resolve. So my personal belief is that when that was added to the Florida Constitution in 1968, it was a mistake and I believe it should be repealed altogether. And you ought to know that is my belief before I give you the alternative suggestions that I have. I think that might be difficult, but I think that would be the courageous and the proper thing to do if we want this state governed properly and if we want to give the people of this state the tools to do the job that they need to do in a republican form of government appropriately. Having said that I would urge you . .

Sen. Smith: Can I assume that was a small "r"?

Mr. Richard: Yes you can, small "r". I have several alternative proposals I would suggest to you. I would suggest them not only if you reject my proposal that you repeal the provision altogether, but even if you were to decide the option of repeal on the ballot, I would urge you also to place these provisions on the ballot as a stop gap in case the repeal fails.

The first is the extraordinary vote, you heard considerable discussion on the extraordinary vote, already. I believe there are two ways to do it that make sense.

The first is based on Article 10 Section 1, which currently provides that on a Legislatively proposed Constitutional Amendment, there must be an extraordinary 3/5 vote, makes sense to say that the same extraordinary 3/5 vote should be required when it is done by initiative petition. No reason why it should be easier for a non-deliberative group of voters to pass it than the Legislature itself. So that is one alternative for the extraordinary vote. And I think if you are going to do this you need to be able to go to the public and say here is the reason, it's not just arbitrary but we want to make it harder for you, and that's the reason. But there is a second option that you have that's to make it a 2/3 vote which would be consistent with Article 11 section 3 that requires a 2/3 vote on any tax or fee amendments.??Those are two options.

Sen. Smith: Let me interrupt you here because when I considered this would it also be an option or is a feasible option that the 3/5 vote would be the standard for the normal change to the Constitution but 2/3 if the change was one that implemented the tax? I know the House has been talking about that and could you have a different level for passage just like we already have?

Mr. Richard: Sure you could do that and one of the things I considered suggesting to you as an alternative to the appeal was just to provide the amendments that are related to taxation or to spending or to revenue not the amendments that could be initiated by petition. The difficulty with that of course, is the definition then of what you mean when you say that it's related to a tax or it's related to fiscal impact. It becomes very difficult to make that determination.

Sen. Smith: But it would be your opinion that we could have a difference in the required amount of the extraordinary vote based on subject matter.

Mr. Richard: Sure you could. I don't think the public would ever understand it but the Secretary of State's office presumably would and would tell us whether or not it passed. So, Yes. But what I think you cannot do, by the way if the question is raised, I do not think you could impose the current requirement that exist for the petition itself that the signatures be gathered from at least such a minimum number of counties and

congressional districts that can't be imposed on the vote itself. I have to tell you that, that initially was a proposal that I made to the Senate President's office and it was Mr. Rubinas who suggested that I research the Constitutionality of it and when I did I found there is at least one case that is held to be unconstitutional and upon further reflection it was my firm belief that, that case would probably be upheld were it to reach the U.S. Supreme Court. Because if you read the line of cases on one person one vote you necessarily come to the conclusion you cannot require that any area of the state have a greater voting power, which is effectively what you would be doing than any other state. So I don't think you can do that. One suggestion that I have for you which was discussed just a moment ago by Mr. Simon, or at least he was asked about it, is to combine the higher threshold to pass a constitutional amendment proposed or to get an amendment on the ballot which was proposed by initiative to combine that with a legislative initiative that has an easier route to get in on the ballot so that you are giving people an incentive to do the Legislative as oppose to the constitutional. I think in order to make that work you probably would also have a provision that once a statue passed by initiative that there would be some restriction upon the Legislature's ability to amend it either that the Legislature could not repeal or amend it for some number of years without an extraordinary vote of some type such as 2/3 in order to give the proponents the comfort level of believing that it wouldn't simply be repealed until next Legislative session but what we're trying to do here, I think, if we're not going to repeal it altogether, is at least discourage people from placing matters that do not belong at the magnitude at the level of the constitution, placing them in statutory law. So I think that's an alternative.

The second proposal I would offer to you, and I only have four more. Is this in 2002 the Legislature required that constitutional amendments carry a fiscal note which is placed upon them by the revenue estimating conference. I would suggest that that be made constitutional while it has not been challenged, my concern is that it could be held to be unconstitutional based upon the theory that the Legislature does not have the authority to add a new condition to the constitutional provision for how you get for the threshold of getting a provision on the ballot, because what that statute now says is, even though the constitution doesn't say it, you must have a fiscal note before you can place it on the ballot. I don't know that that would be the result but I believe it would be prudent to make that constitutional and I would suggest that you consider adding to it that there be a requirement that the summary for the proposed amendment also have a proposed funding source which would not be binding upon the Legislature but at least it would cause the voter, I think this is a far . . . I think this is an . . . unfortunately, there is no way to go far enough to give the voter the ability to weigh all of the issues that must be weighed. But at least it would suggest to the voter that there are other considerations that must be made here if the proponent themselves must tell them what possible funding source proponent believes that there is. So, I think that's something you might consider adding as well.

My third suggestion which you have heard before, and I know you have before you, is that there be a provision requiring that a proposal be of constitutional magnitude, and I know the difficulty, here is concern with the fact that how you would go about defining that. I would suggest that the language be to the effect of what a constitutional is supposed to be. That amendments of the constitution proposed by petition or perhaps proposed at all, are limited to those dealing with the basic structure of government and

the fundamental rights of the citizens of the state of Florida. I think that that type of definition is sufficiently restricted so that we can depend upon boards to reasonably interpret it. I know that there is an undercurrent of distrust in some sectors of our society of the courts, but the bottom line is that if this government is going to work each of the branches of government must have a trust, a level of trust in the other two branches of government to do their job responsively and that the people of the state of Florida to insure that they do. So ultimately, we must rely upon the courts to exercise reasonable discretion in interpreting what's in the constitution. I believe if you have wording in there to that effect, that amendments are to be limited to the basic structure of the government and the fundamental rights of the people that we can rely upon the courts to reasonably interpret those structures.

The fourth proposal that I have is really related to the review and correction of proposed titles and summaries, this does not have to be constitutional it can be done by an amendment of the current statues. We all understand the problem is Florida Supreme Court has interpreted its role as being limited to striking provisions from the ballot that have a defective title and summary it has interpreted the laws not permitting it to rewrite it. The result is a great deal of wasted money, wasted time, wasted effort and unnecessary confusion of the voters which is subjected to the petition processes now 50 active ones, only to find that they are removed from the ballot by the Supreme Court and the other problem with it is, it creates I believe, a unnecessary tension between the people of the State of Florida and the Court. I think that the simple solution to that is to permit, one of two things. Either permit the Supreme Court itself to modify the summary, the title and the summary in order to make it objective including the statute the wording that gives the court, the Legislatures, principles for doing so, or provide for the Attorney General or the Secretary of State to write the initial title and summary subject to review by the Supreme Court. The difficulty now is that the title and summary are written by the last persons that ought to be writing it. They are written by the Proponents of the proposal. Who have an incentive to write it in such manner as to give it the best chance to passage when the voter reads it. They have a clear non-objective interest and they are the last ones who ought to be writing the only language the voter is going to see in the voting booth. So, however it is that you go about finding a way to correct that, whatever entity it is that you place the responsibility in, I think it's difficult for anybody to argue that there needs to be some other body that either writes it or reviews it.

The final suggestion I would make to you is with respect to shortening the life of the petition. What ever you do doesn't make any difference what the numbers are. Four years is simply too long. It's too long for a lot of reasons, one of which is that the signatures themselves become stale. That the person who signs the petition one year by four years later can be diametrically opposed to what the petition calls for. It's simple too long. The other problem with it is that it is one of the things that, four years is a long time for attitudes to change, for circumstances to change, for people to move, so that you may be placing something on the ballot that's not even represented by enough people who still remain in the state to have placed it on the ballot. The number that I would suggest to you is 30 months and the reason that I would suggest 30 months is that it would give the proponents six months prior to the next general election in which to collect signatures and if they failed to collect enough, they still have until the next general election while those signatures remain fresh. So, I believe 30 months is a reasonable number. But the concept

should be that they, signature gatherers have sufficient time but not an unduly lengthy period of time. By the way, it was I believe, eight or nine years just from memory , cause I haven't looked at it recently, I think it was eight or nine years after the initiative provision was added to the 1968 constitution before anybody successfully placed a proposal on the ballot and there were many efforts to do so. The reason that there are so many, and that by the way , is a factor in the statistical analysis because I happen to agree with Mr. Simon, that if you look at the, if you were to draw a graph you would find, there has been an increasing incidence of success. The other problem by the way, is that as more and more groups and persons become aware of the initiative process and as the population increases, and you get more people doing it, you're going to get many more frivolous ones, and so it skews the statistics. But the fact is that the bottom line, there has been a significant increase in the last 10 years in the number of petitions that are successful in getting a measure on the ballot then there were in the first 10 years. And the reason for that, I believe, there are a number of reasons for it. One of them is that since that time, well one of them is that Rubin Askew taught people how to do it. Because initially people were doing it on long written petitions that weren't getting all the information the Secretary of State needed. There were a lot of reasons and the first one successfully passed was the Ethics amendment when Askew put together a group of individuals they studied what had been done in other states and they figured how to do it right. The other reason is that it has become a professional endeavor now. And when somebody when a special interest group has the money in the interest they simply hire an organization that knows how to do this, then comes into a state and does it correctly. So consequently it's become much easier. I think the last one, and I'm not a statistician, and I might not be right about this, but it makes sense to me, that is the population that the state has grown even though the percentage makes the numbers go higher because you have more concentrations of population it becomes easier to collect signatures. In any case, it has, we all know, that it is just become much easier. The Problem with it becoming easier is that it's confusing to the voter. When a voter walks to the voting booth and finds 20 propositions on the ballot it just enhances the problem with the ability of the voter to exercise a meaningful judgment.

Sen. Webster: Thank you Mr. Chairman, I have two questions if I can ask them. First of all, Barry, I asked Mr. Simon a question about the fact of a special election restriction on constitutional amendments on the next general election ballot, which would be a couple of months later and the amendments that would be purposed there. Would there be a, would those provisions whatever they may be, if that would happen, apply in the November 04 election?

Mr. Richard: I'm sorry Senator Webster, I'm not following what . . . .

Sen. Webster: If we were to pass something in a Special Election.

Mr. Richard: Would it apply in the next General Election? I think you could make it do what ever you wanted to. You could include in it the fact that it would take effect immediately upon adoption which is what most of them do, in which case, well, you know the Supreme Court has held that a measure which is on the ballot does not apply to anything else on the ballot at the same time as that measure. But what you're suggesting is that this would be something that would pass prior to the next measure appearing. I think if you wrote into the amendment, that it would apply immediately it would also apply to anything on the next General Election ballot. I don't know anything

in the law that would make that ineffective. I think it would be questionable if you didn't write it in. It would then be subject to judicial analysis and I have no ideas what the court would say.

Sen. Webster: Secondly, you mentioned counties, would there be a possibility of requiring a majority vote in each of the House and Senate Legislative districts and have that and maybe even by majority vote in those districts plus maybe make it 3/5 of those particular districts which would more parallel what's in the constitution now. Would there be a problem with that?

Mr. Richard: I don't think you can do it. And I have to tell you I think it is a good ideal, because you want to say that if something is constitutionally amended it should reflect the opinion of people all over the state not just one section of the state. The reason I don't think you can do it is this, if you go back to the body of case law that began with the reapportionment cases in 66', 67 or after. What those cases were based upon was this, the U.S. Supreme Court said, what they basically said in the Reynolds v Smith, the U. S. Supreme Court said, that the division of the state into counties or into congressional districts is arbitrary. You cannot pattern it after the United States government because that was the great compromise. These were independent states; independent governmental bodies that were coming together and they could do anything they pleased. And this was the great compromise between the small states and the big states. But a state is a single political body that divides itself up arbitrarily. And in fact the Legislature of Florida can change the lines of the counties anytime that it pleases. So, what the Supreme Court has said is that the problem is, if you say you must have 3/5 of the vote or a majority of the vote, whatever it is, in at least half of the congressional district, or half of the counties. What you are doing is necessarily, you are saying that one county has the same ability to keep something off the ballot as another county even though there can be a vast difference in the population in those two counties. And the Supreme Court says you cannot do that.

Sen. Webster: Yes and the follow up is this. I was speaking primarily of Legislative districts which are based on census, based on one man, one vote, would be at least within their eyes following all the voting rights provisions of the constitution and in congressional laws that they passed. What would be the harm there?

Mr. Richard: I think you can do it if you required that there be a 50% vote in all of those districts.

Sen. Webster: Yes.

Mr. Richard: Yes, I may have misunderstood your question.

Sen. Webster: I was thinking about legislatures not. .I said that you had spoken to counties but where I was focusing. .

Mr. Richard: Yes, I thought you could do that. Just for the reason you said, or congressional districts. Because all of them are based necessarily upon population. I agree, I think you could do that. Yes, and the case I referred to by the way was county to county, and that was the problem.

Sen. Smith: Let me, if I could follow up on this cause I think now plainly your opinion is, and I think the case law is pretty clear that the county analogy doesn't work, Reynolds v Sims and that whole prodigy has thrown that out. The idea now is if you looked at legislative districts since they are on the bases of population that you could have some extraordinary requirement within the legislative districts. My question to you

people would be this. You would still have to have an overall majority for that to apply though.

Mr. Richard: Right.

Sen. Smith: In other words, you couldn't win 3/5 of the counties by a number, what ever that number is, and then not overall win because that would be the exact reversal of what happened in Reynolds v Sims. You would be devaluing certain districts.

Mr. Richard: You'd have to have a majority state wide. The question, which is I would have to contemplate for a minute, which I assume is the one Sen. Webster is asking is, could you require that there be an extraordinary vote in half of the legislative districts and I'm not sure. I'd need more time to think about it. You Know, the only thing you're thinking about is could this give more voting power to one area than to another area. That's always the question.

Sen. Smith: Well in that suggestion one of the problems is that about 3/5 of our congressional districts are in about four counties. So that's were you begin to, you worry about the reversal all the rationale that happened in Reynolds v Sims.

Mr. Richard: That is the problem. And Sen. Webster I didn't mean to give you a dissertation on Reynolds v Sims cause I'm well aware of the fact that you are familiar with all those cases. I was buying time to think about the answer while I was talking.

Sen. Campbell: Barry, do all constitutional amendments require implementing legislation?

Mr. Richard: No.

Sen. Campbell: Which ones don't?

Mr. Richard: What do you mean? Generically or do I know of some particular. .

Sen. Campbell: For instance, I thinking of Spanish Only, Polluters Pay. We've never had any implementing legislation, there in the constitution but they are ineffective, we got the Bullet Train, we got Classroom Size, we got PreK Initiative.

Mr. Richard: Well, Article I Section 24 on Open Government is self executing even though it enables the legislature to pass bills in certain respect. But it is self executing. I could probable think of others.

Sen. Smith: Senator there is a line of cases, one of which was called Dade County v. Ryan and the other case was Dade County v. The Legislature which dealt with whether or not the legislature could refuse to implement the collective bargaining rights for public sector employees after the Constitution had been amended to reflect that it could. And there is some, I think I had this case sent around to each of you, but the issue there was, the court finally suggested that if the legislature did not pass implementing language that the court would intervene. That did not happen because 74100 was passed. But I would tell you that was an interesting issue that was raised in that particular, two cases Dade County v Ryan and Dade County v The Legislature which were one was the first case, and they said, well bring it back to us. And Toby Simon actually brought it back later and they said well it hasn't been fixed yet so we're going to say what can happen and then it was fixed.

Mr. Richard: The Problem is, the real problem occurs when you're talking about implementation requires an appropriation of money because then if the legislature just doesn't do it, what would the court do, it would clearly be an invasion of the quintessential legislative process for the court to, the court cannot order the legislature to appropriate money, so, you encounter a problem. I think.

Sen. Campbell: Let me raise this issue. I think the court probably could, for instance, suppose we as a legislature decided that the third branch of government should have no funding? So, we don't appropriate any money. I think that would be unconstitutional. I think the legislature would be could be forced by the Supreme Court to fund the court system. We had a constitutional amendment a couple of years ago on adequate funding for education, which no one has determined what adequate funding is yet. And I'm just, I'm intellectually thinking about something here and I was going to make a devil's advocate argument but, I don't think I can because I don't know the law in that great detail. But let's take Polluter's Pay. We now a constitutional amendment saying "all polluters shall pay for the cleaning up of the everglades", on anybodies pay job. We have a constitutional amendment saying that English is the only language in the state of Florida. I don't think that has been implemented. I don't think anybody has come in and said ok, voters in Dade County if they have Creole in your ballots, you can't do that because it's unconstitutional. So, I'm just trying to think do the implementing bills themselves have some type of restraint on some of the constitutional amendments that are passed. Because effectively, those of constitutional amendments have no meaning.

Mr. Richard: Well, clearly it does. I don't know that it's really necessary to what you're considering today, but you raise this interesting question, what happens? Does the court have the power to order the legislature to appropriate money or to by pass the legislature and order the money out of the treasury? The nature of our government system and checks and balances system, separation of power system is such that some times you reach an impasse where it cannot be done and ultimately the people have to decide at the voting booth. I don't . . we have never fortunately had a situation which the Supreme Court of Florida has ordered the legislature to appropriate money or suggested that it had that authority. I don't want to make a firm statement then have somebody hire me to argue the other side someday in court and have it to come back and haunt me, but I have serious reservations as to whether or not the court has the ability to order the legislature to appropriate money anymore than the legislature has the ability to order the court to make a decision in the case. I think that's where you run into the, as fundamental, a separate of power issue as you can have.

Mr. Campbell: Mr. Chair, I want to ask a question. For instance our Bullet Train, if we decide not to fund it, just we're not going to give the $8 billion dollars that's been estimated it's going to cost. I guess it goes no where. Would you agree?

Mr. Richard: I would agree assuming that the court didn't have the ability to. .

Mr. Campbell: Have there been any cases on this issue that anybody knows about? Because clearly I guess what I'm really getting to is that maybe we do have some checks and balances presently in the system by the legislature just not acting on a constitutional amendment to make it effective.

Mr. Richard: I think probably, what you'd end up with, and again this is the surmise, to reserve the right to contradict myself later, the most likely result would be that the Supreme Court would say we declare that the legislature is in violation of the constitution though we do not have the power to tell them what to do and the people of the state of Florida will have to decide whether or not they are willing to accept the type of violation. So, that's where I think, I would hope that's where we would end up.

Sen. Smith: Sen. Aronberg, you are recognized for a series of questions.

Sen. Aronberg: Thank you Mr. Chairman, Thank you Mr. Richard. My question is on Article 11 Section 5b, you had mentioned the Economic Impact Statement and that's what I'm reading from, says "The legislature shall provide by general law prior to the holding of election", the Economic Impact Statement. I guess your point was that because it says prior, does that mean on the ballot? The Supreme Court could say "prior" does not mean putting it on the ballot and that would render this. . If the legislature wanted to put an Economic Impact Statement on the ballot, then that would not be consistent with this provision. Is that what you are saying?

Mr. Richard: No, my concern is that there are cases that say that where the constitution sets forth the conditions for something to happen, for example, with most of these cases come up where the constitution says what the qualifications are to be a legislator. The legislature, or to be anything, the County Commissioner. The legislature cannot come back and add to those conditions, because the constitution itself has said these are the conditions and you can't add any others. My concern is that the constitution sets forth what you have to do to get a provision, an amendment on the ballot and for the legislature to say that before that amendment can go on the ballot there has to be a fiscal impact statement is to add a new condition. I'm not saying that the court would say that's unconstitutional but because of a concern for it, I think prudence suggests that it be made a constitutional amendment.

Sen. Aronberg: Mr. Chairman may I follow up on that? Thank you. The provision I read from was passed by the voters by a referendum. So it was put into the constitution by the voters. So how would the Supreme Court then . . .

Mr. Richard: I believe that, again I'm . ., some of this is from my memory. I think that subsequently to the passage of that, the legislature amended the statue to provide that the fiscal impact statement would be included in the summary. Am I correct, Wayne?

Mr. Aronberg: That was prior to the passage of that. That . .

Mr. Richard: Yeah, but the constitutional amendment itself doesn't say that "it shall appear". Does it? I don't think it says"it shall appear".

Mr. Aronberg: No, in fact that's where the confusion is. That the constitutional amendment says that"prior to the holding of the election the legislature has to put this information forward". So the question is whether "prior" means on the ballot.

Mr. Richard: Ok. Then I understand your question. And I agree with you that that's where my concern lies, is that it doesn't mean anything, I think, unless you put it on the ballot.

Mr. Aronberg: Then my final question Mr. Chairman? Would it then mean that any constitutional amendment we pass from this point forward would be unable to be self executing, if there is no statement by the legislature, an economic statement, because it requires an economic statement by the legislature? So, if the legislature fails to provide that, well then, would that make future constitutional amendments nonexecuting?

Mr. Richard: You're asking the same question, I think, that Sen. Campbell asked was, can you indirectly keep it off the ballot just by not doing something that you were suppose to do? That's an interesting question. Depends on what the courts would do with it. I think that . ... I don't remember if it's constitutional or statutory but the Revenue Estimating Conference, I believe, is the one that establishes the fiscal note. (Statutory)

Right. That's Statutory. So let's assume that they don't do it, I guess the court could order them to do it.

Sen. Aronberg: This wouldn't keep it off the ballot necessarily. My thinking is that possibly any amendment we pass without an Economic Impact Statement from this point forward could mean the amendment is illegal, is nonexecuting, can't happen because it requires an Economic Impact Statement before the amendment can be passed.

Mr. Richard: Let me, let me go to what I think is a more fundamental question. I don't think any of us want to be operating on the premise that the way that we will control this by not doing what we are suppose to do constitutionally. So, we don't want to say well, the legislature can control this just by not implementing what the people have told them to do, or by not putting a fiscal note on. None of us want to govern that way. So we all want to have a set of laws that enables the legislature or whomever it is to control the situation by exercising the authority that the constitution gives it, not by doing something indirectly which is contrary to what the legislature tells them.

Sen. Smith: Mr. Richard, I'm sorry, Sen. Dockery.

Sen. Dockery: Thank you Mr. Chair. And Mr. Richards, I want to thank you for your honesty. I mean you came right out and said you'd like to repeal the Citizens Initiative process altogether. So, if I were to ask you the same question I asked Mr. Simon, what would you say the problem is, you would say you think the entire Citizens Initiative process is the problem and should be eliminated? Is that correct?

Mr. Richard: Ultimately yes, I mean I think there are a bunch of sub-problems which are the ones we are talking about. But I think the whole concept is flawed.

Sen. Dockery: Ok. And I just want to correct a couple of things that I think you were a little in error in saying. When you talked about changing the vote to 3/5 because it's the same as the legislature, that's a little bit misleading in that it's 3/5 of the legislature to get it to the ballot. So, that would really be better compared to the petition process and then the actual vote of the citizens, would be the same as the legislature which is 50%. So, if we were to change the vote once it got on the ballot, the very few, the 11% that actually made it to the ballot then would you say that that 3/5 should apply to the Citizens Initiative as well as the Legislative Initiatives that make it to the ballot?

Mr. Richard: I'm not trying to be misleading here and there is no corollary, that you can draw between the two in terms of the specifics. You're talking about 3/5 of the entire body of the legislature. We're not going to talk about 3/5 of all the registered voters. I'm just saying, that if you want to pick a number, that can be explained to the public as having been derived by some source, the gate way for the legislature to get an amendment on the ballot is a number which was select as 3/5. So, if you want to select that principle, then that's a rationale instead of just picking an arbitrary number.

Sen. Dockery: And I understand that, but the question now is, once it gets to the ballot, do you think the Citizens Initiatives and the Legislative Initiatives should have the same vote of the population?

Mr. Richard: Senator, I don't have an opinion on that. I mean that . . . the problem frankly, that I have with all this, is that we're creating artificial obstacles because we recognize that too many things are getting on the ballot, and so we're saying well how can we make it harder to get'm on the ballot? That's why I think that you ought to go to the core of the problem, eliminate it altogether. But something has to be done, I think, to reduce the problem we have. So, I . . . What number you choose, I don't

have a real opinion on. I gave you those numbers because I was just suggesting that it gives you something that is not just arbitrary. It's based on some presidential. .

Sen. Dockery: Alright. Let me try one more time. Regardless of what number we choose should it be the same number for the Citizens Initiatives.

Mr. Richard: I understand your question. I don't have an opinion on that.

Sen. Dockery: Ok.

Mr. Richard: Basically, I guess, it's a matter of how hard you want to make it to get on the ballot.

Sen. Dockery: Ok, and if it's your contention is that to many things are making it to the ballot is it also your contention since most of them are coming from the legislature, out of the 73 that went to the constitution 46 were by legislature and 15 were by citizens, that the legislature is putting too many constitutional amendments on the ballot as well?

Mr. Richard: Well, let me backup for a minute. My real concern is not the number of things making it to the ballot. I think, that the fact that an increasing number of things have gotten to the ballot, reflects the increasing ease and the increasing sophistication that people have of getting things to the ballot. That's not really my concern. My concern is two fold. One of them as I said is that the voter is not in the position to be able to weigh the particular matter, the particular issue that he or she is voting on in the context of everything else it will have an impact upon, and that's one of my concerns. So, it's not so much the numbers. The second concern that I have, is that items are being proposed and making it to the ballot that are not of constitutional magnitude and that does two things; the first thing is it clutters up the basic document of government, and the second thing is that it trivializes the fundamental issues that are supposed to be dealt with on the ballot. Those are my personal two concerns. I'm not as concerned about how many things. I think the biggest problem with the number of things on the ballot is that it makes it even more difficult for voters to exercise meaningful decision. As far as the legislature is concerned, I'm not as concerned about the legislature for two reasons. The first is it is a deliberative body. It has the ability to have vigorous debate, and thorough investigation before it does it. The second thing is the legislature has the broad view. It's not, there isn't no restriction to a single subject, but more importantly, it's not in reality restricted to the single subject it's looking at. It can look at everything. So, if the legislature determines that there are 30 things that need to be changed, at least it has been filtered through that debate and deliberative process. If you get 40 things placed on the ballot, by initiative petition there are 40 things being placed upon it by 40 different interest groups that are not looking at anybody else's things or at any of the other stuff that is being effected by these various provisions.

Sen. Smith: Thank you Mr. Richard, I appreciated so much your being here and your answers. I've got three more people I want to get through today. So thank you very much. So, John Sowinski.

(unedited)

Testimony of John Mr. Sowinski:

Mr. Sowinski: Thank you, Mr. Chairman, Senators it's a privilege to be here today. Appreciate the opportunity to speak with you about this issue. My name is John Sowinski, I'm from Orlando. My company is Consensus Communications among other things, we do ballot initiatives. I've been probably involved in them more than anybody in Florida. So if there is a problem, I'm a part of the problem. I like Art Simon's term better "state of the art". I feel better, maybe I'm a state of the art rather then a part of the problem today. By way of background, I've been involved in the initiative process really for the past decade. Starting in 1992 with the Term Limits Campaign, in 1994 I did the Net Ban and the no side of Casino Gambling, the no casinos effort. In 1996 I did the no campaign on the Sugar Tax, 2000 I did the yes campaign on the Bullet Train, and in 2002 the yes campaign on Smoke Free for Health. So I've been involved both sort of on the yes side and the no side of the equation on behalf of a number of clients. Today I'd like to address a few concerns that have been aired. Perhaps respond to some of the arguments that have been made by other speakers as well. Hopefully dispel some misconceptions discuss with you the issue I really believe to be at the heart of the consternation that exist with the initiative process.

Sen. Smith: Can I ask you one question before all this? Given that I'm taking that you are in a business that is related to the success of this process that is, sometime you are hired by the nos' and sometime you're hired by the Yes'. Basically you're in the business of campaigning for constitutional amendments or against them?

Mr. Sowinski: Not exclusively. It's about 15% of what we do by way of business, but we are significant players in that realm.

Sen. Smith: Without going into trying to invade the area of client privilege and I don't know what that is in relation to your industry. How much money is spent by a proponent to . . .in Florida?

Mr. Sowinski: It varies. What varies is the least expensive campaign I was involved with was Term Limits in 1992 less than $800,000, I believe in total was spent to put that on the ballot and pass the amendment.

Sen. Smith: That was the least amount?

Mr. Sowinski: The least amount.

Sen. Smith: What's been the most that has been spent, that you're aware of.

Mr. Sowinski: The most that I'm aware of, the yes side of Casino Gambling in 94' was $16 million, the yes side of Save Our Everglades was about $15 or $16 million, the no side of amendment 4, which we were on, was about $20 million. So those were the biggest numbers.

Sen. Smith: Let me put that in perspective then. Just on the one issue the Everglades issue your view would be somewhere around $35 million dollars was expended in that campaign?

Mr. Sowinski: Correct, Correct. Let me go through a few things and talk about a few of the issues that are there.

One, let's talk about some of the arguments being made against the citizen initiative or in efforts to constrain the process. One argument that we've made, that Mr. Richard made very elegantly, that there is some subject matter making it to the constitution which is not of constitutional magnitude. One of the things that I would ask

anyone who makes that argument, very strongly to do is to really sit down and read Florida's constitution. It is not exactly a "we the people" document. The "we the people" document is about 75 hundred words, the Florida Constitution is about 58 thousand words. It includes a lot of "mynoosha", that I think a lot of people would agree in this room don't rise to constitutional muster, but were put there not by the initiative process but through other amendatory processes. So if we were going to suggest that standard we need to recraft the constitution of Florida because currently it includes three day waiting period for the purchase of a handgun, not placed there by initiative, salaries for County Commissioners and constitutional officers not placed there by initiative, scholarship loan programs for teachers, not placed there by initiative, how the bond money . . .

Sen. Smith: Let me ask you this. How was the three day waiting period placed there?

Mr. Sowinski: By Joint Resolution of the Legislature.

Sen. Smith: Which went to the voters.

Mr. Sowinski: Correct.

Sen. Smith: Which goes back to I think, something Sen. Dockery was suggesting. Certainly was pointing out, is that if there has been a proliferation of subjects that don't belong on the constitution, to be honest with you, my view would be that a three day waiting period for purchase of a gun whether you agree or don't agree with that subject it's not one that rises to the level of a constitutional issue. But that proliferation, has been, the legislature has been guilty of that with some frequency too.

Mr. Sowinski: That's correct Mr. Chairman.

Sen. Smith: But once again getting back to your point, you're not suggesting because we've done it in the past, let's say that now that we have passed the threshold of the pig amendment, that the protection of cows and horses and dairy farms and all these things should now follow because we've done that because want that just make it ever less of a constitutional document?

Mr. Sowinski: I have ideas that I'll share with you later in my presentation. I think it will address some of those concerns. One of the things that we hear is that is that some people say the process has gotten out of control, that there's 50 been filed, that there's more filed every year all the time and what I would like to say is and that has been pointed out by some other speakers is that most of these amendments are what I call kitchen table amendments. Somebody over their kitchen table said people ought to have a right not to be abused. So let's put that in the hopper here. Really what typically happens every cycle out of the 30 or 40 or 50 or 60 that are filed. There are half a dozen serious effects out there. Now out of those half a dozen typically, a couple of them fall short on signatures, a couple get struck by the court which tends to strike almost as many as it lets go to the ballot, and a couple of them go to the voters. There is an argument made that there is this increasing trend, that we're becoming California and this is an increasing trend, but really what we've seen is a bit of "teeder-todder". In 92' we've had two initiatives. They were Eight is enough and Save our Homes. In 94' you had Casino Gambling and a couple of others. In 96' you had Save our Everglades package and one or two by the Tax Cap Committee. In 98' there were none. Zero. In 2000 there was one, The Bullet Train. This last cycle five. So it really, I don't share the concern that it's this trend line that's going like this. It really tends to" teeter-totter" back and forth. The one argument that I almost bristle at is that it's too easy to get things on the constitution. It is

much easier and much less expensive to hire a lobbyist and lobby an issue here. I don't think that people by in large choose the constitutional method as the method of first resort. There is too much left to risk, it's all or nothing. The legislature you get to win some and lose some, if you go at it sometimes, and in the constitution its all or nothing. My experience has been that clients have come to me have come to me out of frustration because what they think is a good idea didn't get done basically on the yes side. The national experts on the initiative process would agree that Florida has if not the most, one of the most rigorous ballot initiative processes in America that exist. We require a great number of signatures per registered voters compared to the norm. To put it into perspective, when I first started doing this in 1992, to get an issue on the ballot, you had to have 363,886 ballot signatures. Today it's 35% higher than that. So the process is good and self cleansing in that it becomes more rigorous as Florida grows. We have the toughest single subject standard anywhere in America and it's funny to listen to lawyers talk about this that have experience in the process across America. A lot of them simply don't want to do business in Florida because it's hard to predict where the court is and the court is extraordinarily restrictive. The court's very willing to strike down amendments, they do not feel really bound or politically hindered by doing that. Finally, we have strong property rights laws in Florida, which I personally support that make it harder. In many initiative states, in California there's not the property rights laws we have here. So they can set up shop outside a mall and treat it as public property and the mall owner has nothing to say about that. Here we have access problems. There is at least one petition vendor, national petition vendor, who does not do business in Florida because the access issues are so difficult for circulars, more or less relegated to public property, in front of Post Offices, outside the Capitol Building, stadiums and the like. The next thing that I've heard is that voters are burdened by amendments and they may not know exactly what they are voting on. What I'll tell you is this, and Wade Hopping pointed out very eloquently, that the people do tend to participate in these things. They vote on them in Florida in many states the ballot drop off, the under vote, which we've all come to wonder what an under vote is, thanks to the 2000 elections, is pretty great on initiatives in some of the western states. In Florida typically mid eighties participate in ballot measures. If there is any level of controversy the participation goes up to the mid nineties to high nineties and here is one interesting case in point I scratch my head when I first saw it on the Internet and said can that be true, and it is. In 1994 when I ran the campaign against Casino Gambling, more people voted in the second to the last issue on the ballot then the eight, then voted on the very top of the ticket race which was the U.S. Senate race between Connie Mack and Hugh Roddum. Voters vote on these things. They read them and they care about them and to suggest a couple of things that I feel, I need to say it because it's being suggested that voters have a superior intellect on the top part of the ballot and have an inferior intellect on the bottom part of the ballot is not correct in my view. And to suggest by the way too, that an issue placed on the ballot by the legislature that they have a stronger IQ in voting on those matters than matters that are put on there by the people, by initiative process is insulting to the voters, if there is a standard to be set let's set it across the board. Do not please do not set a standard that says to the voters of Florida heads we win tails you lose. And that's what one of the speakers before suggested is that type of scenario. I don't agree with that and I think that would lead to voter disenfranchisement even if it passed. Try to explain to voters the day after election well

some of these passed by 50% vote and some of them failed because they got 59% or which ever number you had. We have to consider the tenor of the debate and the public discussion the day before and the day after the election when fashioning policy on the initiative process. A couple of things that I think help in this regard, is that this review process does exist where the Supreme Court looks at ballot title and summary and they're very strict about it and Mr. Richard expressed a concern about having the proponents write the language. I don't have total strong feelings about that issue but I would say that in right language that when a client is having to raise money or spend money that of the sums that are required to place an issue on the ballot, there is always error to the side of caution in terms of writing that language. That too is a self filtering process cause the court can just knock you down and say bang you're dead basically and you're gone. So I don't lose as much sleep about that particular part of the process and with the new provision that passed, the new good amendment that the legislature placed on the ballot last cycle which allows for the construction of a fiscal impact statement, I would hope it could appear on the ballot. Because that being said, if the voters read a ballot title and summary, 75 words about an issue, that the court has said that accurately describes that issue and it has a fiscal statement attached to it says it's going to cost this much then I think voters should be left to make their decision on that particular issue. The one thing that I would like to say about that too, is that even though I'm an advocate of the initiative process, I don't agree with everything that passes. There are a lot of things that pass that I wish wouldn't have passed. There are a lot of things that didn't pass that I kind of wish would. Just because I'm not satisfied with the outcome of the ones I'm not ready to trade in that system. I don't like every President that's elected. I happen to like the one who's there now, but I'm not willing to trade in that system either. So, that is important. The numbers have been brought out by several members of the committee and other speakers, that in the history of Florida we've had 21 initiatives go to ballot, 16 of which have prevailed over the same period of time, there've been a 100 amendments proposed by other fashions, Tax and Budget Reform Commission, Constitution Revision Commission, Joint Resolution of the Legislature, and so if there is a problem and if the problem we're seeking to cure is too many amendments, it cannot be focused on the initiative because the initiative has put less issues on the ballot than any other method of placing issues on the ballot. It is by far the least in terms of the number of issues that have made it to the ballot that way. So what are the problems that need to be addressed? Before I get to that let me say one other thing. The real, real honest problem that a lot of people have with the initiative is they don't like the outcomes, where they fear that there might be an initiative sometime in the future that they might not like the outcome to. My answer to that is, get off the sidelines and get on the playing field and mount a campaign. The process creates points of entry for the no side that left to my own devises if I'm valued at neutral on an issue, and I had a choice to be on the yes side or no side and all that mattered to me was my win/loses record, I'd pick the no side every day of the week., every day of the week. Because you don't have to persuade voters that ideas or totally bad ideas for them to reject it, you just have to persuade them this isn't the best version of this particular idea that they like. So the other thing that I would say is that in the history of Florida there has only been one initiative passed that had significant dollars spent against it and that was Class Size. None of the other initiatives that have passed have had significant dollars spent against them. Part of democracy demands participation. Let me

give you an example where I think these things are examples of how much on the sidelines a lot of people who oppose the issues are. When I did the Net Ban in 1994, we gathered 201,629 signatures of volunteers outside the polling places two years prior to 92'. Everyone knew on day one that one's going to the ballot. Lot of initiatives tend to lull the opponents to sleep, well we worry about it when it gets enough signatures to go to the court, we'll worry about it when it gets pass the court, well we worry about it. . . This was one on day one, it was coming. It's case number one where people stand up and say that doesn't rise to constitutional standards. The Net Ban doesn't belong in the Constitution. Nobody filed a brief at the State Supreme Court against it, no body.

The Pig Amendment, I sat as an observer and watched that. As much ballyhooing that we don't need pigs in the Constitution, nobody bothered to tell the Supreme Court of Florida that. I agree that it's not a part of their review process but I also believe it's one of those issues that the court would have liked to be dignified with a brief and might have found a reason to not put it on the ballot. So what I'm saying is that the process is underutilized by opponents right now, and if people would simple get off the sidelines and start to slug it out a little bit, the process might not be the problem, as big a problem as we think it is. Let me, I'm going to talk about a solution that I think can make that happen. Part of the problem is that it is difficult for stake holders to be able to sort out which ones are serious, which ones are just one of those kitchen table amendments that maybe we should worry about or maybe we shouldn't. So here's the suggestion I have that addresses what I think is the very legitimate concern there and that is the giant disconnect that exist between the initiative process on one hand and the legislative process on the other. I believe that if we could bridge that gap, there are a lot that would say that it is not in my self interest to suggest this, but here is what I would suggest: and that is issues like super majorities are making it harder to get to the ballot or this or that or the other are not the way to go. Simply take the existing Constitutional initiative and make it an indirect initiative as opposed to a direct initiative. Here's how it'd work in my mind's eye; is this, citizen group same 8% needed for ballot placement would start a petition drive. They would need to gather, I differ with what Mr. Simon presented, you have to have it done by before that last legislative session, because if they're done then there's no room for negotiation, there's no leverage for negotiation if they're done, they're going to go to the ballot. Do this, make it an indirect process, say that before the last legislature before the election, so the legislative session, the even year, such as this year, you'll have to have at least half, 4% or 5% of those 8% done. That proposal then goes to the legislature and is introduced at the legislature, at the will of the legislature either as a joint resolution or as a bill, for consideration in both houses, initiative bill or initiative joint resolution one. Legislature has its normal prerogatives it can either pass it as it's presented, it can debate it, amendment, pass it some amended form, or it could vote it down or simply choose not to act. But leaving the citizen group in the driver's seat to be able to say, we're satisfied or we're not satisfied with what came out of the legislative session and move on. Here is what I think happens.

Number one, it won't waste your time with a bunch of proposals that aren't serious. Because proposals either get mountains of signatures or they don't. We're talking about getting 3 or 4 hundred thousand signatures before they can come here. So it wouldn't waste your time with a lot of things that aren't, that don't have a public following anyway.

Here are some of the benefits: Number one, one of the benefits Mr. Simon talked about it forces groups to start early, giving plenty of notice to everyone that, hey, this is out there and this is serious. The writing is on the wall.

Number two, it gets all stake holders fully engaged. It essentially set up non binding arbitration at the legislature on issues that are very, very serious.

Number three, it sets up a statutory option without setting up a statutory initiative. I'd love to see a statutory initiative. I think it would do, my senses though that there's not the sentiment of the legislature to go that direction. I could be wrong, but I'd love that. But this sets up a statutory alternative without having to create a statutory initiative. It'll reduce the number of issues going on the ballot. I promise you that if you give the petitioning group 70% of what they want in legislative solution, 70% of they're money is going to go away. Here's the thing, and this doesn't happen right now, and it's shocking to me. When we went and got all those signatures on Election Day two years before the Net Ban vote, I went to sleep that night worried that I was going to lose a client because somebody would be real smart and call up my clients and say hey, let's make a deal here. It just didn't happen. Two legislative sessions came and went and there was never a discussion of a compromise, because everybody was sort of in their bunkers. This would force that discussion for compromise. It respects the rights of voters, respects the majority rule standard that I think most people in America are very content with and that has served Florida well, establishes a venue for compromise and most importantly might actually pass. Florida is not the first state where a lot of people have woken up in the Capitol city and said you know this process doesn't always serve us and we ought to figure out how to do this. And the states invariably Colorado most notably, there have been several attempts even marginal attempts to reign in the process. And voters I promise you as the home stretch comes, smell it out, that less power for them is more power for someone else and they are against it. So this is an idea that I think might actually pass.

The other thing I would like to talk about is separate from this, and that is, the courts. Something needs to be looked at with regard to the court review. The review process that exists for the court was created by the legislature in the mid 80' and rightly so, because what was happening was that citizen groups were gathering all the signatures they needed and to have the court shut them down. So these groups went to the legislature can you help us please? We need an early high sign yea or nay does this meet constitutional muster to go to the ballot? So the process was created, and in the first few cycles it worked great. In 1992, when I did Term Limits, we were able to work very aggressively with paid petitions to get that first 50,000 signatures so we could get the first 37,000 net val??signatures to go to the court. We turned off the paid signatures went to our volunteers and pushed them hard and waited for the court approval before we started paid signatures again and finished the drive. You can't do that today because the courts institutional memory is gone as to why that process exist. Today petitioning groups more or less have to ignore that processing and continue on. So the idea of the court being required to act on it by date certain, within a certain number of days of receiving it, is a good idea. I would also consider taking the Attorney General out of that loop. The first part of the loop is 30 days the Attorney General has to review it. The history on it has been, and no reflection on the Attorney General, but the court has as often sort of sided with them as not with them so it has not been as meaningful review, I think as had been

originally anticipated in the legislation. Finally what I would like to say is this, is the ultimate piece of that 58 thousand word document in the Florida Constitution is Article 1 Section 1 and it says "all political power is inherit in the people" and I think having a viable initiative process is the one guarantee that we have to make sure that, that is always indeed the case. I thank you Mr. Chairman, and Senators for your time.

Sen. Smith: Sen. Webster. I have two more speakers, so let's try to hold our questions to about five minutes if we could.

Sen. Webster: Ok. Thank you Mr. Chairman. I'll ask a quick one. I May have missed it john, but did you have a , was your proposal, indirect proposal, was there a stopper or was it just a review by the people who was proposing it that if they liked what the legislature did they would quit, or was there a stopper in it?

Mr. Sowinski: What it was, the way my proposal would be is that the petitioning group would remain in the driver's seat. I think that's the one thing that gives them leverage in the legislative process, is that they remain in the driver's seat. My sense is Senator, is that if a meaningful compromise is struck, that most of my clients who've been on the yes side would gleefully save the money that's required to go the rest of the distance and live under a compromise arrangement. Not everyone, but I would bet that most of the time. Particularly groups that are raising money because you have multiple donors, multiple supporters, parts of the coalitions might say yeah I like that and then they're kind of out if the legislature gives them 60, 70, 80% of what they were looking for to begin with and I think by the way they would be pleased if it were . . cause here's my view, there are many issues that go to the initiative process not because the legislature is really dead set against them, but I think back to the Net Ban, the Net Ban was an issue that in my view, the legislature just didn't like to deal with. It brought people out, emotional people, over an issue that a slice of Florida really cared deeply about and to have it dispensed with one way or the other was good riddance, I think. I could be wrong but that was always my view of it. So I would not think that there would be the concern that the next year the legislature is going to turn around and undo whatever they did by statute the year before. So, that's my senses that the . . to answer your question is that the petitioning group would remain in the driver's seat.

Sen. Smith: Sen. Constantine.

Sen. Constantine: Thank you, very quickly. John I think that your presentation and specifically your recommendations have some merit. But let me give you a scenario that is one of your clients, that I disagree and say that although I think that you're correct that the petitioner should stay in control, there has got to be a little bit more of a, ok if we can get this done, let's get it done and not continue on. This is a reflection, when we were doing the Anti-smoking in restaurants and work place, we went ahead and did a 30% reduction, we went from 55% to 35% in restaurants with an agreement that in two years they wouldn't do anything, the health related groups. After those two years, they started the initiative. I brought both sides together during the interim knowing that we ere going to have a Constitutional Amendment knowing that they had 65 minimum percent in a poll, 75 if they didn't include the bars and that's why they didn't include the bars, brought them together, we came up with an agreement. The restaurants were willing to go to "0" with some things concerning outside smoking, and things like that. The work place was willing to go to "0" in fact they liked that idea obviously, for maintenance and everything. The health related groups, when their lobbyist went back to them, said "no".

The reason they said no was because they thought, number one, it would be a fund raising opportunity throughout the U.S. to say we're going to get the fourth largest state in the nation in the Constitution, and secondly, it was the Constitution. They didn't want to do it in statute they wanted to do it in Constitution even though it may not belong there. If you keep the petitioner in control in your scenario that would continue to happen, groups would want, special interest groups would want, knowing that if they have the polling, the strength of the Constitution and the ability to put it over there and as a fund raising tool throughout the United States. What do you say to that?

Mr. Sowinski: Seventy one percent.

Sen. Constantine: I'm not saying that it was right or wrong. I'm just simply saying, that that's exactly right. They knew they could do it whether or not it belonged in the Constitution wasn't the question, the question was they wanted to have a fund raising opportunity and they also knew that they could win. Even if we did it, whatever we did, they would still want to put it from a statute into a constitutional.

Mr. Sowinski: There are always exceptions to the rule, number one. Number two, it was not a fund raising opportunity it was a net expenditure directly from the health related groups. Not to be specific to that because I wasn't a party to the negotiations, but was there a silver bullet that fixes every situation all the time? Absolutely not, if that is what anybody is in search of on this issue then we're in for a lot more long meetings, because it doesn't exist. But my sense is Senator, that 90% of the time that there are compromises possible.

Sen. Smith: Sen. Campbell for a question.

Sen. Campbell: One question John. If I retained you to repeal the Bill of Rights, the State of Florida, think it would pass?

Mr. Sowinski: No.

Sen. Campbell: You don't?

Mr. Sowinski: No.

Sen. Campbell: Have you seen studies that would indicate that many people are against many of the provisions of the Bill of Rights and that's one of the problems I have of the whole initiative process. I'm getting a feeling that your opinion is that the constitution is really not a meaningful document, at least the Florida Constitution cause we have so much garbage in it right now, so let's just fill it up . .and. .

Mr. Sowinski: What I'm suggesting Senator are a couple of things. One that we not envision, if we envision any amendment to the Florida Constitution, being a standard that rises to the Bill of Rights type, that we all agree we'd be comfortable with in the Federal Constitution, then we'd have to rewrite a big part of our existing Constitution as well, that there are a lot of issues but they are not nearly by initiative but by the Legislature and by he Revision Commission, such that don't rise to that level. What I'm suggesting, an idea that I've put forward which arguably is not good for my bottom line, is that we create a vehicle for dialogue with the Legislature to where issues that might better be taken up as legislation have an opportunity to do that and issues where that's not possible can continue on basically. And I would not be opposed to a statutory initiative process, I just feel that there is a great deal of inertia against that idea and it does open up some other concerns, public policy concerns that I think or fair concerns. So I feel like what I've suggested again, there is no silver bullet out there but let's not mistake what the

problems or and what they are not. Let's have a solution that is proportion to the issues that are at hand.

Sen. Smith: Sen. Dockery.

Sen. Dockery: Thank you Mr. Chairman. John, I appreciated your comments. You are apparently the expert on Constitutional Initiative process. Would you tell me in your opinion, there's 52 citizen initiatives currently out there and I don't know if you've had an opportunity to look to see how many validated petitions have been signed on each one, but in your opinion, how many have any chance, at this point in time in January 2004 of making it on to the ballot this year?

Mr. Sowinski: This year you've got some groups with multiple petitions. So it's a bit larger. I mean you have perhaps 10 concepts that are being batted around in terms of amendments that have a type of apparatus around them, sophisticated operation that might rise to get there. Of those 10, my guess is that it winnows down over time. I don't think you'll see 10 on Election Day. Last election cycle, I forget how many were filed, close to 40, five of them made it to the ballot. By the way, on the same ballot, there were six of them that were legislatively placed. So even in the high water mark of ballot initiative activity there were still more legislatively placed amendments than there were citizen initiatives placed on the ballot.

Sen. Dockery: Which is part of my point, there are currently 16 legislative initiatives or Joint Resolutions filed, would you says the percentage rate will be a little higher on them getting to the ballot than out of the 50 citizen initiatives?

Mr. Sowinski: I don't know because I don't follow legislature as closely as I probably should.

Sen. Dockery: And one last question, the petitions what has been your experience in terms of petitions gathered that have been submitted to Supervisors of Elections? Have those been timely reviewed by Supervisors of Elections, or are there hundreds of thousands petitions sitting across the state that are being ignored.

Mr. Sowinski: That's an excellent question. And that is that, there are different types of petitions for different things. Supervisors of Elections have to scrutinize signatures on ballot initiatives, every single signature. There's no random verification provided. Candidate signatures that they also must verify, are required to be acted upon within 30 days. There is no similar requirement for acting upon initiatives and what we see across the state some supervisors or extraordinarily conscientious and deal with them on a very timely basis, and not a systematical basis all of them, bust a timely basis, and there are others where we might have 20, 30,40 thousand signatures sitting in an office none of which have been verified two months before the deadline. And that creates a problem because the petitioning group then starts thinking do I needs to go get 30 thousands more signatures in another part of the state or are they going to come through for us or not? So that is a fair concern along with looking at the court review there might be some consideration there as well.

Sen. Smith: Thank you so much. I would remind you, we're going to be in Orlando on January 14th at the Orlando City Commission Chambers. You might wish to attend or have others in your area who have similar views wish to attend and help us with that conversation.

Mr. Sowinski: Super. Thank you Mr. Chairman.

Testimony by:
Wade Hopping (01/05/04

THE INITIATIVE PETITION PROCESS

WHAT IS THE EVIL SOUGHT TO BE REMEDIED AND HOW WILL YOUR PROPOSALS SOLVE FLORIDA'S PROBLEMS???

1. **Florida Observations that may be applicable to proposed changes in the Initiative Process**

   a. Florida Voter habits

      1. Floridians tend to vote the entire ticket - there is little drop off as you go down the ballot.

      2. Floridians tend to vote yes on issues

         - 16 of 21 (76%) of the citizen initiatives since 1976 were approved
         - Exceed other state approvals by half

   b. Florida's Supreme Court Review of initiative petitions is limited. It focuses primarily on two issues: Accuracy of the Summary and the Single Subject Requirement.

   c. The initiative process in the constitution has been ruled to be "self-executing" so there is a serious limit as to what the Legislature can do to

fix the process without changing the constitution.

(See State ex the Citizens Proposition for Tax Relief v. Firestone 386 So. 2d 561 (1980) and Gray v. Bryant 125 So. 2d 846 (1960)) Nevertheless, legislation for protection of "Ballot Integrity" is permissible (Smith v Coalition to Reduce Class Size 827 So 2d 959 (Fla 2002)

d. Floridians are very creative in what they propose to put into their constitution. Looking forward to November 2004, the issues we vote on could include:

- Review of Sales Tax Exemptions (2003)
- Hometown Democracy (2003) **
- Violations of Oath of Office (2003) **
- Abused nursing home resident protection (2003)
- Physician liability (2003)
- Medical malpractice protection (2003)
- Lawyer fee limitations
- Reapportionment proposal (2003)
- Casino gambling
- Anti-Billboard (2002)
- Equal employment opportunities (2003)
- A $6.15 minimum wage tied to the CPI (2003)
- Partial repeal of class size amendment (2003)
- Right to sexual intimacy (1998)

- Primary enforcement of seat belt law (2003)
- Legalizing marijuana
- Etc, Etc, Ect.

** Equals a significant number of signatures reported as of 12/1/03.

2. Constitutional Issues

a. Constitutional Initiative Process Problems Include:

1. It undermines our representative form of government.

2. It empowers "special interest" groups because of low voter turn out.

3. It permanently clutters our fundamental charter with minutia and details.

4. It reduces debate on complex issues to 30-second sound bites.

5. It allows well financed special interest to buy their way onto the ballot by using paid signature gatherers (an emerging cottage industry).

6. New computer technologies may make it even easier in the future to place pet ideas into our constitution (Howard Dean's sophisticated presidential campaign may give us a glimpse of future initiative campaigns).

b. Commonly Mentioned Constitutional Initiative Remedies

1. Increase the percent of vote required for constitutional initiative passage to:

60% or

66 2/3%

2. Change the process for placing an issue on the ballot:

a. Increased signature requirements and timing changes

b. Alter the timing of when the signatures must be gathered, verified and filed.

c. Other signature and verification process changes including number of signatures required and number of districts where signatures must be gathered.

3. Increase the Supreme Court Review Criteria

3. Creating A New Statutory Initiative Petition Process For Florida *

Some argue that adding a statutory initiative petition process, coupled with increasing the difficulty for adoption of constitutional initiatives, is the only voter acceptable solution to our current dilemma.

a. Creating a Statutory Initiative Petition Process is a **bad idea** because:

1. It will undermine our Representative form of government. It shifts the policy making burden from the Legislature to the voters.

2. It will foster badly drafted legislation leading to a host of "unintended consequences."

3. It will foster deceptively drafted legislation.

4. It undermines the accountability of both the Governor (no veto allowed) and the Legislature (often prevents future changes to voter endorsed laws).

5. It prevents drafting and policy errors from being corrected by Revisor or Glitch bills.

6. It will expand the impact on public policy of "paid signature gathering" and other "professional" advocacy groups.

7. It will create "voter confusion".

8. It will allow a small minority of citizens to set state fiscal and other policy. Less than a majority of citizens vote in any election and only half of those who do vote will set the state's policies.

9. It will subject complex issues affecting important public policy to being adopted without meaningful public hearings or debate.

10. It will lead Floridians to "sound bite" decision making, thus "Californiacating" our statutes.

When in doubt, keep it out.

* See the attached list of initiative states

Prepare By:

Wade L. Hopping

Hopping Green & Sams

12/30/03

Submitted by:
Wade Hopping 01/05/04

THE IMPACT OF CREATING LEGISLATION BY THE INITIATIVE PETITION PROCESS

The California Experience - A Case Study in Voter Confusion

A. The California Legislative Petition Process

1. Proponents can write their own statutory text or ask the "Legislative Counsel" to draft it.

2. Proponents must submit a draft of the statutory Text to the California Attorney General.

   - Filing fee $200
   - The Attorney General prepares the "official" Title and Summary. No petition may be circulated prior to the "official" summary preparation date.

3. When the "Official Title and Summary" is completed, a copy is sent to the Senate, House ("Assembly") and Secretary of State. The Legislature may conduct hearings, but cannot amend the statutory initiative language.

4. The Secretary of State prepares a "Calendar of Filing Deadlines."
   See attached November 5, 2002, General Election deadline for verification by Random Sample (Attachment A)

B. California Statutory Initiative Facts

1. Petition signatures must be gathered within 150 days of Petitioners obtaining an Official Title and Summary from the Attorney General.

2. Signatures needed: Five percent (5%) of total votes cast for Governor in last election. As of November 2002, this number was 419,260.

3. Signature verification deadline - 131 days before the election.

4. There is a Signature Withdrawal Process.

5. There is a Raw Count review process - if the Raw Count equals one hundred percent (100%) random sampling may be used. See attached explanation of the California "Initiative Signature Verification Process" (Attachment B).

6. Statutory propositions are ordinarily submitted for voter approval at general or primary elections.

7. All California voters are mailed an "Official Voter Information Guide" prior to the

election.

8. Currently the Voter Information Guide contains four (4) types of information on statutory initiative Propositions:

- Ballot measure Official Title and Summary (summarizes proposal and states what a "yes" and what a "no" vote means)
- Analysis by the Legislative Analyst (includes fiscal impact information)
- Arguments For and Against by Proponents and Opponents
- The complete Text of the proposed statute

For a brief official explanation of The California Initiative Process see Attachment C, which was prepared by the California Secretary of State's office.

9. Unless the initiative statute provides otherwise, once it is approved by the voters, it may not be amended or repealed by the Legislature unless the changes are approved by the voters.

10. California's Initiative History: Between 1912 and 2002 there were 1,187 California initiatives (both constitutional and statutory) circulated, of which 290 were placed on the Ballot. Of the 290 initiatives on the ballot:

99 initiatives passed by 50% of the vote or more
50 initiatives passed by 60% of the vote or more
20 initiatives passed by 66% of the vote or more

Since 2000, 7 of the 15 statutory initiatives passed. The highest vote for passage was **62.1%.**

Statutory Propositions with more than 60% for passage were:

Prop 21	Juvenile Crime
Prop 22	Definition of marriage
Prop 36	Drug Treatment

Statutory Propositions between 50% and 60% for passage were:

Prop 35	Public Works
Prop 39	School Facilities
Prop 49	After School Programs
Prop 50	Water Quality, etc.

C. Examining Recent California Statutory Initiatives

1. October 7, 2003 Election - No statutory initiatives on the Ballot

2. November 5, 2002, California General Election - The "Official Voter Information Guide" was 103 pages long. It contained 4 initiative statutes (Propositions 49-52).

Information on Propositions 49-52 was located in three separate places in the guide:

a. Voters Guide Coverage

1. Statutory "Ballot Measure Summaries" (4 pages in length)

2. "Analysis by the Legislative Analyst" and arguments Pro and Con by participants (18 pages in length)

3. Actual Text of proposed laws Propositions 49-52 appear on pages 73-101, (28 pages in length)

NOTE: In the November 2002 election materials, each Voters Guide statutory text page has two columns of words for an average of 1,423 words per page.

b. Statutory Propositions 49-52 Issues

- Proposition 49 - After School Education and Safety Program Act of 2002 (2-1/2 pages; approximately **3,557** words) Amends existing law. **Passed**

- Proposition 50 - Water Security, Clean Drinking Water, Coastal and Beach Protection Act (4 pages; 11 major sections including 9 definitions; approximately **5,692** words) Creates new law by adding 51 new sections to the California laws. **Passed.**

- Proposition 51 - Transportation Funding (18 pages; approximately **25,614** words) Amends California Transportation Code. **Failed**

- Proposition 52 - Election Day Voter Registration Act of 2002 (3-1/2 pages; approximately **4,980** words) Amends Election Code. **Failed**

3. General Election November2000 - Voters Guide was only 74 pages. The electorate faced choices on one initiative statute and two initiative constitutional amendments coupled with their companion implementing statutes:

- Proposition 35 - Public Works Projects: Use of Private Contractors for Engineering and Architectural Services (1-1/4 pages of text; initiative constitutional amendment and implementing statute). Statutory language amends the Government Code. **Passed**

- Proposition 36 - Drugs: Probation and Treatment Rather Than Incarceration

(4 pages of text; amends existing law) Amends the Health and Safety Code and the Penal Code. **Passed**

- Proposition 39 - Authorizes Bonds for School Repair if Approved by a 55% Local Vote (2 pages; initiative constitutional amendment and implementing statute) Amends the Education Code. **Passed**

4. March 7, 2000 Primary Election - Voters Guide was 147 pages long. The verbatim statutory text language starts on page 119 and continues through page 146.

   - Proposition 21 - Gang Violence and Juvenile Crime Prevention Act of 1998 (13 pages of text) Amends Penal code and the Welfare and Institutions Code. **Passed**

   - Proposition 22 - Marriage Between Man and Woman Only (5 lines of text) Adds new section to the Family Code. **Passed**

   - Proposition 23 - "None of the Above" Election Reform Act (3-1/2 pages of text) Amends the Election Code. **Failed**

   - Proposition 25 - Amends California Voters Bill of Rights Act (8 pages of text) adds paid petition circulator disclosure requirements. Amends the Election Code. **Failed**

   - Proposition 26 - Amends Smaller Classes Act (1-1/4 pages of text) Amends the California Constitution and the Education Code. **Failed**

   - Proposition 27 - Amends Congressional Term Limits Declaration Act of 1998 (1 page of text) Adds a section to the Elections Code. **Failed**

   - Proposition 28 - Amends Act that Imposed 135% Increase in the Tax on Tobacco Products (1 page of text) Amends the Health and Safety Code and the Revenue and Tax Code. **Failed**

   - Proposition 29 - Ratifying Tribal State Gaming Contracts (1 page of text) Amends the Government Code. **Failed**

5. An Outsiders Observations:

   The California Voters Guide provides too much information which can lead to "voter confusion."

   a. The Official Title and Summary often overlook key details.

   b. The Analysis by the Legislative Analyst is very professional but it does not

directly confront controversial issue like the significance in Prop 50 of the fact that more than one half of the bond proceeds will go to Coastal Protection ($950 million) and the CALFED Bay-Delta Program ($825 million) and that very little goes for water supply reservoirs or dams.

c. Even the wisest voters can be fooled by statutory proposals that range from 1000's of words to 25,000 words.

d. Because the statutory text amendatory language is in "italic" type, it is very difficult to follow the statutory changes being made.

e. There is so much information, voters are driven to rely on sound bites and summaries by third parties.

Prepare by:

Wade L. Hopping
Hopping Green & Sams
123 South Calhoun Street
Tallahassee, FL 32301
December 30, 2003

Submitted by:
Wade Hopping 01/05/04

Appendix A

NOVEMBER 5, 2002
GENERAL ELECTION
BY RANDOM SAMPLE

September 27, 2001 - Suggested last day for proponent(s) to submit proposed measure to the Attorney General and request title and summary.

November 19, 2001 (15 days) (25 w. days) - Attorney General prepares and issues title and summary and proponent(s) may begin circulation of the petition (includes time allotted for fiscal analysis).

April 18, 2002 (150 days) - Last day for proponent(s) to file the petition with county elections officials.

April 30, 2002 (8 w. days) - Last day for county elections officials to complete raw count totals and certify raw numbers to the Secretary of State.

May 9, 2002 (9 days) - Last day for Secretary of State to receive raw count total from each county elections official, determine whether initiative petitions meet the minimum signature requirement, generate random sample, and notify each county elections official of results.

June 21, 2002 (30 w. days) - Last day for county elections officials to verify and certify results of the random sampling of signatures to the Secretary of State.

June 27, 2002 (4 days) - Last day for Secretary of State to determine whether the initiative measure qualifies for the ballot or 100% signature verification is necessary. (E-131)

Note: days = calendar days w. days = working days

ATTACHMENT A

Submitted by:
Wade Hopping 01/05/04

INITIATIVE SIGNATURE VERIFICATION PROCESS

Once the Attorney General has issued a title and summary, an initiative proponent has 150 days to circulate his or her petition within all counties of California.

At the end of the 150-day circulation period for an initiative, each petition section must be filed with the county elections office in the county where it was circulated. Only the signatures of voters who are registered in the county where the initiative petition was circulated are counted as valid. Each county has eight working days to conduct and report a raw count of signatures on the petition. If the amount of petition signatures accumulated in all counties does not reach the numeric threshold, the initiative fails.

If the number of signatures reported by each county reaches the requisite number of signatures, the Secretary of State directs each county to conduct a random sample of all gathered petition signatures.

Prior to 1976, the signature verification process consisted of a manual comparison between each signature on the initiative petition and the signature as it appeared on the individual's voter registration card. Currently, the process of signature verification is done by a computer generated random sample. For each county, a computer program produces a list of random numbers that correspond with the signature numbers on a petition. Within 30 working days, each county must check and verify a random sample of at least 500 or 3% of all petition signatures, whichever is greater, and report the number to the Secretary of State. If the projected validity of all randomly verified petition signatures is 110% of the original amount required, the initiative qualifies for the ballot without further verification. However, if the projected validity of signatures gathered falls between 95% and 110%, each signature must be individually verified. If the total falls below 95%, the initiative fails.

ATTachment B

Submitted by:
Wade Hopping 01/05/04

THE CALIFORNIA INITIATIVE

On October 10, 1911, by way of a special election called by Governor Hiram Johnson, the initiative process was established in California by a margin of 168,744 to 52,093 votes cast for Senate Constitutional Amendment (SCA) 22. South Dakota was the first state in the nation to establish the initiative process (1898). Utah, Oregon, Montana, Oklahoma, Missouri, Michigan, Arkansas, and Colorado followed thereafter, preceding California, respectively. The contents of the 1911 constitutional amendment, and all other issues relating to voting, initiatives, referendum and recall, can be found under Article II of the California Constitution.

Prior to 1911, citizens in California voted only on measures and acts that were placed on the ballot by the Legislature. The approval of the initiative process in 1911 provided two methods by which a citizen could place a measure on the ballot.

The first method, the direct initiative process, allows a citizen the option to bypass the Legislature and go straight to the public in an effort to place an issue of interest on the ballot for voter approval or rejection. The process adopted in 1911, which is still in use today, requires the proponent to obtain an official title and summary of the proposed initiative from the Attorney General. Upon obtaining a title and summary, the proponent of an initiative is permitted to circulate the petition for 150 days. During the course of the 150 days, the proponent must gather a requisite number of signatures of registered voters who support the initiative. If a citizen circulates an initiative petition with the intention to revise a California statute, the number of signatures gathered must equal 5% of all the votes cast for the office of Governor in the last gubernatorial election. If the initiative proposes an amendment to the California Constitution, the number of signatures gathered must equal 8% of all votes cast for the office of Governor in the last gubernatorial election. Once the proponent of an initiative gathers the requisite number of signatures during the 150-day circulation period, the petition must then enter and pass a random or a full signature verification process, or both, before it is finally placed on the ballot to be accepted or rejected by voters.

The second method, the indirect initiative process, allowed a citizen to appeal directly to the Legislature in order to place a measure on the ballot. However, in 1965, the Constitution Revision Commission recommended that the indirect initiative process be revoked due to its lack of use. In 1966, citizens approved Proposition 1A, which accordingly revoked the indirect initiative process. When in use, in order for an indirect initiative to be considered by the Legislature, the initiative petition had to be signed by a number of registered voters equal to 5% of all votes cast for the office of Governor at the last gubernatorial election. The signed petition was then submitted to the Secretary of State who subsequently transmitted the petition to the Legislature. The Legislature then had 40 days to enact or reject the initiative, or to amend it. In the event that the Legislature enacted the initiative as it was written, it became law. If the Legislature failed to enact, reject or amend the initiative within 40 days, the Secretary of State then placed it on the ballot for voter approval or rejection at the next election.

Unless the text of an initiative measure states otherwise, an approved initiative goes into effect the day after the election and is not subject to a Governor's veto, nor may it be amended or repealed by the Legislature without a vote of approval of the electors. Should two conflicting measures be approved by voters in a given election, the measure receiving the largest affirmative vote will prevail.

Attachment C

THE JAMES MADISON INSTITUTE
A FOUNDATION FOR FLORIDA'S FUTURE

Backgrounder

(850) 386-3131 P.O. Box 37460, Tallahassee, FL 32315

Florida's Constitutional Ballot Initiatives: Is This Any Way To Run a Government?

by
Douglas S. Bailey
Executive Vice President, The Windsor Group

Policy Report #39
May 2003

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The James Madison Institute
2017 Delta Blvd., Suite 102
P.O. Box 37460
Tallahassee, FL 32315
Voice (850) 386-3131
Fax (850) 386-1807
E-mail jmi@jamesmadison.org
Website www.jamesmadison.org

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Executive Summary

- Florida's citizen initiative process often sacrifices public interest, as well as the sanctity and supremacy of our state's constitution, to special interests and the ever-changing winds of popular opinion. The constitution is the people's document and our access to it should not be impeded. However, it cannot be altered to the point that government does not function properly.

- Floridians have used the popular initiative to amend the constitution 16 times since the inception of the process in 1968. The state constitution should be brief and limited to fundamental rights, free of legislative matters such as marine fishing net bans, the creation of a high-speed rail system, the reduction of class sizes, prohibitions and limitations on taxes, and protection for pregnant pigs.

- There is too much money and special-interest group influence in the state's initiative process. Voters are often uninformed and, as a result, unable to make responsible decisions at the voting booth. Minority rights are at risk, and harmful fiscal and social implications are often left unexamined.

- Amending the constitution to address the problems with the current initiative process will be a politically challenging endeavor. Floridians indicate no willingness to ratify measures sponsored by the legislature that would further restrict citizens' access to the constitution. Reforms proposed by the legislature that are aimed at increasing petition requirements or at raising the bar for ratification will only fuel the claims that elected governments are elite, self-serving, and undemocratic assemblies.

- Initiative reform aimed at creating a more responsible process and protecting the integrity and supremacy of the constitution, while maintaining citizens' access to the constitution, may seem more sensible to voters.

- The Florida legislature should consider proposing a constitutional amendment requiring a popular initiative to pass two subsequent general elections before becoming enacted. If an amendment is approved once, the Division of Elections would publish and resubmit the question to the voters at the next succeeding general election in the same manner in which the question was originally submitted.

- The citizens of Nevada overwhelmingly adopted a two-election initiative process in 1958. Since then, the Nevada Constitution has been amended through the popular initiative process eight times. In three separate cases, a ballot initiative passed its first general election and then was defeated two years later during its second general election.

- A two-election initiative process in Florida would allow for a more deliberative and thoughtful analysis of the fiscal and social implications of a proposed constitutional amendment. The voters would not be forced to make policy decisions based on sound bites, interest group or elite endorsements, and slick 30-second commercials. Instead, the interim period between the two elections would allow for legislative preemption, agency implementation and fiscal analysis, and thoughtful debate and reflection. As their potential impact becomes apparent, fewer constitutionally irrelevant issues will meet voter approval, thus making the constitution more sacrosanct and more difficult to amend.

- A two-election system would slow the process, thus lessening the influence of high-financed or popular special interest groups, protecting the interest of minority groups, and eliminating the need for hypothetical considerations during debate. As a result, Florida voters would be better prepared and would make more informed decisions on election day.

- While maintaining the people's access to the constitution, a two-election system would address the principles of our nation's founders, who expressed trepidation over the dangers of direct democracy. American Federalists James Madison, John Jay, and Alexander Hamilton recognized that majority rule did not constitute the most meaningful expression of sovereignty. Instead, dangers associated with heat-of-the-moment popular movements would be checked by exhaustive, deliberative, and careful consideration of policy matters by elected individuals. A two-election popular initiative system would help transfer the wisdom of the Founding Fathers to the process for amending the constitution.

I. A Populist Movement

Although the initiative process in Florida is a young and relatively new phenomenon, direct-democratic reform efforts can be traced back in the state's history to the mid-19th century. Populist reform was embodied by Jacksonville attorney Wilkinson Call, who had served as an adjutant general to the Confederate Army during the Civil War, a career decision that kept him from assuming the seat in the U.S. Senate that he won in December of 1865.

As a Populist, Democrat Call employed political rhetoric supporting a more pure form of democracy in the United States. In 1878 he was selected as a member of the Democratic National Executive Committee and was again elected to the Senate in 1879 (when he was allowed to serve); he was subsequently re-elected in 1885 and 1891.[1] Upon his retirement from the Senate in 1897, Call continued to work as a champion for a popular initiative process in Florida, and today is known as Florida's leading initiative and referendum backer of the Progressive Era.[2]

The closest Florida came to establishing a statewide initiative process was in a 1912 Florida Senate bill that was passed just one and a half years after Call's death. The Florida Senate's attempt to institute popular initiatives in the state's constitution met heavy criticism and opposition from both sides of the initiative argument. Populists and Progressives argued, most effectively, that the measure was restrictive and would have rendered nearly impossible any effort to put an initiative on the ballot. The Senate quickly rescinded the bill; 60 years would pass before direct-democracy reform would experience any success in Florida.[3]

II. Florida's Progressive Revolution

During the 1950s and the late 1960s, the Florida legislature deadlocked in repeated attempts to reapportion the state. Florida had already become a modern urban state, but it still had a horse-and-buggy government.[4] The population had reached nearly five million, but legislators were still being selected from large, multimember county-based districts, which limited the voting power of minorities, and were unresponsive to urban needs, specifically in the rapidly developing central and south Florida regions.

The progressive movement continued to pick up momentum as the state's population center shifted and as its traditional rural southern heritage became less important.[5] In an attempt to protect southern values or traditions from those who sought to build a new Florida, rural legislators formed the Pork Chop Gang and took a "blood oath" to stick together, which it fulfilled on all legislation, especially

reapportionment.[6]

The reapportionment battle continued well into the middle 1960s, finally requiring action by the federal government and the federal courts to solve Florida's reapportionment dilemma. By the end of the 1960s, the political stranglehold of north Florida was broken and power shifted to the high-growth population centers of central and south Florida.

Progressive members of the state legislature decided it was time to alter the way Florida's constitution allowed the state to operate. Specific attention was focused on government accountability and citizens' roles in amending the constitution. The stage was set for another attempt to introduce the popular initiative.

The progressive theory of constitutional initiative reform was based on the assumption that legislative gridlock was a result of corruption in government and unresponsiveness of legislators. Contemporary Progressives supported the Federalist ideal of a representative democracy, but they also believed a representative democracy could be held even more accountable if it existed simultaneously with some form of direct democracy. The Populist movement was based on an entrenched confidence in a "pure" form of democracy that would leave citizens less dependent on vulnerable or influential elected representatives.

The trend towards citizen initiatives in the mid to late 1960s in Florida is described by former Governor Reubin Askew to have had elements of both Populist theories and Progressive theories. "Popular initiatives were needed because of our inability to go around the legislative majority and due to the inflexibility of the state's constitution," said Askew. "A citizen initiative would prevent [Florida] from ever getting deadlocked again by a recalcitrant legislature that wouldn't do [its] job."[7]

The Florida legislature worked out the specifics of the popular initiative process in committee and in November of 1966, following a 20-day special session; the initiative amendment was adopted by the legislature and recommended to the Constitutional Revision Commission. According to Askew, the initiative amendment experienced little resistance in the revision commission because it was the result of an exhaustive legislative process. "I don't think it was really hotly debated before the revision commission," he reported.[8]

III. Reform Logic

Direct democracy, as it is embodied in Florida's popular initiative process, is dangerous and irresponsible. It often sacrifices public interest, as well as the sanctity and supremacy of our state's constitution, to the prevailing winds of public

opinion. There is too much money and interest group influence, voters are often uninformed and, as a result, are unable to make informed decisions at the voting booth. Minority rights are at risk, and too often fiscal and social implications go unexamined.

IV. Constitutional Supremacy

The constitution belongs to the people, who should not have their will to alter the document frustrated. However, the state constitution is the heart of the social contract and if it is to work properly, it cannot be altered to the point that government does not function properly.[9]

Constitutions historically are considered timeless documents that should be drafted in such a way as to need little modification. In an advisory opinion to the attorney general, one Florida Supreme Court justice wrote, "Recognizing the sovereignty of the people, I feel compelled to express my view that permanency and supremacy of the state constitution jurisprudence is jeopardized by the most recent proliferation of constitutional amendments."[10] Florida Supreme Court justices are powerless to address the social ramifications of mandating casino gambling, protecting pregnant pigs, class sizes, or smoking policies through the constitution.

Currently Florida is operating under its sixth constitution. The 1968 document has been amended 58 times during the last 34 years. By contrast, the United States Constitution has only been amended 27 times in more than 200 years; 10 of those amendments came in the form of the Bill of Rights in 1791.

There is common agreement among legal scholars that state constitutions should be brief and limited to fundamental rights, avoiding all legislative matters. Treating a subject in a state constitution, as opposed to codifying it in statutory law, places the matter beyond change by most lawmaking processes and at the highest level of legal authority of the state.[11] An overly permissive initiative process limits the ability of the legislature to address, or readdress, topics from year to year based on fluctuations in the state's fiscal status or social barometer.

V. Monetary and Interest Group Influence

Perhaps the most ironic of all reform efforts are those made by groups interested in reducing the influence of money and special interests on the initiative process. The earliest Populist and Progressive movements made the same arguments against money and special interest, only then it was to reduce that influence on the

representative system of government. The proponents of direct democracy argued that, by empowering ordinary citizens to act as election-day legislators, citizens would approve ballot measures and reclaim the right of government by the people.[12] Allowing citizens to make direct policy decisions would break the political stranglehold of the wealthy, well-organized, and influential special interest groups. It has become quite clear during the past century that the process of direct democracy, or more specifically the popular ballot initiative, has been no more immune to the influence of money and special interest than has our representative style of government.[13]

In Florida, the arguments against the influence of special interests or money in the initiative process are even more interesting. The first initiative measure to make it onto a Florida ballot (and perhaps the issue that drove proponents of direct democracy to include an initiative process in the state's 1968 constitution) dealt with absolute and full public financial disclosure by state and county election officials and candidates. The Campaign Finance Reform Initiative came before the state's voters on November 2, 1976.

Former Governor Reubin Askew, author of Florida's Sunshine Amendment, decided to use direct democracy to enact campaign finance reform after years of what he describes as a failure of the state's legislature to act. In line with historical progressive arguments, Askew helped design Florida's initiative process and then used it to circumvent a legislature that he believed was nonresponsive to the public interest.

Askew's efforts in delivering Amendment One to the 1976 ballot were aimed at restoring higher levels of ethical standards in the state's campaign finance processes. The popular governor, through the normal legislative process, was successful in establishing the state's first ethics commission and the gift law requiring disclosure of gifts in excess of $100 made to state lawmakers. And yet Askew was not able to bring about reform in campaign finance disclosure after three legislative sessions, so he turned to the untested initiative process.[14]

Acting as an average "citizen lawmaker," the powerful and respected governor set out to bring about change. "I was not an ordinary citizen," Askew said. "I was the governor, but I want to tell you [gathering signatures and passing an initiative] was an extremely difficult thing to have done."[15] There were no signature gathering/consulting firms available to help, and special interest funds were nonexistent. Amendment One from 1976 may be the only example of Florida's initiative process working the way those who designed it intended it to work.

Florida's first initiative process had been designed to limit financial influence, as had many initiative processes around the United States. In fact, of the 24 states that

permit the initiative process, no state currently limits the campaign contributions to or expenditures of ballot initiative campaigns, even though at one time or another roughly half of them had some sort of regulation limiting ballot campaign financing.[16] In explaining the lack of restrictions limiting campaign expenditures on ballot initiatives, one must only consider the U.S. Supreme Court's unfavorable ruling on such restrictions.

The first case to deal directly with ballot initiative campaign finances was *First National Bank of Boston v. Bellotii, 435 U.S. 765* (1978). In this case, the U.S. Supreme Court invalidated a Massachusetts law that banned corporate expenditures in ballot initiative campaigns. In this decision the Court referred to its prior decision in *Buckley v. Valeo, 424 U.S. 1* (1976), which ruled that campaign contributions and expenditures are a type of free speech and can be regulated only if such regulations support government efforts in halting corruption related to quid pro quos.[17]

Direct democracy via ballot initiative has had an antithetical effect on the U.S. political system with regard to lessening the influence of money and special interest. In fact, by allowing well-financed or well-organized special interests to influence the opinions of voters, governments have removed the only check in the system that existed prior to an initiative process; that is, accountability of those responsible lawmakers come election day. Representative institutions—institutions accountable to the electorate—were designed by the Founding Fathers in such a way as to tame the passions of the moment and for the meticulous consideration of legislation from a variety of perspectives. Who is to be held accountable when well-financed, strategically marketed, political hot-topic initiatives become law?

VI. The Unprepared Voter

In 17th century America, groups of citizens practiced direct democracy by gathering in churches or town halls to vote on ordinances or agenda items. In an ideal world, the direct democracy process in the 21st century, though at a much larger scale, would be similar. Voters would research policy proposals, develop in-depth analyses of their social and fiscal impact, engage in exhaustive discussion and debate, and then turn out on Election Day to register their informed opinions. As the Founding Fathers recognized, however, ours is not an ideal world. Instead, citizens learn much of what they know about ballot measures from bumper stickers, sound bites, interest group or elite endorsements, and slick 30-second advertisements.[18]

The term "unprepared voter" does not suggest that citizen-voters lack

intelligence. Arthur Lupia offers the following definition of voter competence when considering the preparedness of American voters: "A voter's choice is competent if it is the same choice that she would make given the most accurate available information about the consequences. Would she cast the same vote if fully informed about its consequences?"[19] If the answer to Lupia's question is yes, then the voter is considered competent or prepared.

The preparedness of Florida voters has endured testing with several complex and confusing ballot initiatives in the 30 years the process has existed in the state. This contention will be considered at greater length later with the consideration of the fiscal and social responsibility of direct democracy, but in measuring the competence levels of citizen voters in Florida, one must only look back three years.

In November 2000, Florida voters were asked to consider the adoption of a constitutional amendment regarding the development of a statewide high-speed monorail system. To reduce traffic and increase travel alternatives, the amendment required that the state develop a high-speed monorail, fixed guide way, or magnetic levitation system linking Florida's five largest urban areas while providing for access to existing air and ground transportation facilities and services. The state and/or a state-authorized private entity would implement financing, acquire right-of-way, and design, construct, and operate the system. Finally, the amendment required that construction on the new rail system begin by November 1, 2003.

Nearly 5.5 million of Florida's 8.7 million registered voters turned out to vote on the High Speed Rail Initiative. Fifty-three percent (2.9 million) voted in favor of the constitutional amendment.[20] Eighteen percent of Florida's 16 million residents turned out in November of 2000 and indicated based on "low-level information sources," or on the opinions of "elite endorsements," that a high-speed rail mandated by a constitutional amendment costing taxpayers billions was a good idea.

Today, six months before the constitutionally mandated deadline for the rail construction to begin, Florida's economy is down and the state cannot afford the project. In an October 13, 2000, press release from Associated Industries of Florida, Chief Executive Officer Jon L. Shebel is quoted as asking the questions, "What if the inevitable occurs and the November 1, 2003, deadline is missed? Will someone sue the state for violating the constitution? What if lawmakers can't find the money? Will the Florida Supreme Court have to enter the construction business to fulfill the state's constitutional duties?"[21] These are all excellent questions, obviously not considered by Florida's unprepared citizen-voters from the 2000 election.

VII. Minority Rights and Constitutional Initiatives

A third common criticism considered by initiative reformers is that the initiative process exposes minorities to severe rights violations. (In this section of the paper, minorities refers to any group of less than a majority of the population.) As discussed in the opening sections, the very definition of direct democracy describes a process of lawmaking by majority rule. A majority interest can propose, qualify, and pass legislation without any regard to the interests, preferences, or demands of others.[22] Gerber defines "others" as either those important groups in society with substantial but not majority numbers, or those that consist of at-risk minority populations.

America's Founders were especially cognizant of the risks direct democracy posed to minority groups, and they spoke and wrote at great length about the matter. James Madison reminded Americans about the dangers of a large pure-democracy and about the influence of the factional impulse. Madison warned of the potential for tyranny of the majority and made a case for a republican form of government designed to protect the interests and rights of minorities. "By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community," Madison wrote in *The Federalist Papers*.[23] Even Thomas Jefferson, who supported more participatory forms of government, whose views aligned with the populists or antifederalist movement, never included in his proposals such large-scale application of direct legislation.

Today, more than ever before, statewide ballot initiatives are used to consider social and moral issues. During the past five years, initiatives have included topics such as immigration reform, affirmative action, gay and lesbian rights, and bilingual education. Because direct initiative processes involve decision making by simple majority, affected minorities have limited resources for protecting their interests from hostile majorities; their only options are to try to defeat the initiative or, if unsuccessful, to take their case to court.[24]

In a representative government, minority groups are provided numerous opportunities to participate in deciding what policy prescriptions will be considered and how bills will be drafted. Also, minorities have numerous veto points at which they can protect their interests by blocking detrimental legislation.[25] Most importantly, in a representative system, minority leaders or legislators will have several opportunities to explain their interests to the constituents and to the media outlets in an attempt to influence public opinion. Reform efforts across the nation

have taken aim at protecting minority rights in the direct democracy process. Mandatory public hearings have been proposed, as have ideas of minority participation in initiative drafting or legal review.

VIII. Fiscal and Social Responsibility

Opponents of the initiative process are finding evidence in case studies and historical data to indicate popular initiatives are often fiscally irresponsible. With constitutional amendments either requiring or prohibiting specific policy programs, citizen lawmakers only serve to tie the hands of future government leaders or groups of citizens.

Use of initiative process to benefit groups with narrow interests only adds to the idea that initiative procedures promote social irresponsibility. Narrow-issue initiatives are those that seek to protect material rewards for select groups in society.[26] Restricting a worker's right to strike, riverboat casinos, liquor prohibitions, industry-specific environmental regulations, tobacco taxes, and bullet trains are all examples of narrow-issue initiatives that stand to serve a special interest at the expense of the taxpayer or the state budget. Who is to be held accountable when the citizens affect public policy, and how can future governments respond to poor decisions?

There are several examples throughout the United States where direct-initiative decisions have had a negative impact on states' financial operations. Initiatives restricting state governments' policy options make sense to voters one year, but these initiatives could lead to the inability of a legislature to react to specific problems in future years. Amending the constitution to address specific policy issues erodes an elected government's ability to react to changing social and economic conditions.

IX. Initiative Reform Recommendation

It has been suggested that a direct-democracy process is one that serves to undermine the institution of representative government established more than 200 years ago by our Founding Fathers. The public interest is much better served by fair procedures that permit contentious matters to be hashed out face-to-face rather than by the imposition of the results of a plebiscite. That said, the direct initiative process exists in Florida and it is not going to go away. Since the inception of the citizen initiative in South Dakota more than 104 years ago, no state has ever removed such a process from its constitution.

Initiative reform movements have existed almost as long as the initiative process itself. Initiative proponents, however, have argued that reformers aim to make state processes overwhelmingly difficult in an attempt to discourage citizen initiative groups. Reform of initiative process by the erection of impossible barriers—especially by the legislature—only adds fuel to the populists' and progressives' claims that elected governments in America are elite, self-serving, and undemocratic assemblies responsive only to high-financed and well-organized special interests.

These opponents of initiative reform would only have to look to the 2003 Florida legislature to make their point (see Table 1). By the time this year's legislators finish the regular session, no fewer than 14 resolutions and bills outlining numerous reform concepts will have been considered.

Table 1

SJR 318 – Statutory Initiative	HJR 345 – Ratification Threshold
SJR 464 – Fiscal Impact Statements	HJR 437 – Fiscal & Funding Implications
SJR 1172 – Ratification Threshold	HJR 1097 – Ratification Threshold
SB 1322 – Judicial Requirements	HJR 1109 – Ratification Threshold
SJR 1506 – Statutory Initiative	HJR 1119 – Statutory Initiative
SJR 1672 – Ratification Requirements	HB 1521 – Initiative Dates
SB 2644 – Petition Dates	PCB 11-03 – Ratification & Petition Threshold

Proposals that would change the initiative process will require a constitutional amendment approved by the electorate. Amending the constitution to alter the initiative process could appear to the voters as an attempt to make the process more difficult, thereby limiting citizen access to direct democracy. This could explain why attempts to change the process in the past by increasing qualifying signature requirements, extending deadlines, or by requiring supermajority approval consistently fail either in the state legislatures or on the ballots. Initiative reform aimed at creating a more responsible process and at protecting the integrity and supremacy of the constitution, while maintaining the citizens' access to the constitution, may seem more sensible to voters.

To improve Florida's initiative process, the legislature should consider proposing an amendment requiring the popular initiative to pass two subsequent general elections before becoming enacted.

X. A Two-Election System

In 1958, Nevada voters approved by a 61.9 percent majority, a constitutional amendment requiring that initiative constitutional amendments be approved by voters twice—that is, two successive elections—before taking effect.[27]

Since the adoption of the two-election system in Nevada, 11 direct initiative constitutional amendments have been approved by the electorate in the first election (see Table 2). The voters in the subsequent general election approved eight of these amendment proposals. Nevada's constitution has been amended through the two-election direct initiative process eight times in 44 years.

Table 2

Repeal Lottery Prohibition	**1968**	**Failed** (57%)		
Limit Property Taxes	**1978**	**Passed** (78%)	**1980**	**Failed** (58%)
Taxes (Exempt Household Goods)	**1980**	**Passed** (77%)	**1982**	**Passed** (76%)
Taxes (Exempt Food Products)	**1980**	**Passed** (70%)	**1982**	**Failed** (59%)
Taxes (Limit Taxing Authority)	**1984**	**Failed** (52%)		
Taxes (Prohibit Personal Income Tax)	**1988**	**Passed** (82%)	**1990**	**Passed** (72%)
Campaign Finance Reform	**1994**	**Passed** (77%)	**1996**	**Passed** (70%)
Term Limits (State Offices)	**1994**	**Passed** (70%)	**1996***	**Passed** (54%)
			1996**	**Failed** (60%)
Term Limits (US Congress)	**1994**	**Passed** (70%)	***	
Taxes (2/3 legislative, Maj. Refer.)	**1994**	**Passed** (78%)	**1996**	**Passed** (71%)
Informed Voter Law	**1996**	**Passed** (53%)	**1996**	**Passed** (57%)
Drug Policy Reform	**1998**	**Passed** (59%)	**2000**	**Passed** (59%)
Prohibition of Gay Marriage	**2000**	**Passed** (60%)	**2002**	**Passed** (67%)
Legalization of Marijuana	**2002**	**Failed** (61%)		

*** Between the 1994 and 1996 elections the Nevada Supreme Court separated judges from the executive and legislative term limit ballot based on a Separation of Powers argument.
*** Term Limits on the US Congress was determined to be unconstitutional by the US Supreme Court
*

Source: Nevada Division of Elections

Conversely, Florida's "hyperactive" constitution has been amended through its initiative system 16 times in 30 years (see Table 3). Nevada's more deliberative process has served to protect the consistency and supremacy of its constitution.

Table 3

1976 (% Unavailable)	Campaign Finance Reform
1986 (71%)	Lottery
1988 (64%)	English Official Language
1992 (54%)	Taxes (Limit Homestead Valuations)
1992 (77%)	Term Limits Legislature
1994 (72%)	Fishing Net Ban
1994 (58%)	Taxes (Government Revenue Limits)
1996 (57%)	Everglades Trust Fund
1996 (68%)	Environmental (Water Pollution Abatement in the Everglades)
1996 (69%)	Taxes (2/3 Vote for new constitutionally imposed taxes or fees)
2000 (53%)	High Speed Rail System
2002 (71%)	Smoke Free Work Place
2002 (59%)	Universal Pre-K Education
2002 (52%)	Class Size Reduction
2002 (55%)	Pregnant Pig Protection
2002 (61%)	State University Governing Board

Source: Florida Department of State

In Nevada, if an amendment is approved once, the state Division of Elections publishes and resubmits the question of approval or disapproval to voters at the next succeeding general election in the same manner as the question was originally submitted. Under this proposal, the state has nearly two years to conduct an unbiased, more balanced analysis of the impact of an amendment eligible for second approval.

This cool-down period of cost and implementation analysis also allows for state legislators to address the issues once approved by the electorate. Nevada's state legislature has responded successfully to first election mandates twice.

A 1978 popular initiative would have limited all general (ad valorem) taxes levied on real property within the state for all public purposes to 1 percent. The initiative passed during the first general election with 78 percent of the popular vote. Understanding both the mandate of the people and the importance of the legislature's ability to control the state's tax code, the Nevada legislature completely overhauled the state's tax system prior to the initiative's 1980 general election ballot appearance. In this case the legislature successfully accomplished the people's business—the ballot measure failed its second time up.

In 1980 another tax measure proposed by popular initiative passed overwhelmingly with 70 percent during its first ballot appearance. The interim legislature addressed the issue and in 1992 the same tax issue failed.

A two-election system, which includes voter education and governmental

accountability procedures and opportunities, would address all of the previously stated reform criteria on which direct-democracy processes should be based.

XI. Respect the Supremacy of the Constitution

Florida's constitution should be more difficult to amend, and changes should support the documents supremacy by defining basic legal parameters and legal rights. Providing citizens with an opportunity to affect change may be a desirable public policy; even so, the constitution should not be too easily amended.[28] Currently Florida provides five methods for amending the constitution: proposal of the legislature, revision commission, popular initiative, constitutional convention, and through the taxation and budget reform commission.

Judge Thomas Barkdull stated before a public policy forum on the Florida constitutional issues in 1995 that based on the experience of other states, Florida may be on the "verge of getting into a position where every two years [voters] will have four or five petitions to consider." The judge went on to speculate that future constitution revision commissions may consider adopted measures "sacrosanct" and may be reluctant to revise the amendments because of perception that they are mandates from the people.

The first part of the judge's comments has been realized. Since 1995, Florida voters have had to consider an average of six constitutional amendments each election year. It is hard to imagine that any of these amendments, regardless of their impact on society, will be recommended for repeal by future amendments. Instead, state lawmakers will be held accountable for the policies' implementation and their impact on society.

Aside from the opinion of many in the legal community that the constitution is too often changed, there is a shared opinion that the constitution should be reserved for issues affecting basic and fundamental rights. While addressing the validity of a 2002 initiative petition aimed at protecting the rights of Florida's pregnant pigs, Florida Supreme Court Justice J. Pariente interjected this opinion about preserving constitutional supremacy, "[S]ome issues are better suited as legislatively enacted statutes than as constitutional amendments. It is my hope that the next revision commission will have the opportunity to establish some criteria regarding the subject matter of initiatives that will preserve the constitution as a document of fundamental laws, while still preserving the popular power of the people."[29]

A two-election initiative process, as previously stated, will create a more responsible and informed electorate, and it would allow for the legislature to address some of the issues most important to Floridians. During impact analysis,

and as the potential fiscal and social impact of initiatives becomes apparent to the voters, fewer constitutionally irrelevant issues will meet voter approval, thus making the constitution more sacrosanct and more difficult to amend.

XII. Maintain Freedom from Monetary and Interest Group Influence

One of the most interesting facets in the initiative reform debate is the evolution of special interest influence in the popular initiative process. The nation's earliest initiative proponents argued that representative government was failing because politicians were accountable only to high-financed special interest groups, and nonresponsive to their constituents' needs. Populists and Progressives saw direct democracy as a way to circumvent this spoiled process and to bring government back to the people.

It has been argued in this paper that the true effect of the popular initiative system in America, and in Florida, has served to empower these special interest groups, and remove all accountability from citizen-elected policymaking representatives. "Armed with political consultants, direct-mail firms, and paid signature gatherers, and wagering exorbitant television campaigns, well-healed special interests manipulate the seemingly disinterested and uninformed voters. The absence of party identification, name recognition, and other common voting heuristics found in candidate elections is thought to further exasperate the influence of these moneyed interests."[30]

A two-election system would lessen the influence of high-financed special interest by slowing the process and by allowing the electorate the opportunity to take a more responsible look at an issue. A popular initiative that is put before the electorate twice would require considerable justification by the sponsor. No longer would an idea be able to rely solely on the influence of public opinion.

XIII. Promote the Conditions of Open and Thorough Debate

Early arguments for a representative style of government called for a system in which policy ideas are thoroughly debated, face-to-face, by enlightened decision makers. Florida's initiative process does not encourage open or thorough debate. It could be assumed that voters consider constitutional initiatives for the first time when they walk into the voting booth on Election Day.

If voters have considered specific policy options and initiative ramifications, their decisions on Election Day, more often than not, are based on an ideological alignment with newspaper editorial boards, or on 30-second ads they watched on

television or heard on the radio during the days and weeks leading up to the election.[31] Conversely, voters who are afforded the opportunity to consider the costs and social impact of particular policy issues will ultimately make more competent and responsible decisions.

The state's amendment analysis, and the legislative debate which would occur between the first and second elections, will provide the voters with a more conclusive understanding of how the initiative proposal could be implemented, what the proposal would cost, and what consequences could be experienced should the amendment initiative pass. The initial amendment impact statements provided by initiative sponsors will play to the integrity and forthrightness of the sponsors when balanced against state analyses. Sponsor intentions and policy analysis will alleviate the need for hypothetical considerations when initiatives are debated and discussed in the public arena. Florida voters will be better prepared and able to make more informed decision.

XIV. Protect the Interests of Minority Groups

Perhaps the most powerful argument against direct democracy is the one made by early constitutionalists in which governments are warned about the passionate, heat-of-the-moment movements that tend to threaten the principles of enlightened decision making as well as the rights of minority groups. It has been discussed in this paper that the initiative process as it exists today serves to benefit moneyed special interests. Another argument against the citizen initiative contends that an impassioned Populist with an ax to grind could manipulate public opinion so as to gain support for the passage of an onerous law that could infringe upon the rights of minority communities.[32]

By its very design, an initiative process ensures that concerns held by a minority will be subjected to the will of the majority.[33] By minority, reformers mean any group of Americans not large enough in population to amass the opposition required to kill an initiative. An impetuously designed initiative process that does not promote open and thorough debate makes it difficult for the voters to accurately access the many complex issues and the hidden consequences addressed through ballot measures.

In Florida, 11 initiatives on average are circulated at any one time; 10 measures are filed each election year.[34] Though ballot language is limited in length, Floridians are asked too frequently to make complex decisions that circumvent an exhaustive deliberation process.

A two-election process would require the full disclosure of the initiative

sponsor's objectives and the initiative would be subjected to an analysis of its potential social impact. The two-election system would do more to protect minority groups against impassioned majority efforts.

XV. Respect the Fiscal Constraints That Exist

Several examples exist around the nation, as well as in Florida, when a constitutional initiative, regardless of the cost and impact on the state's budget, passed and became law. Initiatives mandating capital outlay projects and restricting class sizes are examples of issues that go straight to the pocketbook of state governments. The effects of such mandated expenditures could devastate a state's economy.

The complexities and ramifications of state budget expenditures are ones best left to an exhaustive committee process and a legislative debate. Citizen voters cannot be expected to understand the complexities of state finance laws or tax codes. The two-election system described in this report will begin to address the need for a more fiscally responsible initiative process.

XVI. Conclusions

It has been argued that direct democracy contradicts the principles of representative government. Our nation's Founding Fathers considered—and rejected—direct democracy. They argued that public interest is the yardstick by which to measure policy, not public opinion. Public interest can best be discovered through a deliberative and thoughtful legislative process by informed and enlightened representatives.

Direct democracy has existed in Florida since 1968. The state's ballot initiative process provides its citizens a simple and direct method of amending the constitution. Florida's direct democracy process is too easy and, as a result, the interest in and the use of initiatives is on the rise.

There is no indication of public sentiment to deny citizens the right to propose initiatives no matter how irresponsible the current process might be. It is unlikely that the Florida electorate would vote to repeal current processes that provide direct access to the constitution. It seems more politically feasible that the electorate would consider initiative reform aimed at facilitating a more responsible process and at protecting the sanctity of the constitution.

There is too much money and interest group influence in Florida's current process, voters are often uninformed and, as a result, unable to make competent decisions at the voting booth, minority rights are at risk, and too often fiscal and

social implications go unchecked. The Florida legislature should propose a constitutional amendment that would create a two-election system for all direct amendment ballot initiatives. A two-election system, which includes voter education and government accountability procedures, would address the aforementioned criticisms of the state's initiative process, making Florida's citizen initiative more reflective of the long-lasting public interest and less reactive to the public's transitory opinion.

Endnotes

[1] L.J. Sabito, H.R. Ernst, B.A. Larson, *Dangerous Democracy? The Battle Over Ballot Initiatives in America,* (New York: Rowman Littlefield Publishers 2001).

[2] Initiative and Referendum Institution (online), available: http:/ /www.iandrinstitute.org, Feb., March 2001.

[3] Ibid.

[4] D.R.Colburn, L. deHaven-Smith, *Government in the Sunshine State* (Gainesville, University Press of Florida, 1999).

[5] Initiative and Referendum Institution (online).

[6] *Government in the Sunshine State.*

[7] Reubin Askew, interview by Doug Bailey, Feb. 2002.

[8] Ibid.

[9] P.K. Jameson, M. Hosack, *Citizen Initiative in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Statutory Initiative Alternatives,* (Law dissertation, The Florida State University Law Library 1996).

[10] Supreme Court of Florida (2002), Advisory Opinion to the Attorney General Re: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy (No. SCOI-1367). Tallahassee, Fla., Supreme Court Printing Office.

[11] *Citizen Initiative in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Statutory Initiative Alternatives.*

[12] Ibid.

[13] D. Smith, *Tax Crusaders and the Politics of Direct Democracy,* (New York, Routhledge, 1998).

[14] Ibid.

[15] Reubin Askew interview.

[16] J. S. Shockley, Testimony before the U.S. House of Representatives. In I.R.S. Administration of Tax Laws Related to Lobbying: Hearings Before a Subcommittee of the Committee on Government Operations, 95th Congress, 2nd Session, May and July 1978.

[17] *Tax Crusaders and the Politics of Direct Democracy.*

[18] A. Lupia, *Dumber Than Chimps?* In L. Sabito, H. R. Ernst, B. A. Larson (Eds.), *The Battle Over Ballot Initiatives in America*, 66-70 (New York: Rowman & Littlefield Publishers, 2001).

[19] *Dangerous Democracy? The Battle Over Ballot Initiatives in America.*

[20] Ibid.

[21] J.L. Shebel, "Associated Industries of Florida Service Corporation Announces Position to Amendment 1." Paper presented to the board of directors and for press release of Associated Industries of Florida Service Corp., Tallahassee, Fla., Oct. 2000.

[22] Ibid.

[23] J. Madison, J. Jay, A. Hamilton, *The Federalist Papers* (New York: Random House 1937).

[24] Ibid.

[25] K.A. Shepsle, B. R. Weingast, "The Institutional Foundations of Committee Power," *American Political Science Review,* 81, 85 – 104, 1987.

[26] *Dumber Than Chimps?*

[27] Initiative and Referendum Institution [online].

[28] *Citizen Initiative in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Statutory Initiative Alternatives.*

[29] Supreme Court of Florida (2002), Advisory Opinion to the Attorney General (No. SCOI-1367).

[30] Ibid.

[31] *Dumber Than Chimps?*

[32] Ibid.

[33] J. M. Turner, *The Anti-Federalists* (Chapel Hill, University of North Carolina, 1961).

[34] Initiative and Referendum Institute. History of the Initiative in Colorado (Online). Available: http:/ / www.iandrinstitute.org/indepth/document6/history.htm, February 2002.

UNIVERSITY of FLORIDA

Fredric G. Levin College of Law
Offices of the Faculty

Spessard L. Holland Law Center
P.O. Box 117625
Gainesville, FL 32611-7625
(352) 392-2211
Fax (352) 392-3005
http://www.law.ufl.edu

January 15, 2004

Wayne Rubinas, Staff Director
The Florida Senate
Select Committee on Constitutional Amendment Reform, 420 Knott Building
404 S. Monroe Street
Tallahassee, Fl. 32399-1100 850-487-5828 Fax 850-487-5208

Re: Revised Documents

Dear Wayne:

I have revised the three documents that I presented to the Committee on Wednesday evening in Orlando:

1. REVISED NUMBER OF AMENDMENTS TO 1968 FLORIDA CONSTITUTION BY INITIATING AGENCY AND ARTICLE AMENDED.

2. REVISED COMPILATION OF INITIATED AMENDMENTS TO THE 1968 FLORIDA CONSTITUTION.

3. REVISED PROPOSED CONSTITUTIONAL AMENDMENT REFORMS.

The revision to the first document merely corrects the number of initiated amendments from 15 to 16. The revision to the second adds the 2002 State University System Amendment that was inadvertently omitted from the original. Note that I have denominated the State University System amendment as "Appropriate" upon application of the interpretative commentary added in item 3.

The revision to the third document (now entitled, "REVISED PROPOSED CONSTITUTIONAL AMENDMENT REFORMS") is limited to adding definitional commentary as to the meaning of what "is within the power of the Florida Legislature to accomplish by law." In all of the document, I do not necessarily mean to propose any final constitutional language at this time, but, instead, to provide commentary that might be distilled into constitutional language, or, perhaps, included in legislative history to provide guidance to the Supreme Court in future litigation. I have italicized the new material.

Please provide copies of this letter to Chairman Smith and members of the Select Committee.

I appreciate the Committee's having contacted me about this matter and stand ready to assist as I can.

Yours sincerely,

Joseph W. Little

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Equal Opportunity/Affirmative Action Institution

REVISED NUMBER OF AMENDMENTS TO 1968 FLORIDA CONSTITUTION BY INITIATING AGENCY AND ARTICLE AMENDED

ARTICLE	LEGISLA-TURE	CONSTITU-TIONAL REVISION COMMIS-SION	TAXATION AND BUDGET REFORM COMMIS-SION	CITIZENS' INITIATIVE
Article I	8	6	1	0
Article II	1	3	0	3
Article III	4	6	1	0
Article IV	5	8	2	0
Article V	10[1]	9	0	0
Article VI	1	4	0	1
Article VII	9	1	0	1
Article VIII	3	2	0	0
Article IX	0	4	0	3
Article X	4	3	0	6
Article XI	6	5	0	2
TOTALS	51	51	4	16

Joseph W. Little University of Florida College of Law. January 15, 2004

O:\...\Projects\Number of Amendments by Initiating Agency2004

[1]This includes only amendments after the original Article V was added in 1972.

REVISED[1] COMPILATION OF INITIATED AMENDMENTS TO THE 1968 FLORIDA CONSTITUTION

	YEAR INITIATED	SUBJECT/CONTENT	ARTICLE & § IN CONSTITUTION	COMMENT
1	1976	Ethics in Government	Article II § 8	*NA'*[2]
2	1985	State Operated Lottery	Article X § 15	? N[3]
3	1988	English Is the Official Language	Article II § 9	N[4]
4	1992	Limited Marine Net Fishing	Article X § 16	N
5	1992	Disqualifications (Term Limits)	Article VI § 4	A[5]
6	1992	Homestead Valuation Limitation (Save Our Homes)	Article VII § 4(c)	A
7	1993	Revenue Limits: One-Subject Eliminated as to Initiated Amendments Pertaining to Revenue Raising Matters	Article XI § 3	A
8	1994	Tax Limitation: (Two-thirds Vote Required to Add New Taxes/Fees in Consitution)	Article XI §7	A
9	1995	Natural Resources and Scenic Beautiful (Everglades clean-up)	Article II § 7(b)	N
10	1996	Everglades Trust Fund	Article X § 17	N
11	1999	High Speed Ground Transportation System	Article X § 19	N
12	2002	State University System	Article IX §7	A
13	2002	Workplace Without Tobacco	Article X § 20	N
14	2002	Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy	Article X § 21	N
15	2002	Public Education (Class Size Amendment)	Article IX § (a)	N
16	2002	Voluntary Universal Pre-Kindergarten Education	Article IX § (b)	N

O:\...\Projects\ComA401.015 J. Little, University of Florida College of Law; January 15, 2004

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[1]The purpose of this revision is to add item #12, State University System, that was inadvertently omitted from the version submitted to the Senate Select Committee on January 14, 2004.

[2]*NA'* means "not appropriate" as a constitutional provision in the sense that it would have been beyond the power of the Legislature to adopt as a statute, *but a sound constitutional policy.*

[3]?N means "not appropriate" as a constitutional provision in the sense that it would have been beyond the power of the Legislature to adopt as a statute, *except some people maintained that the Legislature could not have done it.*

[4]NA means "not appropriate" as a constitutional provision in the sense that it would have been beyond the power of the Legislature to adopt as a statute.

[5]A means fully appropriate as a constitutional provision in the sense that it would have been beyond the power of the Legislature to adopt as a statute.

REVISED PROPOSED CONSTITUTIONAL AMENDMENT REFORMS[1]

1. PROPOSED GLOBAL LIMIT ON CONSTITUTIONAL AMENDMENTS

"No amendment to the constitution may be placed upon the ballot to accomplish a purpose that is within the power of the Florida Legislature to accomplish by law."

COMMENTARY AND MEANING

Placing immutable restrictions of general application *upon the powers of government is NOT within the power of the Florida Legislature to accomplish by law; creating a form of governmental structure of permanent application is NOT within the power of the Florida Legislature to accomplish by law; adopting a specific governmental regulation, a specific governmental program or a discrete public policy of specific application IS within the power of the Florida Legislature to accomplish by law."*

Critical determination: it would fall to the Florida Supreme Court to test whether any controverted proposal "is within the power of the Florida Legislature to accomplish by law." Consideration should be limited to constraints imposed upon the legislature by the Florida Constitution without consideration of external limits imposed by the United States Constitution.

Critical criterion: The Legislature cannot expand or permanently limit its own powers by statute; nor can it change the constitutionally prescribed structure of government (apart from what the Constitution itself might permit), including the revision or abolition of offices and officers. Hence, proposals with those consequences would "accomplish a purpose" that is NOT "within the power of the Florida Legislature to accomplish by law." Accordingly, these proposals would be proper subjects of proposed constitutional amendments.

Conceptually difficult interpretative issues would be raised by proposed amendments that restrict the powers of the Legislature in various manners. For example, the due process clause of Article I §9 restricts the power of the Legislature (and all of government) to deprive any person of life, liberty or property without due process of law. That provision limits the power of government generally in all applications. Nevertheless, that restriction could have, in fact, been enacted as a statute. The flaw in a statutory due process guarantee would be that it would not be immutable; meaning, the Legislature could repeal the statute and thereby repeal the self-imposed statutory limitation on its power. Hence, the constitutional meaning of what is "a purpose that is within the power of the Florida Legislature to accomplish by law" *must EXCLUDE provisions (such as the due process, equal protection, access to courts, jury trial, right to privacy, open meetings and records, other declarations of rights, restrictions on the*

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[1]This revision is provided primarily to add the clarifying statements pertaining to the meaning a "purpose that is not within the power of the Legislature to accomplish by law." The revision is written in italics.

power to tax, restrictions on the power to exercise eminent domain, and many others) that limit the powers of government generally in all applications. Accordingly, under the proposed standard, these measures WOULD be permitted as constitutional amendments.

Certain recent amendments also operate to restrict governmental power, but in a markedly different manner. The class size and anti-smoking amendments are exemplary. They also restrict the power of the Legislature in the limited sense that the government no longer has the legitimate power to operate a school system that does not conform to the details of the class size amendment and the Legislature no longer has the legitimate power NOT to adopt statues enforcing the no-smoking ban. [This conclusion follows from the constitutional maxim that in this context might be paraphrased as follows: "if the Constitution prescribes what is to be done, it takes away the power not to do it."] Nevertheless, by contrast to, say, the due process clause, these restrictions are not of the kind that pervasively limit the powers of government generally in all applications. Instead, these are limited specific measures intended to accomplish particular programmatic political goals that the Legislature could have accomplish by law if it had chosen to do so. As such, in the constitutional sense, measures of this sort ARE *"within the power of the Florida Legislature to accomplish by law." Accordingly, under the proposed standard, these measures would NOT be permitted as constitutional amendments.*

The State University System Amendment embodies a third form of restriction upon the powers of the Legislature. Prior to the adoption of the amendment, the Constitution itself did not prescribe a particular form of governance for the State University System (by contrast; it did and does prescribe local school districts and the State Board of Education for the governance of the system of free public education) and nothing else in the Constitution restricted the form of governance the Legislature might have chosen for the universities. Hence, one could have plausibly argued that the Legislature DID have the power to enact the State Board of Education amendment by law, thereby, rendering it invalid as a constitutional amendment under the proposed standard. From a constitutional point of view, this construction would produce a peculiar effect upon the constitutional structure of government. Although the existing constitutional structure could be changed by constitutional amendment (because the Legislature has no power to change it by statute), new structures that did not of themselves change existing constitutional structures could never by placed in the constitution, because the Legislature would have the power to create those structures by statute. "Freezing" out (or even semi-freezing out) new forms of constitutionally-prescribed governmental structure in this manner does not seem sound constitutional policy. Accordingly, within the meaning of the proposed limitation on the subject of constitutional amendments, a proposal to create a new form of governmental structure of permanent application is NOT within the power of the Florida Legislature to accomplish by law. Accordingly, such a proposal, as exemplified by the State University System amendment, would be deemed to be a valid subject of a constitutional amendment under the proposed standard.

2. PROPOSED LIMIT ON THE POWER OF THE LEGISLATURE TO PROPOSE CONSTITUTIONAL AMENDMENTS

1. No legislative proposal to amend the constitution may be adopted except in a joint resolution initially approved by the two houses and finally adopted in a joint session of the two houses.

2. The joint resolution must be approved by not less than three-fifths of the membership of each house in two successive regular sessions with an intervening election of the House of Representatives. The joint session referred to in subsection 1 must occur in the second of the two regular sessions.

3. The legislature may place no more than three proposals to amend the constitution on the ballot for any election.

3. PROPOSED POWER TO INITIATE AND REPEAL STATUTES BY CITIZENS' INITIATIVE

1. Article III Florida Constitution should be amended to permit citizens to enact and repeal *general laws* by initiative and referendum.

2. An initiated general law would be restricted to the one-subject rule as applied to the Legislature's law making power. An initiated statute should be constrained in length to limit ballot size, to invite genuine review by electorate, and to limit subject matter to primary legislative policies that may be filled out, if needed, by the legislature. Suggested limitation: 750 words.

3. A citizens' initiated referendum to repeal a statute would be limited to a designated session law (except repeal of general appropriations laws should not be authorized) or to a discrete section or inextricably related sections of the compiled statutes. Repeal by reference to a specific session law or to designated sections and subsections of the compiled statutes should be authorized.

4. The requirements for invoking initiated enactments and repeals and procedures for testing the legal sufficiency of the proposal would be fixed by general law, but fewer than the number of signed and verified petitions required to initiate a constitutional amendment should be required and a pre-petition-gathering administrative review of the format should be provided in the office of the Division of Elections, of the Attorney General, or elsewhere.
5. No more than one initiated statute should be permitted on any ballot: a first in time rule should apply in regard to competing proposals.

6. The Legislature should have the power to enact statutes to implement initiated general laws.

7. The Legislature should have the power to amend or repeal initiated general laws subject to limitations, such as:

No general law approved by the electorate of the state may be repealed or amended by the

Legislature, except:

(a) by law approved by the state electorate ,or

(b) by an act of the Legislature that is

(1) approved by four-fifths of the membership of each house of the legislature, if enacted within five years of the effective date of the initiated act to be repealed or amended; or

(2) approved by two-thirds of the membership of each house of the legislature, if enacted within ten but not five years of the effective date of the initiated act to be repealed or amended; or

(3) approved by a majority of the membership of each house of the legislature, if enacted more than ten years after the effective date of the initiated act to be repealed or amended.

4. GENERAL LAWS SUBJECT TO VOTER APPROVAL

Under the authority of Article VI § 5(a),the Legislature should consider enacting general laws subject to approval of the electorate in regard to controversial issues with broad public interest. This should be done only infrequently in regard to controversial issues of genuine public policy that are of demonstrable and substantial interest to the public at large, but which the Legislature itself is unwilling to embrace. Recent matters that might have been treated this way include: the tobacco- free workplace amendment; the class-size amendment; and the pre-kindergarten amendment. The Legislature should place no more than one statute on any ballot.

Joseph W. Little University of Florida College of Law January 15, 2004
O:\...\Projects\ConRevRef\Amendments; Some Proposals

January 14, 2004

Senatorial Sub-Committee on Constitutional Amendment Reform
Chairman Senator Rod Smith

Dear Senator Smith and Committee Members:

A few hours ago I found about this public hearing on Constitutional Amendment Reform. For information on this event I called the committee staff in Tallahassee. Upon inquiry I was immediately asked if I was "invited." I replied that I thought that the public was invited; but wondered who knew about it. I was told that "The Chamber of Commerce" knows about this. It was then that I was referred to Wayne Rubinas, the staff director for this sub-committee. Upon reaching him he said he was on his way to Orlando for a 4:00 meeting with the "Orlando Sentinel" editorial staff. I relayed my concern about the lack of public notification on this hearing and he retorted that, "all media outlets were noticed a week ago."

The public process is vital for a democracy. Failing to inform and involve us in issues that affect our quality of life has silenced our voices.

We have had to resort to amending the Constitution because our Representatives have not done a good job in protecting our environment and us.

As illustrated in Mike Thomas's "Orlando Sentinel's" January 11th column, "Pesky voters seem to think they matter." Voters have changed the Constitution by "demanding that sugar growers in the Everglades pay their fair share in cleaning up pollution," approving pre-K for all kids, class size reductions, a new "Board of Regents" to oversee our Universities, smoke-free, restaurants and workplaces, providing the creation of a high-speed train system and restricting politicians ability to keep public records private. These "friendly" amendments assure a brighter future for our children and for our State of Florida.

The primary function of government is to protect our health, safety and welfare.

I am asking for you to leave the Constitutional Amendment process alone or better yet, make it easier for us to change our Constitution. "Special interests, not our interests" are rapidly depleting our natural resources and compromising our health and education.

I am advocate of Florida's Hometown Democracy Amendment. This amendment would put the power to make land use decisions back in the hands of the people." In fact, tonight I have some of these petitions to put this amendment on the ballot in case you might want to sign one. As you know it takes 500,000 petitions from registered Florida voters to get this on the ballot.

Please assure that the people have a voice in their government. Leave the Constitutional Amendment process intact.

Susan Eberle

Susan Eberle
652 W. Palm Valley Dr.
Oviedo, FL. 32765

THE LEAGUE OF WOMEN VOTERS OF FLORIDA

YARDSTICK
FOR A
GOOD STATE CONSTITUTION

A Good State Constitution:

1. Must not conflict with any provisions of the Federal Constitution.

2. Should be a simple, understandable and integrated statement of basic law, free from obsolete and statutory detail; a flexible instrument free from unsound limitations binding on the Legislature.

3. Should have clearly defined lines of authority and responsibility.

4. Should provide for a representative Legislature based essentially on population with self-executing reapportionment.

5. Should establish a uniform system of courts adapted to the expanding needs of a growing state.

6. Should have general provisions under which cities and counties may achieve self-government.

7. Should establish state standards for finance and taxation that meet the requirements of modern society.

8. Should provide for a merit system for the selection, retention and promotion of state personnel.

9. Should provide for meeting the incressingly extensive social ad economic problems that affect the general welfare.

10. Should provide for a system of free public education with equality of opportunity for all.

11. Should include amendment processes that are in harmony with the other provisions of the Constitution.

(1952)

540 Beverly Court, Tallahassee, FL 32301-2506
Voice: 850/224-2545 • Fax: 850/222-4485 • E-mail: lwvf@cs.com
www.naples.net/presents/lwvf

THE LEAGUE OF WOMEN VOTERS OF FLORIDA

540 Beverly Court, Tallahassee, FL 32301-2506
Voice: 850/224-2545 • Fax: 850/222-4485 • E-mail: lwvf@tfn.net
www.naples.net/presents/lwvf

December 8, 2004

The Honorable Ron Smith
SENATE SELECT COMMITTEE ON CONSTITUTIONAL AMENDMENT REFORM
404 South Monroe Street
Tallahassee, Florida 32399

Dear Senator Smith and members of the Committee:

On behalf of the League of Women Voters of Florida, I would like to thank the Senate Select Committee for the opportunity to present our ideas and positions regarding the Florida Constitution and the process by which it may be amended.

Shortly after The League of Women Voters of Florida was organized in 1935, the League undertook a comprehensive study of Florida government. As a result, members determined that one of the most serious problems hampering responsive and accountable state government was the Florida's outmoded 1885 Constitution. Subsequently, the League has continuously supported Constitutional reform. By 1952, years of study had produced a yardstick for a good constitution, which the League used to analyze and then vigorously campaign for the 1968 revision of the Florida Constitution. LWVF continues to seek improvements in the basic document.

LWVF has supported the process by which citizens may petition for amendments to the Constitution since the 1968 Constitutional Revision Commission placed on the ballot the constitutional citizen petition initiative procedure. In 1972 the League supported a successful campaign to allow an initiative amendment to change more than one section of the Constitution so long as it dealt with only a single subject.

In 1995 LWVF studied the process and impact of citizen initiative on the state Constitution. A position was subsequently adopted that reaffirmed support for the constitutional citizen petition initiative and established support for the statutory citizen petition initiative. Also, a number of criteria for implementing the process were delineated.

In the years since the citizen petition initiative was established several major concerns have developed. Citizens, frustrated by a legislature apparently unwilling or unable to address a specific concern have increasingly resorted to the initiative process to force the legislature to deal with that issue. Often the resulting petitions address issues which should more properly be dealt with by statutory law and are inappropriate for inclusion in a Constitution. However, as long as the ability to propose statutes is not available, and the ability to amend the Constitution is, these initiatives will continue to be proposed.

The governor and legislature also contend that the passage in recent years of several costly amendments to the Florida Constitution has also reduced the flexibility of the legislature to meet changing social and economic challenges.

The League supports a State Constitution which is a "simple, understandable and integrated statement of basic law, free from obsolete and statutory detail; a flexible instrument free from unsound limitations binding upon the legislature."

Building on this standard and to protect the integrity of Florida's Constitution, the League maintains the following positions:

- Florida should have both constitutional and statutory initiatives.

- Criteria should be developed to determine whether an initiative is appropriately placed in the Constitution or in statutory law, and that the ballot language should be approved and/or revised by a designated group. A special commission could be appointed to undertake the task of developing the criteria. The Supreme Court is the logical group to apply the criteria.

- The number of signatures required for placing a constitutional initiative on the ballot should be greater than for a statutory initiative.

- A requirement should exist that a span of years should elapse before a defeated constitutional amendment can again be placed on the ballot.

Another concern focuses on the increasing number of initiatives that have been placed on the ballot through the use of paid signature gatherers, for issues supported by industry and corporate interests who then mount heavily financed campaigns that have used, in the opinion of the League, misleading forms and tactics. The use of paid signature gatherers, although judged legal, has made it much easier for well financed initiatives to reach the ballot.

It is the League's view that there should be regulations governing signature gatherers to include: that they be registered voters in Florida, that they register their name, address and telephone number and sign a statement verifying that citizens signing a petition did do in the gatherer's presence. In addition, we feel that sponsors should not be permitted to pay signature gatherers on a per signature basis.

Again, we thank you for the opportunity to appear before you. The League stands ready to offer additional assistance at your request.

Sincerely,

Caroline Emmons-Schramm

Caroline Emmons-Schramm
President

To protect the integrity of Florida's Constitution, the League maintains the following positions:

- Florida should have both constitutional and statutory initiatives.

- Criteria should be developed to determine whether an initiative is appropriately placed in the Constitution or in statutory law, and that the ballot language should be approved and/or revised by a designated group. A special commission could be appointed to undertake the task of developing the criteria. The Supreme Court is the logical group to apply the criteria.

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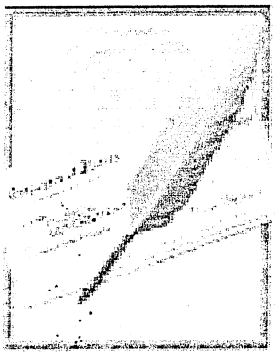
petition did do in the gatherer's presence. In addition, we feel that sponsors should not be permitted to pay signature gatherers on a per signature basis.

COVER STORY

IMPLEMENTING FLORIDA'S CONSTITUTIONAL AMENDMENTS:

TRUTH AND CONSEQUENCES[1]

BY SUSAN A. MACMANUS
WITH THE ASSISTANCE OF THOMAS A. WATSON



Voter-approved constitutional amendments always face hurdles that must be jumped to reach the finish line of full implementation.

Florida is fast becoming like Arizona, California, Colorado, North Dakota, Oregon, and Washington, where numerous proposed constitutional amendments get almost as much attention as presidential or gubernatorial elections.[2]

But unlike people in other states, Floridians tend to approve most of the amendments put before them—from pregnant pigs to bullet trains and smaller classes. Our state's constitution "is five times as long as the United States Constitution and changes more often."[3] One disgruntled citizen has described it as "a junkyard for hard-to-pass legislation."[4] But another sees citizen initiatives as the only way to tell the legislature on a certain issue, "Listen, we want it dealt with."[5]

Proposed amendments receive the most media attention before they are voted on, but the real consequences surface soon after their passage. The state's electorate is fast learning that voting "yes" is just the first step down the long road to full implementation. It is on this trip that citizens learn the often-painful truths about the consequences (sometimes unintended) of implementing amendments they have ratified. It is an increasingly frustrating

journey for both supporters and opponents of various amendments.

There is no better evidence than the amendments passed by Florida voters in 1998, 2000, and 2002.

Amending Florida's Constitution: 1998–2002

In Florida, constitutional amendments or revisions[6] may be placed on the ballot in five different ways:[7]

- By a three-fifths vote of the membership of each house of the state legislature
- By the citizens via petition (direct initiative)[8]
- By the Constitutional Revision Commission (CRC), [9] a 37-member body comprised of both public officials and private citizens that meets every 20 years[10]
- By the Tax and Budget Reform Commission, which meets every 20 years[11]
- By a constitutional convention. Florida's Supreme Court plays a unique role in the process; it determines whether a proposed amendment meets the single-subject rule[12] and is clearly worded. If not, the amendment does not go on the ballot for ratification by the voters.[13]

Three of the five sources named above have accounted for all 26 amendments on the ballot in Florida in 1998, 2000, and 2002. The legislature has proposed 11 (42 percent),[14] the CRC, 9 (35 percent), and citizens, 6 (23 percent), as shown in the table on pages 14–15. The Florida Supreme court intervened on an additional amendment (tax exemptions) proposed by the legislature in 2002, keeping it off the ballot because the court ruled it was misleading.

Historically across the country, more amendment proposals appear on state constitutions in mid-term (nonpresidential) than in presidential election years. That pattern has held true in Florida from 1998 to 2002.

But Florida's amendment activity has gone counter to that observed in the rest of the nation in four ways.

1. Amendment activity in Florida is rising, not declining as it is elsewhere. Across the United States, 30 percent fewer initiatives were on the ballot in 2002 than in 2000—the fewest since 1986. But in Florida, the number of amendments on the state's ballot more than tripled in the same period, from 3 to 10 (see the table).
2. Citizen-initiated amendments are more common in Florida than elsewhere. For example, of the 202 statewide measures on ballots across the United States in 2002, 26 percent were placed there by citizens and 74 percent by state legislatures.[15] In Florida, by contrast, the ratio was 50:50. Furthermore, in the sheer number of proposed amendments, Florida exceeds the national average number of citizen-initiated ballot proposals if one counts amendments proposed by the CRC, which is largely a citizen process. Florida's citizen-initiated proposal average is 5 (from 1998 to 2002),[16] compared with the U.S. average of

3.04 (from 1991 to 2000, up from 2.25 between 1981 and 1990).[17]

3. Florida has had more success in passing citizen initiatives than the 23 other states with citizen initiative processes in place. According to the Initiative & Referendum Institute, the national passage rate[18] from 1904 to 2000 was 42 percent,[19] and in 2002, it was 47 percent. In contrast, Florida's passage rate in the 1998–2002 period was at or near 100 percent. That is, all six of the citizen-initiated constitutional amendments on Florida's ballot passed, as did eight of the nine put on the ballot by the CRC. Meanwhile, during the same period, just eight of the 11 proposed by the legislature passed. (One of the eight, the death penalty amendment adopted in 1998 and subsequently approved by the voters, was eventually ruled unconstitutional by the Florida Supreme Court. As mentioned earlier, the court kept a tax reform proposal off the ballot in 2002 because it failed the language clarity test.) Also worth noting, Florida's success in passing citizen-initiated amendments is considerably higher now (100 percent in 2002) than over the entire period of the initiative's existence—1972 to the present (76 percent).[20]

Proposed amendments receive the most media attention before they are voted on, but the real consequences surface soon after their passage.

4. Florida has low rolloff rates.[21] The rolloff rate is the percentage of voters who vote in races at the top of the ballot (for example, presidential and gubernatorial) but who do not vote on amendments that typically appear at the bottom. In other words, Floridians are more likely than voters in other states to vote on amendments. (See the table for rolloff rates in Florida.) The primary explanation for Florida's lower rates is that the state has, among its voting population, the largest proportion of people age 65 and older who are more likely to vote a complete ballot from top to bottom.[22]

Florida's rolloff rates for 10 amendments in 2002 ranged from a low of 3.3 percent on a workplace smoking prohibition to a high of 18.8 percent on an amendment addressing Miami-Dade County's home-rule charter. In this case, the higher rate on the Miami-Dade County amendment indicated the electorate's confusion about what the proposal would do. High rolloff rates also tend to occur when amendments are highly technical or legalistic in nature.

Citizen-Initiated Amendments: Pros and Cons

Proponents of citizen-initiated amendments (direct democracy) argue that they are necessary to bypass lethargic or unfriendly state

legislatures. As one newspaper editorial has noted, "In theory, the citizen-initiative amendment process can be a powerful tool to let voters jump-start government reforms. It provides a healthy safety valve for public dissent and a useful check-and-balance on unresponsive legislators."[23]

Supporters attribute the increase in citizen initiatives to "a growing impatience with the pace of reform and implementation of earlier amendments by the executive and legislative branch of state government."[24]

Opponents object to the ease of placing constitutional amendments on ballots, fearing that they are cluttering up state constitutions. Opponents also complain about the sound-bite nature of the amendment titles and brief overviews that appear on the ballot.[25] A National Conference of State Legislatures report laments, "Initiatives ask voters to make simple yes-no decisions about complex issues without subjecting the issue to detailed expert analysis and without asking voters to balance competing needs with limited resources."[26]

Opponents also point to the dominance of "big-bucks special-interests" who can buy their way onto the ballot.[27] "Usually, those putting a measure on the ballot are organized and funded, with a specific agenda in mind."[28] (Florida is one of only a handful of states that permit the persons collecting petition signatures to be paid.[29]) But most of all, opponents of initiatives fear they erode, or short-circuit, our system of representative democracy.[30]

The State Legislature Tends to Have the Last Word

State legislatures often have the last word, even on citizen-initiated constitutional changes that were designed to bypass state representatives. But legislatively initiated amendments often share the same fate as those proposed via citizen petition—difficulties and delays in "putting meat on the skeletons" of broadly worded proposals. Legislators must fill in the how-to-do and how-to-pay-for details. The effort they exert to put amendments online varies considerably.

The Florida legislature's implementation plans often involve other state and local entities. State agencies are frequently instructed to adopt rules. Counties, municipalities, and school districts may be required to pass legislation putting various components of the amendments into place. Implementation deadlines established by the amendment may extend several years into the future, allowing new circumstances to alter original plans. And in other instances, litigation may halt or delay full implementation.

Delay, delegation of authority, and other difficulties are typical. Voter-approved amendments always face hurdles that must be jumped to reach the finish line of full implementation.[31] What are they?

Explaining the Pace of Implementation: Truths and Consequences

Theories abound about the great variety in the pace of implementa-

tion. This overview of the 26 amendments ratified by Florida voters since 1998 suggests the following 10 "truths and consequences:"

1.

A larger "yes" vote on an amendment does not necessarily mean government officials will more quickly implement it. (The "yes" votes for each amendment and revision are reported in the table.)

Vote margin is not always the best predictor of amendment implementation rate. For example, in 1998 five amendments (Preservation of the Death Penalty...; Recording of Instruments in Branch Offices; Conservation of Natural Resources...; Public Education of Children; and Firearms Purchases...) were supported by more than 70 percent of the voters. Yet not one of these amendments was fully implemented by 2001. Some were slowed by extensive legislative debates or by lawsuits (Death Penalty, Conservation of Natural Resources, Public Education of Children). Several were designed to give local governments the option of implementing them (Recording of Instruments in Branch Offices; Firearms Purchases—Criminal History Records Check and Waiting Period). For one reason or another, some local governments have not yet seen fit to do so.

Among the nine 2002 amendments adopted, more than 70 percent of voters approved the Economic Impact Statement (Amendment 2), the Two-Thirds Vote to Exempt Public Records (Amendment 4), and the Protection From Second-Hand Smoke (Amendment 6) proposals. Of these, the Economic Impact Statement and Public Records amendments are likely to be implemented more quickly than many of the amendments with less support (for example, Reduction in Class Size—Amendment 9, Statewide University Governing Board—Amendment 11). However, the antismoking amendment seems to be following the path of slow implementation because of extensive legislative debates. Lawsuits are imminent. To a certain extent, even the Exemption of Public Records amendment is encountering implementation difficulties. Legislators are caught between pressures to ensure security in the post–9/11 era by protecting individual privacy and the state's long-standing commitment to government in the sunshine.

The consequences? Citizens may become even more cynical about elected officials and their government when large-scale vote mandates are ignored or reinterpreted in the process of creating statutory language to implement the popular amendments. At the same time, legislators are likely to encounter last-ditch lobbying on both sides of an amendment. In addition, changing times and priorities may force legislators to re-examine the urgency and necessity of implementing amendments.

2.

Amendments put on the ballot by the citizens or CRC are more likely to include specific implementation

timelines than those initiated by the legislature.

The CRC-initiated Revision 7 (...Funding of State Courts portion) passed in 1998 set July 1, 2004, as the deadline for the state to assume many court costs from the counties and to standardize the state's judicial system. The citizen-initiated high-speed rail amendment passed in 2000 mandated that construction begin by November 1, 2003. Four citizen-initiated amendments passed in 2002 all specified deadlines:

- The workplace smoking ban is to be fully in effect by July 1, 2003.
- Universal pre-kindergarten must be offered free to four-year-olds no later than the 2005 school year.
- The so-called pregnant pig amendment, which would outlaw gestation crates used to confine pregnant pigs in a space so small they cannot turn around for months at a time, must be fully implemented by 2008.
- The class-size amendment must be fully implemented by 2010, although school districts will have to begin making some class-size reductions by fall 2003.

Proponents of the deadline approach argue that it is necessary when the state legislature has either refused to take action or delayed action on the issues at hand.

Few of the constitutional amendments and revisions adopted by Florida voters since 1998 have been fully implemented at the time this article was written.

Opponents say rigid edicts hamstring the state financially and create unintended consequences.[32]

The consequences? If the condition of the economy shifts markedly between the date of passage and the established deadline, priorities may shift, too. State legislators writing the implementation rules become caught in the crossfire. As a result, neither supporters nor detractors of the amendment are fully satisfied.

3.

In diverse states like Florida, implementation will not be uniform, even when the mandate is universal in its reach.

Proof of this truth is the 1998 Amendment 6 (Public Education of Children), which calls for the state to provide "a uniform efficient, safe, secure, and high quality system of free public schools...." But the state's 67 school districts vary markedly in their socioeconomic composition, which often means the impact of state-ordered requirements are different across the districts. The same is true for the class size and pre-kindergarten amendments ratified in 2002. In the words of one reporter, "As lawmakers divvy up dollars for the popular initiative to lower class sizes, regional politics threaten to poison public opinion against the measure."[33]

The consequences? One-size-fits-all

amendments involving state funding to local school districts tend to evoke fierce formula fights in the legislature, usually between large and small (urban and rural) districts. Usually, but not always, large districts win and small ones lose.[34]

4.

When given an option, some local governments take it and others leave it. Demographics, socioeconomic composition, financial condition, and politics affect the decision.

Local governments were given the option of implementing five of the 1998 amendments (Historic Property Tax Exemption and Assessment; Additional Homestead Tax Exemption; Recording of Instruments in Branch Offices; Local Option for Selection of Judges...; and Firearms Purchases; Local Option for Criminal History Records Check...). In 2002 counties were given the option of granting a homestead property tax exemption to people who construct living quarters for elderly (62 and older) parents or grandparents.

Thus far, local governments have acted in unison on only one amendment (Local Option for Selection of Judges..., 1998). In this instance, it was to reject the proposed appointment and merit retention of county and circuit court judges. On the other local option amendments, implementation rates have been slow. There are several reasons.

- First, local governments fear revenue losses (Historic Property Tax Exemption; Additional Homestead Tax Exemption For Seniors; Property Tax Exemption For Elderly Relative Living Quarters).
- Second, they may perceive they have little to gain in implementation (little or no efficiency in recording instruments in branch offices).
- Finally, their constituents' preferences may differ from voters in other parts of the state (Firearms Purchases, Local Option for Criminal History Records Check and Waiting Period).[35]

The consequences? Local option structures may be necessary to get enough signatures (or votes in the legislature) to place an amendment on the ballot. But the subsequent unevenness of their adoption may, in turn, place additional political—and economic—pressures on state lawmakers if differential impacts arise.

5.

If the projected budgetary impact of an amendment is large, officials in localities will back away from it, even when their political supporters lobby for it. Fiscal stress tends to trump everything else.

The strongest evidence of this principle at work involves the 1998 Additional Homestead Exemption For Seniors revision and, to a lesser extent, the 1998 Historic Property Tax Exemption. Our surveys of Florida counties and municipalities have found that they are less likely to give property tax breaks if they foresee major fiscal consequences once granted. [36] Local governments worry that they will have to raise property taxes and/or cut services to cover the revenue losses—neither of

which is politically popular. It is easier to resist political pressures from eligible groups, like senior citizens, when local governments tout the inequities of the tax breaks.

The consequences? Differential amendment implementation rates across local governments may create intergovernmental frictions as well as fiscal difficulties. The chances of such outcomes are greater when wealthier neighboring jurisdictions put exemptions in place more quickly than poorer entities simply because they can afford to do so.

6.

Amendments with the most "actors" involved in their ultimate implementation will generate the most controversy as the legislature establishes rules, regulations, and funding. The more persons or agencies involved, the greater the likelihood of fierce disagreements and lawsuits.

The best examples of this truth are the 1998 funding of state courts revision, the 2000 high-speed rail amendment, and the 2002 reduction in class-size amendment. In each instance, roles have been carved out for multiple professional groups and associations as well as for more than one branch of state government and more than one level of government.

The consequences? Implementation becomes a battle of experts. Each actor enters the fray armed with mountains of reports, statistics, and dollar estimates. The courts often have the last say. The result is often the threat of a reversal or re-vote on the amendment.

7.

The more components in a proposal, the less likely all parts of it will be implemented at the same time. Such omnibus amendments often combine "apples and oranges" and require different sets of actors to be engaged. These amendments are most likely to be initiated by the Constitutional Revision Commission, which has the authority to put multipart amendments on the ballot.

A prime example is the CRC's 1998 Conservation of Natural Resources; Creation of Fish and Wildlife Conservation Commission revision. The first part created the commission (FWCC). The second created the Florida Forever Program to purchase and conserve lands and set priorities. The FWCC's creation came quickly; but battles over definitions of "full implementation" of the Florida Forever Program have continued in almost every successive legislative session.

Another classic example of this principle is CRC's 1998 revision involving the state courts. The revision called for a statewide vote on the election versus the appointment/merit retention of circuit and county court judges in November 2000. It also set July 1, 2004, as the date by which enabling legislation for state funding of the court system must be in place. The latter involves a much wider array of actors, including local-level officials, which can slow or stall implementation.

The consequences? Such an all-or-nothing amendment format is equivalent to a double-barreled

public opinion survey question. You like one part of it but not the other, so how do you respond? While such a format may enhance the amendment's chances of passage, it diminishes the likelihood that the coalition pushing passage will stay intact until all the parts are implemented.

8.

The greater the complexity of an amendment, the more difficult it may be to anticipate all the possible results, and the more likely unintended consequences will become apparent.

A great example of this principle is the workplace antismoking amendment passed in 2002. It "prohibits smoking in certain enclosed indoor workplaces and restricts smoking in restaurants and other enclosed indoor workplaces.... It exempts noncommercial private residences, retail tobacco shops, private offices, designated rooms in lodging establishments, and bars...." (ballot summary). The multiplicity of exemptions and definitions in the amendment language has generated considerable controversy and pitted restaurants against bars over the conditions under which "the serving of food [in a bar] is merely incidental to the consumption of any [alcoholic beverage]." Confusion abounds. "Who's going to be the smoking police? Which agency is going to write the rules? What is a 'stand-alone' bar? What about takeout facilities and catering? What is only 'incidental' food service—popcorn, peanuts?"[37] An amendment's complexity is often measured by the number of definitions and/or exemptions included therein. In addition, nine cigar companies have filed a lawsuit against the amendment, claiming it "will prevent them from testing cigars and drive them out of business."[38]

The implementation process tends to be highly incremental. This is not always bad.

The consequences? Regulatory-intensive amendments often generate lawsuits from businesses or professions whose members believe they would suffer serious economic damages from implementation of the legislation. Definitional battles rule the day.

9.

Broadly or vaguely written amendments often slow down the implementation process. They quickly become politicized once the debate over the specifics begins. Initial support wanes as the real impact becomes more apparent. This is what some scholars identify as the law of unintended consequences.[39]

The Additional Homestead Exemption For Seniors revision that passed in 1998 is proof of this principle. The revision authorized the legislature to allow counties and municipalities to adopt ordinances that grant an additional homestead exemption not greater than $25,000 to persons 65 and older whose

annual household income is $20,000 or less. What seemed like a benign approach—namely, to define income as the adjusted gross income figure reported on federal 1040 tax forms—turned out to be highly controversial. Local officials, as well as younger constituents, strongly opposed this definition because of its perceived unfairness. (It excludes certain types of pensions and annuities, among other things.) Battles over how to define income have energized opponents of the additional homestead exemption and emboldened local election officials to reject it on the grounds of intergenerational injustice.

Another example is the high-speed rail amendment, which has been described as "steeped in vague and unanswered questions about its financial and technical feasibility."[40]

The consequences? The lack of detail in an amendment gives legislators bold license to interpret what the voters meant. Political and legal battles over the breadth of authority granted under each vaguely worded amendment slow implementation considerably. So, too, does a major fight over affordability, although in the future (at least for citizen-initiated amendments), that may be less of a problem thanks to passage of the Economic Impact Statement amendment in 2002.

10.

Amendments that deal with issues perceived by some as unconstitutional are the most likely to generate lawsuits, thereby slowing down the implementation process. Issues seen as trampling on individual freedoms protected by the Bill of Rights or those with a religious or moral dimension are the most likely to ignite court challenges.

Three 1998 and two 2002 amendments involved precisely these types of issues. Lawsuits were filed against the 1998 and 2002 death penalty amendments (Article I, Section 17 of the State Constitution), the 2002 public education amendment (for violation of the separation of church and state),[41] and the 2002 antismoking amendment (for violating property rights). Many expected lawsuits against the firearms-purchase, records-check, and waiting-period amendment. But it appears that counties with strong right-to-bear-arms constituencies have fended off lawsuits by simply failing to implement the amendment.

The consequences? In the course of court challenges (or threats thereof), new interpretations of an amendment's reach are likely to surface, often delaying implementation or sparking new statutes and amendments.

Slow Pace of Implementation Not Surprising

Few of the constitutional amendments and revisions adopted by Florida voters since 1998 have been fully implemented at the time this article was written (March 2003). As we have shown, few were intended to be. The implementation process, by definition, tends to be highly incremental. This is not always bad, especially when unintended conse-

quences are slow in surfacing and/or when major changes occur in population, political, and economic conditions. But slow implementation is not always good either, especially when legislative delays are seen as thwarting the will of the voters.

One thing is crystal clear. Attempts to improve the amendment process in our state must take into account the truths-and-consequences lessons outlined here.

Susan A. MacManus is the Distinguished University Professor of Public Administration and Political Science in the Department of Government and International Affairs at the University of South Florida, Tampa. Thomas A. Watson is a USF student enrolled in the Undergraduate Honors Program.

Endnotes

[1]This article builds on a previous analysis of the implementation of 1998 amendments by the author and Mark Pritchett for the Collins Center for Public Policy, Inc., May 2001.

[2]Among the 24 states that have the statewide initiative process, these six states have experienced the most initiatives. Initiative & Referendum Institute, "Is the Initiative Process Out of Control?" www.iandrinstitute.org/Usage.htm, accessed Mar. 16, 2003.

[3]Tom Blackburn, "Hogging the Constitution," *Palm Beach Post*, Nov. 10, 2002.

[4]Thomas F. Rutherford, "Letter: Constitutional Initiatives Need Limits," *St. Augustine Record*, Nov. 11, 2002.

[5]"State Taking Look at Direct Democracy," *Gainesville Sun*, Mar. 9, 2003.

[6]Generally, proposals put on the ballot by the Constitutional Revision Commission and the Tax and Budget Reform Commission are called revisions. Those put on the ballot by the state legislature or via citizen petitions are called amendments.

[7]See Article XI, Amendments, The Florida Constitution.

[8]Direct initiative in Florida is a proposed constitutional amendment initiated and placed on the ballot by citizens for a popular vote after a petition process. If passed, it takes effect without legislative or gubernatorial action. In some other states, the direct initiative process may also be used for statutes. See National Conference of State Legislatures (www.ncsl.com). Floridians first got access to the constitutional initiative process in 1972. The first citizen-initiated amendment was the 1976 "Sunshine" or open-records amendment.

[9]For an excellent history and analysis of Florida's Constitutional Revision Commission, see Rebecca Mae Salokar, "Constitutional Politics in Florida: Pregnant Sows or Deliberative Revision," paper presented at the annual meeting of the American Political Science Association, Aug. 30, 2001.

[10]The most recent CRC convened in 1997. The next CRC will convene in 2017.

[11]The next Tax and Budget Reform Commission will convene in 2007.

[12]If the amendment is initiated via citizen petition.

[13]For a good overview of citizen initiatives in Florida, see P. K. Jameson and Marsha Hosack, "Citizen Initiative in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Statutory Initiatives Alternatives," *Florida State University Law Review*, 1996.

[14]In 2002, one additional amendment proposed by the legislature was removed from the ballot by the Florida Supreme Court for being misleading "because it could make voters think [the committee to study sales tax exemptions] would play only an advisory role when it really would be given legislative powers." (Amendment 5 proposed to create a committee to study sales tax exemptions.) *The Florida Times-Union* editorial, "Taxes: Do It Right," Sept. 21, 2002.

[15]*Initiative & Referendum Institute's Nov. 5, 2002 General Election Post Election Report.* Washington, D.C.: Citizen Lawmaker Press, 2002. See www.BallotWatch.org.

[16]Includes those put on the ballot by the Constitutional Revision Commission in 1998. The CRC meets every 20 years and has the authority to place amendments directly on the ballot.

[17]This number includes both constitutional and statutory initiatives.

[18]This number includes both constitutional and statutory initiatives.

[19]Initiative & Referendum Institute, "Is the Initiative Process Out of Control?" www.iandrinstitute.org/Usage.htm, accessed Mar. 16, 2003.

[20]Julie Hauserman, "What's Next After Citizen Initiative Flurry?" *St. Petersburg Times*, Nov. 11, 2002.

[21]John Sowinski, an Orlando political consultant who has successfully run citizen initiative campaigns, says that Florida's rolloff rate is much lower than in other states. Mary Ellen Klas, "Changing Florida's Constitution," *Florida Trend*, Oct. 2002, p. 58.

Table

Status of Florida's Proposed Constitutional Amendments and Revisions: 1998–2002

1998 AMENDMENTS	Proposed by	% Yes Vote	Pass or Fail	% Rolloff*
1 Historic property tax exemption and assessment	Legislature	54.5	Pass	8.8
2 Preservation of death penalty[1]	Legislature	72.8	Pass	7.2
3 Additional homestead exemption (for seniors)	Legislature	68.5	Pass	5.6
4 Recording of instruments in branch offices	Legislature	74.1	Pass	13.5
5 Conservation of natural resources and wildlife conservation commission	CRC**	72.3	Pass	8.2
6 Public education of children	CRC	71.0	Pass	6.8
7 Local option for selection of judges and funding of state courts	CRC	56.9	Pass	10.1
8 Restructuring the state cabinet	CRC	55.5	Pass	11.4
9 Basic rights	CRC	63.3	Pass	8.0
10 Local and municipal property tax exemptions and citizen access to local offices	CRC	49.8	Fail	11.2
11 Ballot access, public campaign financing, and election process revisions	CRC	64.1	Pass	11.9
12 Firearms purchases, local option for criminal history records check and waiting period	CRC	72.0	Pass	6.9
13 Miscellaneous and technical revisions	CRC	55.0	Pass	14.2
2000 AMENDMENTS				
1 Florida transportation initiative for statewide high-speed monorail, fixed guide way, or magnetic levitation system	Citizen Petition	52.7	Pass	7.6
2 Circuit court judges appointed by governor with retention by vote of the people	Legislature	22.8–42.2[2]	Fail	10.4
3 County court judges appointed by governor with retention by vote of the people	Legislature	13.1–39.9[3]	Fail	10.9

*The rolloff rate is the percentage of voters who vote in races at the top of the ballot (for example., presidential and gubernatorial) but do not vote on amendments that typically appear at the bottom.

**Constitutional Revision Commission

[22]See Susan A. MacManus, *Targeting Senior Voters.* Boulder, Colo.: Rowman & Littlefield, 2000.

[23]South Florida Sun-Sentinel Editorial Board, "Let Voters Write Laws," *Sun-Sentinel*, Nov. 10, 2002.

[24]Earl Mackey, "Citizen Amendments to the Constitution Are Not the Problem," *Tallahassee Democrat*, Dec. 1, 2002.

[25]In Florida, an amendment's ballot title cannot exceed 15 words; there is a 75-word limit on the amendment summary that also appears on the ballot.

[26]National Conference of State Legislatures Task Force on Citizen Initiatives, "Initiatives Back in Vogue," *Daytona Beach News-Journal*, Nov. 11, 2002.

[27]Ibid.

[28]*Pensacola News Journal* Editorial, "Amendment Process Now a Free-for-All," *Pensacola News Journal*, Nov. 10, 2002.

[29]One review of the 2002 campaign finance reports found that the advocacy groups that sponsored the class-size, pre-K, second-hand smoking, and university governing board amendments raised between $1.5 million and nearly $6 million for each petition drive." Gregg Martin, "Petition Amendments Big Business," *Charlotte Sun-Herald*, November 10, 2002. Some like columnist Elijah Gosier question the motives of hired signature collectors: "Those canvassers are more like panhandlers than advocates for their cause: Toss them a signature and they'll leave you alone." "Stop Cluttering My Constitution," *St. Petersburg*

Table (continued)

Status of Florida's Proposed Constitutional Amendments and Revisions: 1998–2002

2002 AMENDMENTS	Proposed by	% Yes Vote	Pass or Fail	% Rolloff*
1 Amending Article 1, Section 17 of State Constitution[4]	Legislature	69.7	Pass	10.9
2 Economic impact statements for proposed constitutional amendments or revisions	Legislature	78.0	Pass	9.9
3 Authorizing amendments to Miami-Dade County home-rule charter by special law approved by referendum	Legislature	47.8	Fail	18.8
4 Laws providing public records or meetings exemptions two-thirds vote required	Legislature	76.7	Pass	11.1
5 Tax exemptions[5]	Legislature			
6 Protect people from hazards of second-hand tobacco smoke by prohibiting workplace smoking	Citizen Petition	71.0	Pass	3.3
7 Exemption for construction of living quarters for parents or grandparents	Legislature	67.3	Pass	6.6
8 Voluntary universal pre-kindergarten education	Citizen Petition	59.2	Pass	5.1
9 Florida's amendment to reduce class size	Citizen Petition	52.4	Pass	4.6
10 Animal cruelty amendment: limiting cruel and inhumane confinement of pigs during pregnancy	Citizen Petition	54.8	Pass	6.6
11 Local trustees and statewide government board to manage Florida's university system	Citizen Petition	60.5	Pass	8.9

*The rolloff rate is the percentage of voters who vote in races at the top of the ballot (for example, presidential and gubernatorial) but do not vote on amendments that typically appear at the bottom.

Table Source Codes:

[1]Declared unconstitutional by the Florida Supreme Court. Court ruled the ballot summary was inaccurate.

[2]Twenty circuits.

[3]Sixty-seven counties.

[4]Death penalty.

[5]Removed from ballot by Florida Supreme Court because language was misleading.

Times, Nov. 12, 2002.

[30]For an excellent discussion of "Direct versus Representative Democracy," see Thomas R. Dye and Susan A. MacManus, *Politics in States and Communities*, 11th ed. Upper Saddle River, N.J.: Prentice Hall, 200341-44.

[31]For good discussions of referenda processes and politics, see Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall*, Cambridge, Mass.: Harvard University Press, 1989; and Daniel A. Smith, *Tax Crusaders and the Politics of Direct Democracy*, New York: Routledge, 1998.

[32]For an excellent discussion, see Mary Ellen Klas, "Changing Florida's Constitution," *Florida Trend*, Oct. 2002.

[33]Letitia Stein, "Debate Over Dollars," *Orlando Sentinel*, Mar. 19, 2003.

[34]For example, Amendment 9 is "seen by critics as a parochial issue primarily benefiting the most-populous counties...South Florida was home to the largest concentration of supporters, and the measure failed in many rural counties..." Bill Hirschman, "South Florida May Get Most of Money For Shrinking Class Sizes," *South Florida Sun-Sentinel*, Mar. 22, 2003.

[35]See Susan A. MacManus, Mark S. Pritchett, and Uri J. Fisher, "Amendments, Mandates, and Money: Challenges Facing Florida Counties" and "City Budgets Stressed by Exemptions, Mandates, Growth, Lawsuits, Health Costs, and

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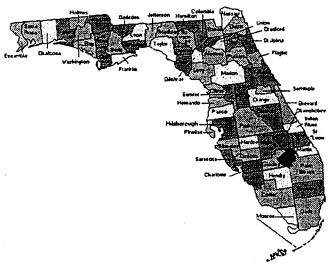
The Keys to
Reforming Florida's Constitutional Amendment Process: Uniformity, Clarity, Transparency, & Voter Education



By

Dr. Susan A. MacManus
Distinguished University Professor of Public Administration & Political Science
Department of Government & International Affairs
University of South Florida, Tampa
4202 E. Fowler Ave., SOC 107
Tampa, FL 33620
(813) 974-5351
samacmanus@aol.com

With the assistance of

Brittany Penberthy
Research Assistant, Political Science Major
University of South Florida, Tampa

Prepared for Presentation to
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The Keys to
Reforming Florida's Constitutional Amendment Process: Uniformity, Clarity, Transparency, & Voter Education

Opinions abound as to whether Florida's constitutional amendment process needs to be revamped and if so, how much and in what way. Thus far, the major focus has been on the state's direct initiative process whereby citizens using the petition process may place an amendment on the ballot for voter approval.

Specifically, a great deal of attention has been paid to: (1) signature requirements (number, timing, geographical distribution); (2) ratification requirements (% of votes needed to pass the amendment); and (3) the possibility and pragmatism of affording Floridians use of the statutory initiative and/or the indirect statutory initiative process.

SHORTCOMINGS OF THE CURRENT PROCESSES

Based on testimony before this Committee thus far, there appears to be little consensus on which, if any, of these reforms should be adopted. My own informal analysis suggests there is considerably more agreement among Floridians on the shortcomings of the system:

- ✓ The amendment process is terribly confusing, partly because the procedures, terminologies, and required content vary among the five ways amendments can be placed on the ballot. There is little uniformity.

- ✓ Ballot titles & summaries (and the text) of the proposed amendments are often written in language that is either "clear as mud" or in such flowery language as to almost guarantee a "yes" vote.

- ✓ It is difficult to really tell the degree to which these petition drives are being undertaken by "grassroots" groups or by powerful special interest or advocacy groups. Likewise, it is difficult to compare the proportion of funding for (or against) a proposed amendment that comes from Floridians versus out-of-state contributors.

- ✓ Voters find it extremely difficult to access and understand the pros <u>and</u> cons of these proposed amendments.

As it stands, the direct initiative (petition) amendment process is dominated by well-funded groups and individuals. (See Table 1 for an analysis of those that made it to the ballot v. those that did not.) Monied groups have the funds to get the requisite number of signatures. They also can afford to hire the best legal and political advisors to craft the language of an amendment and then defend it before the Florida Supreme Court, if necessary. Finally, well-financed groups can pay for the advertising necessary to "sell" the amendment to the public once on the ballot. (And the deep pockets may not be those of Floridians but of outsiders with a broader national agenda.)

It's no surprise that the petition-generated amendment proposals that do make it to the ballot tend to pass. (Florida has a considerably higher passage rate of citizen-initiated amendments than other states.)[1] **It is largely a one-sided game, especially getting on the ballot, that's difficult to play without deep pockets.**

MINIMAL CHANGES CAN VASTLY IMPROVE THE PROCESS

At a minimum, there needs to be greater uniformity, clarity, transparency, and voter education/information in the state's amendment processes.

Recommendation #1: Greater Uniformity

Today, confusion rather than clarity reigns insofar as constitutional amendments are concerned, primarily because there are five different ways to place a constitutional change proposal before the electorate.[2] As a consequence, there are differences in terminologies, formats, lengths, and informational requirements that confuse the voter.

Let's look at a few examples. First, the nomenclature—how it gets on the ballot yields a different term (revision v. amendment).

Second, the rules differ with regard to content—single subject v. multiple subjects, depending upon the entity that successfully places it on the ballot (e.g.,

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[1] Susan A. MacManus, "Implementing Florida's Constitutional Amendments: Truth and Consequences," *The Journal of the James Madison Institute*, vol. 24, Spring 2003: 3-15, 19.

[2] (1) By a three-fifths vote of the membership of each house of the state legislature (legislative referendum); (2) by the citizens via petition (direct initiative); (3) by the Tax and Budget Reform Commission, which meets every 20 years; (4) by the Constitutional Revision Commission, a 37-member body comprised of both public officials and private citizens that meets every 20 years; and (5) by a constitutional convention.

citizen initiatives—single subject; Constitutional Revision Commission—multiple subjects).

Third, ballot title & summary requirements vary depending upon the entity generating the amendment (e.g. Legislature—unlimited, citizen-driven initiatives, title limited to 15 words, explanatory summary—75 words).

Fourth, fiscal impact data is only required of amendments placed on the ballot by citizen petition. Should any legislatively-proposed amendments get on the ballot in 2004 without such information (which is not required) it will likely generate a considerable amount of confusion and criticism.

Different rules for the Legislature than for the public at-large give the public little confidence in the parity and fairness of the amendment process.

Recommendation #2: Greater Clarity

Every election cycle, I am bombarded with citizen requests to help them understand what the amendments REALLY mean...because they genuinely do want to understand. Many suspect that the wording of the ballot title and summary is finessed and misleading--designed to trick the public. When an amendment's wording is overly confusing, voters pass it by (roll-off). Roll-off is most common when the proposed amendment is highly legalistic and/or limited to a single geographical area of the state.

Recommendation #3: Greater Transparency

The format of the Division of Elections Campaign Finance Data Base (contributions and expenditures) is not user-friendly, particularly with regard to the sorting of data. With some simple changes and additions, the public and the press could be much better informed about the funding of "citizen-driven" initiatives.

The Division of Elections should revamp their Campaign Finance Data Base reporting system to allow the user to *sort* and *analyze* more easily:

Contributions Data Base
Greater consistency in entering & proofing contributor names
State in which contributor resides
Type of contributor (group v. individual)

Expenditures Data Base
Create categories of expenditures--to permit better analysis of what money is being expended on (for example, paid signature collectors and media buys).

It would also be helpful to revamp the Constitutional Amendment Petition Form to more prominently identify whether the signature gatherer is a paid collector or a volunteer and in a manner that allows an aggregate calculation of the proportion of signatures collected by paid collectors v. those collected by volunteers.

In summary, greater transparency is needed, especially in light of the pattern of well financed amendments getting on the ballot and poorly-funded ones going nowhere. Why is this important? Because the public has a right to know whether the push to alter the basic governance doctrine of the populace (the state constitution) is coming from a narrow or broad constituency base.

Recommendation #4: Better Voter Education: A Voter Amendment Guide, With Pros & Cons Listed

We have clear evidence that voter education works. Since the 2000 election, Florida has been a leader in state-funded voter education, which has been proven to be effective. Analyses after the 2002 election showed that voter error rates declined considerably in response to *extensive* voter education efforts by county supervisors of elections.[3] The mailing out of sample ballots to registered voters was extremely well received by the electorate.

Florida voters would equally welcome, and use, a voter amendment guide. At a minimum, the guide should describe the purpose of the amendment, summarize the content, list its pros and cons—in easily understood language,[4] and report the projected price tag (on *all*, not just citizen-initiated, amendments).

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[3] Susan A. MacManus, "Goodbye Chads, Butterfly Ballots, Overvotes, & Recount Ruckuses! Election Reform in Florida: 2000-2003," in Daniel J. Palazzolo, ed., *Election Reform: Politics and Policy*. Lexington Books (forthcoming, 2004). Susan A. MacManus, "Voter Education: The Key to Election Reform; Success Lessons From Florida," *University of Michigan Journal of Law Reform*, vol. 36 (Spring 2003).

[4] One analysis of four statewide voter pamphlets, including Oregon's and California's, found that: "The average 'readability' level for the legislative analyst's language...was at the 18th grade level. The average sentence length was 40 words. Neither the short summary that appeared on the ballot nor the impartial analysis is readable by more than 15 or 20 percent of the people." David Magleby in *Western Initiatives: A Challenge to Representative Democracy; Excerpts from the CSG-WEST Committee on the Future of Western Legislatures*, July 1999, p. 25.

A number of states prepare and distribute voter guides that include proposed amendments, although not all guides list the pros and cons. (For a state-by-state listing of the content, distribution, and writers of these guides, see chart in the Appendix material.) Certainly, the guides with the pros and cons included are more helpful than those without. **Simply put, all Florida voters need access to quality information describing both sides of each proposed amendment.**

****

The bottom line is that the success of any amendment process reform is contingent upon a better-educated electorate. Our state can vastly improve the information provided to voters on *all* proposed amendments or revisions—regardless of their route to getting on the ballot.

Table 1
Funding Level Differences of Citizen Initiated Amendments:
Those Making It To The Ballot vs. Those Not Making It

2002 Ballot Status	Sponsor	Total $ Collected*	Total Expenditures	Number of Contributions**	Number of Contributions Reaching Half of All Contributions***	Vote in Favor of Amendment
On Ballot	**Passed**					
Protect People from the Health Hazards of Second-Hand Tobacco Smoke by Prohibiting Workplace Smoking	Smoke-Free for Health, Inc.	$5,898,964.99	$5,877,676.38	101	5/101 = 4.95%	70.97%
Voluntary Universal Pre-kindergarten Education	Pre-K Committee (Parents Readiness Education for our Kids)	$2,242,729.01	$2,041,160.69	349	26/349 = 7.45%	59.23%
Local Trustees and Statewide Governing Board to Manage Florida's University System	Education Excellence for Florida	$1,769,705.13	$1,762,236.60	899	27/899 = 3.00%	60.52%
Animal Cruelty Amendment: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy	Floridians for Humane Farms	$1,697,645.65	$1,574,991.64	6809	11/6809 = 0.19%	54.75%
Florida's Amendment to Reduce Class Size	Coalition to Reduce Class Size	$1,637,150.08	$1,628,967.13	174	9/174 = 5.17%	52.39%
Not on Ballot	**Not on Ballot**					
Smoking Prohibited in Certain Indoor Workplaces and Restricted in Restaurants and Other Indoor Places	Committee for Responsible Solutions	$360,217.18	$335,000.00	4	1/4=25%	
Creates Independent Nonpartisan Commission to Apportion Legislative and Congressional Seats Which Replaces Apportionment by Legislature	People Over Politics	$147,248.28	$105,928.87	76	6/76=7.8%	
Standards to be Followed in Apportioning or Creating Legislative or Congressional Districts						
Equal Opportunity in Public Contracting	Floridians Representing Equity and Equality	$140,841.01	$100,505.03	338	3/338=0.89%	
Equal Opportunity in Public Education						
Equal Opportunity in Public Employment						
Florida Equal Opportunity Initiative						

	Sponsor	Total $ Collected*	Total Expenditures	Number of Contributions**	Number of Contributions Reaching Half of All Contributions***	
Right to Sue Managed Care Entities for Negligence	Committee for Patient Rights	$89,948.53	$9,465.35	4	2/4=50%	
Right to Sue Managed Care Entities for Negligence Cannot be Limited by Contract						
Require Parental Consent for Minor Child's Abortion	Parents-Rights.org	$587.98	$140.00	6	1/6=16.67%	
Citizens' Right of Political Participation	Floridians For Political Choice	$265.00	$194.12	2	NA	
Voter Option of "None of the Above" at General Election						
Voters' Power of Recall						
The Legalization of Cannabis Sativa L. for All Purposes	FORML Freedom Fighters	$205.00	$166.38	14	5/14=35.7%	
Florida's Amendment to Institute Instant Runoff Voting	The Green Alliance of Florida	$100.00	$0.00	1	NA	
Term Limits by Voter Approval	Voter Approval Committee	$0.00	$0.00	0	NA	
Withdrawn						
Patient's Right to Know About Adverse Medical Incidents	Floridians for Patient Protection	$4,733,188.17	$4,726,209.21	856	7/78=8.97%	
Removed by Florida Supreme Court						
Authorization for County Voters to Approve or Disapprove Slot Machines Within Existing Pari-Mutuel Facilities	Floridians For a Level Playing Field	$1,711,000.00	$1,711,689.91	58	13/78+16.67%	

*Included in the total monies collected are the in-kind contributions.
**Contributions can be given more than once by a group or individual.
***Calculated by arraying the donations in descending order from the largest contribution to the smallest. The figure reported is the number of contributions that totaled half of all that were collected divided by the total number of contributions.

Source: Florida Department of State, Division of Elections, Campaign Finance Data Base and Initiatives/Amendments/Revisions. Online: http://election.dos.state.fl.us/ Accessed January 9-January 13, 2004.

Appendix Materials

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Voter Education: The Key to Election Reform Success Lessons from Florida

Susan A. MacManus

VOTER EDUCATION: THE KEY TO ELECTION REFORM SUCCESS LESSONS FROM FLORIDA

Susan A. MacManus*

Over a dozen national task forces and commissions have analyzed the 2000 presidential election and concluded that electoral system reforms are imperative not just in Florida, but nationwide. Among the common recommendations are elimination of punch card ballots, enhancement of registration procedures and outreach, provision of more accurate voter lists, clear delineation of appeals processes, establishment of voter rights and responsibilities, clarification of recount rules and procedures, securing of accessible polling places, better facilitation of voting and proper counting of absentee ballots, and ensuring provisional ballots available at each precinct. For these reforms to be most effective, the reports say, better voter education is needed, and elections officials and poll workers must receive better training.

Florida has passed laws mandating better voter education, along with many other electoral reforms, in both the 2001 and 2002 legislative sessions. The sweeping Florida Election Reform Act of 2001 requires all 67 county supervisors of elections to file voter education plans with the Division of Elections in the Florida Department of State in order to qualify for state funds. (The Act appropriated nearly $6 million for voter education in fiscal year 2001–2002 in addition to $24 million for purchase of new voting equipment, fiscal years 2001—2003.) Laws passed in the 2002 session broaden the scope of voter education responsibilities, more definitively spell out voter rights, and ensure that Florida's electoral system conforms with the Americans with Disabilities Act of 1990.

This Article details the content and thrust of Florida's voter education efforts and examines the creative educational efforts underway at the local level that other states' communities would do well to follow, lest they become the objects of major litigation, the sites of political furor, and the objects of unwanted national attention.

INTRODUCTION

After the embarrassments of Election 2000—the butterfly ballot, chads of all descriptions (hanging, dimpled, pregnant, and otherwise), and re-counting fiascos, the Palm Beach Board of County

* Distinguished University Professor of Public Administration and Political Science, Department of Government and International Affairs, University of South Florida, Tampa. B.S. Government 1968, Florida State University, M.A. Political Science 1969, University of Michigan; Ph.D., Political Science 1975, Florida State University.

Commissioners voted to spend $14.4 million to purchase 4,000 touch screen voting machines.[1] Everyone had high hopes that the new system would eliminate the errors of the old punch card system. However, when the system was used for the first time in 15 municipal elections in 2002, problems abounded.[2] Voter and poll worker error rates resurfaced, and the County Supervisor of Elections, Theresa LePore, was called before the County Commission to explain what happened.[3] Shortly thereafter, similar situations made the news in several other Florida counties as new voting systems "put on trial" in various municipal elections were judged to be less than perfect.[4]

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1. Stebbins Jefferson, *No Chads, Just Glitches*, PALM BEACH POST, March 3, 2002, *available at* http://www.gopbi.com/partners/pbpost/epaper/editions/today/opinion_31865701172a1850060 (on file with the University of Michigan Journal of Law Reform).

2. *See* George Bennett, *New Voting System a Touchy Subject*, PALM BEACH POST, Apr. 3, 2002, at 5B [hereinafter Bennett, *New Voting System*]. The error rate (voters not recording a vote for either candidate in a runoff election) in one small municipality, Wellington, was 3.1%. *Id.* Commissioner Tony Masilotti said, "There seems to be as high a rate of error as there was with the old chad system." *Id.* Other problems included poll workers not collecting cartridges from unused voting machines. Kellie Patrick, *Cartridge Problem Casts Pall on Palm Beach County's New Voting Machines*, S. FLA. SUN-SENTINEL, Mar. 14, 2002, at 1A; *see also* Eliot Kleinberg, *Poll Workers to be Reprimanded for Election's Human Goofs*, PALM BEACH POST, March 14, 2002, *available at* http://www.gopbi.com/partners/pbpost/epaper/editions/Thursday/local_news_c309649f202930 (on file with the University of Michigan Journal of Law Reform). Across the county, 2.8% of the 1,957 absentee ballots cast in the March 12 municipal elections were spoiled (not cast properly). Absentee balloting in Florida was done using a new optical-scan balloting system that replaced the old punch card system. George Bennett, *Ballot Arrows Point Out Problems*, PALM BEACH POST, Mar. 31, 2002, at 1A.

3. Palm Beach County Commissioners disagreed about "whether to blame election difficulties on the machines, voter education efforts, poll worker training or some combination of all these elements." Bennett, *New Voting System*, *supra* note 2, at 5B; *see also* Jennifer Peltz, *County Examines Vote Machines*, S. FLA. SUN-SENTINEL, Apr. 3, 2002, at 3B; Jennifer Peltz, *County Seeks Advice on Voting Machines*, S. FLA. SUN-SENTINEL, Apr. 24, 2002, at 1A.

4. Many of these problems were equipment-oriented and may have been caused by technician errors. For example, in Plant City (Hillsborough County), technicians were unable to transmit election results by computer from Plant City to the Brandon election service center. There were also incidents of remote sites being unable to read touch screen voting system cartridges. Yvette C. Hammett, *New Machines Touch Voters' Fancy*, TAMPA TRIBUNE, April 3, 2003, *available at* http://info.tbo.com/printversion.cgi?yrl=http%3A//www.tampatrib.com/MGA602POKZC.html; Bill Varian, *Glitch Mars Touch Screen Debut*, ST. PETERSBURG TIMES, *available at* http://www.sptimes.com/2002/04/03/news_pf/Hillsborough/Glitch_mars_touch_acr.shtml (on file with the University of Michigan Journal of Law Reform). In the town of Medley (in Miami-Dade County), software, which was used to combine 45 absentee votes with ballots cast at City Hall, changed the order of the candidates' names and caused election officials to announce the wrong winner. Tere Figueras & Tanya Wragg, *Medley's Touch-Screen Vote Ends With Mix-Up*, MIAMI HERALD, April 3, 2003 *available at* www.miami.com/mld/miamiherald/2002/04/03/news/local/2986522.htm?template=cont. A programming error by a software technician created the problem. Oscar Corral, *Technician's Error, Not Machines, to Blame in Dade Election Mix-Up*, MIAMI HERALD, April 4, 2002 *available at* http://www.miami.com/mld/miamiherald/news/local/2993042.htm?template=contentModules.

Post-election analyses of the early trials of touch screen voting machines in Florida merely validated what numerous national commission and task force reports had already concluded: first, there is never an error-free election,[5] and second, without better voter education, new technology and revamped statutes, rules, and regulations have far less of an impact.[6]

As Deborah Phillips of the Voter Integrity Project states: "[T]here actually is no such thing as a 'perfect' voting system."[7] An article in the League of Women Voters' magazine, *The National Voter*, concludes: "[T]here's no such thing as an error-free election."[8] The same article affirms: "voter education—always an important component [of reform]—becomes even more critical when adopting new voting technologies."[9]

A widely cited GAO report cautions reformers against assuming that technology alone will be a cure-all:

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5. Numerous studies acknowledge the impossibility of an error-free election (for a variety of reasons, including a highly decentralized election system). *See, e.g.*, UNITED STATES GENERAL ACCOUNTING OFFICE, GAO-02-90, ELECTIONS: A FRAMEWORK FOR EVALUATING REFORM PROPOSALS (Oct. 2001) [hereinafter GAO-02-90]; NATIONAL COMMISSION ON ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (THE CARTER-FORD COMMISSION), (The Miller Center of Public Affairs, Univ. of Va., The Century Foundation, Aug. 2001); NATIONAL TASK FORCE ON ELECTION REFORM, ELECTION 2000: REVIEW AND RECOMMENDATIONS BY THE NATION'S ELECTIONS ADMINISTRATORS 10 (The Election Center, July 2001); THE CALTECH/MIT VOTING TECHNOLOGY PROJECT, RESIDUAL VOTES ATTRIBUTED TO TECHNOLOGY 18 (Mar. 30, 2001). Some studies acknowledge a 2% error, or residual vote, as average; other studies find that error rate tolerable, but not optimal. The National Commission on Election Reform concludes: "[R]esidual vote rates at or below 1% should be considered good. Residual vote rates between 1 and 2% can be viewed as adequate, but citizens should consider local circumstances and decide what is possible. Rates between 2 and 3% should be viewed as worrying. Rates higher than 3% should be considered unacceptable." NATIONAL COMMISSION ON ELECTION REFORM, *supra*, at 54. A report on election errors in the fifty states in 2000, prepared for Rep. John Conyers, Jr. by the Democratic investigative staff of the House Judiciary Committee states: "Statisticians have estimated that as many as 2% of all ballots cast for the office of President nationwide were discarded because of machine errors and voter errors." STAFF OF HOUSE COMM. ON THE JUDICIARY, 107TH CONG., HOW TO MAKE OVER ONE MILLION VOTES DISAPPEAR: ELECTORAL SLEIGHT OF HAND IN THE 2000 PRESIDENTIAL ELECTION 14 (Aug. 20, 2001).

6. The National Task Force on Election Reform report that analyzed the causes of problems in Election 2000 concludes: "[O]nly a small percentage of the problems were directly related to any failure by vote tally devices themselves. The problems were created by people, not machines, and any reform of substance will deal with what people do or don't do, rather than focusing on a machine that can only do what it is designed to do." NATIONAL TASK FORCE ON ELECTION REFORM, ELECTION 2000, *supra* note 5, at 8.

7. Deborah M. Phillips, *Setting The Standard for Election Integrity*, Jan. 16, 2001, at 1 (on file with The Voting Integrity Project).

8. Kathy Koch, *Can High Tech Save 'Lost' Votes?*, THE NATIONAL VOTER, at 19 (Mar./Apr. 2002).

9. *Id.*

> Introducing new technology alone may not necessarily reduce voter error. In fact, switching equipment actually may introduce new opportunities for voter error unless the jurisdiction deals with the people aspects of successfully fielding new voting technology and offers voter education on how to use the new equipment effectively.[10]

Teaching voters how to use new voting equipment is but one element of voter education. Voters must also be better informed on a wide range of issues—from absentee voting to their rights and responsibilities—to improve the electoral process. To do this, election office personnel and poll workers must receive better training and enlist the help of other institutions, such as schools, families, churches, businesses, civic groups, and community organizations, in voter education efforts.

This Article examines the voter education efforts by the State of Florida and its counties as potential models for other states to follow. The article looks at Florida's electoral reform statutes and the Florida Department of State's minimum standards for nonpartisan voter education, as well as the creative educational efforts on the county level during each phase of the election cycle. It focuses on techniques being used to reach special-need populations—the young, the elderly, the disabled, minorities, new and inexperienced voters, recently relocated voters, and those with reading difficulties. It also looks at marketing and media-based outreach tools that are being used to reach specific segments of the electorate, and to recruit and train poll workers.

II. STRONG OPINIONS ABOUT REFORM

Virtually every recent national election reform task force and commission report has concluded that better voter education is needed.[11] The Florida Governor's Select Task Force on Election

10. GAO-02-90, *supra* note 5, at 51.

11. *See, e.g.*, GAO-02-90, *supra* note 5; U.S. COMMISSION ON CIVIL RIGHTS, ELECTION REFORM: AN ANALYSIS OF PROPOSALS AND THE COMMISSION'S RECOMMENDATIONS FOR IMPROVING AMERICA'S ELECTION SYSTEM (Nov. 2001); NATIONAL ASSOCIATION OF STATE ELECTION DIRECTORS, FEDERAL ELECTION RECOMMENDATIONS (Aug. 15, 2001); NATIONAL COMMISSION ON ELECTION REFORM, *supra* note 5; THE CONSTITUTION PROJECT'S FORUM ON ELECTION REFORM, BUILDING CONSENSUS ON ELECTION REFORM (Aug. 2001); NATIONAL CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTIONS REFORM TASK FORCE (Aug. 2001); NAACP, ELECTIONS REFORM AND VOTING

Procedures, Standards, and Technology placed voter education at the top of its recommendations for addressing the shortcomings evident in Election 2000.[12] The Select Task Force, created by Executive Order of Governor Jeb Bush and staffed by The Collins Center for Public Policy, Inc., put the issue in perspective:

> We can easily get lost in debates about which voting technology is best or what law should control recounts. But, ultimately, elections are not primarily about technology or legal procedures. They are about people, their belief in democracy, and their faith in free and open elections as a reliable way to make their choices known. The interests and skills of people—citizens, voters, poll workers, candidates, and officials—can make or break any voting system. It is essential to put people first and to invest in their abilities to do their jobs well.[13]

Post-election hearings and surveys in Florida in early 2001 asked citizens to identify what went wrong in Election 2000 and what should be done to remedy the problems. While respondents were quick to point out technology-oriented causes, they also noted problems stemming from educational deficiencies of voters, election officials, and poll workers.[14] Generally, African Americans, non-Cuban Hispanics, and Democrats predominately cited government-related shortcomings (ballot design, voting machine inaccuracies and malfunctions, poll workers, and government

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RIGHTS (July 24, 2001); NATIONAL ASSOCIATION OF SECRETARIES OF STATE, RESOLUTION ON REFORM POLICIES AND THE FEDERAL GOVERNMENT (July 2001); NATIONAL TASK FORCE ON ELECTION REFORM, *supra* note 5; NATIONAL ASSOCIATION OF COUNTIES/NATIONAL COMMISSION ON ELECTION STANDARDS AND REFORMS, REPORT AND RECOMMENDATIONS TO IMPROVE AMERICA'S ELECTION SYSTEM (May 2001); UNITED STATES HOUSE DEMOCRATIC SPECIAL COMMITTEE ON ELECTION REFORM, REVITALIZING OUR NATION'S ELECTION SYSTEM (Apr. 2001).

12. GOVERNOR'S SELECT TASK FORCE ON ELECTION PROCEDURES, STANDARDS, AND TECHNOLOGY, REVITALIZING DEMOCRACY IN FLORIDA (Mar. 1, 2001).

13. *Id.* at 16. Prior to writing the report, the Task Force held hearings throughout the state. Several of these hearings were broadcast nationally over C-SPAN and other cable networks.

14. *See* U.S. COMMISSION ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (June 2001); Susan A. MacManus, *Floridians Look Back at Election 2000 and Look Forward to Major Reforms*, J. JAMES MADISON INST. (Summer 2001) (on file with author) [hereinafter MacManus, *Floridians Look Back*]; Susan A. MacManus et al., *Floridians Want Reform Of The Election System . . . Now!*, The Collins Center for Pub. Pol'y, Inc. and The James Madison Inst., Apr. 16, 2001 (on file with author) [hereinafter MacManus et al.]. A poll of six hundred adult Floridians was conducted April 3–8, 2001, via telephone by Schroth and Associates, Washington, D.C. MacManus et al., *supra*. The margin of error for the survey is +/- 4%.

officials), whereas whites, Cuban-Americans, and Republicans more often pointed to individual voter-based reasons (carelessness, lack of experience using voting equipment, reading, and language deficiencies).[15] What they *could* agree on was the need to revamp the state's election system. Three-fourths said it was "very important" for the Florida Legislature to reform the system *before* Election 2002.[16]

Naturally, standardization and uniformity of voting machines, ballot layout and design, re-counting rules, and uniform poll closing times were at the top of Floridians' reform wish list. But 91% also favored better voter education for new registrants, 86% supported the idea of creating a statewide voter registration list to help reduce fraudulent voting by ineligible persons, 81% saw the need for better training of poll workers, and 79% preferred a better registration system.[17]

Improving voter education was heavily supported by 18-to-34 year-olds (96%), non-Cuban Hispanics (98%), African Americans (95%), southwest Florida residents (96%), and non-registered voters (96%).[18] This finding is consistent with the conclusions of a number of other studies and newspaper accounts on the need for more voter education. Surveys of Florida's younger adults show that younger Floridians learn little about the mechanics of voting in their high school government or civics classes.[19] In addition, spokespersons for minority groups have acknowledged that the voters' mistakes from those communities are indicative of the need to better educate newly registered voters.[20] The high percentage of non-registered voters who cite this need is yet another indication that some fail to register because they are somewhat intimidated by a process about which they know very little.

The most mobile residents are the most likely to favor creating a statewide voter registration list to help reduce fraudulent voting by ineligible persons. These residents are 18-to-34-year-olds (95%),

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15. MacManus, *Floridians Look Back*, *supra* note 14, at 5.

16. MacManus et al., *supra* note 14.

17. *Id.* at 11.

18. *Id.*

19. Susan A. MacManus, *What Florida's College Students Say They Didn't Learn in Their High School Government Class*, J. JAMES MADISON INST. (May/June 1999), at 4–10, 28; Susan A. MacManus, *Why Should the Young Desire a Career in Government or Consider Running For Office?*, *in* EDUCATION FOR CIVIC ENGAGEMENT IN DEMOCRACY: SERVICE LEARNING AND OTHER PROMISING PRACTICES 117–30 (Sheilah Mann & John J. Patrick eds., 2000) [hereinafter MacManus, *Why Should the Young Desire a Career in Government or Consider Running For Office?*].

20. *See, e.g.*, Jounice L. Nealy, *Black Voter Drive Begins Anew*, ST. PETERSBURG TIMES, Jan. 15, 2001, at A4.

persons who have lived in Florida five years or less (93%), and those not registered to vote (93%), who are most often young.[21] This finding confirms what other research has shown, namely that young people say they have little knowledge of how to move their voter registration from one place to another.[22] Among those who are registered, some worry that they may be registered in more than one place because they do not know for sure that their name has been removed from the voter roll at their former residence.

Young persons, African Americans, Hispanics (Cuban and non-Cuban), Independents, and South Florida residents are the groups which most strongly support better poll worker training. This finding is consistent with testimony that was given at various hearings across the state,[23] especially in South Florida where ballot format problems were most intense in 2000, and news coverage of poll worker-related problems was heaviest.[24]

III. FLORIDA ELECTION REFORMS: 2001 & 2002

Both the 2001 and 2002 Florida legislative sessions passed electoral reform laws that make Florida's efforts the most comprehensive of any state. Voter education is an integral part of each.

A. The 2001 Act

On May 4, 2001, the Florida legislature passed a sweeping election reform bill, the Election Reform Act of 2001, which was signed

21. MacManus et al., *supra* note 14, at 11.

22. *See* MacManus, *Why Should the Young Desire a Career in Government or Consider Running for Office?*, *supra* note 19.

23. Both the Governor's Select Task Force on Election Procedures, Standards and Technology and the U.S. Civil Rights Commission held hearings around Florida designed to generate testimony from citizens and voter advocacy groups. These public comments were, in turn, incorporated into the final reports of these two groups. GOVERNOR'S SELECT TASK FORCE ON ELECTION PROCEDURES, STANDARDS, AND TECHNOLOGY, *supra* note 12; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 14.

24. *See generally* MARTIN MERZER & THE MIAMI HERALD STAFF, THE MIAMI HERALD REPORT: DEMOCRACY HELD HOSTAGE (2001); CORRESPONDENTS OF THE NEW YORK TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001); THE POLITICAL STAFF OF THE WASHINGTON POST, DEADLOCK: THE INSIDE STORY OF AMERICA'S CLOSEST ELECTION (2001).

by the Governor on May 10.[25] The portions of the Act specifica addressing the need for better voter education assigned respon bility to the Department of State (in which the Division Elections is housed)[26] and the county supervisors of elections.[27]

The 2001 Election Reform Act set deadlines for the Departme of State's development of voter education standards and for coun elections supervisors' design and implementation of nonpartisa voter education. The legislation delineated a wide array of topics t be addressed by the state and its counties, such as a statewide vote registration list, better training of poll workers, voter rights an responsibilities, absentee voting, and provisional ballots.

The 2001 Act also established a procedure for measuring the e fectiveness of the voter education programs. By December 15 o each general election year, each supervisor of elections must sub mit a detailed description of the voter education program implemented by her county to the Department of State. The De partment of State, in turn, is required to prepare a public repor on the overall effectiveness of voter education programs and to submit it to the Governor, the President of the Senate, and the Speaker of the House of Representatives by January 31 of each year following a general election. The Department of State is also charged with using information from the counties to adopt modified rules that incorporate successful voter education programs and techniques.

B. Appropriations

The 2001 General Appropriations Act gave the Division of Elections of the Florida Department of State $5,949,375 for fiscal year 2001–2002 to distribute to counties to implement their voter edu-

25. 2001 FLA. LAWS ch. 40 (The Election Reform Act). There was strong bipartisan support for the legislation. The final vote in the Florida Senate was 38-2 in favor of the legislation. The vote was unanimous in the Florida House of Representatives.

26. The Department of State was required to adopt rules prescribing minimum standards for nonpartisan voter education by March 1, 2002. These standards were to, at a minimum, address voter registration, balloting procedures, absentee and polling place standards, voter rights and responsibilities, distribution of sample ballots, and public service announcements. The Department of State was also required to review the existing voter education program in each of the state's sixty-seven counties.

27. Each county's supervisor of elections is required to implement the Department of State's minimum voter education standards and to conduct additional nonpartisan voter education.

cation plans.[28] The Election Reform Act of 2001 established the distribution formula, effective July 1, 2001—a per capita registered voter figure calculated by dividing the total dollar appropriation by the number of registered voters in Election 2000. Each county was eligible to receive an amount equal to the funding level per individual voter multiplied by the number of registered voters in the county, as certified by the Department of State for Election 2000.[29] This method yielded larger amounts for larger counties (with more diverse populations). Table 1 below summarizes these appropriations by county.

Each county's receipt of funds was contingent upon the filing of a comprehensive voter education program for the 2002 election cycle with the Department of State. Specifically, counties were required to submit a detailed description of how they planned to educate citizens and recruit and train poll workers.[30]

TABLE 1
VOTER EDUCATION, POLL WORKER TRAINING AND RECRUITMENT FUNDING

COUNTY	TOTAL REG VOTERS	EDUCATION FUNDING
Alachua	120,867	$ 82,155.42
Baker	12,352	$ 8,395.87
Bay	92,749	$ 63,043.12
Bradford	13,547	$ 9,208.13
Brevard	283,680	$ 192,822.26
Broward	887,764	$ 603,428.73
Calhoun	7,234	$ 4,917.08

28. General Appropriations Act, 2001 FLA. LAWS ch. 253 (Specific Appropriation 2898B).

29. The Election Reform Act, 2001 FLA. LAWS ch. 40 § 74 (2001).

30. The Election Reform Act addressed the need for educating poll workers by creating chapter 102.014. FLA. STAT. ch. 102.014 (2002). County elections supervisors are responsible for conducting training for inspectors, clerks, and deputy sheriffs prior to each primary, general, and special election. The law requires minimum training requirements:

> The minimum training requirements for clerks are a minimum of six hours of training during a general election year, at least two hours of which must occur after June 1 of that year. Inspectors must have a minimum of three hours of training during a general election year, at least one hour of which must occur after June 1 of that year.

Id.

The Act authorizes payment to inspectors, election clerks, and deputy sheriffs to attend required poll worker training sessions.

COUNTY	TOTAL REG VOTERS	EDUCATION FUNDING
Charlotte	98,898	$ 67,222.70
Citrus	81,378	$ 55,314.05
Clay	86,861	$ 59,040.94
Collier	123,572	$ 83,994.05
Columbia	31,131	$ 21,160.29
Desoto	15,731	$ 10,692.64
Dixie	10,511	$ 7,144.51
Duval	423,967	$ 288,177.79
Escambia	171,004	$ 116,234.41
Flagler	33,466	$ 22,747.43
Franklin	7,578	$ 5,150.90
Gadsden	26,253	$ 17,844.62
Gilchrist	6,878	$ 4,675.10
Glades	6,326	$ 4,299.89
Gulf	9,923	$ 6,744.84
Hamilton	6,939	$ 4,716.56
Hardee	10,886	$ 7,399.40
Hendry	16,268	$ 11,057.64
Hernando	95,549	$ 64,946.33
Highlands	52,941	$ 35,984.92
Hillsborough	499,427	$ 339,469.27
Holmes	10,317	$ 7,012.65
Indian River	71,420	$ 48,545.42
Jackson	23,973	$ 16,294.87
Jefferson	8,161	$ 5,547.17
Lafayette	4,036	$ 2,743.34
Lake	131,031	$ 89,064.06
Lee	252,918	$ 171,912.79
Leon	146,417	$ 99,522.20
Levy	18,671	$ 12,691.01
Liberty	3,752	$ 2,550.30
Madison	10,378	$ 7,054.11
Manatee	170,578	$ 115,944.85
Marion	147,707	$ 100,399.03
Martin	86,514	$ 58,805.08
Miami-Dade	896,912	$ 609,646.78
Monroe	48,409	$ 32,904.44
Nassau	35,170	$ 23,905.66
Okaloosa	111,320	$ 75,666.15
Okeechobee	17,448	$ 11,859.71
Orange	404,779	$ 275,135.37
Osceola	92,196	$ 62,667.23
Palm Beach	656,694	$ 446,366.40
Pasco	221,671	$ 150,673.66

COUNTY	TOTAL REG VOTERS	EDUCATION FUNDING
Pinellas	574,961	$ 390,811.05
Polk	247,807	$ 168,438.75
Putnam	40,396	$ 27,457.87
Santa Rosa	77,778	$ 52,867.07
Sarasota	221,945	$ 150,859.90
Seminole	190,704	$ 129,624.85
St. Johns	89,511	$ 60,842.19
St. Lucie	117,785	$ 80,060.53
Sumter	31,549	$ 21,444.41
Suwannee	20,617	$ 14,013.74
Taylor	12,304	$ 8,363.24
Union	6,752	$ 4,589.45
Volusia	260,572	$ 177,115.35
Wakulla	13,382	$ 9,095.98
Walton	28,144	$ 19,129.97
Washington	14,358	$ 9,759.38
Total	8,752,717	$ 5,949,374.92

C. Minimum Standards for Nonpartisan Voter Education

Most counties filed their voter education plans shortly after the Act became law to take advantage of the funding and to provide the input needed by the Department of State to formulate its minimum standards rule. The rule is an expansive one and incorporates many of the recommended approaches from various task forces and commissions.[31]

31. Under the Administrative Procedure Act, chapter 120.54 of the Florida Code, the rule-making process is as follows: An agency files a notice of workshop for a rule at least fourteen days prior to the workshop in the Florida Administrative Weekly (FAW). After the workshop, the proposed rule is filed. A hearing on the proposed rule is held no earlier than twenty-one days after the rule is filed. If the rule is revised by the agency, it is then noticed in the FAW. If there are no further comments or changes, it is published in its revised format in the FAW. After twenty-eight days, the proposed rule can formally be moved for adoption. The new rule is effective twenty days later. The Department of State's Notice of Proposed Rule Development was published in the FAW on May 18, 2001. The workshop for the proposed minimum standards for voter education was held in Tallahassee in June 2001. The rule was noticed on March 1, 2002; the hearing was held on April 12, 2002. The rule, FLA. ADMIN. CODE ANN. r. 1S-2.033 (2002), was adopted on May 10, 2002, and took effect on May 30, 2002. The law requires covered jurisdictions that are proposing changes in election laws or procedures to submit the proposed changes to the U.S. Attorney General for administrative review or via a lawsuit before the U.S. District Court for the District of Columbia prior to their implementation. *See* The Voting Rights Act of 1965 § 5 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (1994)). The changes may not take place before

The rule requires county supervisors to create a Voter Guide.

> The Voter Guide shall include the following information: how to register to Vote; where registration applications are available; how to register by mail, dates for upcoming elections, registration deadlines for the next primary and general election; how voters should update their voter registration information such as changes in name, address, or party affiliation; information on how to obtain, vote and return an absentee ballot; voters' rights and responsibilities pursuant to section 101.031 of the Florida Statutes; polling information including what times the polls are open, what to bring to the polls, a list of acceptable IDs, what to expect at the polls; instructions on the county's particular voting system; supervisor contact information; and any other information the supervisor deems important.[32]

County election supervisors are required to provide the Vote Guide "at as many places as possible within the county including agencies designated as voter registration sites pursuant to the Na tional Voter Registration Act; the supervisor's office; publi libraries; community centers; post offices; centers for independen living; County governmental offices; and at all registration drive conducted by the supervisor of elections."[33] Voters' rights and re sponsibilities must be posted at each supervisor's office.[34]

The rule also includes parameters for voter education online. "I a supervisor has a website, it must take into account all of the in formation that is required to be included in the Voter Guide. I addition, when a sample ballot is available, the website must pro vide either information on how to obtain a sample ballot or direct hyperlink to a sample ballot."[35] Supervisors with website must also post notice of all changes of polling places and precinct on the site.[36]

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pre-clearance has been obtained. *Id.* The proposed rule herein was pre-cleared by the U.S Department of Justice on August 9, 2002.

32. DIVISION OF ELECTIONS, FLORIDA DEPARTMENT OF STATE, Standards for Nonpart san Voter Education, FLA. ADMIN. CODE ANN. r. 1S-2.033 (2002), *available* http://election.dos.state.fl.us/laws/proposedrules/index.shtml (on file with the Universi of Michigan Journal of Law Reform).

33. *Id.* at § (1)(b).

34. FLA. STAT. ch. 101.031 (2002).

35. DIVISION OF ELECTIONS, FLORIDA DEPARTMENT OF STATE, Standards for Nonpart san Voter Education, *supra* note 32, at § 2.

36. *Id.* at § 9.

The rule expressly targets young voters in both high school and college, although, as will be discussed later, many supervisors voluntarily include elementary and middle schools:

> At least once a year in each public high school [and on each college campus] in the county, the supervisor shall conduct a high school voter registration/education program. The program must be developed in cooperation with the local school board and be designed for maximum effectiveness in reaching and educating high school students.[37]

The supervisors are charged with other types of outreach as well, including targeting senior citizens and minorities. For example, the supervisors are required to "conduct demonstrations of the county's voting equipment in community centers, senior citizen residences, and to various community groups, including minority groups."[38] Supervisors utilize both general and minority media outlets (radio, television and print programs and interviews) in publicizing voting information. County supervisors must provide voter registration workshops for individuals and organizations sponsoring voter registration drives "upon reasonable request and notice."[39]

Finally, there are strict requirements for voter notification—subject, format, and placement:

> Supervisors of elections shall provide notice of changes of polling places and precincts to all affected registered voters. This notice shall include publication in a newspaper of general circulation as well as posting the changes in at least ten conspicuous places in the county. If the supervisor has a website, the supervisor shall post the changes on the website. The supervisors shall also widely distribute a notice that if a voter does not receive a revised voter identification card within 20 days of the election the voter should contact a specific number at the supervisor's office to obtain polling place information.[40]

37. *Id.* at § 3.
38. *Id.* at § 7.
39. *Id.* at § 6.
40. *Id.* at § 9.

D. 2002 Election Reforms

Floridians continued to push for more and better voter educa tion, even after passage of the Election Reform Act of 2001. A survey conducted in March 2002 (during the legislative session revealed that nearly two-thirds of Floridians polled believed th state should do more to teach voters about the voting process.[41] Consequently, the legislature adopted more election reforms dur ing its 2002 session. The primary intent of these reforms was t better inform, protect, and engage citizens in the electoral process

The overall impact of the 2002 legislation will be to broaden th scope of voter education responsibilities and to more definitivel spell out voter rights, especially for the disabled.

House Bill 493, entitled "Voter Registration," authorizes privat individuals and groups interested in registering voters to repro duce voter registration applications.[42] It requires that th Department of Highway Safety and Motor Vehicles ("DHSMV" and other voter registration agencies forward unsigned or incom plete voter registration applications to the appropriate superviso of elections within five days.[43] This requirement is designed to allo the supervisors to contact the potential registrant and help he complete the registration application. The bill permits voters t change their addresses via telephone or e-mail, if the voter pro vides her date of birth.[44]

Convicted felons and persons adjudicated mentally incompe tent, when notified by certified mail that they are potentiall ineligible to vote, must now be told that they can request a hearin before the supervisor to show cause why they should not be re moved from voter rolls.[45] Under the "Voter Education" bill

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41. Lynda Lee Kaid, COLLEGE OF JOURNALISM AND COMMUNICATIONS, UNIVERSITY O FLORIDA, SURVEY: VOTER TRAINING WANTED, (Mar. 2002) (telephone survey of 523 Floridi ans) *at* http://www.tallahassee.com/mld/tallahassee/news/local/3031760htm?template contentModul (on file with the University of Michigan Journal of Law Reform).

42. Enacted as 2002 FLA LAWS ch. 189, amending FLA. STAT. ch. 97.052, allowing fo reproduction if the application is in the same format as that prescribed by the Departmen of State.

43. FLA. STAT. ch. 97.057 § (b)(4) (2002). The previous law was silent on the DHSM duties relative to the maintenance of unsigned applications. It simply required that th agency retain declined applications for two years.

44. FLA. STAT. ch. 97.1031 (2002).

45. FLA. STAT. ch. 98.0977 (2002). The original process, part of the maintenance o the statewide voter registration database, instructed the county supervisor to request that th individual fill out forms to keep her name from being dropped from the voter roll. The nev process gives the voter an alternative. She "may attend a hearing at a time and place speci

information on how to update voter signatures must also be published at least once each general election year.

The major thrust of a recent election-related bill[46] is to ensure that Florida's electoral system conforms with the Americans with Disabilities Act of 1990.[47] The "Elections" law abolishes limitations on the length of time (five minutes) a voter is allowed to occupy a voting booth.[48] It delineates the specific forms of communication and information that must be used to reach hearing, visually, and physically impaired voters.[49] Candidates, political parties, and political committees "must use closed captioning and descriptive narrative in all television broadcasts regulated by the Federal Communications Commission that are on behalf of, or sponsored by," them.[50] Voting machinery must also be physically, visually, and audibly accessible. The law delineates specific accessibility requirements, ranging from minimum height for voting booths, minimum decibels, color combinations, and font size, to strength requirements.[51]

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fied in the notice. If there is evidence that the notice was not received, notice must be given once by publication in a newspaper of general circulation in the county. The notice must plainly state that the voter is potentially ineligible to be registered to vote and must state a time and place for the person to appear before the supervisor of elections to show cause why his or her name should not be removed from the voter registration rolls." *Id.* at § 3. The process provides for an appeal to the circuit court (Florida's state trial courts) if the elector is dissatisfied with the supervisor's decision at the hearing. FLA. STAT. ch. 98.075 (2002).

46. S. 1350, 2002 Leg., Reg. Sess. (Fla. 2002) (2002 FLA. LAWS ch. 281).

47. 42 U.S.C. §§ 12101 (2000). Increasingly, advocacy groups such as the American Association of People With Disabilities (AAPD) closely monitor state and local elections officials to ensure that election laws are in conformity with the ADA. For example, some of the stated goals of AAPD's Disability Vote Project are to "push for meaningful election reform, continue efforts to get out the disability vote [voter education],[and] focus on polling place and voting system access." AAPD, *Disability Vote Project, available at* http://www.aapd-dc.org/dvpmain/dvpindex.html (on file with the University of Michigan Journal of Law Reform).

48. S. 1350, 2002 Leg., Reg. Sess. (2002 FLA. LAWS ch. 281) (amending FLA. STAT. ch. 101.51).

49. FLA. STAT. chs. 97.021, 97.026, 98.122, 101.56062 (2002).

50. FLA. STAT. ch. 98.122 (2002). If they do not, they are required to "file a written statement with the qualifying officer setting forth the reasons for not doing so. Failure to file this statement with the appropriate qualifying officer constitutes a violation of the Florida Election Code and is under the jurisdiction of the Florida Elections Commission." *Id.*

51. FLA. STAT. ch. 101.56062 (2002) (Standards for Accessible Voting Systems). For example, machines must have the capability to set the font size from a minimum of 14 points to a maximum of 24 points. The voting system must use black text or graphics, or both, on a white background, or vice versa unless the Secretary of State approves another high contrast color combination that does not require color perception. Machines with audio capabilities must "provide a gain adjustable up to a minimum of 20 dB with at least one intermediate step of 12 dB of gain." FLA. STAT. ch. 101.56062(h) (2002)). Voting booths must have "voting controls at a minimum height of 36 inches above the finished floor with a

The law also dictates that certified voting systems must inform voters of an undervote or overvote. An "undervote" occurs when a voter "has failed to vote in a race or has failed to vote the number of allowable candidates in any race."[52] An "overvote" occurs when a voter registers more than the allowable number of choices for a particular office or issue on the ballot. The law specifies accessibility and signage requirements at polling places (parking spaces, accessible paths of travel).[53] Finally, it also requires the Department of State to "develop a mandatory, statewide, and uniform program for training poll workers on issues of etiquette and sensitivity with respect to voters having a disability."[54]

Another "Elections" bill revises the Voter's Bill of Rights and Responsibilities[55] and specifically informs the voter that failure to perform any of the responsibilities does not prohibit a person from voting.[56] It requires poll workers to give direct voting instructions instead of referring voters to a voting instruction model.[57]

To protect the integrity of the ballot, the bill requires those who are given provisional ballots to sign a statement acknowledging

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minimum knee clearance of 27 inches high, 30 inches wide, and 19 inches deep" or be designed to allow its use on the top of a table. *Id.* at (m).

52. *Id.* at (n)(7).

53. FLA. STAT. ch. 101.715 (2002).

54. FLA. STAT. ch. 102.014(7) (2002). The program on etiquette and sensitivity to voters with disabilities is to last approximately one hour:

> The program must be conducted locally by each supervisor of elections, who shall periodically certify to the Department of State whether each poll worker has completed the program. The supervisor of elections shall contract with a recognized disability-related organization, such as a center for independent living, family network on disabilities, deaf service bureau, or other such organization, to develop and assist with training the trainers in the disability sensitivity programs. The program must include actual demonstrations of obstacles confronted by disabled persons during the voting process, including obtaining access to the polling place, traveling through the polling area, and using the voting system.

Id.

55. FLA. STAT. ch. 101.031(2) (2002).

56. *Id.*

57. Chapter 101.5611(1) of the Florida Code states:

> The supervisor of elections shall provide instruction at each polling place regarding the manner of voting with the system. In instructing voters, no precinct official may favor any political party, candidate, or issue. Such instruction shall show the arrangement of candidates and questions to be voted on. Additionally, the supervisor of elections shall provide instruction on the proper method of casting a ballot for the specific voting system utilized in that jurisdiction. Such instruction shall be provided at a place which voters must pass to reach the official voting booth.

FLA. STAT. ch. 101.5611(1) (2002).

their awareness of the penalties of voting fraud.[58] The attention to fraud in Florida is understandable, given the massive voter fraud in a 1997 Miami mayoral election involving absentee ballots cast. In that contest, the initial victor's election was invalidated and the runner-up declared the winner following a ruling by the Third District Court of Appeals of Florida that all absentee ballots should be invalidated due to massive absentee voter fraud.[59] Extensive coverage of this situation by *The Miami Herald* and other newspapers prompted the Florida legislature during its 1998 session to pass election reforms tightening rules on absentee voting and increasing penalties for election fraud from misdemeanors to felonies.[60]

IV. CREATIVE, TARGETED EFFORTS: FLORIDA COUNTIES

The remainder of this Article focuses on some of the most imaginative approaches for promoting voter education designed to date.

A. The Need to Target

The need to use varying communication techniques is a well-established fact in the world of politics, especially as the electorate becomes more socio-economically and politically diverse. *Campaigns and Elections* magazine is filled with ads touting the ability of

58. The recipient of the provisional ballot's signed statement, which must be signed by the person receiving the provisional ballot, includes this language: "I understand that if I commit any fraud in connection with voting, vote a fraudulent ballot, or vote more than once in an election, I can be convicted of a felony of the third degree and fined up to $5,000 and/or imprisoned for up to 5 years." FLA. STAT. ch. 101.048(3) (2002). Previously, there was a requirement that such information be prominently posted at each precinct.

59. The dispute resulted in a Florida Supreme Court ruling on the matter, *In re Protest of Election Returns & Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So. 2d 1170 (Fla. 1998).

60. *The Miami Herald* won a Pulitzer Prize in 1999 for its exposure of the election fraud. *See Dubious Tactics Tilted Mayoral Votes*, THE MIAMI HERALD, Feb. 8, 1998, *available at* www.pulitzer.org/year/1999/investigative-reporting/works/980208_dubious_tactics.html (on file with the University of Michigan Journal of Law Reform). The state legislature's subsequent efforts to revamp absentee voting rules got national attention. *See, e.g.*, Warren Richey, *Florida Makes a Move to Rein in Voter Fraud*, THE CHRISTIAN SCIENCE MONITOR, May 4, 1998, *available at* www.csmoinitor.com/durable/1998/05/04/p4s1.htm. The state legislature passed an election bill which became law on May 22, 1998. 1998 FLA. LAWS ch. 129; S. 1402, 1998 Leg., Reg. Sess. (Fla. 1998).

political consulting firms to reach different types of voters via dio, video, and print. Thus, it is not surprising that The Natio Task Force on Election Reform report recommends t "... information be presented creatively to meet the needs of ferent demographics ...."[61] Likewise, the National Association County Information Officers ("NACIO") "Checklist For Voter E cation Initiatives" recommends that thought be given "to wh groups, if any, need special attention in the crafting of a voter e cation program."[62] The groups identified as possibly having "spe educational/information needs" include absentee and early vote citizens living abroad (other than military voters), disabled p sons, ex-felons, first time voters (including new citizens and old previous nonvoters), home- and hospital-bound individuals, me bers of the Armed Forces, minorities, voters in remote areas, a young voters.[63] Attention must also be paid to the special needs illiterate individuals and those for whom English is not the prim language.

B. Demographic, Socioeconomic, and Political Diversity

Florida is a demographically, socio-economically, and politica diverse state. Its sixty-seven counties vary considerably in th population size, growth rate, age profile, racial/ethnic compo tion, wealth, educational level, and partisan make-up.[64] The state divided into ten television media markets.[65] By necessity, ea county supervisor of elections must design voter education effo differently while covering the requisites laid down by state law quirements.

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61. NATIONAL TASK FORCE ON ELECTION REFORM, *supra* note 5, at 20.

62. NATIONAL ASSOCIATION OF COUNTY INFORMATION OFFICERS, A GUIDE FOR VO EDUCATION: A CHECKLIST FOR VOTER EDUCATION INITIATIVES 16–17, *available* http://www.nacio.org/voterguide/educationinitiatives.html (on file with the University Michigan Journal of Law Reform).

63. *Id.*

64. *See* BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORI FLORIDA COUNTY RANKINGS 2001 (Dec. 2001) [hereinafter FLORIDA COUNTY RANKIN 2001]. *See generally* DAVID R. COLBURN & LANCE DEHAVEN-SMITH, FLORIDA'S MEGATREN (2002).

65. Nielsen Media Research has identified and ranked 210 television markets (Des nated Market Areas) in the U.S. operating in the 2002–2003 television season. These DM are determined by the number of television households served in each area. *See* Niels Media Research, *Nielsen Media Research Local Universe Estimates (US)*, http://www.nielsenmedia.com/DMAs.html (last visited Jan. 18, 2003).

The old adage "necessity is the mother of invention" has proven true. Florida's county supervisors of election have been quite creative in this process. Some voter education efforts were already in place prior to new state mandates to expand voter education;[66] others have been launched in the 2002 election cycle in response to the new requirements. Many involve election office partnerships with local businesses, schools, other local governments, nonprofit agencies, civic associations, and citizen advocacy groups.

C. Targeting Young Voters

The declining participation rate of younger voters has been of concern to civic educators for some time,[67] which explains why young people are the focus of many voter education programs. National surveys of high school seniors have found that "one-third of high school seniors lack a basic grasp of the principles of American government and three-fourths are not proficient in civics."[68] Not surprisingly, turnout among 18-to-24-year-olds was at a record low

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66. They were identified in "Current Operations" portions of county voter education plans filed with the Department of State to enable counties to receive voter education funds from the State. *See generally* FLORIDA COUNTY VOTER EDUCATION PLANS 2001, *infra* note 72.

67. *See, e.g.*, LAKE, SNELL, PERRY & ASSOCIATES, THE TARRANCE GROUP, INC., SHORT TERM IMPACTS, LONG TERM OPPORTUNITIES: THE POLITICAL AND CIVIC ENGAGEMENT OF YOUNG ADULTS IN AMERICA (The Center for Information and Research in Civic Learning & Engagement, The Center for Democracy & Citizenship, and The Partnership for Trust in Government at the Council for Excellence in Government, March 2002); DONALD GREEN & ALAN GERBER, GETTING OUT THE YOUTH VOTE: RESULTS FROM RANDOMIZED FIELD EXPERIMENTS (Interim Report for The Pew Charitable Trusts, June 2001); SUZANNE SOULE, WILL THEY ENGAGE? POLITICAL KNOWLEDGE, PARTICIPATION AND ATTITUDES OF GENERATIONS X AND Y (Center for Civic Education, 2001); RUSS FREYMAN & BRENT MCGOLDRICK, THEY PRETEND TO TALK TO US, WE PRETEND TO VOTE: CANDIDATES AND YOUNG ADULTS IN CAMPAIGN 2000 AND BEYOND (The Third Millennium, 2000); LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS, UNIVERSITY OF TEXAS, THE CIVIC EDUCATION OF AMERICAN YOUTH: FROM STATE POLICIES TO SCHOOL DISTRICT PRACTICES (Policy Research Report No. 133, 1999); NATIONAL ASSOCIATION OF SECRETARIES OF STATE, NEW MILLENNIUM YOUNG VOTERS PROJECT—PART I: AMERICAN YOUTH ATTITUDES ON POLITICS, CITIZENSHIP, GOVERNMENT, AND VOTING (1999); NATIONAL COMMISSION ON CIVIC RENEWAL, A NATION OF SPECTATORS—HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT (1998); RICHARD NIEMI & JAN JUNN, CIVIC EDUCATION: WHAT MAKES STUDENTS LEARN (1998); SUSAN A. MACMANUS, YOUNG V. OLD: GENERATIONAL COMBAT IN THE 21ST CENTURY (1996); Robert Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65–78 (1995).

68. THE SYLVIA MAGERS YOUNG VOTER OUTREACH PROGRAM, THE VOTING INTEGRITY PROJECT, PREPARING THE NEXT GENERATION: TEN PRINCIPLES FOR AN ENGAGED ELECTORATE, *at* http://www.voting-integrity.org/projects/youngvoter (on file with the University of Michigan Journal of Law Reform).

in Election 2000 (32.3%).[69] A survey of that age group found that more than half (55%) "say schools don't do a very good job of giving young people the information and basic skills they need to vote."[70]

Many efforts have sprung up nationally to reverse this trend. High profile examples include get-out-the-vote efforts by MTV's Rock the Vote voter registration and voter education program, Kids Voting USA (a program allowing students to join their parents as they vote at their precincts), the National Student/Parent Mock Election program that culminates in a simulated nationwide election, and Project Vote Smart's Vote Smart Classroom, which uses lesson plans to inform students about the voting process and how to evaluate candidates and elected officials.[71] Naturally, many of the approaches that Florida counties use to reach elementary-age children differ from those aimed at middle or high school students.[72]

Materials aimed at Florida's elementary students include everything from brochures, and activity and comic books, to election simulation kits.[73] Some counties decided to ask students to create posters that would persuade people to vote. The posters, in turn, would be displayed at local supermarkets, convenience stores, malls, and government offices several weeks prior to an election. Other counties chose to tailor field trips through the elections office that would allow students to use the election equipment.[74]

Often, voter education efforts focused on elementary school children recognize the opportunity to involve their parents (and

69. Richard Morin, *A Record Low—and No One's Cheering*, WASH. POST, Jan. 20, 2002, at A14.

70. NATIONAL ASSOCIATION OF SECRETARIES OF STATE, *supra* note 67, at 34.

71. ALLIANCE FOR BETTER CAMPAIGNS, ISSUE BRIEF: YOUTH AND POLITICS, *at* http://www.bettercampaigns.org/issuebriefs/display.php?BriefID=10 (on file with the University of Michigan Journal of Law Reform).

72. All Florida examples are from my analysis of the sixty-seven individual county voter education plans filed with the Division of Elections in 2001. FLORIDA COUNTY VOTER EDUCATION PLANS 2001 (on file with the Division of Elections in the Florida Department of State and with the University of University of Michigan Journal of Law Reform). Note that these examples reflect what the counties planned; records of what they actually implemented were not available at this writing.

73. Orange County, for example, has planned a coloring contest for elementary school children. The winner's picture would be issued to local television stations, including Orange TV (the government channel), for airing, and the artwork would be used on election office posters, brochures, and training manual covers. *Id.* at Orange County. Monroe County produced a comic book that illustrates the AccuVote tabulation system, provides captions regarding the importance of voting, and shares information relative toregarding upcoming elections. *Id.* at Monroe County.

74. *See id.* at Santa Rosa County, Sumter County.

grandparents) as well.[75] In some counties, for example, elections supervisors have chosen to send coloring books on voting home with the children, along with a letter for the students to give to their parents reminding them of the importance of registering and voting.[76]

Mock elections, more sophisticated activity books, field trips featuring hands-on voting experiences and expansion of the Kids Vote, Too curriculum are popular plans for reaching middle schoolers. Because middle schools frequently have their own school television channels, certain county supervisors plan to develop videos to broadcast on such channels.[77]

Personal contact is another popular plan for reaching high schoolers. Some counties decided to send a letter to all seniors,[78] along with a voter registration application and other informational materials, such as how to vote absentee.[79] Under Florida's new minimum voter education standards, all county election supervisors must go into the high schools to conduct voter registration and education programs.[80] Additionally, advertising election information on high school television channels, in school flyers, newsletters, yearbooks, and at school sporting events is widespread. So, too, is the use of web sites.[81]

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75. The National Association of Secretaries of State survey concluded: "The single factor that most determines whether a young person will vote is whether his or her parents vote." NATIONAL ASSOCIATION OF SECRETARIES OF STATE, *New Millennium Survey: New Millennium Fact Sheet, at* http://www.stateofthevote.org/factsheet.html.

76. *See generally* FLORIDA COUNTY VOTER EDUCATION PLANS 2001, *supra* note 72.

77. Citrus County's supervisor has proposed developing such a video and creating a Junior Election Board—a select group of middle school students who would work with the elections office and learn firsthand about the process. *Id.* at Citrus County.

78. Some target letters to graduates or send birthday greetings on a student's eighteenth birthday.

79. *See, e.g., id.* at Pasco County. Manatee and Putnam counties had similar plans, except that they would enclose a return mail card in such mail-outs to graduates to make it easier for college-bound students and military enlistees to change their addresses and request absentee ballots. *Id.* at Manatee County, Putnam County. Sarasota County chose to target special education students by working with high school teachers to include voter registration cards in the Individual Educational Plan of each student. *Id.* at Sarasota County.

80. Competition is always a big motivator at the high school level. Columbia County proposed holding a contest to see which high school could create the best voting slogan. *Id.* at Columbia County. Polk County considered three kinds of contests for high schools: a voter registration contest, art contests to choose election logos, and a contest to develop the best election video. *Id.* at Polk County.

81. Florida is one of twenty-two states that has online resources for youth voting and civic learning, according to the National Association of Secretaries of State. *See* http://www.nass.org/Issues/issues_NMvoting&reg.html. Hillsborough County proposed developing online voting system demonstrations for students, as well as information about the election process, a question and answer section, and web animation. Florida County Voter Education Plans 2001, *supra* note 72, at Hillsborough County. Orange County offered

Reflective of a growing trend across the United States, severa counties planned to recruit students to be poll workers on electio day,[82] to serve as volunteers in voter registration drives and get-ou the-vote efforts,[83] and to demonstrate voting equipment (at com munity centers, nursing homes, and assisted living facilities). Som counties propose "Vote for a Vet" programs.[84] Such activities pai students with a veteran to impart the notion that voting is a civi duty and an act of patriotism.

Finally, college students are another audience targeted for bette voter education. Several counties planned to recruit college stu dents as poll workers or interns in the election office. Proposal include forming alliances with college student government associa tions to develop registration networks and poll worker recruitmen drives.[85]

D. Targeting Senior and Disabled Voters

Florida is the nation's "grayest" state, with 17.6% of its popula tion age 65 and older.[86] Some Florida counties have considerabl

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its web page as a place for high schools to display sample ballots for their student counc elections. *Id.* at Orange County. Nearly every county now allows student council elections t be conducted on county voting equipment. *See generally id.*

82. *See id.* at Broward County, Putnam County, & Sarasota County. Putnam County proposal calls for high school honors students to be recruited to work at the polls. Th money they earn will be donated to their school's club or organization. *Id.* at Putnar County. According to the NASS, there is "'a lot of support'" among the elections commu nity for youth poll worker training programs. Aron Goetzl, *Program Seeks to Put More Studen in the Polling Place for 2002 and Beyond*, ELECTIONLINE WEEKLY, Apr. 25, 2002, *availab at* http://www.electionline.org/article.jsp?id=freedom_s_answer_story&p=1 (quoting Dou Bailey). Thirty-nine state chief elections officers have endorsed the creation of a nationa Youth Voter Corps. *Id.*

83. *See* FLORIDA COUNTY VOTER EDUCATION PLANS 2001, *supra* note 72, at Volusi County.

84. *See id.* at Duval County, Marion County, Nassau County, Okaloosa County, St. John County.

85. Hillsborough County's proposal, for example, involves coordination with Unive sity Lecture Series guest appearances, campus newspapers, and campus radio stations. *Id.* a Hillsborough County. Volusia County planned a voter registration drive for all enterin freshmen at Bethune Cookman College and the creation of student election ambassadors a all area colleges to assist in planning a voter registration day at their schools. *Id.* at Volusi County.

86. U.S. CENSUS BUREAU, CENSUS 2000, *available at* http://quickfacts.census.gov/qfd/ states/12000.html.

larger senior populations than others.[87] Unlike younger age groups who are short on basic information, older residents are very interested in politics and are quite informed. Their special voter education needs relate more to their physical limitations—reduced or changed sight, hearing, and mobility, and lack of experience with computers, although that is changing rapidly.

Information provided to seniors must often use different types of print, paper, fonts, drawings, photographs, colors, and sounds.[88] Mobility limitations may necessitate voting via absentee ballots. Florida's county supervisors of elections have been sensitive to these special needs for some time. The famous "butterfly ballot" was actually an effort by the Palm Beach County supervisor to use larger fonts to reach her county's sizable older population.[89] The good news is that seniors are generally quite eager to know everything there is to know about registering and voting.[90] Furthermore, it is easy to go to places where seniors are clustered—senior community centers, assisted living facilities, nursing homes, and condo communities—to demonstrate new voting equipment, discuss absentee ballots, and provide other information.

Many counties send teams of poll workers or election office staff to visit nursing homes and assisted living facilities ("ALFs") to distribute information, such as sample ballots or absentee ballot requests, and to answer questions. It is common for election office staff to return to these facilities to help the residents complete their absentee ballots.[91] One county decided to post information on its website for nursing home and ALF staff so that they could stay up to date on election developments and could download various forms and handouts they regularly use in assisting their residents.[92] In order to reach seniors who are home-bound, certain

87. The percentage of the population 65 and older ranges from a low of 7.5% in Union County to a high of 34.7% in Charlotte County. FLORIDA COUNTY RANKINGS 2001, *supra* note 67, at tbl. 1.3.

88. SUSAN A. MACMANUS, TARGETING SENIOR VOTERS: CAMPAIGN OUTREACH TO ELDERS AND OTHERS WITH SPECIAL NEEDS 180–81 (2000) [hereinafter MACMANUS, TARGETING SENIOR VOTERS].

89. *See* THE POLITICAL STAFF OF THE WASHINGTON POST, *supra* note 24, at 66; CORRESPONDENTS OF THE NEW YORK TIMES, *supra* note 24, at 10.

90. MACMANUS, TARGETING SENIOR VOTERS, *supra* note 88, at 72.

91. This is particularly important in light of the potential for fraud in the absentee ballot process, especially with regard to the elderly who may not physically be able to complete a ballot themselves.

92. St. Johns County decided to provide forms for nursing home and ALF administrators updating their list of residents to send back to the election office. FLORIDA COUNTY VOTER EDUCATION PLANS 2001, *supra* note 72, at St. Johns County.

counties plan to work more closely with agencies that common serve seniors, such as Meals on Wheels and services for the blind.[93]

E. Targeting Minority Voters

Florida is one of the nation's most racially & ethnically divers states. The 2000 Census reports that 22% of the state's populatio is non-white. The two largest non-white groups are African Amer cans (14.6%) and Asians (1.7%). Hispanics or Latinos (of an race) make up 16.8% of the population.[94] Naturally, the state counties vary considerably in their racial and ethnic compositior with the largest concentrations of non-whites in metropolitan a eas.

In general, minority populations are younger, which makes imperative to design intergenerational voter education program that begin with the schools. In some counties, materials must b culturally sensitive and prepared in multiple languages.[95] Fo school-aged children, one proposed school program was to sen letters home in the student's native language informing parents o critical registration deadlines, election dates, and contact informa tion.

Some approaches to better educate minorities about registratio and voting are focused internally, such as expanding election offic staffs to include those with multicultural backgrounds and bilin gual skills,[96] assigning staff to work directly with specific minorit groups, and engaging in aggressive recruiting of bilingual and mi nority poll workers.

Other approaches are focused externally, such as advertising or cable television and in minority newspapers and magazines, estab lishing links to the Supervisor of Elections website from targetec

93. Volusia County, for example, proposed to send absentee ballot request forms wit its Meals on Wheels volunteers. *Id.* at Volusia County. Citrus County investigated a web sit program that is accessible to disabled citizens. *Id.* at Citrus County.

94. *See* U.S. Census Bureau, Census 2000, *supra* note 86. The remaining nonwhite ra cial breakdowns are: American Indian and Alaska Native, 0.3%, and Native Hawaiian anc Other Pacific Islander, 0.1%. Another 3% describe themselves as "some other race", anc 2.4% are of "two or more races." *Id.*

95. For example, materials would be in Spanish and Creole in Broward, Palm Beach and Leon counties. Materials in Orange County, however, would be Creole, Korean, and Vietnamese.

96. Broward County is recruiting a Creole speaking telephone staff to assist voters seeking information, particularly those from the growing Haitian community. Florida County Voter Education Plans 2001, *supra* note 72, at Broward County.

minority websites that have local interest, and creating public service announcements specifically designed to target a county's minority populations.[97]

Some approaches involve community outreach, such as participating in naturalization programs and ceremonies to reach new citizens, working with local NAACP chapters and churches with large minority memberships, and appearing at multicultural festivals.[98] Many of these approaches incorporate multiple languages in publishing voter information, in creating web pages, and in programming automated phone systems with information on registering and voting.[99]

F. Targeting Voters with Reading and Comprehension Deficiencies

Because registration and voting require a basic level of literacy, persons with low literacy skills present an obstacle in voter education efforts. Most of these efforts focus on making materials easy to read and understand. Many counties have recruited the assistance of professionals in developing and editing such materials.[100]

G. Targeting Mobile and New Voters

Florida is often described as a state whose population and politics have been imported from everywhere—inside and outside the United States. The state's population has grown dramatically over the past four decades and is continuing to grow at a faster pace than most states. The state grew by 2.6% between 2000 and 2001 alone.[101]

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97. *See id.* at Duval County.

98. Hillsborough County, for example, commemorates Latin Fest and Asia Fest. *Id.* at Hillsborough County. Leon County celebrates Unity Day. *Id.* at Leon County.

99. St. Lucie County, for example, proposed a Voter Information Hotline that would provide recorded information in English and Spanish. *Id.* at St. Lucie County.

100. Clay County, for example, decided to recruit English as a second-language teachers to help develop brochures for this targeted population. *Id.* at Clay County. In St. Johns County, representatives from the "Learn to Read" program would assist county elections officials with editing printed material for simplicity and clarity. This information, in turn, would be shared with the "Learn to Read" program participants to encourage them to register and vote. *Id.* at St. Johns County.

101. *See* U.S. Census Bureau, Census 2000, *supra* note 86. Eight counties grew faster than the state average, with the greatest growth occurring in Flagler County (+10.3%). *Id.*

The major thrust of voter education for newcomers is often to inform them of how Florida's electoral process works. Voting in Florida may be different from voting in the state or nation where they once lived. In particular, newcomers need to learn about such things as voter registration (Florida has a book closing deadline),[102] the primary election system (Florida has a closed primary unless only one party fields candidates, in which case it has a universal primary),[103] voting equipment (Florida has touch screens and precinct-based optical scan voting systems),[104] and absentee balloting rules.[105]

Although many newcomers register to vote when they apply for their new Florida driver's license through the National Voter Registration Act of 1993 (the "Motor Voter" Act),[106] they do not necessarily gain an in-depth knowledge of election process specifics. The same is true for new, young voters registering to vote at driver's license bureaus.

1. Prior to Election Day—Cooperation between the public and private sectors is needed to reach newcomers and first-time voters. Examples of approaches that are apparently successful in reaching newcomers are partnerships with local title companies, realtors, moving companies, apartment and condo complexes, schools, recreation centers, and the Florida Chamber of Commerce.[107]

Counties have also been imaginative in designing materials and methods to reach first-time voters. Three counties offer good examples. Orange County introduced a voter orientation program/seminar that rotated through its county commission districts.[108] Sarasota County produced an informational video on its government access television channel.[109] Osceola County is developing videos and PowerPoint presentations that can be shown at

102. *See* FLORIDA DEP'T OF STATE—DIVISION OF ELECTIONS 2002 ELECTION DATES TO REMEMBER, *at* http://election.dos.state.fl.us/publications/pdf/DatestoRemWeb.pdf.

103. For information on the law governing Florida's primary elections, *see generally* FLA. STAT. chs. 100.061, 100.081, 100.091, 100.096, 100.101, 100.102 (2002).

104. For a county-by-county map of current voting systems, *see* http://election.dos.state.fl.us/votemeth/systems/countysys.shtml.

105. For an excellent fifty state comparison of the various features of election systems, see GAO-02-90, *supra* note 5.

106. 42 U.S.C. § 1973 (2000).

107. Citrus County proposes a partnership with the Florida Greeting Service. Voter registration and election information (voter guides, brochures) are inserted into welcome packets. FLORIDA COUNTY VOTER EDUCATION PLANS 2001, *supra* note 72, at Citrus County.

108. *Id.* at Orange County.

109. *Id.* at Sarasota County.

all public agencies and specially mandated sites, such as driver's license offices and public assistance agencies.[110]

When registration deadlines loom, some counties proposed "Midnight Madness" events to encourage people to register before the book closing deadline.[111] Many election supervisors display voter registration and election messages on business and movie theatre billboards, highway billboards, convenience store monitors, and public access television.

Counties that have switched to the new touch screen voting machines take the equipment to malls, home shows, fairs, festivals, and other community events to allow a diverse group of citizens, especially non-voters, to test it and overcome any technology or anxiety based fears.[112]

2. *On Election Day*—Counties have devised a number of ways to assist new and inexperienced voters at the polling place through personal attention, practice ballots, audio-visuals, and computer laptops.[113] "High tech" voter assistance could help those who may be embarrassed to ask for assistance.[114] Laptops and cell phones are replacing regular telephone landlines at polling places as the preferred means of contacting the central election office. This development helps voters avoid long waits when their registration status needs verification and helps poll workers who need to report other voting snafus. A number of Florida counties also load their precinct-based laptops with the poll worker procedural manual for easy reference.[115]

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110. *Id.* at Osceola County.

111. *See id.* at Orange County, Pinellas County. Hillsborough County planned a week-long voter registration drive utilizing public and private locations and celebrities. *Id.* at Hillsborough County.

112. *See generally id.*

113. Polk County decided to identify newcomers and first-time voters on voter rolls to alert poll workers that the voter might need special assistance. *Id.* at Polk County. Other counties chose to place an identified "customer service" facilitator at each polling place to explain the voting process, answer questions, and demonstrate voting equipment. *See id.* Madison, Putnam, and Taylor counties planned to use optical scan voting systems that either require blackening an oval or connecting the head and tail of an arrow. To make sure voters know how to properly cast a ballot, each registrant would blacken or connect an example printed on the voter roll when she signs in to vote. *Id.* at Madison County, Putnam County, Taylor County.

114. St. Lucie County planned to equip polling places with television sets at polling places tuned to the public access channel, which would continuously broadcast voting instructions from 7:00 AM to 7:00 PM on election day. *Id.* at St. Lucie County. In Sarasota County, every precinct would have TVs and VCRs with continuous-feed tapes demonstrating how to use the touch screen equipment. *Id.* at Sarasota County.

115. *See generally id.*

V. BETTER TRAINING FOR POLL WORKERS IS CRITICAL

Florida's counties are dramatically restructuring their poll worker training programs and expanding the responsibilities of poll workers. By law, as previously reported, the number of hours of training has been increased.[116] Many counties require attendance at several training sessions, instead of just one, and have reduced the size of their training classes.[117]

Several counties have planned to implement testing programs.[118] Counties also disseminate information to poll workers through required workshops and small groups, online, and on videos and CDs, which can be checked out and taken home.[119] In some places, election office staff members have received specific responsibility for developing and implementing new poll worker training materials and workshops.[120] These new materials contain special instructions on how to interact with disabled, older, and angry voters,[121] how to inform voters of their rights and responsibilities, and how to handle emergencies (including power failures with touch screen voting machines). Many counties have included conflict resolution as a special topic or training session.[122]

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116. *See supra* note 30.

117. *See generally* FLORIDA COUNTY VOTER EDUCATION PLANS 2001, *supra* note 72.

118. In Pasco and Volusia counties, trainees would take a quiz after orientation to determine their ability to perform requisite tasks at the polling place. *Id.* at Pasco County, Volusia County. Jackson County would require clerks to be tested and to receive a passing score before being employed in that capacity. *Id.* at Jackson County. Duval County planned a four-hour interactive training program, with a pre-test and a post-test. The training would emphasize the legal standards, the new optical scan technology, conflict resolution, diversity, and customer service. *Id.* at Duval County. Orange County planned a "telecourse" for poll workers on Orange County Government Television that would reinforce classroom instruction. Poll workers would complete and return a quiz based on the program. The same program would be offered via interactive video in CD format for clerks who have access to a computer. *Id.* at Orange County. Flagler and Santa Rosa counties proposed establishing certification programs for clerks and poll workers. *Id.* at Flagler County, Santa Rosa County.

119. For example, St. Lucie County proposed an Internet-based training program and testing program for poll workers. *Id.* at St. Lucie County. Putnam County came up with the idea of a training video to discuss the importance of assisting a voter, provide instructions on how to open and close the polls, give information on rules governing solicitation at the polls by candidates and political parties, and discuss what to do if a voter is not on the precinct roll. *Id.* at Putnam County. Manatee County planned to make CDs available for use by the election office staff, poll workers, schools, and the public through all branches of the public library. *Id.* at Manatee County.

120. *See generally id.*

121. Jackson County proposed contracting with its local community college to provide training in sensitivity for people with special needs. *Id.* at Jackson County.

122. *See, e.g., id.* at Collier County.

In counties with sizable minority populations, the poll worker training materials are multilingual, and visuals, such as actual photographs of specific polling places and equipment, are becoming an integral part of PowerPoint training for poll workers.[123]

Poll worker education is increasingly perceived as a year-round effort. Election offices publish newsletters to keep poll workers informed of changes in election laws and to notify them of election calendars and future training sessions. Web sites and e-mail are also integral parts of plans for year-round poll worker training.[124]

Florida's county supervisors of elections have adopted many ideas from market researchers and media specialists about how to grab the public's attention. New technologies make many of these ideas viable and affordable. It will be interesting to see which ones are the most effective.

VI. POST-ELECTION EVALUATIONS

In line with the recommendations of various task forces at the state and national levels, several counties have planned ways to solicit recommendations for improvements from poll workers and voters, including a formal process for reviewing comment cards from precinct workers and voters.[125] Other counties propose asking their clerks to give a written report on any significant events during Election Day and an evaluation of their polling places,[126] whereas others propose querying all poll workers (not just clerks).[127]

CONCLUSION

The voting problems of Election 2000 have brought increased scrutiny to voter registration and balloting. The reports from

123. Monroe County has adapted its training manuals accordingly. *Id.* at Monroe County. Duval County proposed establishing an Education Advisory Committee with representation from minority, disabled, non-English speaking, and elderly communities to redesign education programs for poll workers as well as voters. *Id.* at Duval County.

124. *See generally id.*

125. *See, e.g., id.* at Collier County.

126. *See, e.g., id.* at Putnam County.

127. Volusia County, for example, proposes to expand its post-election survey to include feedback from all poll workers. Volusia County would also employ poll workers to periodically inspect polling places to ensure handicap accessibility and the functionality of phone lines for uploading election results. *Id.* at Volusia County.

post-election 2000 task forces and commissions on election reform have all come to virtually the same conclusion—voter education is the key to successful implementation of reforms at each stage of the election process (before, on, and after Election Day).

The Florida legislature, which has passed the most sweeping election reforms of any state, has made voter education a high priority. It has mandated that county election supervisors develop and implement better, more effective voter education programs aimed not only at individual voters but also at the poll workers who instruct voters.

The Florida Election Reform Act of 2001 assigns responsibility for voter education to the Department of State and county supervisors of elections. The Act sets deadlines, includes a wide array of topics to be addressed, establishes a procedure for measuring the effectiveness of the programs, and grants rule-making authoring to the Department of State. Various acts passed during the 2002 legislative session broaden the scope of voter education responsibilities, more definitively spell out voter rights, and ensure that Florida's electoral system conforms with the Americans with Disabilities Act of 1990. The dynamic nature of election reform further elevates the importance of voter education at both the state and local levels.

The demographic, socioeconomic, and political diversity of Florida's 67 counties create different voter education needs and affect the types of interface and outreach strategies that are adopted. Voter education plans filed with the Division of Elections in the Secretary of State's office are filled with creative approaches designed to capture the attention of Floridians and to inform them about registration and voting. County elections supervisors have worked proactively to reduce the levels of voter error and confusion that existed during the 2000 election cycle.

Other states and communities have much to learn from Florida's example. Voter education is serious business in Florida, and it ought to be so everywhere.

215 South Monroe Street
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Tallahassee, Florida 32301
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EMAIL: sturner@broadandcassel.com

January 22, 2004

Via E-mail and Facsimile

Wayne L. Rubinas
Staff Director
Committee on Ethics and Elections
The Florida Senate
420 Knott Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear Mr. Rubinas:

I am enclosing an edited version of my remarks yesterday to facilitate quick review. It was a pleasure appearing before the Committee and I am grateful to you for allowing me the opportunity and for the courtesy shown by the Committee.

Sincerely,

M. Stephen Turner, P.A.

Enclosure

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Remarks of Stephen Turner,

FSU Adjunct Law Professor- State Constitutional Law

Public Hearing 1/21/2004

Senate Committee on

Constitutional Amendment Process in Florida

The inherent problems with the existing constitution amendment process can be generally categorized as follows:

1. Proliferation and misuse of proposed amendments as signature requirements are more easily met and groups with adequate funding can avoid campaign finance rules to accomplish political or legislative objectives.

2. Proposed amendments whose ballot presentation is being framed from the biased perspective of the sponsor without any comment or recommendation from a neutral source.

3. The absence of public disclosures as to the sponsorship and funding of proposed amendments.

4. Proposed amendments that do not rise to constitutional magnitude and scope, i.e., do not advance a basic or fundamental policy or value with a relative degree of permanency.

5. Proposed amendments that provide for changes or programs that are not feasible or manageable as a practical matter, or that require funding or implementation by an unwilling Legislature thereby defeating any operative effect.

6. Proposed amendments that may violate the Federal Constitution or undermine the aim of representative government, or are not appropriate to advance or carry out the purpose of the State Constitution.

7. Proposed amendments that provide for structural change in the government without full appreciation of the potential consequences, or examination of whether corresponding changes should be made.

8. The lack of public debate to test and refine proposals to assure they are well-thought out, do what they are intended to do, and create as few problems as possible.

9. Proposed amendments that are not expressed as simply and clearly as possible, or that do not harmonize with constitutional provisions not stated to be affected.

There are some procedures which various states have in effect or that are suggested to address some of the problem areas noted. It is possible these procedures could be accomplished by statute in order to preserve the integrity of the process:

1. Require disclosure and reporting of sponsorship and funding sources of amendments.

2. Require disclosure if signature solicitors are paid, and increase the number of signatures required if they are not solicited by volunteers.

3. Limit the number of amendments that may appear on the ballot at any general election.

Other problems call for some type of filtering process to review proposed amendments to improve drafting and prepare the ballot title and summary, and to provide commentary for public consideration.

I believe that the opportunity for constitutional change between the comprehensive revisions done by Constitutional Revision Commissions is important. But in my opinion the current, highly limited facial review by the Supreme Court directed to single subject and misleading ballot information is inadequate. Such facial review with no record of testimony, findings or recommendations is not sufficient to address the problems noted, and is too subjective and unpredictable.

For example, in a vital constitutional area - the structure of Florida government, the only substantive check on a proposed amendment is the single subject requirement - which is supposed to disallow any proposed amendment that substantially affects multiple branches of government.

First, a great deal of harm can occur if just one branch of government is affected by a proposed amendment. The number of senate members could be limited. A new court could be added, or jurisdiction of the Supreme Court limited or abolished. The office of CEO could be added to check the Governor, or a new budget and accounting oversight agency added. The existing test does reach or expose concerns that emanate from a proposed structural change that has not been carefully examined and weighed.

Even when existing Supreme Court facial review might operate as a substantive check, there is still great uncertainty whether it will. This is evident in a comparison of the results in two cases: In the Everglades Trust Fund case in 1994 a governmental entity was proposed to tax and clean up pollution in the Everglades. The Court held that governmental power of more than one branch of state government was affected and invalidated the proposal.

Yet in 2002, when the Court approved all proposed amendments it reviewed, the proposal for a comprehensive university governance system to set policy for and operate the university system was allowed. The Court acknowledged that multiple branches of government were affected, as the Attorney General contended, but held there was no "substantial" affect. The proposal went on the ballot and overrode the legislative work in providing for a seamless education governance system. Now a constitutional agency is empowered to control all aspects of higher education except funding.

In short, the current Supreme Court review process is too little substantially, and too unpredictable, to serve as a bulwark against improper, unwise or poorly worded amendments for which there is no filtering process or official comment.

In this regard, I believe our State should provide a Review Commission process unique to its own jurisprudence, borrowing somewhat on the idea of the District of Colombia and Colorado, but expanding the concept to give it muscle. (In the alternative, the Constitutional Revision Commission could continue to function as the Constitutional Review and Revision Commission. This process would ensure that only appropriate, well expressed proposals are presented to the voters through a neutrally prepared title and ballot summary and an informed recommendation after adversary proceedings are held within a defined time period subject to expedited appeal to the Supreme Court.

I suggest consideration of a three member blue-ribbon Constitutional Review Commission, whose members are recognized constitutional scholars appointed jointly by each of the three branches of government. Any proposed amendment, including legislative proposal, would be submitted to the Review Commission when it becomes viable. Public notice would be given and objectors could appear at a hearing on the proposal.

The Review Commission would be responsible to prepare the ballot title and summary of the proposal, and could edit the original wording of the proposal to promote clarity and accuracy. It could order a wording change that carried out the purpose of the amendment as long as it did not materially change the amendment. If the Commission determined that the proposed amendment violated the single subject rule, or violated any other standard such as constitutional magnitude embodying permanent fundamental policy, or practicality and feasibility, or incompatibility with constitutional purpose, the Commission could invalidate the proposal.

With respect to any proposal that met the appropriate standards and was satisfactorily edited, the Review Commission could make findings for public information concerning the wisdom, basis or need for the proposed amendment; suggest potential improvements that might substantially revise the proposal; and issue a recommendation on the proposal. If the recommendation was disapproval, the Commission would state its reasons, and its recommendation pro or con would appear on the ballot. Record would be kept of the Review Commission proceedings, and an expedited appeal could be taken by the proponents or the opponents to the Supreme Court from any order or recommendation of the Review Commission.

Under this approach, proposed constitutional amendments would receive a combination of quasi-legislative and quasi-judicial review by an expert governmental commission, and the public would have the benefit of its deliberations and wisdom in the background of record proceedings, before being asked to vote.

I believe this process or some modified version will maintain the integrity and strength of our State Constitution without sacrifice of the people's right to advance constitutional changes that are truly needed.

STATEMENT BEFORE THE
SENATE SELECT COMMITTEE ON
CONSTITUTIONAL AMENDMENT REFORM
January 27, 2004

My name is Jane Gross. I am speaking on behalf of the League of Women Voters of Broward County. We thank you for the opportunity to present our views relative to Florida's Constitution and the amendment process.

The Florida constitution mirrors the federal Constitution and creates a republican government with a series of checks and balances to curb the abuse of power by elected officials. In the late 1800s, people began to realize they had no direct ability to reign in an out of touch government, or government paralyzed by inaction. States then began adopting various forms of initiative and referendum processes to allow the people to place items on the ballot. Their goal was, and still is, to ensure that elected officials remain accountable to the electorate.

At this time in Florida's history, several Constitutional amendments have caused serious concerns.

First, the Constitutional initiative process is being misused by wealthy special interests to promote their self-interests and imbed inappropriate items in the Constitution. This is contrary to the public good. Citizen groups also propose inappropriate items because they feel that it is the only course open to them. The increased use of the initiative process bears out the same frustration people felt in the 1800s when the process became known.

Secondly, and more importantly, the passage of such initiatives can place the state in fiscal jeopardy by impairing the flexibility of the Legislature to respond to changes in Florida's economy or citizen needs.

That being said, it is obvious that citizens are unlikely to willingly give up the right to petition their government by initiative because of their frustration with the perceived inability or unwillingness of the Legislature to address citizen concerns. Furthermore, simply raising the required number of signatures to place an initiative on the ballot, or requiring a supermajority to pass an initiative, will only increase voters' mistrust of the Legislature's responsiveness.

The LWV of Broward County recommends that Florida have both Constitutional and statutory initiatives to overcome the problem of inappropriate language and issues finding their way into the Constitution. Political scientists and constitutional experts recommend statutory initiative in states that have constitutional initiative. Further, if the concept of statutory initiative is accepted, there should be a time of at least one legislative session, during which the statute passed by referendum could not be changed, but after that period would be

subject to the same right of the Legislature to change or repeal as any other law. LWVBC feels it is very important that the Legislature have this flexibility.

Additionally, it is vital that criteria be developed to determine if an initiative is appropriate for the Constitution or statutory law. Just giving the Supreme Court the job of determining suitability without pre-established criteria is not the intention or recommendation of the League.

This Select Senate Committee is wise to address Florida's Constitutional issues at this time. Let us not follow California's example where the Table of Contents is longer than the Constitution in most states. Or, California's larger problem where 70% of the general fund has already been committed to specific problems due to more than two decades of initiatives that have created enormous fiscal problems.

The LWV urges a comprehensive approach, as suggested above, to put Florida on a steady path toward responsible voting patterns and a Legislature responsive to the needs of the people.

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Miami New Times, Best of Miami 2001 Issue called the UEL'S newsletter, *The Urban Forum*:
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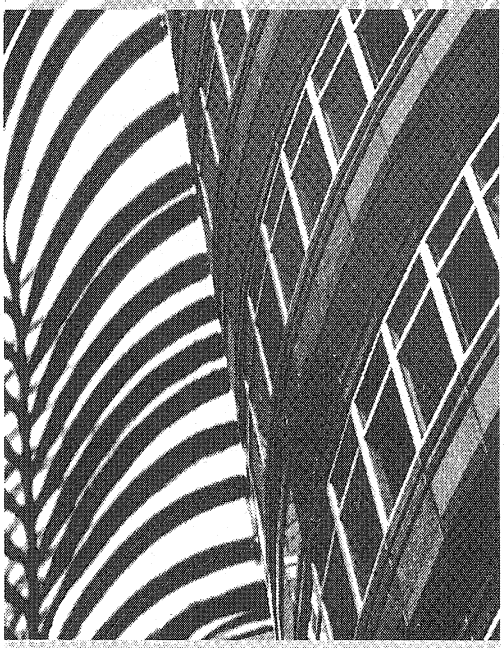
Submitted by:
Nancy Lee

Urban Environment League of Greater Miami



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Is composed of people from many walks of life who have one thing in common:

A concern for how our community looks, how it functions and the integrity of the government process.

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- **Attractive and Affordable Opportunities for Recreation and Education**
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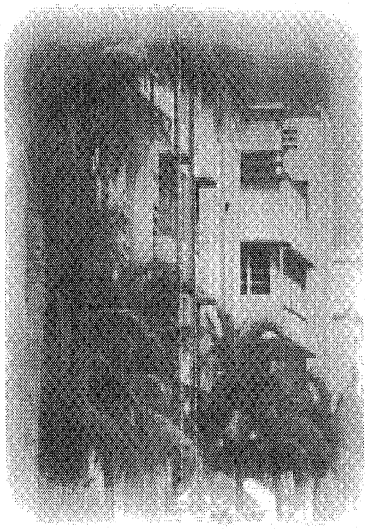
Urban Environment League's Focus for 2002-2003

The UEL seeks to promote and maintain vital public spaces such as accessible waterfront and parks for ALL OUR PEOPLE

1. UEL will host two conferences this year, *Beyond the Magic City: the State of Miami As a Real City, 2003* will feature planning strategies in Miami's neighborhoods, on its waterfront, in the downtown and in the parks. The second, a multi-county conference will focus on open space and growth management. A White Paper will result as a product of the conference.



2. UEL is engaged in ongoing research to preserve and enhance public spaces. UEL will continue to advocate for the preservation and redesign of Virginia Key Beach, Bicentennial, Lummus, Brickell and other local parks throughout South Florida.

3. The UEL website will be redesigned and updated on a more regular basis to provide more links and news about local events.

4. The UEL award winning quarterly newsletter will explore a wide series of local and important regional issues.

5. UEL is researching the State's Growth Management Laws applicable to Parks and Open Space, rethinking Urban Restoration, and seeking to make a case for local and regional Comprehensive Planning changes. The specific goal is to provide a conservation-first approach to growth management with the challenge being the preservation of parks, open spaces and conservation lands.

6. UEL will focus on fostering alternative visions for suburban sprawl, public transportation networks, affordable housing and community redevelopment.

7. UEL will be involved with and will monitor The City of Miami's Park Master Plan, Biscayne Bay and Miami River proposals and the Transportation Bond utilization.

8. UEL's aim is to increase public participation in local government while helping to extend our understanding of local history, historic preservation, infill design and community planning.

9. UEL will continue to collaborate with other local, State and National organizations in organizing common goals in the public interest.

10. UEL programs will be designed to involve teachers, students and the elderly in cooperative educational projects to enhance the urban environment.

11. UEL will focus on doubling its membership.

12. UEL will present its views to the citizens using publications, forums and the public media.

Mark Herron
Post Office Box 1701
Tallahassee, FL 32302-1701

Florida's initiative process gives effect to that provision of the State Constitution which states: "All political power is inherent in the people." Article I, Section 1, Fla. Const. It should not be materially restricted.

Currently, there are two limitations on Florida's initiative process. Both are grounded in the constitution itself. These limitations are significant, not just mere formalities.

The first limitation is the requirement that any revision or amendment proposed by initiative "shall embrace but one subject and matter directly connected therewith." Article XI, Section 3, Fla. Const. The single-subject rule "is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." *Advisory Opinion to the Attorney General – Save Our Everglades,* 636 So.2d 1336, 1349 (Fla. 1994).

It has been applied to preclude initiatives that perform the functions of multiple branches of government. For example, in *Advisory Opinion to the Attorney General – Save Our Everglades,* 636 So.2d 1336 (Fla. 1994), the Florida Supreme Court struck from the ballot a proposal, which in the words of the Court, "creates a virtual fourth branch of government with authority to exercise the powers of the other three on the subject of remedying Everglades pollution." At 1340.

A proposed amendment that substantially affects separate, distinct functions of government likewise violates the single-subject rule. An initiative proposal that allocated 40 percent of state appropriations to education violated the single-subject rule because it affected finance and taxation, gubernatorial veto, and revenue shortfall provisions of the State Constitution, as well as the Legislature's power to appropriate funds. *Advisory Opinion to the Attorney General re Requirement for Adequate Public Education Funding,* 703, So.2d 446, 449-450 (Fla. 1997).

The single-subject rule also prohibits "logrolling," which is the practice of asking voters to "accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support." In *Advisory Opinion to the Attorney General – Restricts Laws Related to Discrimination,* 632 So.2d 1018 (Fla. 1994), the Florida Supreme Court concluded a proposed amendment violated the single-subject requirement – in the words of the Court:

> because it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed. The voter is essentially being asked to give one "yes" or "no" to a proposal that actually asks ten questions. For example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status. Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single subject rule.

At 1020.

The second limitation on the initiative process "is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong v. Harris,* 773 So.2d 7, 12 (Fla. 2000)(Emphasis in text). This requirement is codified in Section 101.161, Fla. Stat., which is applicable to all proposed constitutional amendments.

Section 101.161, Fla. Stat., requires that the title and summary be accurate and informative. *Advisory Opinion to the Attorney General re Tax Limitation,* 644 So.2d 486, 490 (Fla. 1994).

The ballot title and summary must "state in clear and unambiguous language the chief purpose of the measure." *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers,* 705 So.2d 563, 566 (Fla. 1998).

The ballot title and summary must "assure that the electorate is advised of the true meaning, and ramifications, of an amendment." *Askew v. Firestone,* 421 So.2d 151, 156 (Fla. 1982).

"A ballot summary may be defective if omits material facts necessary to make the summary not misleading." *Advisory Opinion to the Attorney General – Limited Political Terms in Certain Elected Offices,* 592 So.2d 225, 228 (Fla. 1991).

In *Askew v. Firestone,* 421 So.2d 151 (Fla. 1982), for example, the Supreme Court struck from the ballot a proposed amendment passed by the Legislature whose ballot summary failed to reflect the chief purpose of

the amendment which was to remove the two year ban on lobbying by former legislators and elected officers. The Court stated: "A proposed amendment cannot fly under false colors." At 156.

In *Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission,* 705 So.2d 1351 (Fla. 1998), the Supreme Court struck from the ballot a proposed initiative because the ballot summary failed to "sufficiently inform the public" that the amendment would strip the Legislature of the authority to regulate marine life and grant it to a constitutional commission.

Each proposed initiative that obtains the necessary signatures becomes subject to this vigorous review process, which includes presentation of the proposed amendment to the Supreme Court by the Attorney General together with the Attorney General's comments and concerns. In many cases, interested parties submit briefs in support of or in opposition to the proposed amendment. In most cases, oral argument on the proposed initiative is held before the Florida Supreme Court.

Drafters of proposed initiatives are cognizant of these limitations and requirements. Initiative proposals are drafted by proponents and reviewed by opponents with these requirements in mind.

I have drafted proposed initiatives. When doing so, I have endeavored to use precise language of constitutional import in addressing the concerns of the citizens who are sponsoring the amendment. I am aware that I am dealing with the state constitution.

The class size amendment was built on constitutional principles. It was not crafted out of thin air. It arose in a historical context framed by litigation and efforts, both successful and unsuccessful, to amend the state constitution.

Prior to 1998, Article IX, Section 1, Fla. Const. (1968), provided as follows:

> Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

In the mid-1990's Florida school districts went to court alleging that the State of Florida had failed to make "adequate provision" for its system of free public schools.

In *Coalition for Adequacy and Fairness in School Funding v. Chiles,* 680 So.2d 400 (Fla. 1996), the Florida Supreme Court concluded that Article IX, Section 1, Fla. Const. (1968), "committed the determination of 'adequacy' to the legislature, and that there is a 'lack of judicially discoverable and manageable standards' to apply to the question of 'adequacy.'" At 408.

By this holding, it was suggested that the Florida Supreme Court had effectively made the issue of whether "adequate provision" had been made for public education a nonjusticiable political issue. Buzzett, William A. and Kearney, Deborah K., "Commentary to 1998 Amendment" of Article

IX, Section 1, Fla. Const., 26A *Florida Jurisprudence* p. 15 (2001 Cumulative Annual Pocket Part.)

An initiative proposal entitled "Requirement for Adequate Public Education Funding" sought to address what was "adequate provision" for public education. In 1997 the Florida Supreme Court reviewed this initiative petition, which required that a minimum of forty percent of total state appropriations, not including lottery proceeds or federal funds, be directed to public education. The Court concluded that the initiative violated the single-subject requirement because it substantially affected several separate, distinct functions of government. *Advisory Opinion to the Attorney General re Requirement for Adequate Public Education Funding,* 703, So.2d 226 (Fla. 1997).

However, Justice Anstead, writing in dissent, noted that the Court, in its consideration of the *Coalition for Adequacy and Fairness in School Funding* case, "would have been greatly aided if there had been an express statement in the constitution defining 'adequate provision'...." At 450.

In 1998, the Constitution Revision Commission placed before the electorate Revision 6, which amended Article IX, Section 1, Fla. Const. (1968), by:

> (1) making education a "fundamental value;" (2) making it a "paramount duty" of the state to make adequate provision for the education of children; and (3) defining "adequate provision" by requiring that the public school system be "efficient, safe, secure, and high quality."

Buzzett, William A. and Kearney, Deborah K., "Commentary to 1998 Amendment" of Article IX, Section 1, Fla. Const., 26A *Florida Jurisprudence* p. 15 (2001 Cumulative Annual Pocket Part.)

The people of Florida approved revision 6 in 1998. Nevertheless, the standards adopted in Revision 6 do not provide "judicially discoverable or manageable standards." The class size amendment was intended to address the lack of such standards.

The class size amendment, by express statement, defines, in part, what is required to satisfy the "high quality" prong of the "adequacy" standard of Article IX, Section 1. The class size amendment provides "judicially discoverable or manageable standards" as to what the Legislature must do to "carry out the paramount duty of the state to make adequate provision for the education of all children residing within the state."

The class size initiative was presented to the people after having been first presented to the Legislature for its consideration. SJR 646 (2001 Session) by Senator Meek was filed in 2001. The joint resolution was never heard in the Senate or any of its committees. In the House, Representative Bendross-Mindingall filed HJR 429 (2001 Session). That resolution was considered by the House Judicial Oversight Committee and summarily rejected on a 6-3 party line vote.

Getting an initiative proposal to the ballot is difficult for a true grassroots movement. Most of the 50-plus initiative proposals currently

filed with the Department of State will not make it to the ballot. The most bizarre, impractical or esoteric initiative proposals will not make it to the ballot because they will fail to obtain the requisite number of signatures. The marketplace of ideas will work.

Nevertheless, several initiative proposals will obtain the requisite signatures, will be validated by the Florida Supreme Court, and will obtain ballot position.

The debate that will be generated by the initiative proposals that make the ballot will be healthy. The debate generated by the class size amendment was healthy and, as you know, continues. If the initiative relating to growth makes it the ballot, the debate on growth will be healthy. Should we fear debate?

If there is concern about a particular initiative proposal, I concur with John Sowinski's advice to this committee: Get involved and become a participant in the process. Engage in the debate and make your case to the people.

In one of my prior lives as the chief of staff of the House of Representatives, the leadership of the House and the Senate was concerned about the impact of a proposed initiative amendment on the operations of state government. The House studied the amendment. It researched its impacts on government and, through a series of white papers, it publicized the consequences of the proposed amendment. It got involved. It joined in the debate. It took its case to the electorate.

The answer to concerns about initiatives is not to do everything you can to limit the right of the people to exercise their inherent political power through the initiative process. When discontent manifests itself in an initiative proposal, it is important that there be communication between government and the discontented. Through communication, the parties may agree or agree to disagree. They may agree on a constitutional or statutory alternative to the initiative proposal. However, government should not declare war on the sponsors of an initiative as it did with the class size amendment.

With minor change Florida's initiative process can facilitate communication between government and initiative sponsors. Involving the Legislature in the initiative process after the sponsors obtain fifty percent of the required votes necessary to get the proposal on the ballot may facilitate such communication. At the very least, it will alert the Legislature as to proposed initiatives that may have sufficient traction to get the ballot.

I have prepared a proposed amendment, which I have submitted to the Committee that changes Florida's initiative process from a "direct initiative" to an "indirect initiative." The proposal is intended not to significantly impact the ability of Florida's citizens to propose amendments or revisions to their constitution by initiative.

It is intended to give the Legislature formal notice of proposals that have a real potential of making it to the ballot. It requires that the

Legislature hold public hearings on the initiative proposal. It gives the Legislature the opportunity to address the concerns of the proponents either statutorily of through a constitutional amendment. In the event, the Legislature and the proponents of an amendment agree to disagree and the Legislature opts to place a competing amendment on the ballot, it provides a rule for which amendment prevails in the event that both are passed.

ARTICLE XI

AMENDMENTS

SECTION 3. **Initiative.**—

(a) The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

(b) Prior to submitting a revision or amendment of any portion or portions of this constitution by initiative to the electors pursuant to Art. XI, Section 5(a), it shall be submitted to the Legislature as provided herein. The sponsor of proposed revision or amendment shall file with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to four percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen. Upon verification of the required signatures, the custodian of state records shall transmit the proposed revision or amendment to each house of the legislature for consideration at its next regular session. Each house of the legislature, acting separately or jointly, shall hold public hearings on the proposed revision or amendment. If the legislature, pursuant to Art. XI, Section 1, in such regular session, proposes an alternative amendment to the amendment proposed by initiative to the electors pursuant to Art. XI, Section 5(a), which has received the required signatures to secure ballot position, the two amendments shall be considered at the next general election held more than ninety days after the joint resolution is filed with the secretary of state. In the event both proposed amendments or revisions are approved by vote of the electors, the amendment or revision receiving the highest number of votes shall be effective as an amendment or revision to the constitution of the state as provided in Art. XI, Section (5)(c).

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BROWARD COALITION

Condominiums, Homeowners Associations & Community Organizations, Inc.

Serving the Needs of Our Community for Over 20 Years

OFFICERS

President
Charlotte Greenbarg
954-927-9902
Ggrandperson@aol.com

1st Vice-President
Col. William P. Totino (Ret.)
954-486-2449

2nd Vice-President
William D. Spiker
954-448-3191

Treasurer
Harry Rosen
954-721-2570

Recording Secretary
Helen Rosen
954-721-2570

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Fred Weinberger
Ben Wermiel Harry Winer
William Woliver

January 27, 2004

To: Members of the Florida Senate
Re: Referendum Reform

Ladies & Gentlemen:

The Broward Coalition, representing over 70 condo, HOAs and community associations comprised of over 90,000 citizens, supports reform of the referendum process.

We have examined the suggestions put forth by Sen. Campbell, and agree with the measures he is advocating. Having endured the onslaught on the Florida Constitution by well-financed, often self-serving promoters, we believe the time has certainly come for reform.

One of the most important factors to include is the cost along with any initiative, from the beginning to the ballot, if signatures warrant.

Another is requiring a supermajority (60%) for approval of constitutional amendments.

The other points should, of course, be a part of the whole reform package.

We thank you for putting this important subject to public hearings, and offer to help in any way we can to see the reforms through.

Sincerely,

Charlotte Greenbarg
President

Charlotte Greenbarg, President
1054 N. Northlake Dr.
Hollywood, FL 33019

Initiative and Referendum Almanac

M. Dane Waters

Carolina Academic Press
Durham, North Carolina

2003

"per page" fee to have information included in the pamphlet. Arizona charges $100 per argument printed in its pamphlet. Oregon charges $500 per argument. This fee may be waived if the submitter collects 2,500 valid signatures in support of the argument.

Voter Guide, Fiscal Impact and Pro/Con Argument Information

State	Does the state publish a voter's Pamphlet?	What's In it?	How is it distributed?	Do they allow for pro and con statements?	Who writes the pro and con statements?	Is there a fiscal impact Statement?	Are there hearings on the initiative?	How many hearings and when and where?
AK	Yes	Title, full text, ballot language, neutral Legislative Affairs Agency summary and pro and con arguments.	Mailed to every registered voter.	Yes	Whoever wants to submit one but can't exceed 500 words.	No	No	N/A
AZ	Yes	Title, full text, form in which it appears on the ballot, a Legislative Council analysis, fiscal impact statement, and pro and con.	Mailed to every registered voter.	Yes	Anyone who agrees to pay $100 but can't exceed 300 words.	Yes	Yes	Hearings in at least three different counties.
AR	No	N/A	N/A	N/A	N/A	No	No	N/A
CA	Yes	Title, summary, full text, fiscal statements and pro and con (and rebuttals to pro and con).	Mailed to every registered voter.	Yes	Proponents — opponents chosen by SOS if more than one.	Yes	Yes	One in the state legislature.
CO	Yes	Title, summary and text, and pro and con.	Mailed to every registered voter.	Yes	The Legislative Council writes the pro and con.	Yes	Yes	At least one
FL	No	N/A	N/A	No	N/A	Yes	No	N/A
ID	Yes	Title, Ballot form, full text, pro and con arguments and rebuttal.	Mailed to every registered voter in the state.	Yes	Selected by the state.	No	No	N/A
ME	Yes	Title, summary, explanatory statement, fiscal statement	Two to every town office and libraries. Also, posted in poster form at voting center. Also, available on request.	No	N/A	No, except for bond issues.	No	N/A
MA	Yes	Title, ballot language, full text and pro and con.	Mailed to every registered voter.	Yes	State legislative committees and proponents	No	Yes	At least one
MI	No	N/A	N/A	No	N/A	No	No	N/A
MS	Yes	Title, summary, full text, fiscal analysis and pro and con.	Newspaper	Yes	Whoever submits one but not to exceed 300 words.	Yes	Yes	At least one in every Congressional district.

State	Does the state publish a voter's Pamphlet?	What's In it?	How is it distributed?	Do they allow for pro and con statements?	Who writes the pro and con statements?	Is there a fiscal impact Statement?	Are there hearings on the initiative?	How many hearings and when and where?
MO	No	N/A	N/A	N/A	N/A	Yes	No	N/A
MT	Yes	Title, text, fiscal statement and pro and con.	Mailed to every registered voter.	Yes	Written by a committee of three chosen by the legislative leadership.	Yes	No	N/A
NE	No	N/A	N/A	No	N/A	No	No	N/A
NV	Yes	Title, text, fiscal statement and pro and con.	Mailed to every registered voter.	No	N/A	Yes	No	N/A
ND	No	N/A	N/A	N/A	N/A	No	No	N/A
OH	Yes	Title, text, fiscal statement and pro and con.	Mailed to every registered voter.	Yes	Groups chosen by the state	Yes	No	N/A
OK	No	N/A	N/A	N/A	N/A	No	No	N/A
OR	Yes	Title, summary, explanatory statement, fiscal statement, etc.	Mailed to every registered voters home.	Yes	Anyone who wants to pay $500	Yes	No	N/A
SD	Yes	Explanation of measure, proponent's and opponent's statement.	Available online and available at any County Auditor's office.	Yes	Proponent writes a statement and the SOS chooses an opponent to write a statement.	No	No	N/A
UT	Yes	Impartial analysis of all ballot issues. Arguments for and against each ballot issue. Complete text of all ballot issues.	In every newspaper in general circulation.	Yes	Proponent writes argument for and state chooses who writes con argument	Yes	No	N/A
WA	Yes	Official ballot title and explanatory statement, statement for and against, fiscal impact statement, and complete text of measure.	Mailed registered to voters and available at county election offices.	Yes	Supporters opponents who apply with the Secretary of State's and office.	Yes	No	N/A
WY	No	N/A	N/A	No	N/A	No	No	N/A

Voter Approval

Once an initiative is on the ballot, the general requirement for passage is a simple majority vote. Exceptions are Nebraska, Massachusetts and Mississippi. These states require a majority, provided the votes cast on the initiative equals a percentage of the total votes cast in the election (35% in Nebraska, 30% in Massachusetts, and 40% in Mississippi.) Wyoming requires "an amount in excess of 50% of those voting in the preceding general election." An initiated constitutional amendment in Nevada must receive a majority vote in two successive general elections. Washington requires a simple majority approval for all measures except those concerning gambling (which requires 60% affirmative vote for passage). Utah has a requirement that any initiative pertaining to the taking of wildlife must pass by a 2/3 vote.

20A-7-701. Voter information pamphlet to be prepared.

(1) The lieutenant governor shall cause to be printed a voter information pamphlet designed to inform the voters of the state of the content, effect, operation, fiscal impact, and the supporting and opposing arguments of any measure submitted to the voters by the Legislature or by initiative or referendum petition.
(2) The pamphlet shall also include a separate section prepared, analyzed, and submitted by the Judicial Council describing the judicial selection and retention process.
(3) The lieutenant governor shall cause to be printed as many voter information pamphlets as needed to comply with the provisions of this chapter.

20A-7-702. Voter information pamphlet — Form — Contents — Distribution.

(1) The lieutenant governor shall ensure that all information submitted for publication in the voter information pamphlet is:
(a) printed and bound in a single pamphlet;
(b) printed in clear readable type, no less than ten-point, except that the text of any measure may be set forth in eight-point type; and
(c) printed on a quality and weight of paper that best serves the voters.
(2) The voter information pamphlet shall contain the following items in this order:
(a) a cover title page;
(b) an introduction to the pamphlet by the lieutenant governor;
(c) a table of contents;
(d) a list of all candidates for constitutional offices;
(e) a list of candidates for each legislative district;
(f) a 100-word statement of qualifications for each candidate for the office of governor, lieutenant governor, attorney general, state auditor, or state treasurer, if submitted by the candidate to the lieutenant governor's office before July 15 at 5 p.m.;
(g) information pertaining to all measures to be submitted to the voters, beginning a new page for each measure and containing, in the following order for each measure:
(i) a copy of the number and ballot title of the measure;
(ii) the final vote cast by the Legislature on the measure if it is a measure submitted by the Legislature or by referendum;
(iii) the impartial analysis of the measure prepared by the Office of Legislative Research and General Counsel;
(iv) the arguments in favor of the measure, the rebuttal to the arguments in favor of the measure, the arguments against the measure, and the rebuttal to the arguments against the measure, with the name and title of the authors at the end of each argument or rebuttal;
(v) for each constitutional amendment, a complete copy of the text of the constitutional amendment, with all new language underlined, and all deleted language placed within brackets; and
(vi) for each initiative qualified for the ballot, a copy of the measure as certified by the lieutenant governor;
(h) a description provided by the Judicial Council of the selection and retention process for judges of courts of record, including, in the following order:
(i) a description of the judicial selection process;
(ii) a description of the judicial performance evaluation process;
(iii) a description of the judicial retention election process;
(iv) a list of the criteria and minimum standards of judicial performance evaluation;
(v) the names of the judges standing for retention election; and
(vi) for each judge:
(A) the counties in which the judge is subject to retention election;
(B) a short biography of professional qualifications and a recent photograph;
(C) for each standard of performance, a statement identifying whether or not the judge met the standard and, if not, the manner in which the judge failed to meet the standard;
(D) a statement identifying the cumulative number of public orders issued by the Utah Supreme Court under Utah Constitution Article VIII, Section 13 during the judge's current term and the immediately preceding term, and a statement of the basis for each order that the judge has received; and
(E) a statement identifying whether or not the judge was certified by the Judicial Council;
(vii)(A) except as provided in Subsection (2)(h)(vii)(B), for each judge, in graphic format, the favorable response rating for each attorney, jury, and other survey question used by the Judicial Council for certification of judges, displayed in 1% increments and identifying the minimum standards of performance for each question;

(B) notwithstanding Subsection (2)(h)(vii)(A), if the sample size for the survey for a particular judge is too small to provide statistically reliable information in 1% increments, the survey results for that judge shall be reported as being above or below 70% and a statement by the surveyor explaining why the survey is statistically unreliable shall also be included;
(i) an explanation of ballot marking procedures prepared by the Office of Legislative Research and General Counsel, indicating the ballot marking procedure used by each county and explaining how to mark the ballot for each procedure;
(j) voter registration information;
(k) a list of all county clerks' offices and phone numbers;
(l) an index of subjects in alphabetical order; and
(m)on the back cover page, a printed copy of the following statement signed by the lieutenant governor:

"I, _____ (print name), Lieutenant Governor of Utah, certify that the measures contained in this pamphlet will be submitted to the voters of Utah at the election to be held throughout the state on ____ (date of election), and that this pamphlet is complete and correct according to law. SEAL
Witness my hand and the Great Seal of the State, at Salt Lake City, Utah this ____ day of ____ (month), ____ (year)
(signed) _____ Lieutenant Governor"
(1) The lieutenant governor shall:
(a) ensure that one copy of the voter information pamphlet is placed in one issue of every newspaper of general circulation in the state not more than 40 nor less than 15 days before the day fixed by law for the election;
(b) ensure that a sufficient number of printed voter information pamphlets are available for distribution as required by this section;
(c) provide voter information pamphlets to each county clerk for free distribution upon request and for placement at polling places; and
(d) ensure that the distribution of the voter information pamphlets is completed 15 days before the election.

20A-7-703. Impartial analysis of measure — Determination of fiscal effects.

(1) The director of the Office of Legislative Research and General Counsel, after the approval of the legislative general counsel as to legal sufficiency, shall:
(a) prepare an impartial analysis of each measure submitted to the voters by the Legislature or by initiative or referendum petition; and
(b) submit the impartial analysis to the lieutenant governor no later than August 20 of the year in which the measure will appear on the ballot.
(2) The director shall ensure that the impartial analysis:
(a) is not more than 1,000 words long;
(b) is prepared in clear and concise language that will easily be understood by the average voter;
(c) avoids the use of technical terms as much as possible;
(d) shows the effect of the measure on existing law;
(e) identifies any potential conflicts with the United States or Utah Constitutions raised by the measure;
(f) fairly describes the operation of the measure;
(g) identifies the measure's fiscal effects for the first full year of implementation and the first year when the last provisions to be implemented are fully effective; and
(h) identifies the amount of any increase or decrease in revenue or cost to state or local government.
(3) The director shall analyze the measure as it is proposed to be adopted without considering any implementing legislation, unless the implementing legislation has been enacted and will become effective upon the adoption of the measure by the voters.
(4)(a) In determining the fiscal effects of a measure, the director shall confer with the legislative fiscal analyst.
(b) The director shall consider any measure that requires implementing legislation in order to take effect to have no financial effect, unless implementing legislation has been enacted that will become effective upon adoption of the measure by the voters.
(5) If the director requests the assistance of any state department, agency, or official in preparing his analysis, that department, agency, or official shall assist the director.

20A-7-704. Initiative measures — Arguments for and against — Voters' requests for argument — Ballot arguments.

(1)(a)(i)(A) By August 20 of the regular general election year, the sponsors of any initiative petition that has been declared sufficient by the lieutenant governor may deliver to the lieutenant governor an argument for the adoption of the measure.

States with Direct (DA) and Indirect (IDA) Initiative Amendments; Direct (DS) and Indirect (IDS) Initiative Statutes and Popular (PR) Referendum[2]

State	Date adopted	Type of process available		Type of Initiative process available		Type of initiative process used to propose Constitutional Amendments		Type of initiative process used to propose Statutes (Laws)	
		Initiative	Popular Referendum	Constitutional Amendment	Statute	Direct (DA)	Indirect (IDA)	Direct (DS)	Indirect (IDS)
AK	1956	Yes	Yes	No	Yes	No	No	No	Yes
AZ	1911	Yes	Yes	Yes	Yes	Yes	No	Yes	No
AR	1910	Yes	Yes	Yes	Yes	Yes	No	Yes	No
CA[3]	1911/66	Yes	Yes	Yes	Yes	Yes	No	Yes	No
CO	1912	Yes	Yes	Yes	Yes	Yes	No	Yes	No
FL	1972	Yes	No	Yes	No	Yes	No	No	No
ID	1912	Yes	Yes	No	Yes	No	No	Yes	No
IL[4]	1970	Yes	No	Yes	No	Yes	No	No	No
KY	1910	No	Yes	No	No	No	No	No	No
ME	1908	Yes	Yes	No	Yes	No	No	No	Yes
MD	1915	No	Yes	No	No	No	No	No	No
MA	1918	Yes	Yes	Yes	Yes	No	Yes	No	Yes
MI	1908	Yes	Yes	Yes	Yes	Yes	No	No	Yes
MS[5]	1914/92	Yes	No	Yes	No	No	Yes	No	No
MO	1908	Yes	Yes	Yes	Yes	Yes	No	Yes	No
MT[6]	1904/72	Yes	Yes	Yes	Yes	Yes	No	Yes	No
NE	1912	Yes	Yes	Yes	Yes	Yes	No	Yes	No
NV	1905	Yes	Yes	Yes	Yes	Yes	No	No	Yes
NM	1911	No	Yes	No	No	No	No	No	No
ND[7]	1914	Yes	Yes	Yes	Yes	Yes	No	Yes	No
OH	1912	Yes	Yes	Yes	Yes	Yes	No	No	Yes
OK	1907	Yes	Yes	Yes	Yes	Yes	No	Yes	No
OR	1902	Yes	Yes	Yes	Yes	Yes	No	Yes	No
SD[8]	1898/72/88	Yes	Yes	Yes	Yes	Yes	No	Yes	No
UT	1900/17	Yes	Yes	No	Yes	No	No	Yes	Yes
WA	1912	Yes	Yes	No	Yes	No	No	Yes	Yes
WY	1968	Yes	Yes	No	Yes	No	No	No	Yes
Totals	27 states	24 states	24 states	18 states	21 states	16 states	2 states	14 states	9 states

Similarities

Although the initiative process is different in every state, there are certain aspects of the process that are common to all. The five basic steps to any initiative are:

1) Preliminary filing of a proposed initiative with a designated state official;
2) Review of the initiative for compliance with statutory requirements prior to circulation;
3) Circulation of the petition to obtain the required number of signatures;
4) Submission of the petition signatures to the state elections official for verification of the signatures;
5) The placement of the initiative on the ballot and subsequent vote.

2. This list does not include the states with legislative referendum (LR). Legislative referendum is when a state legislature places an amendment or statute on the ballot for voter approval or rejection. The legislative referendum process is available in every state.
3. In 1996 California repealed the in-direct initiative process for statutes.
4. In Illinois, the subject matter of proposed constitutional amendments is severely limited to legislative matters. Consequently, initiatives seldom appear on the ballot.
5. Mississippi first adopted the initiative process in 1914 but a State Supreme Court ruling voided the election. The process was "readopted" in 1992.
6. In 1972 Montana adopted a provision that allows for directly initiated constitutional amendments.
7. In North Dakota prior to 1918, constitutional amendments could be initiated only indirectly.
8. In 1972 South Dakota adopted a provision that allows for directly initiated constitutional amendments. In 1988 South Dakota repealed the in-direct Initiative process for statutes.

Signature, Geographic Distribution and Single Subject (SS) Requirements for Initiative Petitions

State	Type	SS	Net Signature Requirement for Constitutional Amendments	Net Signature Requirement for Statutes	Geographic Distribution	Deadline for Signature Submission	Circulation Period
AK	IDS	Yes	Not allowed by state constitution	10% of votes cast in last general election.	At least 1 signature in 2/3 of Election Districts	Prior to the convening of the legislature[1]	1 year
AZ	DA/DS	Yes	15% of votes cast for Governor	10% of votes cast for Governor	No geographical distribution	Four months prior to election	20 months
AR	DA/DS	No	10% of votes cast for Governor	8% of votes cast for Governor	5% in 15 of 75 counties	Four months prior to election	Unlimited
CA	DA/DS	Yes	8% of votes cast for Governor	5% of votes cast for Governor	No geographical distribution	To be determined by state each year[2]	150 days
CO	DA/DS	Yes	5% of votes cast for SOS	5% of votes cast for SOS	No geographical distribution	Three months prior to election	6 months
FL	DA	Yes	8% of ballots cast in the last Presidential election	Not allowed by state constitution	8% in 12 of 23 Congressional Districts	90 days prior to election[3]	4 years
ID	DS	No	Not allowed by state constitution	6% of registered voters	6% in each of the 22 counties [4]	Four months prior to election	18 months
ME	IDS	No	Not allowed by state constitution	10% of votes cast for Governor	No geographical distribution	To be determined by state each year[5]	1 year
MA	IDA/IDS	No	3% of votes cast for Governor	3½% of votes cast for Governor[6]	No more than 25% from a single county	To be determined each year by state[7]	64 days
MI	DA/IDS	No	10% of votes cast for Governor	8% of votes cast for Governor	No geographical distribution	Constitutional amendment[8] Statute[9]	180 days
MS	IDA	No	12% of votes cast for Governor	Not allowed by state constitution	20% from each Congressional District	90 days prior to the convening of the legislature	1 year
MO	DA/DS	Yes	8% of votes cast for Governor	5% of votes cast for Governor	5% in 6 of 9 Congressional Districts	Eight months prior to election	16 months
MT	DA/DS	Yes	10% of votes cast for Governor	5% of votes cast for Governor	Statute: 5% in 34 of 50 Legislative Districts Amendment: 10% in 40 of 50 Legislative Districts[10]	Second Friday of the fourth month prior to election	1 year
NE	DA/DS	Yes	10% of registered voters	7% of registered voters	5% in 38 of 93 counties	Four months prior to election	1 year

[1] In Alaska, signatures must be submitted prior to the convening of the legislative session in the year in which the initiative is to appear on the ballot. The lieutenant governor shall place the initiative on the election ballot of the first statewide general, special, or primary election that is held after (1) the petition and any supplementary petition signatures have been submitted, (2) a legislative session has convened and adjourned, and (3) a period of 120 days has expired since the adjournment of the legislative session.

[2] In California, each year the Secretary of State will set a complete schedule showing the maximum filing deadline and the certification deadline by the counties to the Secretary of State. There is a recommended submission date for "full check" and "random check". These dates are only recommended. Notwithstanding any other provision of law, no initiative shall be placed on a statewide election ballot that qualifies less than 131 days before the date of the election.

[3] In Florida, certification must be received by the Secretary of State from the county supervisors stating the number of valid signatures submitted by the initiative proponent no later than 90 days prior to the general election ballot for the initiative to be considered for that ballot. However, there are several additional criteria that must be met prior to the certification of an initiative for the ballot. This includes the requirement that the proposed initiative has been approved for the ballot by the state supreme court. An initiative can only be submitted to the court for review after 10% of the required number of signatures have been collected and certified to the Secretary of State by the county supervisors. The court is under no statutory time frame to render a decision. Therefore, there is no precise date in which the signatures must be submitted in order to insure that you qualify for any specific general election ballot.

[4] This distribution requirement was struck down as unconstitutional by the Federal District Court of Idaho in early 2002. The decision was appealed by the state and as of the writing of this Almanac, the appeal had not been decided.

[5] In Maine, signatures must be submitted on or before the 50th day after the convening of the Legislature in the first regular session or on or before the 25th day after the convening of the Legislature in the second regular session.

[6] In Massachusetts, the initial petition must include 3% of the total votes cast for Governor. If the legislature has not passed an initiated statute by the first Wednesday in May, petitioners must file a supplementary petition with petitions equal in number to one-half of one percent of the total votes cast in the previous gubernatorial election to place the issue on the ballot.

[7] In Massachusetts, the initial petition signatures shall be submitted no later than the first Wednesday in December in the year in which the Initiative was submitted. If the legislature has not passed the initiated statute by the first Wednesday in May, petitioners must file a supplementary petition with petitions equal in number to one-half of one percent of the total votes cast in the previous gubernatorial election no sooner than the first Wednesday in June and no later than the first Wednesday in July in for the initiative statute to be placed on the ballot.

[8] In Michigan, signatures for constitutional amendments must be submitted not less than 120 days prior to the general election.

[9] In Michigan, signatures for statutes must be submitted ten days prior to the start of the legislative session.

[10] The legislature has placed a constitutional amendment on the November 2002 that would increase the state's distribution requirement. If it passes the requirement will be based on counties and not on legislative districts.

State	Type	SS	Net Signature Requirement for Constitutional Amendments	Net Signature Requirement for Statutes	Geographic Distribution	Deadline for Signature Submission	Circulation Period
NV	DA/IDS	No	10% of registered voters	10% of votes cast in last general election.	10% in 13 of 17 counties	Constitutional amendment[11] Statute [12]	CA: 11 months[13] Statute: 10 months[14]
ND	DA/DS	No	4% of population	2% of population	No geographical distribution	90 days prior to election	1 year
OH	DA/IDS	Yes	10% of votes cast for Governor	6% of votes cast for Governor[15]	Statute: 1½% in 44 of 88 counties Amendment: 5% in 44 of 88 counties	Constitutional amendment[16] Statute[17]	Unlimited
OK	DA/DS	Yes	15% of votes cast for Governor	8% of votes cast for Governor	No geographical distribution	Eight months prior to election [18]	90 days
OR	DA/DS	Yes	8% of votes cast for Governor	6% of votes cast for Governor	No geographical distribution	Four months prior to election	Unlimited
SD	DA/DS	No	10% of votes cast for Governor	5% of votes cast for Governor	No geographical distribution	Constitutional amendment[19] Statute[20]	1 year
UT	DS/IDS	No	Not allowed by state constitution	Direct statute: 10% of votes cast for Governor In-direct statute: 10% of votes cast for Governor[21]	10% in 20 of 29 counties	Direct statute[22] In-direct statute[23]	Direct: Unlimited In-direct: Unlimited
WA	DS/IDS	No	Not allowed by state constitution	8% of votes cast for Governor	No geographical distribution	Direct: statute[24] In-direct statute[25]	Direct: 6 months In-direct: 10 months
WY	IDS	Yes	Not allowed by state constitution	15% of votes cast in the last general election.	15% of total votes cast in the last election from at least 2/3 of the counties	One day prior to the convening of the legislature[26]	18 months

[11] In Nevada, signatures for constitutional amendments must be submitted 90 days prior to the election.
[12] In Nevada, signatures for statutes must be submitted 30 days prior to the convening of the legislature.
[13] In Nevada, petition language for constitutional amendments can be filed no sooner than September 1 of the year preceding the election and all signatures are due 90 days prior to the election.
[14] In Nevada, petition language for statutes can be filed no sooner than January 1st of an even numbered year and signatures must be submitted no later than November 1st of that same even numbered year.
[15] In Ohio, the initial petition must include 3% of the total votes cast for Governor. A supplementary petition containing an additional 3% is required in the event the proposed statute is defeated, amended or left idle by the legislature.
[16] In Ohio, signatures for amendments must be submitted 90 days prior to the election.
[17] In Ohio, signatures for statutes must be submitted 10 days prior to the convening of legislature.
[18] In Oklahoma, an initiative must be submitted to the state Supreme Court for review before it can be certified for the ballot by the Secretary of State. Due to the fact that there is no statutory deadline for the court to make this determination, the state recommends that you submit your signatures eight months prior to the election that you desire the measure to be considered for.
[19] In South Dakota, signatures for amendments must be submitted at least one year prior to the election.
[20] In South Dakota, signatures for statutes must be submitted by the first Tuesday in May in the general election year.
[21] In Utah, direct statutes require signatures equal in number to 10% of the votes cast for all candidates for Governor in the next preceding gubernatorial election for the statute to be placed on the ballot. Indirect statutes must contain signatures from 5% of the votes cast for all candidates for Governor in the next preceding gubernatorial election. If the legislature rejects or does not enact the proposed statute, a supplemental petition contacting additional signatures equal in number to 5% of the votes cast for all candidates for Governor in the next preceding gubernatorial election for the statute to be placed on the ballot.
[22] In Utah, signatures for direct statutes must be submitted at least four months prior to the election.
[23] In Utah, signatures for in-direct statutes must be submitted at least 10 days before the commencement of the annual general legislative session.
[24] In Washington, signatures for direct statutes must be submitted four months prior to the election.
[25] In Washington, signatures for indirect statutes must be submitted ten days prior to the convening of the regular session of the legislature.
[26] In Wyoming, signatures must be submitted prior to the convening of the legislature. The state constitution states that the legislature shall convene at noon on the second Tuesday in January.

Source: Dane Waters, *Initiative and Referendum Almanac*. Durham, NC: Carolina Academic Press, 2003.
Notes: Since this table was published in early 2003, the courts have struck down Idaho's geographic distribution requirement. Currently, there are lawsuits in North Dakota and Oregon challenging their geographic distribution requirements. Phone conversation with Dane Waters, January 12, 2004.

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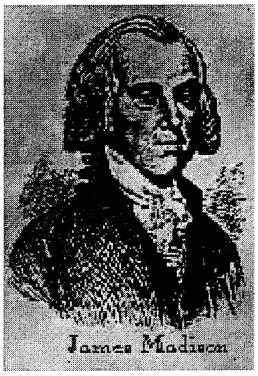

FEDERALIST PAPERS

Federalist No. 10

The Same Subject Continued:
The Union as a Safeguard Against Domestic Faction and Insurrection
From the New York Packet.
Friday, November 23, 1787.

Author: **James Madison**

To the People of the State of New York:

AMONG the numerous advantages promised by a wellconstructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence, of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which

is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party

to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number

of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic,--is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened

views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

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Initiative and Referendum in the 21st Century

Final Report and Recommendations of the NCSL I&R Task Force

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PREFACE AND ACKNOWLEDGMENTS

The NCSL Initiative and Referendum Task Force assumed a difficult task in addressing such a complicated and highly controversial issue. Thanks to the committed leadership of Senator DiAnna Schimek, the task force was able to quickly focus on the most important issues and eventually come to consensus on a set of recommendations. NCSL is indebted to each one of the task force members who contributed their expertise for this project.

The task force was a diverse, bipartisan group representing seven of the 24 initiative states and the District of Columbia. Its makeup was unique in that it also included industry members. The following legislators, legislative staff, and industry representatives served on the task force:

Honorable DiAnna Schimek, State Senator, Nebraska, Task Force Chair
Chris Badgley, Vice President of State Government Affairs, PhRMA, Washington, D.C.
Jerry Barnett, Ph.D., Principal, Thomas-Huntington Ltd., Missouri
Honorable Jim Costa, State Senator, California
Sharon Eubanks, Senior Attorney for Administration, Office of Legislative Legal Services, Colorado
Honorable Marilyn Jarrett, State Senator, Arizona
Patrick Kelly, Director of State Government Relations, Biotechnology Industry Organization, Washington, D.C.
Tracy Mihas, Manager of I&R and Corporate Issues, Philip Morris Companies, Washington, D.C.
Frank H. Plescia, Senior Director of U.S. State Government Affairs, Monsanto Company, Missouri
Honorable Lane Shetterly, House Speaker Pro Tem, Oregon
Michael Stewart, Senior Research Analyst, Legislative Counsel Bureau, Nevada

The task force was fortunate to gain the insight of many individuals who took the time to appear before the group and share their expertise. The task force is grateful to the following witnesses who contributed their time:

David Broder, *Washington Post,* Washington, D.C.
Lois Court, Save Our Constitution, Colorado
Neal Erickson, Office of the Secretary of State, Nebraska
Wayne Pacelle, Humane Society of the United States, Washington, D.C.
John Perez, Speaker's Commission on the California Initiative Process, California
Honorable Joe Pickens, State Representative, Florida

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M. Dane Waters, Initiative and Referendum Institute, Washington, D.C.
Joseph F. Zimmerman, State University of New York-Albany, New York

Many others helped in the creation of this report, including legislative staff and election officials in initiative states who shared valuable data and took the time to review and confirm information about their states' laws and procedures. Their assistance is greatly appreciated; it contributed to the quality and accuracy of the information in this report.

A number of NCSL staff supported the task force in its work, including Jennie Drage Bowser and Kate Rooney in NCSL's Denver office. Leann Stelzer of the NCSL publications department helped edit and prepare the report for publication, and Scott Liddell of NCSL formatted the report.

EXECUTIVE SUMMARY

On December 7, 2001, the National Conference of State Legislatures assembled a task force to review the growing use of initiatives and referendums around the country and to examine their effect on representative democracy at the state level.

The Initiative and Referendum Task Force found that opportunities for abuse of the process outweigh its advantages and does not recommend that states adopt the initiative process if they currently do not have one.

The task force also developed recommendations that would enable initiative states to make their processes more representative. For states that are intent upon adopting an initiative process, the task force offers a set of guidelines to enhance the process and to avoid many of the pitfalls currently experienced by the initiative states. The task force urges such states to consider giving preference to a process that encourages citizen participation without enacting specific constitutional or statutory language—specifically, the advisory initiative or the general policy initiative.

The 34 recommendations contained in this report acknowledge that the initiative process has outgrown the existing laws that govern it. After listening to expert testimony from a wide variety of witnesses and compiling data from all 50 states, the task force concluded that the initiative has evolved from its early days as a grassroots tool to enhance representative democracy into a tool that too often is exploited by special interests. The initiative lacks critical elements of the legislative process and can have both intended and unintended effects on the ability of the representative democratic process to comprehensively develop policies and priorities.

As a result, the task force suggests that initiative states reform drafting, certification, signature-gathering and financial disclosure statutes; adhere to single subject rules; and improve practices regarding voter education. It also recommends that initiatives be allowed only on general election ballots.

It is the task force's intent that the discussion and adoption of the reforms in this report lead to a more thoughtful lawmaking process, improve interaction between initiative proponents and legislatures, and ultimately produce better public policy and reinforce representative democracy.

Task Force Recommendations

The following 34 recommendations were adopted unanimously at the final meeting of the NCSL Initiative and Referendum Task Force in Denver, Colorado, on April 26-27, 2002.

The task force does not recommend that states that currently do not have an initiative process adopt one. The task force believes that representative democracy is more desirable than the initiative. The disadvantages of the initiative as a tool for policymaking are many, and the opportunities for abuse of the process outweigh its advantages. However, if a state is intent upon adopting an initiative process, the first four recommendations lay out the task force's view of an effectively structured process.

The remaining recommendations deal with specific elements of the initiative process and are intended as guidelines to improve existing procedures. The task force believes that the adoption of these recommendations will improve the initiative process to the benefit of both state government and voters and will result in improved public policy making via the initiative.

General Recommendations Regarding the Initiative Process

Recommendation 1.1: States that are considering adopting an initiative process should give preference to one that encourages citizen participation without enacting specific constitutional or statutory language. Specifically, states should consider:

A. First, adopting the advisory initiative; or
B. In the alternative, adopting the general policy initiative.

Recommendation 1.2: If states wish to adopt an initiative process and neither the advisory initiative nor the general policy initiative are adopted, they should adopt an indirect initiative process.

Recommendation 1.3: If states adopt a direct initiative process, they should adopt only a statutory initiative process, not a constitutional amendment initiative process.

Recommendation 1.4: If states adopt a constitutional amendment initiative process, they also should adopt a statutory initiative process.

Involving the Legislature in the Initiative Process

Recommendation 2.1: States that currently have a direct initiative process should consider adopting an indirect process as well, and provide incentives to encourage its use.

Recommendation 2.2: After a specified percentage of signatures has been gathered for an initiative petition, the legislature should provide for public hearings on the initiative proposal.

Recommendation 2.3: When appropriate, the legislature should place an alternative legislative referral on the ballot with an initiative that appears on the ballot.

The Subject Matter of Initiatives

Recommendation 3.1: States should encourage the sponsors of initiatives to propose them as statutory initiatives when possible, rather than as constitutional amendments.

Recommendation 3.2: States should adopt the single subject rule to enhance clarity and transparency in the initiative process.

Recommendation 3.3: If an initiative measure is rejected by voters, states should prohibit an identical or substantially similar initiative measure from appearing on the ballot for a specified period of time.

The Drafting and Certification Phase

Recommendation 4.1: States should require a review of proposed initiative language by either the legislature or a state agency. The review should include non-binding suggestions for improving the initiative's technical format and content, and should be considered public information.

Recommendation 4.2: States should require the drafting and certification of a ballot title and summary for each initiative proposal. Ballot titles must identify the principal effect of the proposed initiative and must be unbiased, clear, accurate, and written so that a "yes" vote changes current law.

Recommendation 4.3: States should require the drafting of a fiscal impact statement for each initiative proposal. The statement should appear on the petition, in the voter information pamphlet, and on the ballot.

Recommendation 4.4: States should establish a review process and an opportunity for public challenge of technical matters, including adherence to single subject rules, and ballot title, summary and fiscal note sufficiency, to be made prior to the signature-gathering phase.

The Signature Gathering Phase

Recommendation 5.1: States should require that initiative proponents file a statement of organization as a ballot measure committee prior to collecting signatures. States should void any signature that is gathered before a statement of organization is filed.

Recommendation 5.2: States should provide for safeguards against fraud during the signature gathering process. Safeguards should include:

A. Prohibiting the giving or accepting of money or anything else of value to sign or not sign a petition.
B. Requiring a signed oath by circulators, stating that the circulator witnessed each signature on the petition and that to the best of the circulator's knowledge, the signatures are valid.
C. Requiring circulators to disclose whether they are paid or volunteer.

Recommendation 5.3: States should provide for an adequate but limited time period for gathering signatures. The deadline for submission should allow a reasonable time for verification of signatures before the ballot must be certified.

Recommendation 5.4: States should establish a limit on the length of time that verified signatures are valid.

Recommendation 5.5: States should require a higher number of signatures for constitutional amendments than is required for statutory initiatives.

Recommendation 5.6: To achieve geographical representation, states should require that signatures be gathered from more than one area of the state.

Recommendation 5.7: Each state should establish a uniform process for verifying that the required number of valid signatures has been gathered.

Voter Education

Recommendation 6.1: States should provide to the public a manual describing the initiative and referendum process.

Recommendation 6.2: States should encourage public education and discussion about measures on the ballot.

Recommendation 6.3: States should produce and distribute a voter information pamphlet containing information about each measure certified for the ballot.

Recommendation 6.4: In addition to a printed voter information pamphlet, states should consider alternative methods of providing information on ballot measures, such as the Internet, video and audio tapes, toll-free phone numbers, and publication in newspapers.

Financial Disclosure

Recommendation 7.1: States should require financial disclosure by any individual or organization that spends or collects money over a threshold amount for or against a ballot measure.

Recommendation 7.2: After a title has been certified for an initiative measure, states should require that proponents and opponents of the initiative measure file a statement of organization as a ballot measure committee prior to accepting contributions or making expenditures.

Recommendation 7.3: States should make the disclosure requirements for initiative campaigns consistent with the disclosure requirements for candidate campaigns.

Recommendation 7.4: States should prohibit the use of public funds or resources to support or oppose an initiative measure. This should not preclude elected public officials from making statements advocating their position on an initiative measure.

Voting on Initiatives

Recommendation 8.1: States should allow initiatives only on general election ballots.

Recommendation 8.2: States should adopt a requirement that creates a higher vote threshold for passage of a constitutional amendment initiative than for passage of a statutory initiative.

Recommendation 8.3: States should require that any initiative measure that imposes a special vote requirement for the passage of future measures must itself be adopted by the same special vote requirement.

Recommendation 8.4: States should ensure that statutory initiative measures require the same vote threshold for passage that is required of the legislature to enact the same type of statute.

Recommendation 8.5: States should adopt a procedure for determining which initiative measure prevails when two or more initiative measures approved by voters are in conflict.

INTRODUCTION

Initiative and referendum operated quietly in the background of state politics for much of the 20th century, but during the last decade, it has come back into vogue. More initiatives are circulated, more make it to the ballot, and more money is spent in the process than ever before. Consider the numbers: 183 statewide votes on initiatives in the 1970s, 253 in the 1980s, and 383 in the 1990s, more than double the total from the 1970s. California alone accounts for 130 of the total 819 measures during that 30-year period; Oregon can claim 107. Between them, these two states account for nearly 30 percent of all initiatives from 1970 to 1999. It is no wonder that people in California and Oregon are beginning to voice concerns about the initiative process.

Initiative advocates say the resurgence of the initiative is good for states—it means citizens are using it as a tool to implement new laws and reforms that the legislature is unable or unwilling to enact. Besides accomplishing policy change, supporters also say that initiatives increase citizen involvement with government—people are not only more aware of state policy issues, but they are also more likely to vote. For these reasons, movements have begun to establish an initiative process in some of the states that currently do not have such a process.

However, in some states where the initiative is heavily used, there is growing public frustration with initiatives, and some people are beginning to speak out against the process. Legislatures are struggling to find ways to prevent fraud in the signature-gathering process; disclose information about who pays for initiative campaigns; and add flexibility to the process to accommodate more debate, deliberation and compromise than presently exists. Equally concerning to many is the disadvantage that, unlike our legislatures' process of representative government, decisions made through the initiative process do not provide an opportunity to accommodate minority interests. Most importantly, initiatives ask voters to make simple yes-no decisions about complex issues without subjecting the issue to detailed expert analysis and without asking voters to balance competing needs with limited resources. In short, the initiative affects the ability of representative democracy to develop policies and priorities in a comprehensive and balanced manner.

The problems with the initiative process are not easy to solve for a number of reasons. The courts have made it difficult to regulate both petition circulators and initiative campaign finance, and almost any reform can be a difficult political issue because proponents of the initiative generally are hostile to legislative attempts to change the process.

The initiative is a vital and popular part of democracy in half the states (refer to appendix A for a list of initiative states), but it is clear that the initiative has outgrown the existing state laws governing it. NCSL's Initiative and Referendum Task Force set out to first gather the facts and data necessary to paint an accurate picture of how the initiative process works in each state. It identified and focused on problems in the process, then considered ways that the process might be made more open and flexible. The task force feels strongly that the changes it recommends in the initiative process would equally benefit both voters and the legislative process, and that, in the end, a reformed initiative process might produce better public policy.

The task force met three times during a five-month period. Meetings were held on:

- December 7-8, 2001, in Washington, D.C.;
- February 8-9, 2002, in Washington, D.C.; and
- April 26-27, 2002, in Denver, Colorado.

The task force took great care to ensure that it heard testimony from experts and activists on a wide array of issues and from as many points of view as possible. Presenters included both supporters and critics of the initiative process, citizens who use the initiative process, and election administrators. The experts who testified before the task force were:

David Broder, *Washington Post,* Washington, D.C.;
Lois Court, Save our Constitution, Colorado;
Neal Erickson, Office of the Secretary of State, Nebraska;
Wayne Pacelle, Humane Society of the United States, Washington, D.C.;
John Perez, Speaker's Commission on the California Initiative Process, California;
Honorable Joe Pickens, State Representative, Florida;
Larry Sokol, Speaker's Commission on the California Initiative Process, California;
M. Dane Waters, Initiative and Referendum Institute, Washington, D.C.; and
Joseph F. Zimmerman, State University of New York-Albany, New York.

In addition to the experts who testified before the task force, the task force members themselves are experts on the initiative process. The perspectives and suggestions that each member brought to the table contributed to the extensive body of knowledge the task force developed about how the initiative works around the country. Finally, the task force also relied on a wide array of written materials on the initiative process. These include reports from earlier initiative reform commissions and task forces, and the many books and academic papers that are listed in appendix B and in the reference section of this report.

The task force adopted 30 recommendations for legislatures in the initiative states that are seeking guidance on how their initiative process might be improved. Four additional recommendations are meant for states that may be thinking about adopting an initiative process. Although the task force does not recommend that non-initiative states adopt such a procedure, these four recommendations are offered for those states that have, nonetheless, made the decision to go forward.

All the recommendations were based on a set of observations and conclusions about representative and direct democracy that were adopted by the task force at its first meeting. These principles reflect the task force members' belief that it is important to carefully balance the pure democratic impulse of the initiative with the deliberative, consensus-

building practices of representative democracy. It also is the belief of task force members that the adoption of this set of recommended reforms by initiative states will lead to a more thoughtful lawmaking process, improved interaction between initiative proponents and legislatures, and ultimately, better public policy.

Observations and Conclusions About Representative and Direct Democracy

Adopted by the NCSL I&R Task Force on April 27, 2002

We offer in the following observations regarding representative and direct democracy.

1. Representative democracy is the foundation of America's system of government.

2. Representative democracy has provided a stable and flexible system of government that has served America well for more than 200 years.

3. Direct democracy, as envisioned in the initiative and referendum system, was first instituted as a check on representative democracy. It was meant to enhance representative government, not to supercede or abolish it.

4. As intended by its founders, the initiative and referendum process was meant to give citizens a tool to break what they perceived as the hold of special interests over some state legislatures.

5. In most of the 24 states where it exists, the initiative is a popular part of the lawmaking process.

6. The initiative brings to the fore issues that may not receive legislative attention or final action and engages citizens in a debate of important public policy issues.

Based on these observations, we draw the following conclusions about direct democracy.

1. The initiative has evolved from its early days as a grassroots tool to enhance representative government. Today, it is often a tool of special interests.

2. The initiative process, as it exists today, lacks some of the critical elements of the representative system of government, including debate, deliberation, flexibility, compromise and transparency.

3. The initiative process does not involve all the checks and balances that representative government does.

4. The initiative can affect the ability of representative democracy to develop policies and priorities in a comprehensive and balanced manner.

5. As the initiative process and the way it is used have evolved over time, a review of the laws governing it is merited.

1. General Recommendations Regarding the Initiative Process

Recommendations

The task force does not recommend that states that currently do not have an initiative process should adopt one. However, if a state is intent upon adopting an initiative process, the following four recommendations lay out the task force's view of how an effective process might be structured.

Recommendation 1.1: States that are considering adopting an initiative process should give preference to one that encourages citizen participation without enacting specific constitutional or statutory language. Specifically, states should consider:

A. First, adopting the advisory initiative; or
B. In the alternative, adopting the general policy initiative.

Recommendation 1.2: If states wish to adopt an initiative process and neither the advisory initiative nor the general policy initiative are adopted, they should adopt an indirect initiative process.

Recommendation 1.3: If states adopt a direct initiative process, they should adopt only a statutory initiative process, not a constitutional amendment initiative process.

Recommendation 1.4: If states adopt a constitutional amendment initiative process, they also should adopt a statutory initiative process.

Overview

The task force does not recommend that non-initiative states adopt an initiative process. However, should a state choose to do so, the recommendations in this chapter outline what the task force considers to be an ideally structured initiative process.

The Advisory Initiative

An advisory initiative process provides citizens with a formal means of presenting to the legislature the views of the majority on a particular issue, but stops short of the actual enactment of laws. It permits public input in the decision-making process, and allows the legislature to weigh public opinion in determining the appropriate implementation. In short, the advisory initiative uses a more deliberative lawmaking process than the direct initiative. Another advantage of the advisory initiative over the binding direct initiative is that, with the direct initiative, a slim majority might enact a binding policy measure, but a close vote on an advisory initiative simply indicates a lack of consensus.

Recommendation 1.1(A): States that are considering adopting an initiative process should give preference to one that encourages citizen participation without enacting specific constitutional or statutory language. Specifically, states should first consider adopting the advisory initiative.

Several states use the advisory referendum, whereby the legislature or even the governor may place a question on the ballot, asking voters their opinion on an issue. In 2000, for example, the governor of Rhode Island placed an advisory question on the statewide ballot, asking voters if they favored co-equal branches of government. It is much rarer for states to permit citizens to initiate an advisory question.

The General Policy Initiative

A general policy initiative is similar to the advisory initiative discussed above, except that it is binding upon the legislature. If the voters pass a citizen initiative of a general sort—for instance, expressing their desire that the state use tobacco settlement revenues for improving health care—it is up to the legislature to enact the specific laws required to implement that general policy. Like the advisory initiative, the general policy initiative permits direct public input to the policymaking process but uses a more deliberative approach to crafting detailed policy. The general policy initiative offers citizens the opportunity to put their policy ideas before the voters, but offers legislatures more flexibility in implementing voter-mandated policy than does the initiative process currently offered in 24 states.

> **Recommendation 1.1(B):** States that are considering adopting an initiative process should give preference to one that encourages citizen participation without enacting specific constitutional or statutory language. Specifically, as an alternative to the advisory initiative, states should consider adopting the general policy initiative.

The Indirect Initiative

The indirect initiative is frequently offered as an improvement over the direct initiative because it allows for legislative analysis, committee hearings and floor debate. Legislative deliberation and debate on the issue itself and its effect on other existing policies may result in an improved initiative proposal because unintended consequences and errors may come to light.

Pitfalls exist in the indirect initiative process, however, which prevent it from being a panacea to the problems of the initiative. The main argument against the indirect initiative is that, where the process is currently offered, legislatures rarely take up the initiative proposal and, when they do, they almost always reject initiative proposals. Rarely do they engage in negotiation with initiative proponents and seek to craft a compromise. Most often, indirect initiatives are rejected by the legislature and end up on the ballot for a popular vote; the indirect process has done little but protract the initiative process.

In spite of its pitfalls, the indirect initiative process is more desirable than the direct initiative process because it allows for more public debate and deliberation, and it involves the legislature, with its professional research and bill drafting staff, in the process.

> **Recommendation 1.2:** If states wish to adopt an initiative process and neither the advisory initiative nor the general policy initiative are adopted, they should adopt an indirect initiative process.

Eight states currently offer an indirect initiative process. In the indirect initiative process, a proposed initiative is referred to the legislature after proponents have gathered the required number of signatures. The legislature has the option to enact, defeat or amend the measure. Depending on the legislature's action, the proponents may continue to pursue placement on the ballot for a popular vote. In three states (**Massachusetts**, **Ohio** and **Utah**), proponents must gather additional signatures to place the measure on the ballot; in the others, it automatically goes to the ballot.

Table 1. States with an Indirect Initiative Process		
	Constitutional Amendments	Statutory Initiatives
Maine		✔
Massachusetts	✔	✔
Michigan		✔
Mississippi	✔	
Nevada		✔
Ohio		✔
Utah*		✔
Washington*		✔

*State also has a direct initiative process; proponents may select the direct or indirect route.
Note that the table does not represent all forms of the initiative process available in each state; only the indirect processes are represented.
Source: National Conference of State Legislatures, January 2002.

In several states (**Maine**, **Massachusetts**, **Michigan**, **Nevada** and **Washington**), it is specifically provided for in law that the legislature may place an alternate proposition on the ballot with the initiative. Voters may vote for one or the other or for neither.

Alaska's and **Wyoming's** initiative processes are sometimes cited as indirect. However, instead of requiring that an initiative be submitted to the legislature for action, they require only that an initiative cannot be placed on the ballot until after a legislative session has convened and adjourned, thus providing the legislature with the opportunity to address the issue if it so chooses.

Two states—**Utah** and **Washington**—offer both the direct and indirect initiative process; proponents have the option of choosing either. In Utah, the initial signature requirement is lower for the indirect process. This serves as an incentive to proponents to choose the indirect route and thus incorporate the legislature into the process. Qualifying an initiative directly to the ballot requires signatures equal to 10 percent of the votes cast for governor in the last election; presenting an indirect initiative to the Legislature requires signatures equal to 5 percent of the votes cast for governor in the last election. However, if the indirect initiative is rejected by the Legislature, proponents must gather additional signatures equal to 10 percent of the votes cast for governor, creating a total signature threshold for indirect initiatives that is higher than that for direct initiatives. As a consequence, use of Utah's indirect initiative is significantly lower than use of the direct method.

California had an indirect initiative process until 1966. It was available in addition to the direct process, and proponents were permitted to choose the process they would use. The indirect option was rarely used, and voters approved its abolition in 1966.

Nevada currently has an indirect process for statutory initiatives. At one time, it also had the indirect process for initiative constitutional amendments, but it abolished this option in 1962. Voters approved a constitutional amendment referred by the Legislature that abolished the indirect process for constitutional amendments and at the same time imposed the requirement that any constitutional amendment be approved by a majority vote in two successive elections.

Adopting an indirect initiative process has been suggested as a significant reform by the following individuals and groups.

Professor Joseph Zimmerman, SUNY-Albany (in testimony before the task force in February 2002),
Speaker's Commission on the California Initiative Process (2002),
David Broder, *Washington Post* (in testimony before the task force on Dec. 7, 2001),
Dane Waters, I&R Institute (in testimony before the task force on Dec. 8, 2001),
California League of Women Voters (1999),
City Club of Portland, Oregon (1996),
Citizens' Commission on Ballot Initiatives (California, 1994),
Florida's Citizen Initiative Process Report (1994), and
California Commission on Campaign Financing (1992).

Case Studies: The Indirect Initiative

Switzerland

Switzerland's initiative process, which has long been cited as a model of a successful initiative process and heavily influenced the early development of the initiative in the United States, is an indirect process. When an initiative is submitted to the legislature in a Swiss canton, the legislature has four years to deliberate and act on the measure before it is referred to the ballot. When it does go to the ballot, the legislature often submits a statement of its position on the measure and has the option of placing a competing measure on the ballot. Most important, however, is the fact that many initiatives are withdrawn from the legislature before they reach the ballot. According to Richard Ellis in *Democratic Delusions: The Initiative Process in America*, the most common reason for this is that the legislature has promised or taken action that satisfies the proponents. Ellis writes that:

> "The initiative in Switzerland is thus an integral part of the legislative process and is often used as a spur to get a majority in the legislature to heed the concerns of minority groups that have previously been thwarted in the assembly. Unlike in the United States, where the initiative process is a badly confrontational, zero-sum game, in Switzerland it is often employed to arrive at a consensus by facilitating legislative deliberation and compromise."[1]

Massachusetts

The indirect initiative process used for constitutional amendments in Massachusetts is unique because a citizen-initiated constitutional amendment cannot gain ballot access without first passing the legislature. An initiated constitutional amendment must be approved in two consecutive legislative sessions before it can go on the ballot. In the first session, it may be amended by the legislature with a three-fourths vote, and must be approved by one-fourth of the legislature in a joint session in order to advance to the second legislative session. In the second session, the proposal must again be approved by one-fourth of the legislature in a joint session in order to advance to the ballot. The legislature may not amend the proposal at this point in the process, but it may place a substitute measure on the ballot together with the initiative proposal. Few initiated constitutional amendments survive this process and ultimately land on the ballot (three in the history of the state), but many initiatives that fail to pass the legislature and advance to the ballot succeed in prodding the legislature to take action on the issue.

The process for statutory initiatives in Massachusetts, although still indirect, is less rigorous than the process for constitutional initiatives. A statutory initiative must be

heard by the committee to which it is referred, and the committee must issue a report. If the legislature fails to enact the proposal, proponents may gather a small number of additional signatures to place it on the ballot. The legislature may place its own substitute proposal on the ballot together with the initiative proposal.

The advantages of the Massachusetts indirect initiative are that 1) the legislature is incorporated into the process, resulting in public consideration and debate, and 2) it gives the legislature the opportunity and an adequate period of time to respond to a proposal presented in an initiative. By making the constitutional process more difficult to use, it also directs more proposals toward the statutory initiative instead of the constitutional initiative. Its disadvantage is that it allows the legislature to block an initiative constitutional amendment from reaching the ballot, something that initiative advocates find too restrictive.

1. Richard Ellis, *Democratic Delusions: The Initiative Process in America* (Lawrence, Kan.: University Press of Kansas, 2002, 140-1.

Initiated Statutes vs. Constitutional Amendments

Constitutions are the foundations of state laws and governments. They are sacrosanct and should not be amended hastily or at the whim of a narrow segment of society. In offering an initiative constitutional amendment process, a state runs the risk of accumulating material in its constitution that is statutory in nature, since initiative proponents are left with no other tool to initiate policy.

> **Recommendation 1.3:** If states adopt a direct initiative process, they should adopt only a statutory initiative process, not a constitutional amendment initiative process.

Offering a statutory initiative process in addition to a constitutional amendment initiative process also can help avoid this problem. Some initiative proponents will choose the statutory process if it is available to them, especially if incentives are offered to encourage the use of the statutory process over the constitutional process.

> **Recommendation 1.4:** If states adopt a constitutional amendment initiative process, they also should adopt a statutory initiative process.

Other Ideas for Reform

Limits on the Legislature's Power to Amend and Repeal Initiated Statutes

Limiting the legislature's power to amend and/or repeal a statute enacted through the initiative may be an incentive to encourage the use of the statutory initiative over the constitutional initiative. Very often, initiative proponents elect to use the constitutional initiative in order to prevent the legislature from amending or repealing their proposal. If proponents were assured that the legislature's ability to amend and/or repeal statutory initiatives was limited, perhaps they would be more inclined to avail themselves of the statutory initiative process.

Currently, the legislature's power to amend and/or repeal a statute passed by the initiative is restricted in 10 states, and in **California**, it is expressly prohibited. In these states, a supermajority vote of the legislature is required to amend or repeal an initiated measure, or the legislature may be prohibited from acting on an initiated measure for a specified period of time. In the other 14 states, the legislature is free to amend or repeal an initiated measure at any time.

Table 2. Legislative Amendment and Repeal of Initiated Measures

	Restriction
Alaska	No repeal within two years; amendment by majority vote anytime
Arizona	No repeal; 3/4 vote to amend; amending legislation must "further the purpose" of the measure
Arkansas	2/3 vote of the members of each house to amend or repeal
California	No amendment or repeal of an initiative statute by the Legislature unless the initiative specifically permits it
Michigan	3/4 vote to amend or repeal
Nevada	No amendment or repeal within three years of enactment
North Dakota	2/3 vote required to amend or repeal within seven years of effective date
Oregon	2/3 vote required to amend or repeal within two years of enactment
Washington	2/3 vote required to amend or repeal within two years of enactment
Wyoming	No repeal within two years of effective date; amendment by majority vote any time

Source: National Conference of State Legislatures, January 2002.

Recent Legislative Action

In the period of 1999-2002, 17 non-initiative states saw legislation proposing the adoption of an initiative process. In **Minnesota**, an initiative bill passed the House twice in recent years. In fact, Minnesota voters have voted against adopting the initiative three times since 1913. However, the vote has been close, and the idea of adopting the initiative process continues to have strong support in Minnesota. In **New York**, Governor Pataki urged the adoption of the initiative in his 2002 state-of-the-state address. Several initiative bills currently are pending in the New York Legislature, one of which has passed the Senate.

Florida, which has had an initiative process for constitutional amendments since 1972, considered a bill in 2002 that would have provided for citizen initiatives to amend the statutes, as well. The bill would have modified the constitutional initiative process at the same time, changing the vote requirement from a simple majority to a two-thirds vote and requiring economic impact statements for all initiatives. The bill passed the House but failed to pass the Senate.

2. Involving the Legislature in the Initiative Process

Recommendations

Recommendation 2.1: States that currently have a direct initiative process should consider adopting an indirect process as well, and provide incentives to encourage its use.

Recommendation 2.2: After a specified percentage of signatures has been gathered for an initiative petition, the legislature should provide for public hearings on the initiative proposal.

Recommendation 2.3: When appropriate, the legislature should place an alternative legislative referral on the ballot with an initiative that appears on the ballot.

Overview

Further integrating the legislature into the initiative process would result in improved policymaking in the initiative states. Initiatives often tie the hands of the legislature, preventing state legislatures from developing broad, cohesive state policies. Improving the adversarial nature of the relationship between initiative advocates and state legislatures would be beneficial to legislatures and initiative proponents alike—initiative proponents would be more likely to see the legislature enact the policies they advocate, and legislatures would face fewer voter-mandated policies that restrict their flexibility and discretion in the lawmaking process.

Furthermore, increasing legislative involvement in the initiative process enhances the debate that surrounds initiative proposals and provides more opportunity for public access and input to the initiative process.

The Indirect Initiative

As discussed in chapter one, the indirect initiative process is more desirable than the direct process. In **Utah** and **Washington**, however, which have both types of processes, the indirect variety is rarely used. If states provided incentives—such as creating a lower signature threshold and a longer circulation period for indirect measures, or requiring the legislature to hold hearings on all indirect initiatives submitted—to proponents to use the indirect process, perhaps more proponents would be drawn to the indirect process. The benefits of such incentives also might include a significant monetary savings for proponents if they are able to reach a compromise with the legislature and thus avoid a campaign, and an improved end product, thanks to the legislative hearing process. No matter how a state chooses to structure an indirect initiative process, the legislature must actively interact and negotiate in good faith with initiative proponents if the process is to be effective.

Recommendation 2.1: States that currently have a direct initiative process should consider adopting an indirect process as well, and provide incentives to encourage its use.

Public Hearings on Initiatives

Public hearings provide a forum for expert testimony, staff research and analysis, and debate by opposing sides. They also establish a public record of the proponents' intent, which could be useful to voters, to both sides in a campaign, and also in later court challenges, should they arise. Public hearings could be handled in several ways. The legislature itself could hold hearings on measures that have gathered a specified minimum percentage of the required signatures or on measures that have qualified for the ballot. As an alternative, the secretary of state could be required to hold public hearings on initiatives.

Recommendation 2.2: After a specified percentage of signatures has been gathered for an initiative petition, the legislature should provide for public hearings on the initiative proposal.

The organizations and individuals recommending public hearings for initiatives include:

Dane Waters of the I&R Institute (in testimony before the task force in December 2001),
California League of Women Voters (1999),
City Club of Portland, Oregon (1996),
Nebraska Petition Process Task Force (1995),
California Post Commission (1994), and
California Commission on Campaign Financing (1992).

Case Studies: Public Hearings on Initiatives

California's Senate Bill 384, proposed in the 1999-2000 legislative session, would have triggered public hearings for any initiative that obtained 15 percent of the required signatures. After the hearing, proponents would be permitted to make non-substantive technical changes—such as correcting drafting errors or making stylistic changes—then could continue to gather the remaining required signatures.

Oregon's House Bill 3487 from the 1999 legislative session would have created a 12-member citizen initiative review committee appointed by the governor, the president of the Senate, and the speaker of the House. After holding hearings on a proposal, the committee would be required to issue a report to the public and the news media, identifying issues raised by the proposal and including a fiscal impact estimate and summaries of all public testimony received at hearings. Proponents would be permitted to make non-substantive amendments to the initiative, subject to attorney general approval, after the report was issued.

Referring Legislative Alternatives to Initiative Proposals

If the legislature feels that an initiative measure is flawed, it should exercise its right to place an alternative measure on the ballot. When the legislature's proposal is placed on the ballot together with an initiative, voters are offered more than a simple yes/no vote—they

are offered policy choices. The presence of similar but competing measures on the ballot also can prompt public debate and analysis of the proposals, resulting in more thorough attention to the perceived problem and potential solutions the measures address.

> **Recommendation 2.3:** When appropriate, the legislature should place an alternative legislative referral on the ballot with an initiative that appears on the ballot.

Support for this reform has been expressed by Professor Joseph Zimmerman (in testimony before the task force in February 2002) and the California Post Commission (1994).

Case Studies: Legislative Alternatives to Initiatives

In at least five states (**Maine**, **Massachusetts**, **Michigan**, **Nevada** and **Washington**), the legislature is specifically granted the power to place alternatives to initiatives on the ballot. In most other states, the legislature is neither specifically granted nor denied that power. The Maine Legislature frequently chooses to exercise this right. In 1996, for example, Question 2A appeared on the ballot. It was a citizen initiative that sought to ban the timber harvesting practice of clearcutting in the state. The Legislature placed Question 2B on the ballot, a more moderate proposal. Voters also were offered Question 2C, which was a vote for neither 2A nor 2B. Question 2B, the Legislature's alternative to the initiative, passed.

Recent Legislative Action

California, **Oregon** and **Utah** considered bills that would permit the legislature to make certain amendments to proposed initiatives before they are placed on the ballot. **Utah** passed HB 143 in 1999, which allows the Legislature to make technical corrections to indirect initiatives submitted to the Legislature and to prepare a legislative review note and fiscal note for indirect initiatives. Four states considered requiring legislative review and comment on proposed initiatives.

3. The Subject Matter of Initiatives

Overview

It is common for states to prohibit the use of the initiative for certain subjects. In Massachusetts and Mississippi, for instance, the initiative cannot be used to modify or repeal the rights of individuals, and several states prohibit initiatives that deal with the judiciary. These are fundamental matters of law, and it is appropriate that some states should choose to remove them from the purview of the initiative process. Some scholars and reformers argue that the same argument extends to state constitutions—that they are the foundations of state law, and changing them should not be entered into lightly.

Recommendations

Recommendation 3.1: States should encourage the sponsors of initiatives to propose them as statutory initiatives when possible, rather than as constitutional amendments.

Recommendation 3.2: States should adopt the single subject rule to enhance clarity and transparency in the initiative process.

Recommendation 3.3: If an initiative measure is rejected by voters, states should prohibit an identical or substantially similar initiative measure from appearing on the ballot for a specified period of time.

Constitutional vs. Statutory Initiatives

In many initiative states, constitutions are becoming cluttered with matter that is more appropriate for the state's statutes. Initiative proponents often use the constitutional amendment rather than the statutory initiative because they fear the legislature might amend or repeal their initiative if they place it in statute. They are further encouraged to use the constitutional amendment because it is rarely more difficult or costly to pass than a statutory initiative. States could implement reforms that provide incentives for using the statutory process, such as lower signature thresholds and increased circulation periods. They can also reassure proponents by enacting time limits during which the legislature may only amend an initiated statute with a supermajority vote. This subject is also discussed on page 10 in chapter one.

> **Recommendation 3.1:** States should encourage the sponsors of initiatives to propose them as statutory initiatives when possible, rather than as constitutional amendments.

The City Club of Portland made a similar recommendation in 1996. Their recommendation states that the process for amending the Oregon Constitution should be substantially more difficult than adopting, amending or repealing a statute.

Single Subject Rules

Single subject rules require that an initiative address only one question or issue. Such rules benefit the initiative process because they make initiatives simpler and easier to understand. There is a danger in permitting a popular vote on a measure that addresses multiple, distinct subjects. How might a voter express his support of one subject but his rejection of another in such a situation? The lack of a single subject rule also leaves the door open to proponents who might try to make an unpopular idea more palatable by pairing it with a popular idea in a single initiative. In such cases, it is impossible to determine the majority's viewpoint on an issue.

> **Recommendation 3.2:** States should adopt the single subject rule to enhance clarity and transparency in the initiative process.

Single subject rules also are common in legislatures—41 states have constitutional provisions stipulating that bills may address only one subject, and several others have chamber rules for single-subject bills.

Among the groups that express support for single subject rules are:

Speaker's Commission on the California Initiative Process (2002),
Professor Joseph Zimmerman (in testimony before the task force, February 2002),
California League of Women Voters (1999),
Nebraska Petition Process Task Force (1995),
California Policy Seminar (1991), and
Los Angeles Times (1990).

Currently, the following 12 initiative states require that initiatives address no more than one subject. Wide variation exists in how these states define "single subject" and in how courts have interpreted the definitions.

Alaska	**Florida**	**Oklahoma**
Arizona	**Missouri**	**Oregon**
California	**Montana**	**Washington**
Colorado	**Nebraska**	**Wyoming**

Banning Similar Measures from the Ballot for a Specified Period of Time

Banning the same or a substantially similar measure from reappearing on the ballot for a specified period of time helps to reduce the number of measures on the ballot.

> **Recommendation 3.3:** If an initiative measure is rejected by voters, states should prohibit an identical or substantially similar initiative measure from appearing on the ballot for a specified period of time.

Five states currently prohibit the same or a substantially similar measure from reappearing on the ballot for a specified period of time after it is rejected by voters. Time periods range from two years in **Mississippi** to five years in **Wyoming**. If an initiative is found to be the same or substantially similar to an initiative that appeared on the ballot within the specified time frame, state election officials deny the proponent's initiative application.

In none of these states are the terms "same" and "substantially similar" defined in statute or the constitution. The decision about whether a measure is the "same" or "substantially similar" is left to a state official, generally the state's chief election officer or, ultimately, the courts.

Table 3. States with Bans on Same/Substantially Similar Initiatives

	Language of the Ban	Time Period
Massachusetts	A measure cannot be substantially the same as any measure that has been qualified for submission or appeared on the ballot at either of the two preceding biennial state elections.	Six years (banned from next two biennial state elections)
Mississippi	If an initiative is rejected, no initiative petition proposing the same or substantially the same amendment shall be submitted to the electors.	Two years
Nebraska	The same measure, either in form or in essential substance, shall not be submitted by initiative petition more often than once in three years.	Three years
Oklahoma	Any initiative measure rejected by the people cannot be again proposed by initiative within three years by less than 25 percent of the legal voters.	Three years
Wyoming	An initiative petition may not be filed for a measure substantially the same as that defeated by an initiative election within the preceding five years.	Five years

Source: National Conference of State Legislatures, April 2002.

In many states, a similar restriction is imposed on the legislature, prohibiting bills that have been defeated (or bills that are substantially the same as ones defeated) from being reintroduced—either as a bill or an amendment—during the same legislative biennium. **Florida**, **Mississippi**, **Ohio** and **Wyoming** are examples of initiative states with such rules for their legislatures.

Table 4 summarizes all initiative subject restrictions.

Table 4. Initiative Subject Restrictions

	Single Subject?	Other Subject Restrictions
Alaska	Yes	No revenue measures No appropriations No acts affecting the judiciary No local or special legislation
Arizona	Yes	None
Arkansas	No	None
California	Yes	May not include or exclude any political subdivision of the state from application or effect. May not contain alternative or cumulative provisions wherein one or more of those provisions would become law, depending upon the casting of a specified percentage of votes for or against the measure.

Table 4. Initiative Subject Restrictions (continued)		
	Single Subject?	Other Subject Restrictions
Colorado	Yes	None
Florida	Yes	May not include limitations on the power of government to raise revenue.
Idaho	No	None
Illinois	Yes	Allowed only for amendment of constitutional Article IV, relating to structural and procedural subjects concerning the legislative branch.
Maine	No	Any measure providing for an expenditure of funds in excess of those appropriated becomes inoperative 45 days after the legislature convenes.
Massachusetts	No*	No measures relating to: • Religion • The judiciary • Specific appropriations • Local or special legislation • The 18th amendment of the constitution • Anything inconsistent with the rights of individuals as enumerated in the constitution A measure cannot be substantially the same as any measure that has been qualified for the ballot or appeared on the ballot in either of two preceding general elections.
Michigan	No	The initiative power extends only to laws that the Legislature may enact.
Mississippi	No	The initiative cannot be used to amend/repeal the: • Bill of Rights • Public employees' retirement system • Right-to-work provision • Initiative process Only first five certified measures may go on ballot If a measure is rejected by voters, no identical or substantially similar measure may go on ballot for a minimum of two years. If an initiative requires a reduction in government revenue or a reallocation from currently funded programs, the initiative text must identify the program or programs whose funding must be reduced or eliminated to implement the initiative.
Missouri	Yes	No appropriations of money other than new revenues created and provided for by the initiative. Cannot be used for any purpose prohibited by the state's constitution
Montana	Yes	No appropriations No local or special laws
Nebraska	Yes	Limited to matters that can be enacted by legislation and cannot interfere with Legislature's ability to direct taxation for state and governmental subdivisions. The same measure cannot be initiated more often than once in three years.
Nevada	No	No appropriations Cannot require an expenditure of money unless a sufficient tax is provided as part of the initiative proposal.

Table 4. Initiative Subject Restrictions (continued)		
	Single Subject?	Other Subject Restrictions
North Dakota	No	No emergency measures No appropriation measures for the support and maintenance of state departments and institutions
Ohio	No	May not be used to pass a law: • Authorizing any classification of property for the purpose of levying different rates of taxation thereon • Authorizing the levy of any single tax on land, land values or land sites at a higher rate or by a different rule than is applied to improvements thereon or to personal property
Oklahoma	Yes	Initiatives rejected by the voters cannot be proposed again for three years by less than 25 percent of the state's legal voters
Oregon	Yes	None
South Dakota	No	No private or special laws
Utah	No	None
Washington	Yes	None
Wyoming	Yes	Cannot be used to: • Dedicate revenues • Make or repeal appropriations • Create courts • Define the jurisdiction of courts • Prescribe court rules • Enact local or special legislation • Enact legislation prohibited by the Wyoming constitution The same measure cannot be initiated more often than once in five years.

*In interviews conducted in May 2002, election officials in Massachusetts said that although that state does not have a single subject rule, it does have a requirement that an initiative contain only subjects that are related or mutually dependent. Courts have interpreted relatedness to mean that "... one can identify a common purpose to which each subject of [the] initiative petition can reasonably be said to be germane."
Source: National Conference of State Legislatures, January 2002.

Other Ideas for Reform

Restrictions on the Dedication of Revenue

Initiative measures that mandate the expenditures of large amounts of public revenue without including a new dedicated revenue source (such as taxes or fees) can make it difficult for the legislature to continue to fund existing state services and programs. In addition, initiatives that increase or create new taxes to fund new or existing programs negatively affect the legislature's ability to impose reasonable taxes to fund necessary programs for citizens. Although the task force agreed that initiatives limiting or dedicating revenue or otherwise imposing fiscal policies can be a significant problem—perhaps even the most serious problem—in the initiative process, members were unable to agree on a specific recommendation to address the issue.

The City Club of Portland recommended in 1996 that Oregon's initiative process be changed so that initiatives that dedicate revenue or require appropriations in excess of $500,000 per year should be required to provide new revenues.

Eleven states currently have restrictions on the use of the initiative with regard to appropriations and funding mechanisms.

Table 5. Restrictions on Imposing Fiscal Policies Via the Initiative

	Restriction
Alaska	No dedication of revenues or making or repealing appropriations.
Florida	Tax or fee increases require a 2/3 vote to pass.
Maine	Expenditures in an amount in excess of available and unappropriated state funds remain inoperative until 45 days after the regular legislative session, unless the measure provides for raising new revenues adequate for its operation.
Massachusetts	May not be used to make a specific appropriation from the treasury. However, if such a law, approved by the people, is not repealed, the legislature must raise by taxation or otherwise and appropriate such money as may be necessary to carry such law into effect.
Mississippi	Sponsor must identify in the text of the initiative the amount and source of revenue required to implement the initiative. Initiatives requiring a reduction in government revenue or a reallocation from currently funded programs must identify the program(s) whose funding must be reduced or eliminated to implement the initiative.
Missouri	May not appropriate money other than new revenues created and provided for by the initiative.
Montana	May not appropriate money.
Nebraska	No measure that interferes with the Legislature's ability to direct taxation of necessary revenues for the state and its governmental subdivisions.
Nevada	No appropriations or other expenditures of money, unless such statute or amendment also imposes a sufficient tax or otherwise constitutionally provides for raising the necessary revenue.
North Dakota	No appropriations for the support and maintenance of state departments and institutions.
Wyoming	No dedication of revenues or making or repealing appropriations.

Source: National Conference of State Legislatures, April 2002.

Recent Legislative Action

A total of 29 bills dealing with initiative subject matter were introduced in 14 states between 1999 and 2002. None have passed to date. Among the most common subjects were:

- Prohibiting or restricting appropriations and reductions in state revenue via an initiative (considered in **Arizona, Mississippi** and **Washington**); a bill is pending in **Michigan** that would prohibit using the popular referendum for acts whose primary purpose is to make appropriations or meet deficiencies in state funds.

- Strengthening and providing for interpretation of single subject rules (pending in **California**; also considered in **Oklahoma**).

- Making it more difficult to propose and pass wildlife measures (considered in **Alaska, Massachusetts, Oklahoma** and **Washington**).

- Banning a measure that is failed by voters from returning to the ballot for a specified period of time (considered in **Maine** and **Oregon**).

Other measures that address initiative subjects included a 1999 bill in **Arizona** that would have established a four-year sunset provision for initiatives that establish the functions or activities of a state agency; a 1999 **Oregon** bill that would have prohibited initiatives that result in the taking of private property; and a pending bill to enact an initiative procedure in **New Jersey** that would be limited to campaign finance, lobbying, government ethics and election procedures. A failed 1999 bill in **Oregon** would have limited initiative amendments to the constitution to the structure and powers of government and the rights of people with respect to their government, and would have prohibited initiated constitutional amendments that dedicated or appropriated revenue, repealed appropriations, or required expenditures in excess of $500,000 per year.

4. The Drafting and Certification Phase

Recommendations

Recommendation 4.1: States should require a review of proposed initiative language by either the legislature or a state agency. The review should include non-binding suggestions for improving the initiative's technical format and content, and should be public information.

Recommendation 4.2: States should require the drafting and certification of a ballot title and summary for each initiative proposal. Ballot titles must identify the principal effect of the proposed initiative and must be unbiased, clear, accurate and written so that a "yes" vote changes current law.

Recommendation 4.3: States should require the drafting of a fiscal impact statement for each initiative proposal. The statement should appear on the petition, in the voter information pamphlet, and on the ballot.

Recommendation 4.4: States should establish a review process and an opportunity for public challenge of technical matters, including adherence to single subject rules, and ballot title, summary and fiscal note sufficiency, to be made prior to the signature-gathering phase.

Overview

Certifying an initiative for signature collection is an involved process with many steps and deadlines. No two states have exactly the same certification requirements. Generally, however, the process includes these steps:

1) Drafting the initiative proposal;
2) Preparation of a ballot title and summary;
3) In some states, preparation of a fiscal analysis; and
4) Technical challenges to ballot titles, summaries and fiscal analyses.

Drafting the Initiative Proposal

Often, initiatives are drafted by citizens who have little or no legal background or expertise. Making the legislature's professional bill drafting staff available to proponents may help to prevent errors in drafting and ensure that a proposal's language is in the proper form and harmonizes with other constitutional or statutory language. Advice from the legislature's legal experts also may help initiative proponents recognize constitutional flaws and unintended consequences of their proposal. Correcting such problems early in the process can help proponents avoid costly court battles later in the process. In short, assistance and advice from legislative bill drafting staff may help improve the quality and consistency of initiative measures. Making public the comments and recommendations of such a review process is important because it can draw attention to issues that otherwise might escape public notice.

> **Recommendation 4.1:** States should require a review of proposed initiative language by either the legislature or a state agency. The review should include non-binding suggestions for improving the initiative's technical format and content, and should be considered public information.

Similar reforms have been proposed by the following:

California League of Women Voters (1999),
City Club of Portland, Oregon (1996), and
Nebraska Petition Reform Task Force (1995).

Presently, some states offer no assistance or advice to initiative proponents on the draft of their proposed law. The states that do offer assistance generally have one of two basic levels of review, which may be provided either prior to filing the initiative or upon filing. In some states, the review is purely technical; the proposal is reviewed to ensure it meets the legal requirements for format and style and adheres to drafting conventions. However, 11 states go further and offer some sort of drafting assistance in order to improve the quality and consistency of initiative proposals. In these states, sponsors may take a draft or even just an idea to a legislative office for assistance with the form and content of the initiative before submitting the proposal to the appropriate state official. Sponsors' acceptance of any recommendations made is optional. Table 6 contains a list of technical and content-oriented state agency review.

Table 6. State Agency Review

	Technical	Content	Who Reviews
Alaska	No	Optional	Department of Law
Arizona	Mandatory*	No	Secretary of State
Arkansas	Mandatory	No	Secretary of State
California	Optional	Optional	Legislative Counsel
Colorado	Mandatory	Mandatory	Legislative Council and Legal Services
Florida	Mandatory	No	Division of Elections
Idaho	Mandatory	Mandatory	Attorney General
Illinois	No	No	N/A
Maine	Mandatory	No	Secretary of State
Massachusetts	Mandatory	Mandatory	Attorney General
Michigan	Optional	No	Bureau of Elections
Mississippi	Mandatory	Mandatory	Revisor of Statutes
Missouri	Mandatory	No	Secretary of State and Attorney General
Montana	Mandatory	Mandatory	Legislative Services Division and Attorney General
Nebraska	Mandatory	No	Revisor of Statutes
Nevada	Mandatory	No	Secretary of State
North Dakota	Mandatory	No	Secretary of State and Attorney General
Ohio	No	No	N/A
Oklahoma	Mandatory	No	Attorney General and Secretary of State
Oregon	Optional	Optional	Legislative Counsel and State Treasurer
South Dakota	Mandatory	No	Director of Legislative Research Council
Utah	Mandatory	Mandatory	Lieutenant Governor
Washington	Optional	Optional	Assistant Code Revisor
Wyoming	Mandatory	Mandatory	Secretary of State; Legislative Service Office and executive agencies may render assistance

* In all states, the designation "Mandatory" indicates that the review process is mandatory, not that adherence to the recommendations made as a result of the review process is mandatory.
Source: National Conference of State Legislatures, April 2002.

Of the 11 states that offer some sort of drafting assistance, a wide range of services is offered. In at least four states—**California, Massachusetts, Montana**, and **Oregon**—initiative sponsors may take a draft or just an idea to drafters in their state for assistance. California serves as an example of a state that offers extensive assistance to proponents during the drafting

process. There, an initiative sponsor may take an idea to the Legislative Counsel, and a staff member will draft the language of the initiative for the sponsor.

Case Study: Initiative Drafting and State Agency Review

Colorado's Review and Comment Process

In Colorado, the Legislative Council staff and Legislative Legal Services conduct a public hearing to present their review and comments on proposed initiatives. The comments are intended to help proponents clarify their proposal, but they are not required to accept any suggestions offered by legislative staff. The meeting, held in the Capitol, is open to the public and although people who may oppose a measure are welcome to attend, no testimony or comments are accepted from anyone other than the proponents. The meeting is taped and becomes public record. Proponents are required to go through this process before they can move on to the next step of setting a title.

Preparation of a Ballot Title and Summary

The ballot title and summary are arguably the most important part of an initiative in terms of voter education. Many voters never read more than the title and summary of the text of initiative proposals. Therefore, it is of critical importance that titles and summaries be concise, accurate and impartial.

> **Recommendation 4.2:** States should require the drafting and certification of a ballot title and summary for each initiative proposal. Ballot titles must identify the principal effect of the proposed initiative and must be unbiased, clear, accurate, and written so that a "yes" vote changes current law.

Presently, a wide range of procedures exists in states for ballot title setting. In **Colorado** there is a special Ballot Title Board. Initiative proponents must appear before the board, which assigns a title, before the sponsor is authorized to gather signatures. In some states, the title is written by the sponsor, subject to the approval of a state official. In other states, the ballot title is written either by the attorney general, secretary of state or lieutenant governor. Table 7 contains a detailed list of who drafts ballot titles.

Table 7. Drafting the Initiative Title

	Party Responsible for Drafting Title		Where to File Challenge
	Petition	Ballot	
Alaska	Proponent (approved by Lt. Governor)	Lt. Governor and Attorney General	Superior Court
Arizona	Proponent	Proponent (approved by Attorney General)	Superior Court
Arkansas	Proponent (approved by Attorney General)	Proponent (approved by Attorney General)	Supreme Court
California	Attorney General	Attorney General	Sacramento County District Court
Colorado	Secretary of State and Ballot Title Board	Secretary of State and Ballot Title Board	Supreme Court
Florida	Proponent (approved by Secretary of State)	Proponent (approved by Secretary of State)	Supreme Court
Idaho	Attorney General	Attorney General	Supreme Court
Illinois	Proponent (approved by Board of Elections)	Proponent (approved by Board of Elections)	Not specified in law

Table 7. Drafting the Initiative Title (continued)

	Party Responsible for Drafting Title		Where to File Challenge
	Petition	Ballot	
Maine	Secretary of State	Secretary of State	Superior Court
Massachusetts	Proponent (approved by Attorney General)	Secretary of State (approved by Attorney General)	Supreme Judicial Court
Michigan	Proponent	Director of Elections with the approval of the Board of State Canvassers	State District Court
Mississippi	Attorney General	Attorney General	Circuit Court of 1st Judicial District of Hinds County
Missouri	Secretary of State	Secretary of State	Circuit Court of Cole County, appeal to Supreme Court
Montana	Attorney General	Attorney General	District Court in Lewis and Clark County
Nebraska	Same as summary by proponent	Attorney General	District Court
Nevada	None (Full text only)	None (summary only)	N/A
North Dakota	Secretary of State and Attorney General	Secretary of State and Attorney General	Supreme Court
Ohio	Proponent (approved by Attorney General)	Proponent (approved by Attorney General)	Not specified in law
Oklahoma	No separate title; summary serves as title	Proponent (approved by Secretary of State and Attorney General)	Supreme Court
Oregon	Attorney General	Attorney General	Supreme Court
South Dakota	None required	Attorney General	Circuit Court
Utah	None required	Office of Legislative Research and General Counsel (approved by Lt. Governor)	Supreme Court
Washington	Attorney General	Attorney General	Thurston County Superior Court
Wyoming	Proponent	Secretary of State	District Court of Laramie County

Source: National Conference of State Legislatures, January 2002.

At the time the ballot title is drafted, the title-setting entity often includes a statement of what the result of a "yes" vote means if the measure is passed and what the result of a "no" vote means if the measure is defeated. In **Oregon**, this statement is drafted by the attorney general and may not exceed 25 words. In **Washington**, the ballot title, drafted by the attorney general, consists of three parts: a statement of the subject of the petition in 10 words or less, a concise summary in 30 words or less, and a question crafted in a way that clearly defines what a "yes" and a "no" vote mean.

Two types of summaries are drafted for initiatives. The first is the summary that appears on the petition; it is usually drafted by the same person or agency that drafts the ballot title. The other summary appears in the voter information pamphlet, which is discussed further in chapter six. In all states, the summary, whether drafted by proponents, the attorney general, secretary of state, or another state agency, is a concise statement of the main points of the proposed measure. Proposed initiative summaries in all states are required to be impartial and non-argumentative. The number of words usually is limited; in **Washington**, it is limited to 75 words written by the attorney general, and in **Florida**, it also is

limited to 75 words written by the sponsor, with the approval of the secretary of state. See table 8 for a detailed description of state procedures for drafting summaries.

Table 8. Drafting the Initiative Summary

	Party Responsible for Drafting Title		Where to File Challenge
	Petition	Ballot	
Alaska	Lt. Governor and Attorney General	Proponent (approved by Lt. Governor	Superior Court
Arizona	None	Secretary of State (approved by Attorney General)	Superior Court
Arkansas	Proponent (approved by Attorney General)	Proponent (approved by Attorney General)	Supreme Court
California	Attorney General	Attorney General	Sacramento County District Court
Colorado	None	Secretary of State and Ballot Title Board	Supreme Court
Florida	Proponent (approved by Secretary of State)	Proponent (approved by Secretary of State)	Supreme Court
Idaho	Attorney General	Attorney General	Supreme Court
Illinois	Proponent (approved by Board of Elections)	Proponent (approved by Board of Elections)	Not specified in law
Maine	Revisor of Statutes, approved by Secretary of State	Revisor of Statutes (approved by Secretary of State)	Superior Court
Massachusetts	Secretary of State (approved by Attorney General)	Secretary of State (approved by Attorney General)	Supreme Judicial Court
Michigan	None	Director of Elections (approved by Board of State Canvassers	State District Court
Mississippi	Attorney General	Attorney General	Circuit Court of 1st Judicial District of Hinds County
Missouri	None	Attorney General	Circuit Court of Cole County, appeal to Supreme Court
Montana	Attorney General	Attorney General	District Court in and for the County of Lewis and Clark
Nebraska	Proponent	Attorney General	District Court
Nevada	None	Secretary of State and Attorney General	Not specified in law
North Dakota	Secretary of State (approved by Attorney General)	Secretary of State (approved by Attorney General)	Supreme Court
Ohio	Proponent (approved by Attorney General)	Proponent (approved by Attorney General)	Not specified in law
Oklahoma	Proponent (approved by Secretary of State and Attorney General)	Proponent (approved by Secretary of State and Attorney General)	Supreme Court
Oregon	Attorney General	Attorney General	Supreme Court
South Dakota	None	Attorney General	Circuit Court
Utah	None	Attorney General	Supreme Court
Washington	Attorney General	Attorney General	Thurston County Superior Court
Wyoming	None	Secretary of State	District Court of Laramie County

Source: National Conference of State Legislatures, January 2002.

Preparation of a Fiscal Analysis

Fiscal impact statements are an important component of voter education on initiative proposals. Voters often do not have the budgetary perspective necessary to make an informed decision about an initiative. Often, they enact a measure and it is left to the legislature to determine where the money will come from, which can mean redirecting funds from other programs.

> **Recommendation 4.3:** States should require the drafting of a fiscal impact statement for each initiative proposal. The statement should appear on the petition, in the voter information pamphlet, and on the ballot.

It is currently the law in 12 states that, if a proposed initiative will have a monetary effect on the state's budget, a fiscal impact statement must be drafted (see table 9). A legislative fiscal agency generally writes it, and it appears on the petition, in the voter info pamphlet, and/or on the ballot.

Table 9. Fiscal Impact Statements

	Who Prepares It	Where It Is Published
Arizona	Joint Legislative Budget Cmte. (after measure qualifies for ballot)	Voter information pamphlet
California	Dept. of Finance, Joint Legislative Budget Cmte., and Attorney General	Petition, voter information pamphlet, and ballot (included in title prepared by Attorney General)
Colorado	Director of Research of the Legislative Council	Voter information pamphlet
Mississippi	Legislative Chief Budget Officer	Petition, voter information pamphlet, and ballot (included in text)
Missouri	State Auditor and Attorney General	Petition, voter information pamphlet, and ballot (included in title)
Montana	Budget Director	Petition, ballot and voter pamphlet
Nevada	Secretary of State, in consultation with the Fiscal Analysis Division of the Legislative Counsel Bureau	Ballot, voter information pamphlet
Ohio	Tax Commissioner	Voter information pamphlet
Oregon	Secretary of State, Treasurer, Director of Dept. of Administrative Services, and Director of Dept. of Revenue	Voter information pamphlet, ballot
Utah	Office of Legislative Research	Voter information pamphlet
Washington	Office of Financial Management, in consultation with the Secretary of State, Attorney General, and any other appropriate state or local agency	Voter information pamphlet, Secretary of State Web site
Wyoming	Secretary of State and/or initiative sponsors*	A newspaper of general circulation in state and ballot

*If the final estimated fiscal impact by the Secretary of State and the final estimated fiscal impact by the committee of sponsors differ by more than twenty-five thousand dollars ($25,000.00), the Secretary of State's comments under this section and the ballot proposition (published in newspaper and ballot) shall contain an estimated range of fiscal impact reflecting both estimates.
Source: National Conference of State Legislatures, April 2002.

One may argue that, even if voters have fiscal information, it is meaningless unless the public knows how big the budget is. Simply attaching a dollar amount to a measure may not provide enough information. To make a fiscal statement meaningful, it must be considered in the context of the fiscal resources of the state. Suggestions include printing pie charts or graphs to illustrate the fiscal impact of the proposed measure in the context of

state resources. The City Club of Portland, Ore., recommended in 1996 that the Secretary of State be required to prepare a general statement in the Voters' Pamphlet that lists the estimated financial effects of each ballot measure upon the general fund and the combined effect if all were to be approved.

Case Study: Fiscal Analysis

California

If the Attorney General determines that the initiative measure requires a fiscal analysis, the Department of Finance and the Joint Legislative Budget Committee are required to prepare an analysis within 25 working days from the date they receive the final version of the proposed initiative measure. The fiscal analysis includes either the estimate of the amount of any increase or decrease in revenues or costs to state or local governments, or any opinion as to whether a substantial net change in state or local finances would result if the proposed initiative measure is adopted. The fiscal analysis is part of the measure's title prepared by the Attorney General, which appears both on petitions and on the ballot. It is also included in the voter information pamphlet.

Technical Challenges: Ballot Titles, Summaries and Fiscal Notes

If a sponsor or other qualified voter is dissatisfied with a title, summary or fiscal analysis, most states have a procedure for challenging and petitioning to change it. In some cases, however, the outcome of challenges is not decided until after the election, often after an initiative has been passed by the voters. Proponents have expended a great deal of effort—and often a great deal of money, as well—to gather signatures and qualify an initiative, and are justified in judging it unfair when a measure is stricken by the court for a technical reason after it has passed.

Although building a time period and a process for technical challenges into the certification process cannot prevent post-election challenges entirely, it can encourage such challenges at an early stage in the process.

> **Recommendation 4.4:** States should establish a review process and an opportunity for public challenge of technical matters, including adherence to single subject rules, and ballot title, summary and fiscal note sufficiency, to be made prior to the signature-gathering phase.

Similar reforms have been advocated by the following:

Wayne Pacelle, Humane Society of the United States (in testimony before the task force, February 2002),
M. Dane Waters, I&R Institute (in testimony before the task force, December 2001), and
Citizens' Commission on Ballot Initiatives (California, 1994).

Nebraska's challenge process, similar to other states', serves as an example for how the process generally works. Any person dissatisfied with the title provided by the Attorney General may file a petition with the district court, asking for a different title and setting forth the reasons why the title prepared by the Attorney General is insufficient or unfair. The challenge must be filed within 10 days of the Attorney General's decision. The dis-

trict court then examines the measure, hears arguments, and certifies to the Secretary of State a ballot title for the measure in accord with the intent of the proposed initiative.

In most states, any challenges to the title or summary of a ballot measure must take place during the certification process; that is, before signature collection. However, in at least two states, ballot titles are reviewed after signature collection.

In **Arkansas**, the state Supreme Court hears challenges to ballot titles only after the signature-gathering phase is complete and a measure is certified for the ballot. In considering titles, the court either allows or disallows the initiative; it makes no attempt to rewrite the title. If a title is disallowed, the measure is stricken from the ballot and proponents must start over.

In **Florida**, petitioners gather at least 10 percent of required signatures, then submit the ballot title for approval. Proponents write their own title, which includes a 15-word caption and a 75-word explanatory statement. The Attorney General must submit the initiative to the state Supreme Court for single-subject review and to ascertain that the ballot title and summary comply with requirements for clarity and common language. The court cannot rewrite the title, and if it disallows the title, all signatures gathered to date are invalidated and proponents must start over. The court's strict application of the single-subject rule since 1994 has resulted in a steep drop in the number of initiatives that appear on the ballot in Florida. This pre-election judicial review, mandatory for all initiatives in Florida, is the only instance of a mandatory pre-election judicial review among all 24 initiative states.

The timing of title and summary challenges in Arkansas and Florida is highly controversial, and most initiative proponents regard it as unfair. Initiative proponents are forced to circulate a petition with a title that may later be ruled invalid, thus disqualifying their initiative. Proponents may have spent large sums of money in the qualification phase, and thus are resentful of last-minute court rulings that remove their otherwise qualified measure from the ballot.

Case Study: Technical Challenges

Washington, D.C.

In Washington, D.C., a time period and process for technical challenges are built into the certification process, thereby reducing instances of post-election technical challenges. The Board of Elections and Ethics drafts for each proposed initiative measure a short title (not more than 15 words), a true and impartial summary statement (not more than 100 words), and the proper legislative form of the measure. These are formally adopted by the board at a public meeting, and the initiative sponsor must be notified of the exact language within five days of adoption. Also within five days of adoption, the board must publish the exact language in the *District of Columbia Register*. Any registered voter in the district who objects to the title, summary or legislative form may seek review in the Superior Court of the District of Columbia within 10 days of the publication of the language. The court is required to expedite consideration. If no review is sought during this time period, the title, summary and legislative form are deemed to be accepted by the board.

Single-subject challenges also are encouraged during the certification process in Washington, D.C. The board may refuse to accept an initiative measure submitted if it determines that the measure is not a proper subject of the initiative. When that occurs, the person submitting the measure has 10 days after the board's refusal to apply to the Superior Court of the District of Columbia to compel the board to accept the measure.

Other Ideas for Reform

Post-Election Court Challenges

The number of initiatives challenged post-election in the courts has risen steadily in recent decades. One study of initiatives passed in four states over a 40-year period found that about half the initiatives passed during that time were challenged in court and more than half of those challenged are held unconstitutional, at least in part.

Initiative proponents look to the courts routinely when they feel the initiative process itself is in jeopardy. For example, consider the suit pending over whether petitioners can gather signatures on U.S. Postal Service property (*Initiative & Referendum Institute vs. United States Postal Service* [U.S. District Court for the District of Columbia 1:00CV01246]). The suit seeks to overturn the Postal Service's regulation prohibiting citizens from collecting signatures on initiative petitions on postal property.

Opponents of initiatives look to the courts just as often as proponents, however. When they fail to achieve their political aim at the ballot box, they frequently take the fight to the courts.

Another reason initiatives often end up in court after they are passed is that they are technically flawed. Initiatives are drafted in private, often without the benefit of expert analysis from legislative bill drafters. They are not subject to committee hearings, where testimony may be offered both in support and in opposition to them. They do not go through the process of consideration and amendment by two bodies before their final approval. In summary, initiatives are not forced through the same process of dissection and refinement that a bill must endure before it becomes law. As a result, the initiatives that the public votes on often contain errors, unintended consequences, conflicting sections, or unconstitutional provisions.

Critics of the initiative system believe that post-election court challenges are dangerous to the U.S. system of government. Challenges anger citizens, who often may assume that an initiative would not have made it to the ballot if it were not constitutional, and they force judges to make political decisions that are more appropriately made by the legislature.

Oregon provides a recent example of how judicial involvement in the initiative process can rapidly grow. An initiative was recently challenged in Oregon on the grounds that it violated the state's single subject requirement. The state's Supreme Court agreed that it did, and declared the measure unconstitutional. That case spurred other single-subject challenges, most notably a successful challenge to the state's term limits law. Term limits proponents, angered by the fact that term limits were declared unconstitutional because they violated the single-subject rule, have vowed to search Oregon's initiative history and challenge as many as they can find on single-subject grounds, which could wreak havoc on Oregon's laws and its judicial system.

Recent reform proposals addressing the proliferation of post-election court challenges have been suggested in **Nebraska** and **Washington**. House Bill 1732 from **Washington's** 2001 legislative session would have formed a three-member ballot measure review committee. The Secretary of State would be permitted to request an opinion as to the constitutionality of any proposed initiative measure from this committee. After reviewing a measure, the committee would issue a report, including a summary of 100 words or less, stating its opinion on the measure's constitutionality. The summary would appear in the voter information pamphlet. A proponent dissatisfied with the committee's opinion would be permitted to petition a review by the state Supreme Court. The court would consider whether the committee's report is fair and reasonable, and may either permit the publication of the summary, enjoin its publication, or rewrite it. The committee's reports could not be cited or construed in other cases as decisions on constitutionality, and the judicial review provided for in this measure would not preclude any court from subsequent consideration of the constitutionality of a measure. Rather, the review process might give early warning to initiative proponents of potential problems in their proposal. At a bare minimum, the review process would simply generate more information for voters to consider as they cast their votes. The California Policy Seminar made a similar recommendation in 1991.

The **Nebraska** Legislature passed a similar proposal in the 1999-2000 biennium, but it was not approved by the governor. LB 729 would have permitted the Secretary of State to reject any petition that was constitutionally suspect. That would have enabled proponents to take it to court for an expedited hearing. Under this plan, the constitutionality of many initiative measures could be determined early in the process, before initiative proponents have spent large amounts of time and money in the signature-gathering and campaigning stages of the process.

Recent Legislative Action

Nine states introduced 59 bills regarding pre-circulation requirements—which include drafting measures, ballot titles, summaries and fiscal impact statements—between 1999 and 2002. Highlights include the following:

- In **Oregon**, the deadlines for the Secretary of State to send ballot title comments to the Attorney General, the time period for Attorney General to revise draft ballot title, and the deadline for a person seeking review of a ballot title have been modified.

- In **Utah**, title naming conventions were established for ballot propositions submitted to the voters, and the standard of review in writing and judicially reviewing initiative and referendum ballot titles was clarified.

- In 2002, **Washington** passed SB 6571, requiring that a fiscal impact statement be drafted by the Office of Financial Management for all initiatives that appear on the ballot, legislative alternatives to initiatives on the ballot, and referenda, including those referred to the ballot by the legislature. The new law requires the Secretary of State to make the statement available online and include it in the state voters' pamphlet.

- In 2000 and 2001, **Colorado** passed bills that require fiscal impact statements on all initiative measures and specify the content of the statements.

- A failed 2001 bill in **Arizona** would have created an eight-member Citizen Ballot Measure Committee and transferred the responsibility for drafting analyses of initiative proposals from the Legislative Council to the new committee. The committee members would have been appointed by the House and Senate majority and minority leadership.

5. The Signature Gathering Phase

Overview

Signature gathering is the most fundamental part of the initiative process, and the most thoroughly populist and grassroots part. The purpose of signature requirements is to demonstrate that an initiative has a certain level of public support before it goes to the ballot.

Statement of Organization

In some states, the campaign finance disclosure requirements do not take effect until a petition is qualified for the ballot. The task force believes that the money spent earlier in the process, particularly the money and sources of money spent on gathering signatures, is of equal importance to money spent on campaigning. Citizens should have access to information about who is circulating a petition before they decide to sign it.

> **Recommendation 5.1:** States should require that initiative proponents file a statement of organization as a ballot measure committee prior to collecting signatures. States should void any signature that is gathered before a statement of organization is filed.

Fraud in the Signature Gathering Process

Paid vs. Volunteer Petitioners

Professional signature gathering has long been a part of initiative politics. Paid signature gatherers were common in both **California** and **Oregon** in the early 1900s. Banning paid signature gatherers, an early idea, was seen as a way to stop wealthy individuals or groups from buying their way onto the ballot. **Ohio**, **South Dakota** and **Washington** passed bans on paid signature gatherers in 1913 and 1914. **Oregon** passed a ban in 1935, **Colorado** in 1941, and **Idaho** and **Nebraska** in 1988. Until the 1980s,

Recommendations

Recommendation 5.1: States should require that initiative proponents file a statement of organization as a ballot measure committee prior to collecting signatures. States should void any signature that is gathered before a statement of organization is filed.

Recommendation 5.2: States should provide for safeguards against fraud during the signature-gathering process. Safeguards should include:

A. Prohibiting the giving or accepting of money or anything else of value to sign or not sign a petition.
B. Requiring a signed oath by circulators, stating that the circulator witnessed each signature on the petition and that, to the best of the circulator's knowledge, the signatures are valid.
C. Requiring circulators to disclose whether they are paid or volunteer.

Recommendation 5.3: States should provide for an adequate but limited time period for gathering signatures. The deadline for submission should allow a reasonable time for verification of signatures before the ballot must be certified.

Recommendation 5.4: States should establish a limit on the length of time that verified signatures are valid.

Recommendation 5.5: States should require a higher number of signatures for constitutional amendments than is required for statutory initiatives.

Recommendation 5.6: To achieve geographical representation, states should require that signatures be gathered from more than one area of the state.

Recommendation 5.7: Each state should establish a uniform process for verifying that the required number of valid signatures has been gathered.

courts upheld bans on paid signature gatherers. That changed in 1988, when the U.S. Supreme Court invalidated Colorado's ban in the *Meyer vs. Grant,* 486 U.S. 414 (1988) decision.

Five states—**Maine, Mississippi, North Dakota, Washington** and **Wyoming**—tried to ban payment per signature, but to permit payment on a salary or hourly basis. All but North Dakota's and Wyoming's have been invalidated by courts.

Today, the vast majority of petition campaigns use paid circulators, who are paid between $1 and $3 per signature. Very few campaigns attempt to qualify an initiative petition with volunteer circulators, and even fewer do so successfully. Paid drives, on the other hand, are much more successful. A campaign that has adequate funds to pay circulators has a nearly 100 percent chance of qualifying for the ballot in many states.

The increase in reliance on paid circulators has increased the cost of qualifying an initiative. In **California**, it now costs more than $1 million. In **Oregon**, costs for qualifying ballot measures for the 2000 election ranged from $65,000 to $400,000, with most spending in the neighborhood of $100,000 to $150,000. Average costs in other states generally range between $70,000 and $100,000.

Oregon has tried a new idea for regulating paid circulators. The state defines paid circulators as employees (in other states they generally are defined as independent contractors), making them eligible for unemployment benefits. Signature collection firms now must pay payroll taxes and unemployment insurance premiums and must meet minimum wage requirements.

The U.S. Supreme Court's opinions on petition circulators have made the prevention of fraud in the signature gathering process very difficult for states. Since the 1988 *Meyer vs. Grant* decision invalidated state bans on paid signature gatherers, it has become more difficult to regulate the signature gathering process. The argument that payment for signatures promotes fraud has met with mixed reactions in courts around the country. A federal judge in **North Dakota** agreed, and upheld North Dakota's ban on payment-per-signature (hourly or salaried payments are permissible in North Dakota). Federal judges in **Maine** and **Washington**, however, disagreed, and found no evidence of fraud among paid signature gatherers. A more worthy argument that is less often cited is that prohibiting payment for signatures protects the integrity of the initiative process by encouraging grassroots efforts that can succeed on nothing more than popular support and discourages signature gathering efforts that can succeed only with large sums of money. Nevertheless, the U.S. Supreme Court has removed the ban on paid signature gatherers from initiative reformers' agendas.

Registered Voter and Residency Requirements

In 1999, the U.S. Supreme Court struck down a **Colorado** law stipulating that only Colorado registered voters could circulate initiative petitions in *Victoria Buckley vs. American Constitutional Law Foundation,* 119 S. Ct. 636 (1999). Colorado argued that it should be able to limit the ability to circulate petitions to those who are also qualified to vote on them. At least 13 other states were affected by *Buckley vs. ACLF* because they had similar laws. Other states, including **Mississippi, North Dakota** and **Oklahoma**, require that circulators be residents of the state. Many of the states that previously had registered voter requirements changed their laws to require that circulators be residents, including **Arizona, California, Idaho, Maine, Missouri, Utah** and **Wyoming**. This requirement has fared bet-

ter in the courts than the registered voter requirement, with federal courts upholding Maine's and Mississippi's residency requirements.

If states cannot ban paid signature gatherers and they cannot require that signature gatherers be registered voters in the state, what can they do to ensure the integrity of the petition process and protect it from fraud? They can enact laws that specifically address and prohibit clear instances of fraud in the petition process.

Recommendation 5.2: States should provide for safeguards against fraud during the signature-gathering process. Safeguards should include:

A. Prohibiting the giving or accepting of money or anything else of value to sign or not sign a petition.
B. Requiring a signed oath by circulators, stating that the circulator witnessed each signature on the petition and that, to the best of the circulator's knowledge, the signatures are valid.
C. Requiring circulators to disclose whether they are paid or volunteer.

At least 10 states prohibit the giving or accepting of money or anything else of value to sign or not sign a petition. Those states are:

Arizona	**Mississippi**
California	**Nebraska**
Colorado	**Ohio**
Idaho	**Washington**
Maine	**Wyoming**

Sixteen states currently require that petition circulators witness the placing of signatures on the petition, and that they sign an oath affirming that to the best of their knowledge, each signature is valid. Such an oath can discourage the kind of fraud some states have witnessed. For example, in 1998 in Arkansas, it was discovered that a circulator had forged several hundred signatures on a petition to do away with property taxes. Other circulators turned in petitions with signatures they had not witnessed, thus invalidating those signatures. The petition eventually was stricken from the ballot after numerous instances of fraud in the petitioning process were proven.

At least 10 states currently require circulators to disclose whether they are paid or volunteer, most often on the petition form itself.

Table 10. Paid/Volunteer Status Must be Disclosed

	Where Disclosed
Alaska	On the petition
Arizona	On the petition
Colorado	On a name tag
Idaho	On the petition
Missouri	Must file a form with the Secretary of State
Nebraska	On the petition
North Dakota	Disclosed on registration form filed with the Secretary of State
Ohio	On the Circulator's Compensation Statement (part of the petition)
Oregon	On the petition
Wyoming	On the petition

Source: National Conference of State Legislatures, February 2002.

Circulation Periods

In most states, petitioners have a limited period of time during which to gather the requisite signatures. The limits range from 60 days (**Massachusetts**) to four years (**Florida**). In 17 of the 24 initiative states, circulators have a year or more to gather signatures. In **Arkansas, Ohio** and **Utah**, no time limits are set for circulating petitions. Table 11 summarizes circulation periods in the initiative states.

Table 11. Circulation Periods

	Circulation Period	Submission Deadline
Alaska	1 year	Prior to the date the Legislature convenes (January)
Arizona	2 years	120 days before the election
Arkansas	Unlimited	120 days before the election
California	150 days	150 days after issuance of official summary; will be placed on the ballot in the next election that is at least 131 days after it is submitted
Colorado	6 months	3 months before the election
Florida	4 years	91 days before the general election
Idaho	18 months or until April 30 in an election year, whichever occurs earlier	May 1 in the year an election on the initiative will be held, or 18 months from the date the petitioner receives the official ballot title from the Secretary of State, whichever is earlier
Illinois	2 years	
Maine	1 year	On or before the 50th day after the convening of the Legislature in first regular session: on or before the 25th day after the date of convening of the Legislature in the second regular session
Massachusetts	60 days to submit to legislature; 42 days if legislature fails to act	14 days before the first Wednesday in December
Michigan	180 days	Constitutional: 120 days before the election Statutory: 10 days before beginning of a legislative session
Mississippi	1 year	90 days before the first day of the legislative session
Missouri	18 months	6 months prior to the date of the next regular election
Montana	1 year	By the third Friday of the fourth month preceding the election
Nebraska	2 years	4 months prior to the general election
Nevada	Constitutional: 291 days Statutory: 316 days	Constitutional: third Tuesday in June of an even-numbered year Statutory: second Tuesday in November of an even-numbered year
North Dakota	1 year	90 days before the election
Ohio	Unlimited	Constitutional: 90 days prior to the general election Statutory: 10 days prior to legislative session
Oklahoma	90 days	60 days prior to the date of the next general election
Oregon	2 years	120 days prior to the general election
South Dakota	1 year	Constitutional: 1 year before the next general election Statutory: first Tuesday in May in a general election year
Utah	Unlimited	Before June 1
Washington	Direct: 6 months Indirect: 10 months	Direct: 4 months prior to the next state general election Indirect: 10 days before the regular session of the Legislature
Wyoming	18 months	Prior to the date the Legislature convenes for a regular session

Source: National Conference of State Legislatures, May 2002.

Interestingly, longer circulation periods do not necessarily lead to an increased number of initiatives on the ballot. Some of the states with the longest circulation periods—such as **Florida** and **Illinois**—have very few measures on the ballot. Some states with the shortest circulation periods—such as **California**, **Colorado** and **Washington**—are among the states with the highest number of initiatives that reach the ballot. Providing more time for gathering signatures, therefore, should not lead to a flood of initiatives on the ballot.

The length of the circulation period is important to volunteer efforts, and increasing the time for gathering signatures may be beneficial. Volunteer efforts are time-consuming because they often are less well-organized and more often are subject to disruptions when volunteers fail to show up. Longer circulation periods clearly benefit volunteer petition drives.

> **Recommendations 5.3:** States should provide for an adequate but limited time period for gathering signatures. The deadline for submission should allow a reasonable time for verification of signatures before the ballot must be certified.
>
> **Recommendation 5.4:** States should establish a limit on the length of time that verified signatures are valid.

Crafting an appropriate limit on circulation periods is a delicate task. If the period is too short, volunteer efforts will be disadvantaged. However, if the period is too long, there is a risk that voters may have moved between the time they signed the petition and the time it is submitted for verification, thus resulting in a higher percentage of invalid signatures.

Signature Requirements

State signature requirements for ballot access vary widely. Signature requirements usually are based on a percentage of votes cast for a particular office—most often the office of governor—in the most recent election. In a few states, the requirement is based on total votes cast, total registered voters, or total state residents.

In most states that have both a statutory and constitutional initiative process, there is a higher signature threshold to qualify a constitutional initiative. The only exceptions are **Colorado**, **Massachusetts** and **Nevada**. The distinction exists because it is widely believed that amending the constitution should be more difficult than amending the statutes. Some reformers, however, argue that a more effective manner of achieving this goal would be to require a higher vote to approve constitutional initiatives than statutory initiatives. This argument is supported by the fact that the higher signature threshold for constitutional initiatives is rarely a barrier to achieving ballot status, provided proponents have ample funds to pay signature gatherers. Nevertheless, it is the belief of this task force that the sanctity of state constitutions demands that constitutional amendments be held to a higher standard of popular support than statutory initiatives, including signature thresholds for ballot access.

> **Recommendation 5.5** States should require a higher number of signatures for constitutional amendments than is required for statutory initiatives.

Percentage requirements for signatures on statutory initiatives range from a low of 2 percent of the resident population in **North Dakota** (12,844 for 2002 ballot access), to a high

of 15 percent of the total number of votes cast in the preceding election in **Wyoming** (33,253 signatures for 2002 ballot access). However, because Wyoming is a small population state, there are other states where the actual number of signatures that must be gathered is higher. The highest actual signature requirement for 2002 ballot access is **California**, where 419,260 signatures are required to place a statutory initiative on the 2002 ballot (equal to 5 percent of the votes cast for governor in the last election).

Percentage requirements for signatures on constitutional amendments range from a low of 3 percent of total votes cast for governor in **Massachusetts** (57,100 for 2002 ballot access), to a high of 15 percent of total votes cast for governor in **Arizona** (152,643 for 2002 ballot access) and **Oklahoma** (185,145 for 2002 ballot access). Once again, however, thanks to its large population, **California** has the highest total actual signature requirement for 2002 ballot access at 670,816 (equal to 8 percent of the votes cast for governor in the last election).

Geographic Distribution Requirements

Many initiative states are primarily rural, with a substantial proportion of their populations centered in a few urban areas. In states that follow this population pattern but that lack a geographic distribution requirement for signatures, it is not only possible but common for initiative proponents to gather all their signatures in the state's largest city. The voters in the largest city, therefore, may decide for the state as a whole what issues make the ballot and what issues do not. Such a system gives urban voters an unfair advantage over rural voters.

> **Recommendation 5.6:** To achieve geographical representation, states should require that signatures be gathered from more than one area of the state.

Thirteen of the 24 initiative states currently require that signatures be gathered from around the state. Supporters of geographic distribution requirements say they are important because they force initiative proponents to demonstrate that their proposal has support statewide, not just among the citizens of the state's most populous region. Critics say geographic distribution requirements place an unfair burden on initiative proponents, since it is much more difficult to gather signatures in rural areas than it is in urban areas. They also claim that such requirements mean that fewer initiatives qualify for the ballot.

Polling data suggests that voters generally support the idea of requiring initiative proponents to gather their signatures from various parts of the state. In fact, as recently as 1998, voters in **Wyoming** approved of a legislative proposal to make that state's geographic distribution requirement even more restrictive. A February 1995 poll conducted by the City Club of Portland showed that **Oregon** voters also supported a geographic distribution requirement. The fact that they later rejected a 2000 constitutional amendment on this very issue may reflect their dissatisfaction with the stringency of that particular proposal, rather than a drop-off in support for the general idea of geographic distribution requirements.

It should be noted that **Idaho's** geographic distribution requirement was held unconstitutional by a U.S. District Court in December 2001. In addition to a total number of signatures equal to 6 percent of the state's registered voters at the time of the last general election, proponents had to gather signatures from 6 percent of the registered voters in 22 of the state's 44 counties. The decision currently is on appeal in the 9th U.S. Circuit of Appeals, and it is unclear at this time whether this decision, if upheld, would affect geo-

graphic distribution requirements in other states. The 9th Circuit includes **Montana** and **Nevada**, which also have geographic distribution requirements.

Tables 12 and 13 summarize the signature requirements for statutory and constitutional initiatives, including geographic distribution requirements.

Table 12. Signature Requirements—Statutory Initiatives

	Statutory Initiatives		
	Signatures	2002 Actual Requirement	Geographic Distribution
Alaska	10% of total votes cast in last general election	22,716	At least one signature by voters resident in each of at least 2/3 of 27 election districts
Arizona	10% of votes cast for governor in last election	101,762	None
Arkansas	8% of votes cast for governor in last election	56,481	Signatures from 4% of registered voters from at least 15 of 75 counties
California	5% of votes cast for governor in last election	419,260	None
Colorado	5% of votes cast for sec. state in last election	80,571	None
Florida	N/A		
Idaho	6% of qualified electors in previous election	43,685	6% of registered voters from each of 22 counties*
Illinois	N/A		
Maine	10% of votes cast for governor in last election	42,101	None
Massachusetts	3% of votes cast for governor in last election	57,100	No more than 25% of signatures may be from one county
Michigan	8% of votes cast for governor in last election	242,168	None
Mississippi	N/A		
Missouri	5% of votes cast for governor in last election	117,342	5% of votes cast for governor in last election from 6 of the 9 congressional districts
Montana	5% of qualified electors in state at large	20,510	At least 5% of voters in at least 34 of the 100 legislative districts
Nebraska	7% of registered voters at the filing deadline	75,969	5% of registered voters in 38 of the 93 counties
Nevada	10% of total votes cast in last general election	61,336	10% of total votes cast in the last general election from at least 13 of the 17 counties
North Dakota	2% of resident population of the state	12,844	None
Ohio	3% of votes cast for governor in last election	100,626	1.5% of total vote cast for governor in last election from 44 of the state's 88 counties
Oklahoma	8% of votes cast in last state election for the office receiving the highest number of votes	98,744	None
Oregon	6% of votes cast for governor in last election	66,786	None
South Dakota	5% of votes cast for governor in last election	13,010	None
Utah	Direct: 10% / Indirect: 5% of votes cast for governor in last election	Direct: 78,458 Indirect: 39,229	Direct: 10% / Indirect: 5% of votes cast in at least 20 of the counties
Washington	8% of votes cast for governor in last election	197,734	None
Wyoming	15% of total votes cast in last general election	33,253	15% of residents in at least 2/3 of the state's 23 counties

* Held unconstitutional by U.S. District Court in December 2001; pending appeal in the 9th U.S. Circuit Court of Appeals.
Source: National Conference of State Legislatures, January 2002.

Table 13. Signature Requirements—Initiated Constitutional Amendments			
	Constitutional Initiatives		
	Signatures	2002 Actual Requirement	Geographic Distribution
Alaska	N/A		
Arizona	15% of votes cast for governor in last election	152,643	None
Arkansas	10% of votes cast for governor in last election	70,601	Signatures from 5% of registered voters from at least 15 of 75 counties
California	8% of votes cast for governor in last election	670,816	None
Colorado	5% of votes cast for sec. state in last election	80,571	None
Florida	8% of total votes cast statewide in last presidential election	488,722	8% in at least 12 of the state's 23 congressional districts
Idaho	N/A		
Illinois	8% of total votes cast for governor in previous election	268,693	None
Maine	N/A		
Massachusetts	3% of votes cast for governor in last election	57,100	No more than 25% of signatures may be from one county
Michigan	10% of votes cast for governor in last election	302,710	None
Mississippi	12% of votes cast for governor in last election	91,673	No more than 1/5 total signatures from one congressional district
Missouri	8% of votes cast for governor in last election	187,746	8% of votes cast for governor in last election from 6 of the 9 congressional districts
Montana	10% of qualified electors in state at large	41,020	At least 10% of voters in at least 40 of the 100 legislative districts
Nebraska	10% of registered voters at the filing deadline	108,527	5% of registered voters in 38 of the 93 counties
Nevada	10% of total votes cast in last general election	61,336	10% of total votes cast in the last general election from at least 13 of the 17 counties
North Dakota	4% of resident population of the state	25,688	None
Ohio	10% of votes cast for governor in last election	335,421	None
Oklahoma	15% of votes cast in last state election for the office receiving the highest number of votes	185,145	None
Oregon	8% of votes cast for governor in last election	89,048	None
South Dakota	10% of votes cast for governor in last election	26,019	None
Utah	N/A		
Washington	N/A		
Wyoming	N/A		

Source: National Conference of State Legislatures, January 2002.

Verifying Signatures

Recommendation 5.7: Each state should establish a uniform process for verifying that the required number of valid signatures has been gathered.

States use various methods to verify the number of valid and correct signatures gathered on a petition, and vary in whether signatures are checked at the state or county/local level. In 15 states, verification is conducted by the state's chief election official. In nine states, it is done at the county level and forwarded to the appropriate state official.

The second major area of variation is whether validation is accomplished by counting or verifying each signature or by employing a random sampling formula. Ten states verify signatures using a random sampling method. It is most common in states that use a random sample method that at least 5 percent of the signatures gathered be verified. In Montana, county officials verify all names and signatures and then randomly select signatures to be checked against voter registration records.

North Dakota and **Ohio** are unique. Since North Dakota does not have voter registration, sponsors must collect signatures of people who legally reside in the state. The Secretary of State is responsible for conducting a representative sampling of signatures using postcards, phone calls and other methods to verify residency. In Ohio, signatures are presumed valid unless otherwise proven. Anyone may file with the board of elections challenging the validity of any signature(s). If a sponsor does not have enough signatures after filing the petition with the Secretary of State, the sponsor is allowed 10 additional days to collect the correct number of signatures.

The timeframe for verifying signatures averages about one month. Most states allow petitioners to observe the verification process. In **Arkansas** and **Ohio**, if a petition does not have the required number of valid signatures, an additional time period (30 days in Arkansas and 10 days in Ohio) is allowed to gather the remaining signatures. Most states, however, automatically disqualify a proposed initiative if it does not have enough valid signatures.

Table 14 summarizes the various methods of verifying signatures on initiative petitions.

Table 14. Method of Signature Verification

	Method of Signature Verification
Alaska	Actual; signatures are verified by Lt. Governor until correct number is met
Arizona	Random; 5% of total number of signatures must be verified by county recorders with equal chances for any signature to be chosen
Arkansas	Actual; signatures are verified by the Secretary of State's office, which may contract with various county clerks for assistance
California	Random; Secretary of State verifies total number of signatures, county election officials then conduct random sampling; required to verify 500 signatures or 3% of signatures filed, whichever is greater
Colorado	Random; at least 5% or 4,000 signatures must be verified by Secretary of State
Florida	Actual; every signature is checked by Supervisor of Elections of each county; sponsor must pay $0.10 for each signature checked or the actual cost of checking the signatures to supervisor at the time the petition is submitted; if the sponsor is unable to pay, a statement of undue burden given under oath must be submitted; a sponsor using paid signature gatherers may not submit statement
Idaho	Actual; county clerk verifies each signature, then files petition with Secretary of State
Illinois	Random and actual; state Board of Elections conducts random sampling of signatures and then transmits list to county election officials for individual verification; sampling must include: 10% of the signatures if 5,010 or more signatures are involved; or 500 signatures if more than 500 but less than 5,010 signatures are involved; or all signatures if 500 or less signatures are involved
Maine	Actual; Secretary of State verifies every signature

Table 14. Method of Signature Verification (continued)

	Method of Signature Verification
Massachusetts	Actual; signatures must be verified by a majority (at least three) of the local registrars or election commissioners in the city or town in which the signatures were collected
Michigan	Actual; the board of state canvassers verifies the correct number of signatures and that each signer is a qualified registered voter; the qualified voter file may be used to determine the validity of petition signatures by verifying the registration of signers
Mississippi	Actual; county Circuit Clerk of each county where the petition was circulated verifies every signature, then submits the petition to the Secretary of State
Missouri	Actual or random (at discretion of Secretary of State); if random sampling is used, the method is determined by the Secretary of State and shall include examination of 5% of signatures collected
Montana	Actual and random; county official verifies that each signer is a registered voter and also randomly selects signatures to check against voter registration records
Nebraska	Actual; local election officials verify all signatures using voter registration records; Secretary of State double checks total number of valid signatures
Nevada	Actual and random; county clerks/registrars verify the total number of signatures and forward the number to the Secretary of State, who verifies the raw count and, if the total number of signatures is correct, notifies county clerks/registrars to begin verifying each signature; if there are greater than or equal to 500 signatures, clerk/registrar conducts a random sample of 500 or 5% of signatures
North Dakota	Random; since N.D. does not have voter registration, sponsor must collect signatures of residents; Secretary of State then conducts a representative sampling of signatures using post-cards, phone calls, or other methods to verify signatures
Ohio	Signatures are presumed to be valid unless proved otherwise; if more signatures are needed, sponsors are allowed 10 additional days to file signatures
Oklahoma	Actual; Secretary of State counts and verifies every signature
Oregon	Random; Election Division verifies the number of signatures and randomly selects (using a computer-generated report) samples of signatures to send to county election officials for individual verification
South Dakota	Actual; every signature is verified until the minimum number of signatures is reached
Utah	Actual; county clerks verify every signature
Washington	Actual or random (at discretion of Secretary of State); Secretary of State verifies each signature unless the number of signatures filed is substantially in excess of the minimum needed, in which case the Secretary of State may use a random sampling process to verify signatures
Wyoming	Actual; Secretary of State verifies every signature

Source: National Conference of State Legislatures, January 2002.

Other Ideas for Reform

One suggestion for reform is to decrease the number of signatures needed for qualification. This would reduce the amount of time and money needed to both gather the signatures and to verify them. The task force does not support this reform but, rather, believes that the demonstration of a substantial degree of popular support, represented by signatures on a petition, is an important step in gaining ballot access.

Another suggested reform is to allow petitioners to turn in signatures periodically throughout the circulation phase. This would allow proponents to know how many signatures they still need to gather, and it would help to alleviate the burden of counting a large volume of signatures at one time.

Perhaps the most intriguing suggestion for reforming the signature-gathering process is the establishment of a bifurcated system for signature gathering, such that each signature gathered by a volunteer is worth more than a signature gathered by a paid circulator. Such a

plan would provide an incentive for initiative campaigns to use volunteer circulators, but would not penalize efforts that use paid circulators. An initiative reform task force in **Nebraska** considered such a plan in 1995, but did not carry it forward due to concerns about its constitutionality. Disagreement exists among scholars as to whether a bifurcated system would pass constitutional muster, and it will be impossible to know for sure until a state adopts it.

Recent Legislative Action

Changing signature requirements, filing deadlines, and regulations on petition circulators were among the most common topics of initiative reform legislation between 1999 and 2002.

- Six states considered changing the filing deadline for initiative petitions. **Oregon** placed a measure on the March 2000 ballot to change the filing deadline from four months to five months before the election, effectively shortening the circulation period by one month but providing more time for signature verification. Voters passed the measure.

- Thirteen states considered additional regulation of petition circulators. **Arizona**, **California** and **Idaho** established new requirements that petition circulators be state residents. **Oregon** passed a measure requiring that paid petitioners be identified as such.

- Three states considered bills designed to combat signature fraud.

- Thirteen states looked at changing the number of signatures required to qualify a ballot initiative. None enacted a change.

6. Voter Education

Recommendations

Recommendation 6.1: States should provide to the public a manual describing the initiative and referendum process.

Recommendation 6.2: States should encourage public education and discussion about measures on the ballot.

Recommendation 6.3: States should produce and distribute a voter information pamphlet containing information on each measure certified for the ballot.

Recommendation 6.4: In addition to a printed voter information pamphlet, states should consider alternative methods of providing information on ballot measures, such as the Internet, video and audio tapes, toll-free phone numbers, and publication in newspapers.

Overview

An important part of the initiative process is educating voters. Most states prepare voter information pamphlets and post election information on the secretary of state's Web page. In addition, proponents and opponents of initiatives put together their own education campaigns to advertise for and inform voters about initiatives that will appear on the ballot.

Manual on the Initiative Process

Providing citizens with information about how to use the initiative process and the rules and laws that apply is a valuable voter education effort. It helps citizens organize their efforts early in the process and also may help to reduce problems and disputes at later stages of the process.

> **Recommendation 6.1:** States should provide to the public a manual describing the initiative and referendum process.

This recommendation was also made by the Nebraska Petition Process Task Force in 1995.

Public Education and Discussion of Initiative Measures

Clearly, one of the most serious criticisms of the initiative process is that voters do not always fully understand the contents of the initiatives on which they are asked to vote. This is due partly to the increasing number of measures on the ballot, resulting in such a large volume of information that it is not reasonable to expect all voters to thoroughly study and understand all issues. Furthermore, many initiative measures are lengthy and complicated and often may be so poorly drafted as to be incomprehensible.

> **Recommendation 6.2:** States should encourage public education and discussion about measures on the ballot.

Recommendation 6.4: In addition to a printed voter information pamphlet, states should consider alternative methods of providing information on ballot measures, such as the Internet, video and audio tapes, toll-free phone numbers, and publication in newspapers.

States have a responsibility to educate voters about measures on the ballot. Better educating voters will lead to improved decision making and, ultimately, to better policy making in the state. In addition to producing a voter information pamphlet (discussed in detail below), states should explore new and innovative ways of conveying information to voters. This might include posting information on the Internet, providing chat rooms for discussion and debate of initiative proposals, holding public hearings and town hall meetings, and providing debates and information on public access television. Each of these venues gives proponents and opponents an opportunity to speak and also provides an event that the media can cover. Media coverage will extend the debate and informational content of state-sponsored voter education efforts to an even broader audience.

Other individuals, commissions and task forces that have recommended public and/or legislative hearings on initiatives include:

M. Dane Waters, I&R Institute (in testimony before the task force on Dec. 8, 2001),
California League of Women Voters (1999),
Nebraska Petition Process Task Force (1995),
Citizens' Commission on Ballot Initiatives (California, 1994), and
California Commission on Campaign Financing (1992).

Case Study: Public Hearings on Initiatives

Mississippi

Mississippi holds public hearings in each congressional district for every initiative measure that is certified for the ballot. At the hearing, a representative from the Secretary of State's office summarizes the measure for the audience, and the proponents and opponents have the opportunity to speak about the initiative. Although public hearings clearly provide a useful forum for debate, discussion and voter education, their value must be weighed in contrast with their cost. In some states—such as Nebraska—that hold public hearings for initiatives, the hearings rarely draw significant participation or media coverage.

Voter Information Pamphlets

One of the most commonly used tools for voter education is the voter information pamphlet. These pamphlets provide a great deal of information about ballot issues—and sometimes about candidates, as well. Voters may peruse the pamphlet at their leisure, and may even take it with them into the voting booth. Clearly, voter information pamphlets are a worthy voter education effort.

Recommendation 6.3: States should produce and distribute a voter information pamphlet containing information on each measure certified for the ballot.

Voter information pamphlets should be user-friendly. They should group related measures, and should use charts and other graphic elements to facilitate comparisons. The information provided for each ballot measure should include the ballot title, an impartial summary, fiscal analysis, arguments for and against each measure, and the text of the proposed law. Some states also include in their ballot pamphlets statements that point out conflicting measures, explaining what will happen if both are adopted. Other states' ballot pamphlets list programs or services that a measure containing an appropriation would take money away from.

Voter information pamphlets are required by statute in 14 of the initiative states. In most states, the pamphlets are printed by the state's chief election official and generally include the text of the measure, an impartial analysis or summary, a fiscal impact statement, and arguments for and against the proposed initiative. In Colorado, the Legislative Council is responsible for writing and assembling the pamphlet, which includes a detailed, impartial analysis of each proposed measure and arguments for and against. Table 15 contains detailed information about the production and contents of voter information pamphlets in the initiative states.

Table 15. Voter Information Pamphlets

	Who Prepares and Distributes	Contents of Pamphlet
Alaska	Lt. Governor	Full text Ballot title and summary from petition Neutral summary prepared by Legislative Affairs Agency Statements for and against (limited to 500 words each) *Also published in full on Lt. Governor's homepage www.gov.state.ak.us/ltgov/elections/homepage.html
Arizona	Secretary of State prepares; county boards of supervisors distribute	Title Text Arguments for and against Analysis (prepared by Legislative Council). Summary of fiscal impact statement *Also published in full on Secretary of State's homepage http://www.sosaz.com/election
Arkansas	N/A	Text of measures published online at http://sosweb.state.ar.us/elect.html
California	Secretary of State	Text Copy of specific constitutional or statutory provision that would be repealed or revised Arguments and rebuttals for and against Analysis (prepared by Legislative Analyst) Fiscal impact estimate Art work, graphics and other materials that the Secretary of State determines will make pamphlet easier to understand *Also published in full on Secretary of State's homepage http://www.ss.ca.gov/elections/elections.htm

Table 15. Voter Information Pamphlets (continued)		
	Who Prepares and Distributes	**Contents of Pamphlet**
Colorado	Legislative Council	Title Text Impartial analysis, including description of major provisions of proposal and comments on proposal's application and effect (Legislative Council prepares) Summary of major arguments for and against (Legislative Council prepares) Fiscal impact statement *Also published on the Legislative Council's Web page, and hyperlinked from the Secretary of State's page http://www.sos.state.co.us/pubs/elections/main.htm
Florida	Up to individual counties to prepare if they choose	Varies from county to county Information also available online at http://election.dos.state.fl.us/initiatives/initiativelist.asp
Idaho	Secretary of State	Title Text Ballot number Arguments and rebuttals for and against *Also published in full on Secretary of State's homepage http://www.idsos.state.id.us/elect/eleindex.htm
Illinois	None	N/A
Maine	Secretary of State	Title Text Summary of intent and content Explanation of significance of a "yes" or "no" vote *Text of measures published in full on Secretary of State's Web site http://www.state.me.us/sos/cec/elec/
Massachusetts	Secretary of Commonwealth	Title Text Summary prepared by Attorney General Fair and neutral one-sentence statement of the effects of a "yes" or "no" vote (prepared by Attorney General and Secretary of Commonwealth) Arguments for and against. *Also published in full at Secretary of Commonwealth's homepage www.state.ma.us/sec/ele/eleidx.htm
Michigan	N/A	Text of each proposal is published online at www.sos.state.mi.us/election/elecadmin/index.html
Mississippi	Secretary of State	Text Ballot title (Attorney General drafts) Ballot summary (Attorney General drafts) 300-word argument for and 300-word argument against Fiscal analysis (drafted by Legislature's chief budget officer) *Text of proposals are published online at www.sos.state.ms.us/elections/elections.html
Missouri	Secretary of State	Text "Plain language" explanation Fiscal impact statement (State Auditor drafts) *Also published in one newspaper in each county and online at www.sos.state.mo.us

Table 15. Voter Information Pamphlets (continued)		
	Who Prepares and Distributes	**Contents of Pamphlet**
Montana	Secretary of State prepares; county officials distribute	Title Text Impartial summary prepared by Secretary of State Fiscal impact estimate Proponent and opponent arguments and rebuttals *Also published online at sos.state.mt.us/css/ELB/Contents.asp
Nebraska	Secretary of State prepares; county clerks distribute	Title Text Arguments for and against (Secretary of State drafts) General Election Voter Information Pamphlet published on Secretary of State's Web site at www.sos.state.ne.us/elections/election.htm
Nevada	Secretary of State publishes; county clerks distribute	Title Text Summary Arguments for and against Fiscal impact statement *Also published online by Secretary of State at sos.state.nv.us/nvelection/
North Dakota	N/A	Text of proposals are published online at www.state.nd.us/sec/Elections/Elections.htm
Ohio	Secretary of State	Ballot title Impartial statement (prepared by Secretary of State) Explanation (prepared by Ohio Ballot Board) Arguments for and against Information also available online at www.state.oh.us/sos/
Oklahoma	House Research, Legal and Fiscal Divisions	Ballot title Background Text
Oregon	Secretary of State	Title Text Fiscal impact estimate Explanatory statement (written by committee of five citizens—two members from opponents selected by Secretary of State, two members appointed by proponent's committee, fifth member selected by other four) Arguments for and against *Also published in full on Secretary of State's homepage at www.sos.state.or.us/elections/other.info/irr.htm
South Dakota	Secretary of State	Ballot title Text Explanation and effect (prepared by Attorney General) Arguments pro and con *Also published in full on Secretary of State's homepage at www.state.sd.us/sos/sos.htm
Utah	Lt. Governor	Ballot number Ballot title Final vote cast by Legislature if it is a measure submitted by the Legislature Fiscal impact estimate Impartial analysis (prepared by Office of Legislative Research and General Counsel) Arguments and rebuttals in favor of and against Text *Also published online at elections.utah.gov/

Table 15. Voter Information Pamphlets (continued)		
	Who Prepares and Distributes	Contents of Pamphlet
Washington	Secretary of State	Ballot number Official title Brief statement of law as it presently exists Brief statement explaining effect of proposed law (Attorney General prepares) Total votes for and against by House and Senate if measure has been passed by Legislature Arguments for and against Names and addresses of those writing arguments Full text of each measure *Also published in full on Secretary of State's homepage at www.secstate.wa.gov/elections/
Wyoming	N/A	Text of proposals published in full online at soswy.state.wy.us/election/election.htm

Source: National Conference of State Legislatures, May 2002.

Costs associated with the production, printing and distribution of voter information pamphlets vary from year to year (see table 16). Much of the cost depends upon how many pages are in the pamphlet, whether there is a need to print a supplemental ballot pamphlet (sometimes the case in **California**), and whether the pamphlet must be available in languages other than English.

Table 16. Costs of Voter Information Pamphlets (Selected States)				
	Printing	Postage	Total Printed/Mailed	Sent to
Arizona (00)	$443,376	$190,000	1.3 million/1.1 million	Every registered voter household; county offices
California (02)*	$4.3 million	$2.7 million	12.8 million/10.9 million	See summary
Colorado (00)	$283,000	$192,000	1.6 million/1.6 million	Every registered voter household; county offices
Colorado (01)	$96,000	$209,000	1.6 million/1.6 million	Every registered voter household; county offices
Nebraska (02)	$165 to $250	$335 to $750	500/500	Each county office
Oregon (00)	$1.9 million	$870,417	1.6 million/1.6 million	Every residential household

* California amounts are per election (they have initiatives in both the primary and general elections).
Source: National Conference of State Legislatures, April 2002.

Each state requires the inclusion of different material, such as title, summary, and text of measures; arguments pro and con; and candidate information. In **Nebraska**, for instance, the ballot pamphlet contains information only about measures—candidates are not included. In **Oregon**, information about both measures and candidates is included, as well as voter registration materials (which qualified the pamphlet for nonprofit postage status and saved the state $750,000 in postage). The Oregon ballot pamphlet for the November 2000 election comprised two volumes and more than 400 pages.

Postage costs are determined by state requirements for the distribution of pamphlets. The pamphlet is mailed only to county offices in **Nebraska**. In **Colorado**, it is mailed to each registered voter household. **California** also mails a pamphlet to each registered voter household, and to all city election officials, each member of the Legislature, the proponents of each ballot measure, public libraries, high schools, and institutions of higher learning.

In **Colorado** and **Nebraska**, the text and title of each measure also must be published in a newspaper. This is a significant expense in Nebraska, where the publication cost per measure is $75,000.

Arizona, **California** and **Colorado** are required to print voter information pamphlets in languages other than English. California currently prints in five languages in addition to English, and Colorado and Arizona in two additional languages. Translation costs in Arizona for the November 2000 election were $20,000, which included audio tapes in Navajo. In Colorado, translation costs for 2000 were $25,000. California directly mails 278,519 translated versions of the voter information guide.

Virtually every commission that has studied the initiative process has recommended improved voter information pamphlets. Some of the specific recommendations include the following:

- Analyses of initiative measures should be written for the reading level of the average citizen (California League of Women Voters, 1999).
- The ballot pamphlet should clearly indicate the effect of a "yes" vote and a "no" vote (California League of Women Voters, 1999; Citizens' Commission on Ballot Initiatives, California, 1994).
- Related initiatives should be grouped together in the ballot pamphlet, and comparison charts should be used to facilitate voter comparison of similarities and differences (Citizens' Commission on Ballot Initiatives, California, 1994).
- The state should provide the citizens with readily accessible, in-depth information regarding the various issues surrounding each proposed constitutional amendment (Florida's Citizen Initiative Process, November 1994).

Case Study: Voter Information Pamphlets

Oregon

Oregon charges a fee of $500 for the submission of arguments for or against initiative measures to be printed in the voters' pamphlet. This helps fund the printing and postage costs associated with the pamphlet. Note that it is possible to bypass the $500 fee by submitting a petition bearing the signatures of 1,000 people who are eligible to vote on the measure.

Oregon also has an innovative manner of drafting the explanatory statement that is printed in the voters' pamphlet with each measure. A committee is created, made up of the following:

- Two people appointed by the chief proponents (in the case of a legislative referendum, one person is appointed by the president of the Senate and one by the speaker of the House)
- Two opponents are appointed by the Secretary of State

- A fifth member, selected by the two proponent and two opponent members of the committee

The committee prepares a simple, impartial and understandable explanatory statement of no more than 500 words. The statement must be approved by at least three members of the committee.

The Secretary of State holds a public hearing to receive comments and suggested changes to the explanatory statement. The committee considers testimony at the hearing, and also considers written suggestions and comments, and issues a final explanatory statement no later than 90 days before the election. If the committee fails to issue a statement by the deadline, a statement drafted by the Legislative Counsel Committee is used instead. Any person who offered testimony at the public hearing may petition the Oregon Supreme Court to seek a different explanatory statement.

Voter Education on the Internet

All states except two provide online information about measures on the ballot and other initiative information. It also is becoming more common for states to list initiatives that were put on the ballot in past years and the outcome of each. Many states publish the voter information pamphlet in full online, including the title and text of each measure and arguments and rebuttals for and against the measure, an impartial summary of the measure, and a fiscal impact estimate.

The Media's Role in Voter Education

Scholarly research has shown that most people get their information about election issues from friends, family, special interest groups with which they identify, and the media. So, while voter information pamphlets printed by the state offer the most comprehensive and objective information, paid advertising and news media coverage of campaigns may have an equal or even stronger influence on voters. Others argue that the quality of the information available to voters is directly related to the integrity of the initiative process. Therefore, less comprehensive, shorter, purposefully inflammatory and potentially exaggerated media sources of election information could pose a threat to the initiative process.

Finally, some people argue that the use of media sources to educate voters unnecessarily increases the costs of running an initiative campaign. The process no longer is grassroots in nature but is, rather, a high-powered advertising campaign. Also, without disclosure requirements, it may be unclear to voters who is behind or sponsoring the advertising, leading to biased or only partially informed voter opinions.

Whatever one believes about the value and influence of paid campaign advertisements, however, the news media bears a responsibility to provide adequate and balanced coverage of initiative proposals.

Other Ideas for Reform

Some reform advocates have suggested that a list of individual and organizational endorsements included in the voter information pamphlet would be useful to voters, since they often use such cues to make their decisions about ballot measures. The Citizens' Commis-

sion on Ballot Initiatives (California, 1994) recommended this reform. Listing the position of legislators and the governor also has been suggested, for the same reason.

Recent Legislative Action

During the period of 1999 through 2002, legislatures in 11 states considered 39 bills addressing voter education on initiatives.

- **Montana** passed a bill that clarifies the contents of arguments prepared on ballot measures for inclusion in the voter information pamphlet.
- At the November 2002 election, **Florida** voters will decide if they want to add language to the state's constitution requiring the Legislature to draft a statute to require economic impact estimates on initiative constitutional amendments. Presently, Florida has no requirement for fiscal analysis of constitutional amendments.

7. Financial Disclosure

Overview

The role of money in the initiative process has grown dramatically during the past decade. Although large contributions to initiative campaigns are not new and date to the turn of the last century, they are even larger and more common today than ever before. The I&R Institute reported in 1998 that issue committees nationwide spent almost $400 million to support and oppose ballot measures. **California** led the way in 1998. According to the secretary of state, California committees spent just under $193 million to support and oppose the 12 general election ballot measures. Combined spending for 214 statewide and legislative candidates in the 1998 general election totaled just under $136 million for the general election, or about 70 percent of the spending on ballot measures.

Recommendations

Recommendation 7.1: States should require financial disclosure by any individual or organization that spends or collects money over a threshold amount for or against a ballot measure.

Recommendation 7.2: After a title has been certified for an initiative measure, states should require that proponents and opponents of the initiative measure file a statement of organization as a ballot measure committee prior to accepting contributions or making expenditures.

Recommendation 7.3: States should make the disclosure requirements for initiative campaigns consistent with the disclosure requirements for candidate campaigns.

Recommendation 7.4: States should prohibit the use of public funds or resources to support or oppose an initiative measure. This should not preclude elected public officials from making statements advocating their position on an initiative measure.

Even more concerning than the extraordinary amounts of money raised and spent in initiative campaigns is the fact that such large sums of money come from so few sources. Large contributions overwhelmingly dominate initiative campaigns, and small, grassroots contributions make up a small percentage of the total money spent. Of course, whether that is a problem in and of itself is debatable; nevertheless, voters deserve to know who is funding initiative campaigns. If a measure qualifies for the ballot because one or two wealthy individuals or corporations underwrote the costs, voters should be able to consider that fact as they decide how to vote on the measure.

Unlike candidate campaigns in most states, in which contributions are limited, it is not uncommon for large contributions from a small handful of contributors to fund an initiative, from the drafting and signature-gathering phases through the campaign. A series of U.S. Supreme Court rulings, *Buckley vs. Valeo,* 424 U.S. 1 (1976), *National Bank of Boston vs. Bellotti,* 435 U.S. 1 (1978), and *Citizens Against Rent Control vs. City of Berkeley,* 454 U.S. 290 (1981) have clearly established the Court's view that limiting contributions and expenditures in initiative campaigns is an impermissible violation of First Amendment rights. The rationale behind the Court's rulings is that, although it is possible that a candidate could be corrupted by large contributions, it is impossible to corrupt an issue.

In spite of the Court's reluctance to limit money in initiative campaigns, voters have consistently supported the idea. About half the states have at some time in their history attempted to limit spending in initiative campaigns, and voters have supported spending restrictions on initiative campaigns in at least two states—**California** and **Alaska**. Such limits have failed to stand up to judicial scrutiny, however.

Initiative Financial Disclosure Requirements

With contribution and expenditure limits out of the question, states are left with only one avenue of regulating money in initiative campaigns: disclosure. States have a responsibility to ensure that voters receive high-quality, transparent information about the sponsorship and financial support of initiative proponents and opponents. Such information not only minimizes abuse and manipulation of the initiative process, but also provides voters with key tools necessary for deciphering the sometimes veiled motives of initiative proponents. Voters cannot make a fully informed decision without campaign finance information about initiatives.

> **Recommendation 7.1:** States should require financial disclosure by any individual or organization that spends or collects money over a threshold amount for or against a ballot measure.
>
> **Recommendation 7.2:** After a title has been certified for an initiative measure, states should require that proponents and opponents of the initiative measure file a statement of organization as a ballot measure committee prior to accepting contributions or making expenditures.
>
> **Recommendation 7.3:** States should make the disclosure requirements for initiative campaigns consistent with the disclosure requirements for candidate campaigns.
>
> **Recommendation 7.4:** States should prohibit the use of public funds or resources to support or oppose an initiative measure. This should not preclude elected public officials from making statements advocating their position on an initiative measure.

The following commissions, individuals and organizations have recommended increasing disclosure requirements for initiative supporters and opponents:

Speaker's Commission on the California Initiative Process (2002),
David Broder, *Washington Post* (in testimony before the task force on Dec. 7, 2001),
California League of Women Voters (1999),
City Club of Portland, Oregon (1996),
Citizens' Commission on Ballot Initiatives (California, 1994),
Sacramento Bee (1994), and
Los Angeles Times (1990).

States use disclosure requirements in various phases of the initiative campaign. In some states, sponsors must disclose the amount of money they pay to petition circulators. In most states, initiative campaign committees are required to disclose their contributions and expenditures. They also are often required to disclose the names of contributors who give more than a threshold amount. A few states also require that initiative committees

identify out-of-state contributors, and at least 11 states require reporting by people or groups that make independent expenditures in support of or opposition to an initiative. Presently, no state requires that expenditures be reported for pre-certification activities, such as polling and drafting.

Every initiative state requires some degree of disclosure of contributions and expenditures by initiative campaigns; states vary in the degree of detail required in such reports and the frequency of reporting. In many states, the information is posted for the public on a Web site (usually the secretary of state's).

Effectiveness of Initiative Campaign Spending

Recent scholarly research suggests that high-spending campaigns often are no more successful in passing an initiative than are low-spending campaigns. Money is instrumental in changing voter opinion, however, when it is spent in opposition to a measure. Research suggests that high spending by opponents can be effective in defeating initiatives by creating a climate of confusion and uncertainty, under which most voters vote "no."

Recent Legislative Action

There has been significant legislative activity in the area of initiative campaign finance reform, as states scramble to equalize the disclosure requirements for initiative campaigns with those imposed on candidate campaigns. During the period of 1999 through 2002, legislatures in 15 states considered 34 bills addressing the issue of money in initiative campaigns. Highlights include the following.

- In 2001, **Arizona** passed HB 2389, requiring that committees that support or oppose ballot measures register before distributing campaign literature or running advertisements, that literature and ads disclose the political committee that funds them, and that ballot measure committees report contributions of $10,000 or more within 24 hours of receiving them.

- **Montana** passed HB 468 in 1999, requiring the people who employ paid signature gatherers to file financial disclosure reports. The report must include the amount they pay to each signature gatherer. **Utah** also passed a similar measure in 1999.

- In 2001, **North Dakota** passed a pair of bills that tightened financial disclosure requirements for petition sponsors and extended the requirements for last-minute contributions to initiative campaigns to include contributions from political parties to initiative campaigns.

- **Oregon** passed a bill in 2001 that added a new report requirement prior to the May primary, and up to two additional reports if aggregate contributions or expenditures exceed $2,000. Under prior law, proponents had to file just one report two weeks after the July deadline for turning in signatures.

- A 1999 bill passed in **Arkansas** requires that the use of state funds to support or oppose a ballot measure be reported to the Legislative Council if the expenditure exceeds $100.

- A bill pending in **Massachusetts** would test the U.S. Supreme Court's ruling that prohibited limiting contributions to initiative campaigns. HB 3862 proposes limiting to $100 contributions made for the promotion or defeat of ballot questions.

- A bill passed in 2002 in **Arizona** voids any signatures gathered before the proponents filed a statement of organization. It also requires that committees include their name, the serial number for the petition, and their support or opposition of a measure in their statement of organization. The bill is SB 1285.

- A failed bill in **Oklahoma** would have swept initiative campaigns into the existing campaign finance disclosure requirements by changing the definitions of "contribution" and "expenditure" to include any communication that clearly advocates the passage or defeat of a ballot measure.

8. Voting on Initiatives

Overview

In most states, present law permits the passage of an initiated law or constitutional amendment with a simple majority vote. Some states have implemented higher vote standards in an effort to ensure that initiatives truly have popular support before they are enacted.

Recommendations

Recommendation 8.1: States should allow initiatives only on general election ballots.

Recommendation 8.2: States should adopt a requirement that creates a higher vote threshold for passage of a constitutional amendment initiative than for passage of a statutory initiative.

Recommendation 8.3: States should require that any initiative measure that imposes a special vote requirement for the passage of future measures must itself be adopted by the same special vote requirement.

Recommendation 8.4: States should ensure that statutory initiative measures require the same vote threshold for passage that is required of the legislature to enact the same type of statute.

Recommendation 8.5: States should adopt a procedure for determining which initiative measure prevails when two or more initiative measures approved by voters are in conflict.

When Initiatives Can Appear on the Ballot

In a handful of states, initiatives may appear on primary or special election ballots. **Alaska, California, North Dakota** and **Oklahoma** permit initiatives on primary and special election ballots. Six states also permit initiatives on odd-year ballots: **Colorado** (only revenue measures), **Maine, Mississippi** (note, however, that Mississippi's legislative elections also are held in odd years), **Ohio, Oklahoma** and **Washington.** Voter turnout typically is significantly lower at primary, odd-year and special elections than at regular general elections. When initiatives appear on those ballots, it means a small percentage of registered voters are permitted to dictate policy for the majority. It is preferable that initiatives be voted on by as many people as possible.

> **Recommendation 8.1:** States should allow initiatives only on general election ballots.

This reform also was recommended by the California League of Women Voters in 1999, and the California Constitution Revision Commission in 1996.

Supermajority Vote Requirements for Constitutional Amendments

Most states require a simple majority vote to pass an initiative measure, whether statutory or constitutional in nature. By contrast, a supermajority vote of the legislature is necessary in almost all states to refer to the voters a measure to amend the constitution. All states except **Delaware** also require a vote of the people to pass a constitutional amendment. Supermajorities are intended to prevent a "tyranny of the minority," and also encourage

deliberation and compromise as proponents attempt to gather enough votes to reach a supermajority. Supermajorities in the legislature often are required for constitutional amendments because of the belief that constitutions should not be amended without careful deliberation. Many states also require a supermajority vote of the legislature to increase taxes.

In most states, however, the initiative constitutional amendment process is not subject to the same supermajority vote requirement as the legislature. Some experts question why supermajorities are required of the legislature but not of the people. They point out that the initiative process lacks checks found in the legislature that promote compromise and consensus and suggest that a supermajority vote requirement might help to prevent the passage of initiatives that are supported only by a narrow majority.

> **Recommendation 8.2:** States should adopt a requirement that creates a higher vote threshold for passage of a constitutional amendment initiative than for passage of a statutory initiative.

Requiring a supermajority vote to amend the constitution also was recommended by the City Club of Portland (1996).

Wyoming's supermajority requirement was challenged in 1997 by the proponents of an initiative that received a simple majority but failed to reach the supermajority requirement (*Brady vs. Ohman,* 105 F.3d 726 (1998)). The 10th Circuit Court of Appeals rejected the challenge and wrote that Wyoming had the right to prevent "... abuse of the initiated process and make it difficult for a relatively small special-interest group to enact its views into law." The case was appealed to the U.S. Supreme Court, which upheld the Circuit Court ruling.

According to Richard Ellis in *Democratic Delusions: The Initiative Process in America,* the effect of a supermajority passage requirement would have dramatic consequences. He analyzed the passage rates of initiatives in the five most active initiative states—**Arizona, California, Colorado, Oregon** and **Washington**—between 1980 and 2000, and found that an average of 60 percent of the initiatives on the ballot would have passed under a 55 percent supermajority requirement, 45 percent under a three-fifths requirement, and only 20 percent under a two-thirds requirement (pp. 128-9).

Table 17 summarizes supermajority requirements for passing initiative measures.

Table 17. Supermajority Initiative Passage Requirements

	Passage Requirement	Applies to
Florida	Any measure imposing a tax or fee not in place in November 1994 must receive a 2/3 vote in order to pass	Constitutional amendments
Illinois	Passage by 3/5 of those voting on the measure, or a majority of those voting in the election	Constitutional amendments
Massachusetts	Majority vote, provided that the total number of votes cast on the initiative equals at least 30% of the total votes cast in the election	Statutory initiatives and constitutional amendments
Mississippi	Majority vote, provided that the total number of votes cast on the initiative equals at least 40% of the total votes cast in the election.	Constitutional amendments

Table 17. Supermajority Initiative Passage Requirements (continued)		
	Passage Requirement	Applies to
Nebraska	Majority vote, provided that the total number of votes cast on the initiative equals at least 35% of the total votes cast in the election	Statutory initiatives and constitutional amendments
Nevada	An initiative constitutional amendment must receive a majority vote in two successive general elections in order to pass	Constitutional amendments
Oregon	Any measure that includes any proposed requirement for more than a majority of votes cast by the electorate to approve any change in law or government action must be approved by at least the same percentage of voters specified in the proposed voting requirement	Statutory initiatives
Washington	Majority vote, provided that the vote cast upon the measure equals at least one-third of the total votes cast at such election	Statutory initiatives
Wyoming	Majority vote, provided that an amount in excess of 50% of those voting in the preceding general election must cast votes on an initiative or the initiative fails	Statutory initiatives

Source: National Conference of State Legislatures, January 2002.

Special Vote Requirements

In **Oregon**, any measure that includes any proposed requirement for more than a majority of votes cast by the electorate to approve any change in law or government action must be approved by at least the same percentage of voters specified in the proposed voting requirement. For instance, if an initiative proposes that all future tax increases must receive a 60 percent supermajority to pass, then that same initiative also must receive a 60 percent supermajority to pass. The Citizens' Commission on Ballot Initiatives (California, 1994) recommended this reform for California.

> **Recommendation 8.3:** States should require that any initiative measure that imposes a special vote requirement for the passage of future measures must itself be adopted by the same special vote requirement.

In many states, legislatures must assemble a supermajority vote to pass certain types of statutory measures, in particular tax and fee increases. Such requirements are imposed because legislators and citizens feel that certain sections of law deserve special protection, and should not be easily or hastily changed. That assumption should extend to the initiative process as well.

> **Recommendation 8.4:** States should ensure that statutory initiative measures require the same vote threshold for passage that is required of the legislature to enact the same type of statute.

A similar reform was proposed by the California Policy Seminar in 1991.

Case Study: Passage and Ratification of Constitutional Amendments

Nevada

Nevada's passage requirement for constitutional amendments has received attention recently. Since 1962, Nevada has required that a constitutional amendment be passed by a majority of the voters in two successive general elections. This is not an uncommon requirement to be placed on legislatures—Nevada requires its own Legislature to pass a constitutional amendment in two consecutive sessions before putting it on the ballot, as does Massachusetts. Ten other states also require the legislature to pass an amendment twice before it goes to the ballot, and 33 require either a single supermajority vote or a majority vote in two legislative sessions.

The advantage of the double-vote requirement is that it allows more time for voters to learn about and consider the measure. It also gives the legislature a chance to act on an issue if a measure receives substantial support in its first election. Most amendments in Nevada that receive a majority "yes" vote in the first election also pass the second election. However, at least three measures—two tax measures and a term limits measure—that passed in the first election but failed in the second.

Conflicting Measures

It has become a common technique for initiative proponents to qualify multiple or competing measures that address the same subject. Often, the motive for this is to confuse voters, ensuring that a particular measure—or all of the competing measures—will fail. It is important that states have a standard for determining how to respond when conflicting measures are passed by voters. A state without such a standard may someday find itself in a complicated and expensive court battle to sort out conflicting measures.

> **Recommendation 8.5:** States should adopt a procedure for determining which initiative measure prevails when two or more initiative measures approved by voters are in conflict.

Legislatures have a variety of ways for dealing with the passage of laws that conflict with each other. It is common for a state to provide the code revisor with authority to rectify certain problems without requiring further action. Commonly, revisors may not alter the sense, meaning or effect of an act, but may renumber and rearrange sections, transfer or divide sections, change capitalization, correct manifest typographical and grammatical errors, and make other such minor changes. States also may provide a series of rules to help resolve conflicts. For instance, if amendments to the same statute are enacted without reference to one another, they often are harmonized to give effect to each, to the extent possible. If conflicting amendments or statutes are irreconcilable, the most recently enacted amendment or statute generally prevails.

Other Ideas for Reform

Sunset Provisions

Many states currently use a sunset process. In these states, some laws contain an automatic termination provision, meaning the law automatically terminates unless it is reauthorized.

It is even more common for states to subject certain agencies to termination unless they are reauthorized. No state currently requires a sunset provision for initiative measures.

It has been suggested that requiring a sunset provision on initiative measures would provide an opportunity and a formal venue for the legislature and others to publicly discuss the effects of an initiative. If an initiative had unintended consequences, they would come up during the sunset process, and the legislature might have the opportunity to show voters why the initiated law needed amendment. **Arizona** has considered bills that would impose a sunset provision on initiated laws, and it was recommended by the California League of Women Voters in its 1999 position statement on the initiative process.

Supermajorities

Several states require a particular type of supermajority vote for ballot measures (see Table 17). In these states, not only must a majority of votes cast on the measure be affirmative, but a certain percentage of votes cast in the election must be in favor of the measure. For instance, in **Massachusetts**, an initiative must receive a simple majority, and the votes in favor of the initiative must be equal to at least 30 percent of the total votes cast in the election. Such restrictions are intended to address the problem of voters who choose not to cast a vote on an initiative. In effect, such restrictions count the lack of any vote as a "no" vote. They presume that a non-vote is an indication of the voter's preference to maintain the status quo in favor of any change. Opponents of this idea say that it creates a disadvantage for measures that appear later on the ballot, and that it is unfair because the same requirement is not imposed on candidate elections.

Recent Legislative Action

Eight states have considered changing the passage requirements for initiative measures since 1999. Proposals that were considered but not enacted include the following.

- Requiring a two-thirds vote to pass an initiative that changes state revenues and for constitutional amendments (considered in **Arizona, California**).
- Requiring a 60 percent vote on initiatives resulting in a loss of state revenues of more than $100 million (considered in **Mississippi**).
- Requiring a two-thirds vote on conservation initiatives (considered in **Missouri**).
- Requiring that constitutional amendments be passed at two consecutive general elections before taking effect (failed on the ballot in 2000 in **Nebraska**).
- Requiring a three-fifths vote to pass a constitutional amendment (considered in **Oregon**).
- Requiring that the ballot title for an initiative that contains any supermajority voting requirement also contain a statement indicating that the measure will allow a minority of voters to veto the will of the majority in certain elections (considered in **Oregon**).

- Establishing a method for the Legislature to determine if an initiative measure has substantial fiscal impact; requiring measures that are determined to have a substantial fiscal impact receive a vote of 60 percent to pass (considered in **Washington**).

- Requiring a two-thirds vote to pass an initiative that allows, limits or prohibits the taking of wildlife (considered in **Wyoming**).

APPENDIX A. THE INITIATIVE STATES

	Statutory Initiative	Constitutional Initiative
Alaska	D*	None
Arizona	D	D
Arkansas	D	D
California	D	D
Colorado	D	D
Florida	None	D
Idaho	D	None
Illinois	None	D
Maine	I	None
Massachusetts	I	I
Michigan	I	D
Mississippi	None	I
Missouri	D	D
Montana	D	D
Nebraska	D	D
Nevada	I	D
North Dakota	D	D
Ohio	I	D
Oklahoma	D	D
Oregon	D	D
South Dakota	D	D
Utah	D&I	None
Washington	D&I	None
Wyoming	D*	None

D—*Direct Initiative*: proposals that qualify go directly on the ballot.
I—*Indirect Initiative*: proposals are submitted to the legislature, which has an opportunity to act on the proposed legislation. Depending on the state, the initiative question may go on the ballot if the legislature rejects it, submits a different proposal or takes no action.
D*—Alaska and Wyoming's initiative processes exhibit characteristics of both the direct and indirect initiative. Instead of requiring that an initiative be submitted to the legislature for action (as in the indirect process), they require only that an initiative cannot be placed on the ballot until after a legislative session has convened and adjourned. The intent is to give the legislature an opportunity to address the issue in the proposed initiative, should it choose to do so. The initiative is not formally submitted to the legislature.
Source: National Conference of State Legislatures, January 2002.

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GLOSSARY

Advisory Initiative—A non-binding proposed statute and/or constitutional amendment that is initiated by citizens and placed on the ballot for a popular vote after a petition process.

Direct Initiative—A proposed statute and/or constitutional amendment initiated by citizens and placed on the ballot for a popular vote after a petition process. If passed by the voters, the statute or constitutional amendment takes effect without legislative or gubernatorial action.

General Policy Initiative—A citizen-initiated proposal for a statute and/or constitutional amendment that is general in nature, and does not contain specific constitutional or statutory language. If voters pass a general policy initiative, the legislature is required to take action to develop and implement the policy.

Indirect Initiative—A citizen-initiated proposal for a statute and/or constitutional amendment that is first submitted to the legislature, which has an opportunity to act on the proposed legislation. The initiative question may be placed on the ballot if the legislature rejects it, submits a different proposal or takes no action.

Legislative Referendum/Referral—A proposed or newly enacted law or proposed constitutional amendment placed on the ballot by the legislature for voter approval.

Popular Referendum—A process by which voters may petition to place a recent enactment of the legislature on the ballot for approval or rejection by the people.

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Essay

*675 DIRECT DEMOCRACY IN OREGON--SOME SUGGESTIONS FOR CHANGE [FNa1]

Leroy J. Tornquist [FNaa1]

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I. Introduction

The increased number of initiatives recently proposed in Oregon and other states [FN1] suggests that there is a deep-seated distrust of representative government, as well as a desire to overcome legislative opposition or inertia. Those who favor the initiative process argue that it is an important alternative to the legislative process that is here to stay.

In Oregon, voters use the initiative to pass or reject taxes, set budget priorities, and outline social policy. There exist several arguments against a process that assumes control of such great governmental policies. Some argue that this process is inconsistent with traditional notions of a republican government that assume elected representation is the proper repository of governmental power. However, because initiated statutes can be amended or repealed by the legislature, they are not a threat to sound lawmaking in Oregon. Others argue that what began as just another tool of special interests is now their favorite instrument. The idea behind this argument is that those who have ***676** enough money to spend on gathering signatures can obtain a place on the ballot for an initiative. Supporters of the process argue that sponsors of initiatives are only doing what the legislature should have done and that the initiative provides protection against a legislature that may be incompetent, inattentive, or indifferent. The foremost criticism of the present initiative process is that placing laws into the Constitution puts them beyond the reach of legislative amendment.

This Article discusses how the initiative process, particularly as applied to proposed constitutional amendments, is in need of careful revision to balance the proper role of initiatives with the role of representative government.

II. The Oregon Experience

In November 1996, Oregonians voted on 23 ballot measures, most of which were placed on the ballot through the initiative process. [FN2] Almost two- thirds of the last 49 initiatives called for constitutional amendments. [FN3]

The Oregon Constitution provides three ways to make laws or amend the constitution. [FN4] First, the legislature may enact, amend, or repeal ordinary laws governing private behavior or government programs, subject to veto by the governor. [FN5] Second, the legislature, without the governor, may refer both laws and constitutional amendments to the voters. [FN6] Third, both laws and constitutional amendments may be referred to the voters by initiative petitions. [FN7]

A crucial difference exists between the initiative process and the other two methods. Ordinary laws, including those enacted by petition, can be amended to clarify doubtful terms, to solve unforeseen problems or consequences or to adjust for future circumstances. Initiative laws frequently need amendment because they appear on the ballot as their sponsors drafted them. ***677** Unlike legislative bills, initiatives are not first examined by legislative committees or professional lawyers.

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III. Problems with the Initiative Process

A certain amount of uneasiness has arisen concerning the initiative process, and recent studies by the City Clubs of Eugene and Portland have pointed out flaws and made suggestions for the future. [FN8] Certainly one of the most significant problems with the process is that initiative lawmaking proceeds without benefit of any representative institution. Sponsors often offer proposals in a vacuum, without adequate knowledge of either existing law or good drafting. Proposals also frequently contain ambiguities and other flaws that may not be corrected once the measure receives a ballot title. In the legislative process, these types of problems can be avoided by use of professional drafters (legis-lative counsel) or corrected through committee hearings where proposed legislation is debated openly.

Some submitted measures do not meet the appropriate legal criteria for initiating laws or constitutional amendments. Election officials must reject such proposals. The same applies to proposals that deal with more than one subject or those that a court may declare to be a "revision" of the constitution. [FN9]

Some initiatives invite voters to enact very expensive programs without providing new sources of funds to pay the costs. [FN10] Others invite voters to cut taxes without specifying what public services will be abandoned or reduced. [FN11] Such conflicting popular votes for both tax cuts and expensive new programs make it difficult for the legislature to balance the budget.

Another problem is that some measures violate constitutional rights. For example, a recent Supreme Court decision struck down Colorado's anti-homosexual initiative as unconstitutional. ***678**[FN12] Oregon's Measure 8, passed in 1994 to reduce PERS pensions, was invalidated by the Oregon Supreme Court as violative of the United States Constitution. [FN13]

Initiatives are more likely to contain constitutional error than are legislative acts because sponsors usually do not seek legal advice and rarely consider or debate potential constitutional issues before going forward with a proposed measure. Even if a measure is defeated at the polls, the public debate over measures that would almost certainly be declared unconstitutional causes unnecessary social unrest. Challenging a measure that violates constitutional protections also raises serious cost issues.

However, these criticisms of the initiative process are not repeated here in an attempt to repeal the process. Instead, the Oregon Legislature should act to improve the initiative process. Part of the problem in doing so, however, is that the legislative assembly has been weak in asserting its own responsibility.

The 1995 legislature introduced more than 50 bills to change the initiative process, but only a few received a hearing, and only one was enacted as a referendum. [FN14] For example, Measure 24, which required petition signatures to be obtained in roughly equal proportion to each congressional district, was defeated in the May 1996 election ballot. [FN15] Therefore, it is doubtful that meaningful reform of the initiative process can be accomplished through traditional legislative politics.

IV. Possible Solutions

A. Improving Initiative Draft Quality Through Expert Analysis

Requiring review of initiative drafts by the legislative counsel or some other knowledgeable expert or group of experts before submitted it for ballot approval would improve the quality of initiative measures. Sponsors currently have the option to seek legislative counsel review, but few choose to do so. [FN16] Although ***679** they cannot force sponsors to change their measures, legislative experts could analyze the measures and suggest improvements. It is possible that some defeated measures might have passed had they been drafted

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more carefully. Although sponsors are entitled to proceed with a flawed measure, an expert analysis of the measure, as well as information regarding potential impacts and costs, should be available to the public. [FN17] Failure of sponsors to seek such analysis could then be mentioned in the voters' pamphlet.

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B. Avoiding the Improper Use of Initiatives to Amend the Constitution

As stated by David Frohnmayer and Hans Linde in their Atiyeh v. State amicus curiae brief,

[t]he issue is whether an initiative may properly amend the Oregon Constitution in order to place a law that is in terms directed against citizens beyond reach of legislative amendment or repeal. Do the words "laws and amendments to the Constitution" in Article IV, Section 1(2)(a), allow initiating as "amendments to the Constitution" laws directly governing private conduct, adopted without deliberation by elected, politically accountable lawmakers, and beyond the ability of elected lawmakers to change?

The answer is no. A proposed measure directly imposing duties or sanctions on private conduct may be initiated as a "law" but not as an "amendment." [FN18]

In recent years, initiative amendments to the Oregon Constitution have been used to place ordinary legislation beyond the reach of the Legislature. As pointed out by the City Club of Portland, constitutional amendments "should relate only to the structure, powers, and limitations of government and to the rights of people with respect to their government." [FN19] Or, put another way, "a principled distinction marks a bright line between rules that in terms direct government officials as to what to do, ***680** how to do it, and what not to do, and rules that in terms impose obligation directly on private persons." [FN20]

1. The Problems

Two problems arise if initiatives of a less fundamental nature are passed as constitutional amendments. First, the legislature cannot repeal or amend a constitutional amendment passed by the voters, even if the so-called constitutional amendment is, in reality, a statute. Second, the court cannot apply the state constitution to invalidate a provision if the initiative is made a part of the constitution. [FN21] In Oregon, sponsors of initiative measures can simply declare their measure a constitutional amendment. [FN22] The only additional requirement is that they must obtain signatures of 8% of the electorate rather than the 6% required for a statutory initiative. [FN23] No state official or court will review the measure to determine if it is an "appropriate" constitutional amendment prior to the election.

2. The Legal Case Against Inappropriate Constitutional Amendments

The key Oregon case addressing the initiative process is Kadderly v. City of Portland, [FN24] which upheld statewide initiatives two years after the Oregon Constitution was amended to include a provision allowing initiatives and referenda. It appears that Justice Bean's opinion in Kadderly was implicitly premised on two beliefs: (1) that the legislature could repeal an initiated law passed by the voters; and (2) that the courts could review initiated law and subject it to the scrutiny of the existing provisions of the Oregon Constitution.

Although it is sometimes appropriate to amend the constitution through the initiative process, a sharp distinction between appropriate and inappropriate constitutional amendments does ***681** exist. While measures that structure or limit governmental powers or create new civil rights are appropriate, measures that impose obligations or sanctions on private conduct in the form of constitutional amendments are not.

Not all restrictions on government must be placed in the state constitution. Procedures for government entities may be in a constitution, a statute, or a rule. Simply stated, no legal principle requires that the duties and obligations of government officials belong in the state constitution. [FN25] Nevertheless, the converse is not true. Rights or duties concerning private conduct should be enacted as statutes, not constitutional amendments. Statutory matters merely clutter the constitution and violate the premise of Kadderly that initiated laws are subject to legislative and judicial review.

Valid reasons for setting forth restrictions on government procedures in state constitutions do exist. Debt limitation, for example, is a restriction on government that cannot be changed without the consent of Oregon

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voters. The argument is simply that it is improper to place ordinary legislation in the Oregon Constitution.

Former Oregon Supreme Court Justice Hans Linde attempted to define the abstract distinction between laws and constitutional amendments by explaining:

An initiative may amend the constitution to permit lotteries, but not to establish a lottery. That may be done by an initiated statute, which the legislature later can change.

An amendment forbidding official invasions of privacy may be initiated. Liability for invasions of privacy can be initiated as a statute. . . . [FN26] Unless the Constitution requires amendment, initiatives should be legislative rather than constitutional in form. [FN27]

Two recent examples illustrate this assertion. In 1996, voters passed Measure 50, which amended the Oregon Constitution to cut local property taxes and limit their growth. [FN28] Measure 50 ***682** rolls back assessed property values to 90% of 1995-96 assessed values, sets permanent tax rates, and limits assessed value growth for individual properties to 3% a year. [FN29] The attorney general's office expended enormous time and effort to analyze and reveal serious problems in the text, and the sponsors themselves could not have corrected the flaws once the signatures were collected. These problems occupied the legislature for most of the 1997 session and, at significant cost to the taxpayers, required a special election in May 1998 to clarify the law with another constitutional amendment. Had Measure 50 been a statute, the legislature could have amended it with very little cost.

Similarly, Measure 40, dealing with victims' rights, became a constitutional amendment despite the fact that some of its provisions were already statutes. [FN30] The measure was presented as a constitutional amendment because it restricted criminal defendants' rights that had been constitutionally guaranteed since 1859. However, the text of the measure introduced serious errors into the constitution by literally requiring jurors to find certain defendants guilty, [FN31] and by requiring other defendants to serve lengthy prison terms for charges that even district attorneys cannot dismiss. [FN32] These provisions were unnecessary and do ***683** little to further the rights of victims whom Measure 40 intended to protect.

3. Who Should Make the Determination of Inappropriateness?

Determining whether a proposed initiative properly qualifies as an "appropriate" constitutional amendment should be the responsibility of the attorney general, subject to judicial review. Article IV, section 4 of the United States Constitution provides that "[t]he United States shall guarantee to every state in this Union a Republican Form of Government." The Guaranty Clause then obligates every state to govern itself by use of republican institutions. It may be argued, therefore, that it is the duty of state government officials to determine whether a political process is compatible with a republican form of government. The United States Supreme Court has held that the clause places enforcement of the guarantee in the purview of state political branches rather than the federal courts. [FN33] In short, the Court has held that such matters are not justiciable. [FN34]

The initiative process, as it applies to constitutional amendments, may be attacked on the ground that it violates the Guaranty Clause of the United States Constitution. Such an attack was rejected by Justice Bean in Kadderly. [FN35] The defense was that "initiated laws may be amended or repealed by the legislature at will," [FN36] and that they are subject to the same constitutional limitations as other statutes.

When affirmative legislation is enacted as a constitutional amendment rather than as a law, the legislature and the courts become unnecessary. The legislature's ability to amend or repeal the law is lost. Regardless of the validity of the law itself, the process bypasses the legislature and its role. Thus, inappropriate amendments may violate the Guaranty Clause.

The attorney general currently provides advice regarding the eligibility of initiatives that do not concern

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republican government ***684** issues. The attorney general, in my opinion, should also advise as to the "appropriateness" of constitutional amendments. He should determine if constitutional amendments are affirmative legislation in constitutional clothing. If the proposed amendment is really affirmative legislation, the attorney general would so certify and notify Oregon voters accordingly. Ultimately, the attorney general could attack an inappropriate and misleading constitutional amendment in the courts and ask that the measure be listed as a legislative initiative rather than a constitutional amendment.

The attorney general, for several reasons, should notify voters if a constitutional amendment is inappropriate. Of course, such an action may create political enemies. Attorneys general may be tempted to escape criticism by concluding that no legal decision is at issue. Arguably, the Kadderly decision written by Justice Bean requires the attorney general to make such a decision.

The attorney general is an elected official in the state of Oregon. [FN37] As such, he or she is politically motivated by the desire to be re- elected. No matter what the outcome, either the supporters or the opponents of a particular initiative will be disappointed when the attorney general makes such an announcement. Furthermore, voters may lose confidence in the initiative process if a state official can decide whether an initiative petition is an appropriate constitutional amendment.

The following three suggestions may ease political pressure on the attorney general and instill voter confidence in a fair, evenhanded process. First, clear and impartial rules should be established for determining whether an initiative is an appropriate constitutional amendment. In promulgating such rules, all competing parties would provide input. The rules would give guidance to those who seek constitutional amendments and help them realize when a measure is an inappropriate amendment. Second, proponents, opponents, and other interested persons, within a specified time, should submit their written challenges and responses concerning the eligibility of the constitutional measure. Third, a committee of retired judges, citizens, and constitutional scholars should review the arguments, apply the rules to the initiative, and write a nonbinding opinion for the attorney ***685** general to use in making his decision.

The Law School Deans Committee, which reviews initiatives and makes suggestions concerning their constitutionality, may serve as a model for the attorney general. The Committee is not a formal part of state government, but its recommendations are published in the voters' pamphlet. Ultimately, however, the attorney general would have to make the decision and endure any political criticism. That may be the cost of a republican form of government.

None of these suggestions would allow the attorney general or his selected representative to declare a measure unconstitutional. The attorney general would simply determine if the initiative is constitutionally inappropriate and subsequently designate the measure a legislative initiative. The sponsor could then decide whether to proceed with the measure.

C. Evaluating Measures for Constitutionality

The Oregon Constitution places only one restriction on the content of an initiative that can be placed on the ballot. The statute or amendment must "embrace one subject only and matters properly connected therewith." [FN38] The secretary of state has assumed responsibility for determining if a measure complies with this requirement. [FN39]

Some states allow courts to review the constitutionality of a measure before it is placed on the ballot. [FN40] Oregon does not allow such review. [FN41] The secretary of state cannot reject an initiative***686** based on its potential unconstitutionality. [FN42] Some constitutional issues cannot be decided until a law is applied in a concrete case between adversarial parties. Also, advance review by the court would contradict the judicial principle disfavoring advisory opinions, especially if the measure is never enacted. In this respect, initiatives are no different from legislative bills. Nonetheless, information concerning a measure's constitutionality

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would be helpful to sponsors and voters.

Providing voters information and advice regarding the constitutionality of initiatives was the Secretary of State's basis for organizing a committee of former Oregon law school deans in November 1997 to examine the constitutional validity of upcoming ballot measures. The committee then published its conclusions in the Voters' Pamphlet. Perhaps such pre-enactment evaluations, independent of the state's lawyers and judges, could prove to be a useful practice.

D. Postponing the Vote for Legislative Review

Requiring postponement of the popular vote on any initiative proposal until after the next regular legislative session or requiring a special session of the legislature before the election would constitute a more drastic change in the initiative process. This would give the legislature an opportunity to relate each measure to current state laws, as well as to the budget, with the understanding that a measure would be placed, as originally drafted, on the ballot if the legislature failed to address potential problems of the proposed initiative. This procedure would include a period of reflection during which the legislature could hold hearings and obtain input from those most affected by the measure. The legislature could then amend the initiative to correct technical or legislative drafting errors. Any disagreements between sponsors and legislators concerning what constitutes a "technical" or "drafting error" could be overcome by requiring a ***687** supermajority of the legislature before changes could be made or before an alternative measure is submitted to the voters.

Arguably, the legislature may not be authorized to change the text of pending initiatives without a constitutional amendment. This would be true whether the change is "technical" or "substantive." Even so, allowing the legislature to intervene between the filing of the petition and election day provides the legislature an opportunity to address an initiative's subject. This may satisfy the purpose of the initiative process. However, because sponsors do not own the signed petitions, they may be unable to withdraw their initiative after the legislature has addressed the issues.

V. Conclusion

These suggested improvements could be made without violating the constitutional right to initiate laws or amendments. The attorney general and the legislature should study these suggestions for possible adoption because, although the initiative process may be here to stay, it has many problems that need to be addressed.

[FNa1]. A preliminary version of this Essay was presented at Willamette Law Review's Initiative Symposium held in February 1998.

[FNaa1]. Professor of Law, Willamette University College of Law, Salem, Oregon.

[FN1]. Twenty-four states have a form of the initiative process. Those states are Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. See The Council of State Governments, The Book of the States 210 (1998). See also Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503, 1509 n.22 (1990); Kathryn L. Tucker, The Death With Dignity Movement: Protecting Rights and Expanding Options After Glucksberg and Quill, 82 Minn. L. Rev. 923, 930 (1988). One-hundred seventy-five initiatives are expected to pass nationwide between 1990-1999, more than double the number of initiatives passed nationwide between 1980-1989. See David B. Magleby, Let the Voters Decide? An Assessment of the Initiative and Referendum Process, 66 U. Colo. L. Rev. 13 (1995).

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[FN2]. See Oregon Ballot Measures, The Oregonian, Nov. 6, 1996, at C5.

[FN3]. Phil Keisling, Re-Thinking Oregon's Initiative Process, Address Before the Marion County Bar Association (July 23, 1998) (transcript on file with author).

[FN4]. See Or. Const. art. XVII, § 1.

[FN5]. See id.

[FN6]. See id.

[FN7]. See id.

[FN8]. See generally City Club of Portland, The Initiative and Referendum in Oregon (1996).

[FN9]. Or. Const. art. IV, § 1. See also Holmes v. Appling, 392 P.2d 636, 637 (Or. 1964); City Club of Portland, supra note 8, at 40.

[FN10]. See City Club of Portland, supra note 8, at 41.

[FN11]. Initiatives that enact legislation or vote to cut taxes remove money from the general fund with no means of replacing it. A new program passed by voters takes away money from the pool, causing the same effect as a loss of incoming revenue. Legislators then must scramble to replace the dollars or cut into existing programs.

[FN12]. See Romer v. Evans, 517 U.S. 620 (1996).

[FN13]. See Oregon State Police Officers' Ass'n, v. State, 918 P.2d 765 (Or. 1996).

[FN14]. See Keisling, supra note 3.

[FN15]. Id.

[FN16]. See City Club of Portland, supra note 8, at 23.

[FN17]. Each ballot measure must have a financial impact statement. See Or. Rev. Stat. § 250.125 (1997). The lack of an impact statement, however, will not keep the initiative off the ballot. See id. § 250.127(7) (1908). See also Bassien v. Buchanan, 798 P.2d 667, 669 (Or. 1990).

[FN18]. Brief for Amicus Curiae at 1, Atiyeh v. State of Oregon, 918 P.2d 795 (Or. 1996) (No. 542467) (reprinted at 34 Willamette L. Rev. 749 (1998)).

[FN19]. City Club of Portland, supra note 8, at 43.

[FN20]. Brief for Amicus Curiae, supra note 18, at 2.

[FN21]. Amendments to Oregon's constitution are still subject to the United States Constitution. For example, in Pierce v. Society of Sisters, the Supreme Court struck down as unconstitutional Oregon's Compulsory Education Act of 1922, a constitutional amendment that required all Oregon students to attend public schools. 268 U.S. 510 (1925).

[FN22]. See Or. Rev. Stat. § 250.035(2)(a) (1997).

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[FN23]. See Or. Const. art. IV, § 1.

[FN24]. 74 P. 710 (Or. 1903).

[FN25]. But see Oregon Const. art. IV, § 2.

[FN26]. Hans A. Linde, Who Is Responsible for Republican Government?, 65 U. Colo. L. Rev. 709, 717 (1994).

[FN27]. The Oregon Legislature did not help this argument when they resubmitted Measure 16 to the voters rather than amend the language of the proposal.

[FN28]. See Lois Colson, Legislative Changes Affect Filing for Annual Property Taxes, 58 Or. St. B. Bull. 55 (1997).

[FN29]. See id.

[FN30]. Or. Const. art. I, § 42. See also Or. Rev. Stat. § 144.108(5) (1997) (giving a victim the right to notification and of the opportunity to attend a parole board hearing that may result in a revocation sanction for a post-prison supervision violation); id. § 144.343(9) (giving a victim the right to notification of and the opportunity to attend a parole board hearing that may result in the revocation of parole); id. § 147.419 (giving a victim the right to obtain copies of transcripts or tapes of court proceedings at cost); id. § 147.421 (listing the information the public body must provide the victim upon request).

[FN31]. The measure, as it amended the Oregon Constitution, states that the victim has "the right to have eleven members of the jury render a verdict of guilty of aggravated murder or murder, notwithstanding any other law or provision of this Constitution." Or. Const. art. I, § 42(1)(h). However, the Oregon Supreme Court subsequently invalidated Measure 40 because it violated the single amendment rule of Article XVII, section 1 of the Oregon Constitution. See Armatta v. Kitzhaber, 959 P.2d 49 (Or. 1998).

[FN32]. Victims have "[t]he right that no law shall permit a sentence imposed by a judge in open court to be set aside or otherwise not carried out except through the reprieve, commutation, and pardon power of the governor or pursuant to appellate or post-conviction relief," and "[t]he right that no law shall limit the court's authority to sentence a criminal defendant consecutively for crimes against different victims," Or. Const. art. I, § 42(1)(j)-(k).

[FN33]. "As to the guaranty to every state of a republican form of government... it is well settled that the questions arising under it are political, not judicial, in character, and thus are for the consideration of the Congress and not the courts." State of Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit County, 281 U.S. 74, 79 (1930).

[FN34]. But see Erwin Chemerinski, Cases Under the Guarantee Clause Should be Justiciable, 65 U. Colo. L. Rev. 849 (1994).

[FN35]. See Linde, supra note 26, at 714.

[FN36]. Id at 720.

[FN37]. See Or. Rev. Stat. § 180.020 (1997).

[FN38]. Or. Const. art. IV, § 1(2)(d).

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[FN39]. See Oregon Educ. Ass'n, et al. v. Phillips, 727 P.2d 602 (Or. 1986).

[FN40]. See, e.g., Fla. Const. art. 4, § 10 ("The attorney general shall... request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated.... The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion expeditiously."). See also Legislature of State of Cal. v. Deukmejian, 669 P.2d 17 (Cal. 1983).

[FN41]. [W]here all statutory requirements have been complied with [for placing an initiative measure on the ballot],... the people alone are authorized to determine whether the proposed measure shall be enacted into law, and if the measure, when enacted is unconstitutional, then only have the courts power to declare it to be unconstitutional.
State ex rel. Carson v. Kozer, 270 P. 513, 515 (Or. 1928), cited in Brummell v. Clark, 570 P.2d 671 (Or. Ct. App. 1977).

[FN42]. Where an initiative petition has been filed in the office of the secretary of state [which meets the statutory requirements, it is] the imperative duty of the secretary of state to file the petition, and, upon its being filed, to certify and print the ballot title and numbers on the official ballot, so that it can be voted upon.
Kozer, 270 P. at 515. As previously mentioned, however, the secretary of state can decide whether the petition violates the constitutional single- subject restriction and whether the subject is properly legislative. See Phillips, 727 P.2d at 604.

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C

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Symposium Articles

*227 THE CITIZEN INITIATIVE PETITION TO AMEND STATE CONSTITUTIONS: A CONCEPT WHOSE TIME HAS PASSED, OR A VIGOROUS COMPONENT OF PARTICIPATORY DEMOCRACY AT THE STATE LEVEL?

John F. Cooper [FNa1]

INTRODUCTION

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INTRODUCTION

One method by which many state constitutions can be amended is the citizen initiative petition. [FN1] This method of amending a state constitution is authorized in eighteen states [FN2] and is a creature [FN3] of relatively recent vintage, with the first such provision enacted in 1898. [FN4]

Although specifics vary from state to state, citizen initiative provisions generally require that its organizers draft a proposed state constitutional amendment, and obtain certain percentage of state voters, as determined from some previous measuring election who consent by their signatures to place the proposed amendment before the statewide electorate at a time in futuro. Signature requirements range from three percent [FN5] to fifteen percent [FN6] of the statewide electorate.

***228** The citizen initiative method of amending a state constitution has come under increasing-in both number and vociferousness-attacks by political observers [FN7] and legal scholars. [FN8] These attacks have labeled it a tool of bigots and economic special interests. [FN9]

To the author, many of their attacks exude a shrillness suggesting they may be motivated more by elitism or aristocratic individual political philosophies than by genuine constitutional or legal concerns. Nonetheless, many of the criticisms, particularly those that are process oriented, suggest, to the author, that the current constitutional initiative process may be ripe, if not for substantial reform, for some minor retuning.

A balanced and objective evaluation of the current constitutional initiative process can be commenced only after considering its historical origins. Like any other constitutional provision, the intent of the people who drafted and ratified the provision is a vital part of interpreting it and giving it effect. [FN10] Unfortunately, many critics of the process are unaware, or prefer to remain ignorant, of these historical origins. This is regrettable since these historical origins have continued relevance today.

This article will attempt to rectify these perceived shortcomings in the current debate by presenting a more even-handed evaluation of the current constitutional initiative process. In striving to accomplish these twin goals, the following topics will be addressed:

I.

The historical origins of the constitutional citizen initiative process will be addressed. The Oklahoma Constitution, which was the first state constitution to include such a provision when first adopted, will be used as a reference point.

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II.

Current criticisms of the constitutional initiative process will be identified, analyzed, and responded to. For ease of presentation and discussion, these criticisms have been divided into three broad categories.

A.

Criticisms concerning the proper allocation of power between the states and federal government under the United States Constitution.

***229** B.

Criticisms concerning the proper allocation of state power under a state constitution.

C.

Criticisms concerning the manner by which citizen initiative petitions are currently administered.

III.

A few conclusions will be drawn and several recommendations made.

Most of the analysis and reasoning is based on the author's research and legal experiences. As much of that experience and research has focused in the states of Oklahoma and Florida, many references in this article are to the constitutions and political cultures of those states. However, the reasoning and conclusions are applicable elsewhere.

I. THE HISTORICAL ORIGINS OF THE CITIZEN INITIATIVE PETITION TO AMEND A STATE CONSTITUTION

In the relatively few instances in which the United States Supreme Court has discussed the merits of state and local initiative and referendum processes, the Court has generally viewed these participatory processes as important and positive components of American government and democracy. Justice Hugo Black referred to the processes as reflecting a "devotion to democracy, not to bias, discrimination or prejudice." [FN11] Chief Justice Warren Burger analogized the process to the venerable New England town meeting. [FN12] Conceding that under our constitutional system the people in establishing a legislature are also free to reserve to themselves power that might normally be expected to be allocated to a legislature, Burger lauded the initiative and referendum process as "a means for direct political participation." [FN13] Justice Tom Clark, in his concurring opinion in Baker v. Carr, [FN14] indicated that he found the apportionment claim in that landmark case justiciable only because the Tennessee electorate was not able to obtain political relief elsewhere via the initiative or referendum process. [FN15]

Other sources have also recognized beneficial attributes of the citizen initiative process. Some have observed that initiatives not only serve an important role in educating voters and involving citizens in the political process, but also serve as a source of innovation in state lawmaking and as a means of correcting some of the abuses of representative government. [FN16] Citizen initiatives also serve as a safety valve for voter frustration when a state government effectively ignores the wishes of the electorate.

***230** In 1898, South Dakota became the first state to permit the amendment of its constitution by this mechanism. [FN17] Between 1898 and 1918, fourteen additional states adopted provisions permitting citizen initiative petitions to propose constitutional amendments. [FN18] Of the states admitted to the Union during

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the first half of the twentieth century, only New Mexico failed to include an effective initiative and referendum provision in its state constitution. [FN19] Despite this failure, the topic was one of the most contested issues at the New Mexico Constitutional Convention of 1910. [FN20]

The concentration of the adoption of constitutional initiative provisions in the first few decades of the twentieth century is neither a coincidence nor an accident. The initiative was one of the leading goals of the Populist and Progressive political movements in the United States. [FN21] At this period of time, these movements were at their most politically potent.

The citizen initiative petition is commonly labeled a "populist" device. [FN22] During the author's lifetime, the term "populist" has been used to label diverse political figures and philosophies. The term has been to describe both George and Henry Wallace, and Joseph and Eugene McCarthy. More recently it has been used to describe both Bill Clinton and Pat Buchanan. The only constant conclusion is that the term "populist" in modern usage has become primarily a pejorative-a negative label placed on one with whom the speaker or writer politically disagrees. As the term appears frequently in this article, it is important to define the term carefully and fairly, in its proper historical context, to dispel any negative connotations that might arise in the minds of those only familiar with its current misusage.

While Populism with a capital "P" describes a short-lived American political party that functioned during the last decade of the Nineteenth Century, [FN23] populism with a lower case "p" represents an American political movement that owes its maturation to the political beliefs of Thomas Jefferson, but which predates even the American Revolution. [FN24] American populism has been described by one leading observer as the one constant political "ism" in American politics. [FN25]

***231** American populism has always trusted the collective instincts of the American people and questioned the actions and motives of politicians, judges, and other elites. Thomas Jefferson succinctly delineated the underlying bedrock principles of the movement when he wrote:

I know no safe depository of the ultimate powers of the society but the people themselves, and, if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion by education. This is the true corrective of abuses of constitutional power. [FN26]

In many ways the current debate on citizen initiative petitions is merely the most recent chapter in our oldest national political debate, the same debate that forged the creation of our major political parties and is most clearly exhibited in the ideological differences between Alexander Hamilton and Thomas Jefferson. American populists, distrustful of financial cliques, interests, and elites, sought ways to check the power of these groups by subjecting their actions to the review of the electorate. The citizen initiative petition is a by-product of this movement.

The 1907 Oklahoma Constitution was the first state constitution to include a citizen initiative provision when first adopted. [FN27] In many ways, the Oklahoma Constitutional Convention represents the highwater mark of the populist movement in the United States. In this convention, populist and progressive thinking dominated and guided the agenda.

J.F. King, who was elected president pro-tempore of the Oklahoma Constitutional Convention, captured the mood of the delegates and articulated the rationale behind citizen initiatives when he identified the biggest threat to democracy as an "uncontrolled" legislature. [FN28]

***232** The President of the Constitutional Convention, and later depression- era Governor of Oklahoma, William H. "Alfalfa Bill" Murray, specifically linked this same theme of legislative distrust to the adoption of the initiative process. [FN29] In his opening address to the Convention, Murray identified a number of provisions he felt should be included in the Constitution, one of which was the initiative.

We should adopt the initiative and referendum, patterned after the law in force in the Republic of

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Switzerland and the State of Oregon. The only argument offered against this system is that the people are not conservative, while the history of the optional power shows that the people are more conservative than reform leaders. The fact that the people have this power will prevent bribery of the members of the Legislature. The fact that they have this power will make it unnecessary to use it. It has been in force in Switzerland since 1874 and has been used but four times, and twice when used the people voted down the government ownership of certain utilities. [FN30]

"Alfalfa Bill" Murray's observation that the "fact that they have this power will make it unnecessary to use it" [FN31] may have been overly optimistic, but it was insightful. Murray envisioned the initiative as a means of guiding and pressuring the legislature to perform its duties. [FN32] If the legislature was responsive to the popular will, the electorate would have no need to resort to the initiative. It would only be in those instances when the legislative branch refused, or failed to act, that the electorate would guide, pressure, or ultimately act for the legislature through the citizen initiative. In either instance, whether the legislature acted or failed to act, democratic values would ultimately prevail.

Murray did not view the initiative as diminishing representative government. Rather, representative government was enhanced by giving the people a method to insure their representatives acted honestly and responsively. Although ideological adversaries from different political parties, this was an issue upon which Murray and President Theodore Roosevelt ultimately agreed. [FN33] In 1912, Roosevelt declared his support for state initiatives indicating they "should be used not to destroy representative government, but to correct it whenever it becomes misrepresentative." ***233**[FN34] Woodrow Wilson, initially an initiative opponent, ultimately became a convert while serving as Governor of New Jersey: "We are cleaning house and in order to clean house the one thing we need is a good broom. Initiative and Referendums are good brooms." [FN35]

Recent successful and failed citizen initiative amendments to the Florida Constitution may illustrate Murray, Wilson, and Roosevelt's point. Since 1968, the Florida Constitution has contained a provision permitting its amendment by citizen initiative petition. Like many states, Florida's experience with the citizen initiative petition has been mixed. [FN36] However, in a number of instances, the provision has operated precisely as Murray and Roosevelt predicted.

The first successful use of the citizen initiative petition in Florida was the 1976 adoption a constitutional amendment titled "Ethics in Government," which, inter alia, imposed financial disclosure requirements on candidates to public office. [FN37] This initiative did not spring unexpectedly into the political arena. Rather, as contemporaneous news reports clearly reflect, then Governor Reuben Askew resorted to the initiative out of frustration. [FN38] Prior to the amendment, the legislature had regularly and routinely failed to enact financial disclosure requirements in the face of widespread popular support for such measures. The requisite signatures for this petition were obtained by unpaid volunteers. [FN39] The initiative imposing such financial disclosure requirements ultimately passed with seventy-nine percent of the vote, [FN40] and was subsequently upheld by the courts-ironically in lawsuits filed by members of the state legislature. [FN41] Had the legislature been more responsive to the electorate's will, the resort to the initiative would not have been necessary. The existence of the initiative process served to police the unresponsive actions of elected representatives.

An even more recent example of the interaction between the electorate and an unresponsive legislature is illustrated by a recent amendment prohibiting gill net fishing within Florida waters. [FN42] Once again this issue did not magically appear in the Florida political arena without advance warning. Rather, the organizers of the petition resorted to the initiative only when multiple pleas to the legislative and executive branches had been ignored. [FN43] In describing legislative attempts to limit the ***235** amendment after the enactment, one major state newspaper described the legislature's maneuverings:

Florida lawmakers are at it again, trying to undermine coastal fishing regulations. Every year the Legislature seeks to intimidate, weaken or abolish ***236** the Marine Fisheries Commission, the agency that formulates state fishing regulations.

It was precisely such political meddling that led to voters' overwhelming endorsement last fall of the Save Our Sealife constitutional amendment, which bans the use of commercial gill nets in state waters. This extreme

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measure will put many commercial netters out of work, some unnecessarily so.

Voters probably never would have backed the restriction if they had confidence the state would implement the tough regulations necessary to protect saltwater fish populations. But too often citizens had seen the governor and Cabinet members, who have the final say on Marine Fisheries Commission proposals, reject biologists' advice. Too often they had seen lawmakers scheme, at the behest of special interests, to gut saltwater regulations. [FN44]

Like the ethics in government amendment, the gillnet provision had broad popular support. When the legislature ignored this broad support, the electorate acted for it by approving the amendment with more than seventy-two percent of the popular vote. [FN45] The voters corrected the inactivity of unresponsive representative government, and confidence in democracy, if not the legislature, was maintained. [FN46]

In the wake of this type of initiative amendment, a few Florida legislators began to heed "Alfalfa Bill" Murray's turn of the century admonition. In 1993, the Florida legislature began considering a proposal to impose a constitutional "tax cap." News accounts reported that the process of preparing a citizens initiative petition to impose such a "cap" if the legislature failed to act were already underway. [FN47] In at ***237** least partial response to this electoral pressure, the Florida Legislature proposed to the electorate an amendment imposing such a cap. This proposal was subsequently enacted, thereby deflating any competing citizen initiative efforts. [FN48] Hopefully, this recent history is merely a prelude to a more responsive and responsible interaction between the legislature and the electorate. If so, the initiative is responsible for this development.

II. CRITICISMS OF THE INITIATIVE PROCESS

The frequently articulated criticisms of the citizen initiative process can be divided into three separate categories: (i) the proper allocation of power between state and federal governments under the federal constitution; (ii) concern with the proper allocation of state power under a state constitution; (iii) the manner by which citizen petitions are currently administered. Each category will be addressed separately.

A. Criticisms Concerned with the Proper Allocation of Power Between State and Federal Governments Under the United States Constitution

1. Some citizen petitions have been determined violative of federal constitutional law.

Some critics attack the citizen initiative process by asserting that it frequently results in the enactment of provisions ultimately held to violate the federal constitution. [FN49] The fact that initiatives are "often unconstitutional," [FN50] has been identified as one of the ten strongest objections to the creation or extension of the initiative. [FN51] While some popularly-supported initiatives have been declared unconstitutional, [FN52] there is very little empirical evidence to suggest that citizen initiatives are invalidated at a higher rate than constitutional amendments or statutes originating in state legislatures. Although somewhat dated, one study of forty state-level initiatives enacted by voters between 1980-1982 indicated that only two ***238** initiatives were subsequently invalidated on any constitutional ground. [FN53] Regardless, this argument simply misses the point. If anything, the fact that initiatives are subject to rigorous federal constitutional scrutiny lends support to the use of initiatives.

Applying the logic of these initiative critics, one could make a compelling argument to abolish the judicial and legislative branches of government at both the state and federal levels. Many of the greatest injustices in American history have been perpetrated by the legislative branch of government or sanctioned by the judicial branch. For example, in Korematsu v. United States, [FN54] the United States Supreme Court upheld executive and legislative actions that excluded persons from certain areas whose loyalty was not questioned

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based solely on their race. [FN55] In Lochner v. New York, [FN56] the federal courts temporarily elevated the capitalist economic system to constitutional protection. [FN57] The United States Supreme Court's decision in Dred Scott v. Sanford [FN58] also has not rebounded to its everlasting credit. The Supreme Court's conclusion in each case that the conduct was technically constitutional is insufficient to mask the injustices perpetrated in those cases.

Nor can state legislatures claim innocence from a similar charge. The racial segregation statute found constitutional by the United States Supreme Court in Plessy v. Ferguson [FN59] was enacted by the Louisiana legislature and upheld by the Louisiana Supreme Court. In addition, the pervasive system of racial segregation existing across the American South in the first half of the Twentieth Century was primarily enacted by state legislatures and enforced by state courts. [FN60] Accordingly, the fact that an occasional initiative may be judicially invalidated does not discredit the process.

The fact that the legislature and the courts have improperly interfered with our citizens' constitutional rights does not justify the electorate to do the same. Nevertheless, the fragmentation, diffusion, and dissemination of governmental power are the best available defense of citizen and minority rights. [FN61] The abolition ***239** of citizen initiatives would run counter to that goal and would further concentrate governmental power in the hands of the legislature or the courts. This would be inimical to all of our civil rights. [FN62]

***240** For example, many view the current federal judiciary as hostile to remedying past racial discrimination through the use of affirmative action programs. [FN63] A state citizen initiative petition could attempt to adopt or protect affirmative action programs that do not violate the federal constitution. An illustration of this recently occurred in Houston, where in municipal elections held in November 1997, the electorate rejected a plan to repeal their municipal affirmative action plan. [FN64] If initiatives are prohibited by federal law or policy, this would not be permitted, and the rights of minorities would be left exclusively to a perceived-hostile judiciary.

If the initiative process was somehow totally insulated from federal constitutional review, the critics' arguments might possess some merit. However, federal and state courts have aggressively subjected initiative petitions to searching and rigorous review. The United States Supreme Court has rarely noted, yet alone differentiated, between whether a particular state provision originated in the state legislature or by the initiative process. Where the issue has been addressed, it has been dispensed with summarily. Chief Justice Burger phrased it tersely when he stated: "It is irrelevant that the voters rather than a legislative body enacted [this law] because the voters may no more violate the constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." [FN65] When it is clear that a provision was enacted by initiative, it is often unclear in the United States Supreme Court opinion whether the initiative was a statutory, or constitutional one. [FN66] The Court has specifically held that a state constitutional provision falls within the Supreme Court's jurisdiction to review the constitutionality of a state statute under the Supremacy Clause. [FN67] This is consistent with the prevailing federal view: "The Supreme Court has never found it significant that the challenged provision was part of the state's constitution rather than a simple enactment of its legislature." [FN68]

Initiative amendments are treated by the federal courts with the same respect and deference as state statutes. The federal courts have exhibited little reluctance to enjoin or invalidate citizen petitions they suspect or declare to violate the federal constitution. One of the more well-publicized citizens initiatives in recent years was California Proposition 187, which was approved by fifty-nine percent of California voters during the November 8, 1994 general election. [FN69] This amendment, inter alia, ***241** purported to prohibit illegal aliens from receiving public services in the State of California. [FN70] Immediately following its enactment, five separate legal challenges were filed in federal court alleging the unconstitutionality of many of the provisions of the Proposition. [FN71] These separate actions were consolidated. A federal court, on November 16, 1994, [FN72] temporarily restrained the operation of Proposition 187. On December 14, 1994, the federal court granted the plaintiff's motion for a prelimin-ary injunction. [FN73] On November 20, 1995, the federal court made the preliminary injunction permanent. [FN74] The permanent injunction remains in effect, while

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the Ninth Circuit reviews the federal trial court's action.

A similar pattern is evidenced by California Proposition 209. On November 6, 1996, California voters approved this amendment to the California Constitution. The amendment, which prohibited discriminatory treatment on a variety of grounds including race, was viewed by many observers as specifically intending to prohibit the use of affirmative action by the State of California and its subdivisions. [FN75] The day following the approval of Proposition 209, groups opposing it filed suit in federal court seeking to restrain its enforcement, alleging federal constitutional violations. The district court promptly entered a temporary restraining order and later entered a preliminary injunction prohibiting the implementation of Proposition 209. [FN76] This injunction remained in effect until the Ninth Circuit Court of Appeals reversed, [FN77] finding the opponents of Proposition 209 possessed "no likelihood of success on the merits of their equal protection or pre-emption claims." [FN78] Proposition 209 then became effective when the United States Supreme Court declined to review the Ninth Circuit's decision.

2. Extensive pre-enforcement judicial review of initiatives prevent their misuse.

Initiative amendments are also subject to pre- and post-enactment judicial review. While concededly most pre-enactment judicial review [FN79] involves a determination of whether state procedural requirements have been satisfied, not all judicial review of citizen petitions is so limited. A majority of courts have historically declined to entertain federal constitutional challenges to an initiative amendment before its enactment, [FN80] while other courts have. [FN81] Recently, the Oklahoma Supreme Court ***242** invalidated an initiative petition and precluded it from being presented to the electorate. [FN82] It did so on the basis that the petition conflicted with federal constitutional law as interpreted by the United States Supreme Court. [FN83] This decision was dubiously predicated, in part, on a desire by the court to "prevent the holding of a costly and unnecessary election"-normally a legislative rather than judicial determination. [FN84] Nonetheless, the ruling does evidence an avenue a particularly activist judiciary can travel in reviewing the federal constitutionality of an initiative petition. [FN85]

While it is true that initiative amendments have been invalidated by the federal courts as violative of the federal constitution, sufficient judicial safeguards are in effect, including pre- and post-election review, to make abolishing the initiative process unjustified. If necessary, restraining orders and injunctions are used to halt the enforcement of initiative amendments that violate the federal constitution. The mere fact that an unconstitutional initiative may be approved by the electorate provides no more justification for abolishing the initiative process than the possibility that a legislature may enact an unconstitutional statute provides a justification for abolishing the legislative process.

3. Some legal observers have asserted that citizen initiative amendments violate the provisions of Article IV, Section 4 of the United States Constitution, which directs the United States to guarantee to every state a republican form of government.

Too much ink has been needlessly shed, and too many trees have needlessly died in support of the proposition that state initiative petitions violate the guarantee clause of the United States Constitution. As one early proponent of this argument acknowledged, it is not an argument that probably will ever be heard "in other than an academic forum." [FN86] The United States Supreme Court would have to overturn well-settled precedent to even reach the proponents' rather strained interpretation of the historical origins of the guarantee clause. For close to 150 years, the Supreme Court has consistently held that the guarantee clause is nonjusticiable, because the ***243** provision raises political questions only Congress can address. [FN87] Over eighty- five years ago, the United States Supreme Court specifically held that the question whether a state initiative petition violated the federal guarantee clause was a nonjusticiable political question. [FN88]

Despite the clarity of law on this point, a number of innovative-but ultimately unsatisfying-law review

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articles have appeared pleading for a reexamination of these well settled points. Interestingly, these articles seem to be generated whenever an initiative process results in the enactment or consideration of a provision with which the writer disagrees. For example, one of the earliest articulations of the argument appears to be a response to California Initiative Proposition 14 invalidated by the United States Supreme Court in Reitman v. Mulkey. [FN89] Similarly, a constitutional initiative amendment characterized as "aimed primarily against homosexuality," was rejected by the Oregon electorate in November 1992. [FN90] Rather than applauding the enlightened tolerance of the Oregon electorate, a post-election legal attack was launched upon the initiative process itself. [FN91] The attack viewed initiatives as arrogating to the electorate decisions that the attacker presumably felt more properly disposed of by federal judges. [FN92]

However entertaining the academic arguments have been, federal courts have shown little enthusiasm for abandoning their decisions in Luther v. Borden and Pacific States Telephone & Telegraph Co. v. Oregon. [FN93]

In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court cited both Luther v. Borden and Pacific States. [FN94] Referring to Luther, the Court stated: "But the only significance that Luther could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently . . . ." [FN95] In its most recent analysis of the guarantee clause, the United States Supreme Court stated that it approached "the issue with some trepidation," [FN96] in that in most cases in which the clause was raised, ***244** the Court "found the claims presented to be nonjusticiable." [FN97] While recognizing that this traditional approach had recently been questioned by courts and legal academics, the Court declined to address this "difficult question." [FN98]

Even if the Supreme Court ultimately elects to abandon its long-held precedent on the nonjusticiability of the guarantee clause, it does not follow that citizen initiative amendments will be found to violate that provision. Prior to the Supreme Court's nonjusticiability interpretation of the guarantee clause in Pacific States, every court that had considered the issue concluded that initiative petitions did not violate the guarantee clause. [FN99] The results were certain and the reasoning convincing. For example, in In re Pfahler, [FN100] the California Supreme Court concluded that the use of municipal initiatives did not violate the federal guarantee clause. Reasoning that at the time of the adoption of the United States Constitution existing state governments were accepted into the Union as they existed, the Court observed that four original states conducted their local government affairs under a method of participatory democracy commonly referred to as the "New England town government," and that, under this system, representative government was not the norm. [FN101]

Next, there does exist executive and legislative interpretations of the guarantee clause that should be respected if the Court ever reconsiders the justifiability issue. The Enabling Act of the State of Oklahoma [FN102] was passed on June 16, 1906 by the United States Congress. This Act required convening a convention to draft a constitution for the new state. [FN103] The Enabling Act required that the "constitution shall be republican in form." [FN104] A subsequent section of the Act required the President of the United States to proclaim the creation of the new State of Oklahoma if, inter alia, "the constitution and government of said proposed State are republican in form." [FN105] The Oklahoma Constitution, which Congress required to be "republican" in form, and was so held by President Roosevelt in his Proclamation of Statehood, [FN106] contained provisions for citizen initiative amendments at Article V, ***245** Section 1. [FN107] Thus, even before the Pacific States decision, both the legislative and executive branches of the federal government believed that the initiative process was consistent with the guarantee clause of the United States Constitution.

Moreover, if the ultimate issue is addressed without regard to justiciability, the academics' arguments are still wanting. Basically, these arguments assert that the guarantee clause mandates exclusive representative government in the states and that participatory democratic devices, like the initiative and presumably town meetings, violate its provisions. [FN108] Almost all of the academics' articles rely heavily on the general writings of James Madison and his concerns expressed in the Federalist Papers. [FN109]

While Madison's observations on a republican form of government will be specifically addressed below, a

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cursory review of the observations of the guarantee clause by other founding fathers is illuminating. John Adams admitted that he never knew what the term "republican" form of government meant, and asserted that "no man ever did or ever will . . . [the reference to a republican form of government] is so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness." [FN110] Characteristically, Thomas Jefferson understood the term "republican form of government" to mean one that trusted the "mass of citizens . . . [as] the safest depository of their own rights." [FN111]

Even many who argue that state initiative petitions violate the federal constitution concede that the term "republican form of government" assured in the guarantee clause has no precise historical meaning. As one observed: "The use of the word 'Republican' in Article IV clearly did not have a single connotation for those who drafted the Constitution, let alone for the far greater number who ratified it." [FN112] However, after making this concession, the same critic then suggested that the court should "guess" at the content of the provision, and then apply this judicial "guess" to invalidate one of the few forms of participatory democracy available to American citizens. [FN113]

But the document does establish a republican form, and a republican form is what was guaranteed to the states. If we cannot ascertain exactly what the form ***246** ought to be, we can at least come up with an educated guess concerning the goals' accountability to the majority with filters to protect minorities. [FN114]

One of the most comprehensive recent analyses of the historical meaning of "republican form of government," as understood at the time of the adoption of the United States Constitution, appears in a law review article by Professor Deborah Merritt. [FN115] In this article, Professor Merritt persuasively argues that the notes of the actual debates in the Constitutional Convention and the subsequent ratification debates reflect that the framers specifically viewed the clause as assigning to the "federal government the task of rooting out monarchial tendencies and putting down armed rebellions in the states." [FN116] In support of this conclusion, James Madison is quoted as stating that the duties that the guarantee clause confers on the federal government "are having to defend the system against aristocratic or monarchial innovations" and to suppress "domestic violence." [FN117] Some observers have noted the irony of using Madison's democratic political beliefs as a mean of attacking citizen initiative petitions. [FN118]

The most intriguing aspects of Professor Merritt's analysis of the contemporaneous history of the guarantee clause is totally ignored by initiative critiques. Under this analysis, the guarantee clause, as originally understood, serves not only as a check on state governments, but the federal government as well.

The language of the guarantee clause has two aspects. On the one hand, the clause prohibits the states from adopting non-republican forms of government. On the other hand, as long as the states adhere to republican principles, "the ***247** clause forbids the federal government from interfering with state governments in a way that would destroy their republican character." [FN119]

From this conceptual base, Professor Merritt argues that the guarantee clause actually protects certain state government machinery and practices-possibly including initiative petitions-from federal interference: [FN120]

The guarantee clause, moreover, restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents. A republican government, as explained above, is responsible to its voters rather than to any outside agency. In order to ensure that state and local governments remain responsive to their constituents, those citizens must have the power to choose the governmental forms that work best for them. The guarantee clause, therefore, grants states control over their internal governmental machinery. States, for example, should be free to allocate power among the branches of state government; to create political subdivisions and administrative agencies; to set terms of office for state officials; and to regulate the internal affairs of governmental bodies. In addition, states should have the power to control the procedures by which their government officials are selected: to draw election districts, set the dates and times of local elections, and govern other aspects of election procedure. [FN121]

An accurate reading of the guarantee clause consistent with its intent and history does not result in a finding that state initiative petitions violate its provisions. Rather, the guarantee clause constitutionally protects the

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rights of state government to enact citizen initiatives.

4. Citizen initiative petitions undermine federal policies and should be prohibited.

Some initiative critics assert that Congress should enact a federal law barring the use of citizen initiative petitions at the state level. They argue that initiative petitions have been used to enact substantive provisions inconsistent with the critics' view of existing federal policy or their perceptions of what federal policy should be. Thus, it has been argued that Congress, pursuant to the guarantee clause, [FN122] should enact a federal statute presuming invalid any citizen-initiated ballot measure "that uniquely burdens a member of an identifiable group traditionally the subject of arbitrary or invidious discrimination," or "that has been popularly enacted to avoid the protective structures of a republican form of government." [FN123] The proponent of this statute argues that Congress should "assert its power under the ***248** Guarantee Clause, and the Fourteenth Amendment." [FN124] Even assuming, arguendo, the constitutional validity of such a statute, several problems still arise. Aside from the rather dubious expansion of federal judicial power that such a statute would create-and the absurd subjectivity of the phrase "protective structures of a republican form of government," [FN125]-a number of other fallacies are associated with such a proposal.

First, the author of the proposed statute asserts that her proposal will "right the wrongs so many have drawn attention to regarding ballot initiatives." [FN126] To identify these "wrongs," the author cites circuitously [FN127] four guarantee clause law review articles published over a seven-year period, at least one of which does not even appear to deal directly with the initiative issue. Thus, apparently relying exclusively on anecdotal support, the author implies that initiatives are somehow evil, [FN128] and Congress needs to ban some, or all of them, by a statute akin to an electoral "book burning." [FN129]

In identifying the "wrongs so many have drawn attention to," [FN130] the cited article mentions only three or four recent initiatives, which the article's author considers offensive, at least one of which was an electoral failure. [FN131] While it is conceded that initiatives, like statutes, regulations, and court decisions, can run afoul of the United States Constitution, the record of citizen initiative petitions assumed by this article is unsubstantiated. [FN132] Sweeping statements describing citizen proposal initiatives as ***249** "Discrimination-Prone" Initiatives [FN133] are unsupported by fact and are pure academic hyperbole.

Citizens initiatives are neutral. They are a mere mechanism, equally available to citizens of liberal and conservative political persuasions. Any political interest can attempt to place its political concerns before the electorate through using this device. [FN134] Throughout their history, citizen initiatives have been used by all sectors of the political spectrum. As one student of citizen initiatives observed, they have been historically "used almost equally by liberal environmental citizen groups and ***250** by conservatives." [FN135] A five-year study of citizen initiatives substantiated this when it concluded:

The results of the . . . study, over five years in the making, show conclusively that initiatives-proposed . . . amendments placed on ballots by citizen petition and enacted or rejected by popular vote-are truly the tools of all citizens, from the ideological left to the right, from the grass roots to the corporate suites. [FN136]

The political environment and the rights we enjoy in this country would be much different if state initiatives had not been permitted under federal and state law. Three states-Colorado, Oregon, and Arizona-approved women's suffrage at statewide elections before the 1920 adoption of the Nineteenth Amendment to the United States Constitution. [FN137] Previously, state legislatures had rejected similar proposals to grant women's suffrage. [FN138] Presumably, these statewide electoral successes advanced women's suffrage at the national level and assisted in the ultimate adoption of the Nineteenth Amendment. Similarly, state equal rights amendments have been approved by statewide voters in eighteen of the twenty-seven statewide elections in which the issue has appeared. [FN139] The federal constitutional counterpart was defeated when an insufficient number of state legislatures ratified the proposed amendment within the time allotted by Congress.

State initiatives have been used to enhance not only women's rights but those of other minorities as well. For

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example, initiatives have been used to abolish poll taxes, establish minimum working hours, enact environmental protection measures, campaign finance reform, and open meeting laws, provide for financial disclosure, enhance victim rights, and reform voter registration. [FN140]

Initiative critics who have urged the enactment of a federal law to prohibit state initiatives rely heavily on overstatement, and under-substantiate their assertions. The citizen initiative petition process is a neutral political mechanism, subject to reasonable legislative and judicial checks and balances which nurtures the democratic process and the education of American citizenry.

All of this reasoning dodges the real issue: What is the pragmatic political likelihood that, even if Congress possessed the constitutional authority to ban citizen initiative petitions under the guarantee clause, it would do so? Congressional majorities concededly can rapidly change. Any evaluation is pure speculation, which may change. Nonetheless, there appears little or no current support in the federal Congress to ban statewide initiatives.

This congressional reluctance may be based on strong public support of the citizen initiative process. [FN141] Presumably an electorate so predisposed would find a congressional ban on initiatives to be prohibiting, anti-democratic, high-handed, ***251** aristocratic, and elitist. [FN142] Arguably, in some congressional districts, supporting a ban would be tantamount to committing political suicide. Indeed, many political observers attributed the electoral defeat of former Speaker of the House, Thomas Foley, to his public opposition and legal challenge to the results of the term limits initiative enacted by the voters in his home state of Washington. [FN143]

The current congressional agenda does reflect at least one proposal-by Representative Jerry Solomon of New York-urging the adoption of a nationwide initiative. [FN144] Former Republican Vice Presidential candidate Jack Kemp and former Democratic South Dakota United States Senator James Abourzek have also previously urged similar proposals. While national initiative proposals have appeared frequently in our history, they have previously garnered little popular support.

On a related issue, Congress is studying revising federal judicial review of state initiatives. In September 1995, the House of Representatives passed and referred to the Senate a bill commonly referred to as the Bono bill [FN145] in honor of its sponsor, the late Congressman Sonny Bono of California. [FN146] This proposal attempts to ***252** streamline federal judicial review of citizen initiatives by requiring any attempt to enjoin the enforcement, operation, or execution of a statewide initiative to be presented to a three-judge panel, rather than a single judge. [FN147] The proposal's accompanying legislative history indicates it is intended to preclude "judge- shopping," and to expedite the federal review of statewide initiatives. This paper proffers no opinion on the merits of this proposal, other than to infer that Congress is exhibiting no present conduct that would suggest any current intention to prohibit statewide initiatives by federal law.

B. Criticisms Concerned with Proper Allocation of State Power Under a State Constitution

The criticism of citizen initiatives under this category are more policy-related and less legalistic than those under the preceding category. However, the gist of these arguments is that the use of citizen initiatives represents a misallocation of state power. These arguments address what provisions should, or should not, be included in a state constitution.

1. State constitutions are becoming too "statutory" and too "lengthy" as a result of citizen initiative provisions.

Some critics argue that state constitutions are becoming too "statutory" and too "lengthy" as a result of citizen initiative provisions. This is an intriguing argument, which is at least partially aesthetic. The written constitution is peculiarly a creation of American law; one need not look far in tracing its evolution. The

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original state constitutions were short and were limited to the most fundamental matters. [FN148] These state constitutions grew in length and complexity as American society and state government grew. The enlargement in size and complexity of state constitutions was undeniably attributable in part to urbanization, technological advances, and the proliferation of governmental functions in a complex society. [FN149] This growth is based on a natural evolution and development.

Based on this reality, the goal of a short, fundamental constitution is a relative one. The primary goal must be whether the state constitution performs the functions that the people adopting it desire it to accomplish. It is only after this primary goal is satisfied that secondary concerns about the dimensions and appearance of a state constitution are even relevant.

Assuming the analysis has focused on the goal of drafting a short, fundamental state constitution, the question becomes why this is important and whether it is even possible in a complex world. Why should a state constitution be short and limited to fundamental matters?

***253** The essence of the argument is that constitutional provisions should state only general principles, which should have a certain degree of permanence. Statutory provisions, on the other hand, are viewed as more transitory in nature, and subject to frequent change. Critics charge that the use of the citizen initiative has resulted in the inclusion of a number of provisions in state constitutions that more properly would be "statutory" provisions under the preceding definition. No explanation has ever been given as to why initiative petitions are more susceptible to this criticism than amendments proposed by other means.

One of the clearest articulations of the argument appears in Advisory Opinion to the Attorney General-Limited Marine Net Fishing. [FN150] The Florida Supreme Court concluded that a proposed constitutional amendment banning gill- net fishing in Florida satisfied all requirements for inclusion on the ballot. [FN151] While joining in this conclusion, Justice Parker Lee McDonald, in a concurring opinion, questioned the wisdom of including such matter in the state constitution:

I concur with the majority that the proposed amendment complies with the constitutional and statutory requirements. The merit of the proposed amendment is to be decided by the voters of Florida and this Court's opinion regarding the wisdom of any proposed amendment is irrelevant to its legal validity. I am concerned, however, that the net fishing amendment is more appropriate for inclusion in Florida's statute books than in the state constitution.

The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society. [FN152]

Justice McDonald then suggested that the permanency of the Florida Constitution was threatened by the proliferation of amendments. [FN153] He observed that the Florida Constitution had been amended forty-one times between 1968-1984, at a rate of 2.4 amendments per year. [FN154] He then suggested that a Constitutional Revision Commission address the problem of frequent amendments and initiatives, apparently linking his concern with ease of amendment to the use of initiatives. [FN155]

In the following year, Justice Stephen H. Grimes of the Florida Supreme Court joined the now growing anti-initiative chorus. While dissenting from the court's opinion to strike a citizen initiative petition from the ballot, Grimes still observed: "I personally believe that constitutional amendment by initiatives is being overused . . . ." [FN156] This appeared to be a reference to the constitutional/statutory argument raised earlier by McDonald. While both McDonald and Grimes voted in support of ***254** the validity of the initiatives before them, both statements contain a disturbing nonjudicial tone which suggests the preelection review of initiative petitions in Florida may be less objective than one would hope.

A 1986 study of approved and proposed Florida constitutional amendments supported Justice McDonald's

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overall conclusion that the Florida Constitution has been easy to amend. [FN157] However, the same study refuted the assertion that the ease of amendment is attributable to citizen initiative petitions. [FN158] According to the study, the Florida Constitution had at that time been amended thirty-nine times. [FN159] Only one of the successful amendments was by citizen initiative; the remaining thirty-eight were by legislative proposal. [FN160]

One author of the study updated its finding in 1995 when the pace of initiative petitions had increased. [FN161] This updated study concluded that there was no immediate need to place any limits on initiative petitions. [FN162] The vast majority of the proposed amendments clogging the Florida ballot had been attributable to legislative, not citizen, proposals. [FN163]

The preceding discussion reflects a disturbing truth about criticisms of citizen initiative petitions. Initiatives are frequently attacked for creating problems which a review of the actual facts readily disputes. One senses an almost irrational distrust and hostility toward initiatives where judges, politicians, and many academics are involved.

While placing the frequency of amendment argument in proper factual perspective, the same Florida study then proposed a rule that all proposed constitutional amendments be subject to a requirement that its subject matter be "constitutional" in scope rather than "statutory." [FN164] The author of the rule readily conceded that the proposed rule would interfere with the electorate's right to discipline nonresponsive legislatures, [FN165] but presumably believed that concerns ***255** about the alleged misuse of the constitution through the inclusion of "statutory" materials outweighed any participatory democracy concerns.

A closer analysis of the constitutional/statutory criticism suggests that this argument can be and has been overstated. As a young Assistant Attorney General for the State of Oklahoma, I was surprised when first encountering the 1907 provision of the Oklahoma Constitution that establishes the flash point and specific gravity of kerosene. [FN166] When this provision-which at the time seemed misplaced in the constitution-was brought to the attention of the then Attorney General, he merely looked puzzled and responded, "Well, it hasn't changed any since then, has it?"

The Oklahoma Constitution of 1907 has frequently been criticized as too lengthy and too statutory. [FN167] This criticism is a longstanding one, which the Oklahoma electorate has repeatedly rejected by refusing to substantially revise or amend its constitution.

In 1947, the Oklahoma legislature authorized a study of the Oklahoma Constitution, contemplating revisions to it. [FN168] Pursuant to this authorization, a citizen advisory committee examined the Oklahoma Constitution and issued a report in 1950. [FN169] Several issues confronted by the committee were criticisms of the lengthy, "statutory" provisions contained in the Oklahoma Constitution.

The committee addressed these concerns in the first chapter of the study entitled "What a Constitution Should Contain." [FN170] This chapter is subdivided into three subsections, two of which are directly relevant to our inquiry. [FN171] The first subsection inquires why state constitutions are longer than they previously have been. The primary response given is that the electorate has simply lost confidence in the ***256** legislature. "State constitutions have grown longer because legislatures have often failed to fulfill the reasonable expectations of the public." [FN172] In response to real or perceived abuse, the electorate has placed constitutional restrictions on the legislature's traditional prerogatives through constitutional provisions creating bureaus and commissions, and restricting traditional legislative functions such as imposing taxes, creating public debt, and spending public funds. All of this has increased the length and complexity of state constitutions. The electorate has also used the initiative to propose constitutional amendments that "afford the legal voters an opportunity to submit amendments when the legislature, either out of wisdom, indifference or even corruption, refuses to do so." [FN173]

The second explanation given for lengthy, complex constitutions in the advisory committee's report is

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"Judicial Opposition to Social Policy." [FN174] This argument concludes that some activist state courts had used principles of natural law and general provisions of the state constitution to invalidate progressive social policy. To rein in an activist judiciary, several state constitutions ensconced specific provisions that might otherwise be considered "statutory" provisions into the state constitutions. For example, the Oklahoma Constitution prescribes an eight-hour workday for public employees, [FN175] prohibits women and children from working underground, [FN176] and requires the legislature to enact laws to protect the health and safety of industrial employees. [FN177] These "statutory" provisions were added to restrict the ability of an activist judiciary to invalidate progressive social legislature. [FN178] While the presence of such provisions in the state constitution might offend the sensibilities of academic constitutional purists, they did solve the problem they were aimed at, and otherwise vulnerable members of Oklahoma's workforce were protected from economic exploitation by their employers.

In a perfect world a state constitution may in fact be brief and limited exclusively to fundamental matters. However, we live in far from a perfect world. Our world is urban, technologically advanced, and complex. Our political history reveals periods of unresponsive legislatures and renegade judges. In the world in which we do live, a lengthy, complex state constitution is the price, albeit a small price, we pay for responsive government.

Are current state constitutions too lengthy or too "statutory"? No, they are as lengthy and as statutory as they need to be to accomplish the societal purposes desired by the majority of the electorate that adopted them. Perhaps Thomas Jefferson saw this point best when he balanced concerns for constitutional permanence with the realities of modern life:

I am certainly not an advocate of frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with because, ***257** when once known, we can accommodate ourselves to them and find practical means of correcting them.

But I know also that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. [FN179]

2. Initiative provisions undermine the aims of representative government.

The objections covered by this category have long been articulated. An early critic of citizen initiatives was William Howard Taft. In 1913, the corpulent former Republican President criticized initiatives, referendums, and recall provisions. [FN180] Characterizing the proponents of the participatory democracy devices as "cranks," [FN181] Taft attacked the devices, asserting they necessarily weakened the will of the legislature by depriving it of its courage and independence of action, and by holding it up as unworthy of public confidence. [FN182] At about the same time, a Republican Senator from Utah, George Sutherland, who later became one of the more conservative justices in United States Supreme Court history, also attacked the initiative process as destructive of the legislative deliberative process. [FN183]

With all appropriate respect to these important figures in our legal history, their arguments were unconvincing when made and certainly have not improved with age. Taft's argument is an incredibly patronizing one in which elected officials are treated as hypersensitive and totally lacking in self- confidence and personal conviction. Presumably, the mere existence of judicial review would also propel them into an inactive comatose state. Legislators as hypersensitive as Taft hypothesizes would better be served by seeking employment in a less public occupation.

Justice Sutherland's criticism, however, contains a grain of truth, which he never fully explored. Sutherland feared that the use of the initiative would result in decisions being made in the privacy of voting booths, without the public debates, accommodations, and compromises of the legislative process. [FN184] What Sutherland neglected to address was the political discourse that an initiative election can, and generally does, trigger. Initiatives frequently trigger political participation by those citizens not normally involved in

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representative government. [FN185] While it may qualify ***258** as "Geek-Speak," at least one observer has touted the initiative process as contributing to the "alienation amelioration" [FN186] of our citizenry. [FN187]

Sutherland's observations do raise, indirectly, a recurring concern about initiatives. Many observers have noted that the legislative process involves public hearings, evaluation of testimony, reflection, deliberation, and compromise. [FN188] While not all observers find this process a totally commendable one, [FN189] and other observers have viewed these "benefits" as being substantially embellished, [FN190] some [FN191] deliberative process does exist in the drafting of legislative proposals that is not available for initiative petitions.

***259** Analysts speak of the "filtering effects of the legislative process" available in the legislature, which is absent in the initiative process. [FN192] A recent controversial federal appellate court decision struck down an initiative approved by the California electorate almost a decade prior. [FN193] In its ruling the court noted: "Before an initiative becomes law, no committee meetings are held . . . . No legislative analysts study the law; no floor debates occur . . . and it is far more difficult to 'reconvene' to amend or clarify the law if a court interprets it contrary to the voter's intent." [FN194] This opinion was identified as one that exhibited "growing concern in the initiative process . . . being used more and more to address major issues of policy." [FN195]

Some of this criticism is clearly exaggerated. While no "official" or "legislative history" exists for citizen initiative petitions, there is often a considerable unofficial history in campaign literature published by the state and the political parties, as well as extensive media coverage. [FN196] This publicity frequently exceeds the publicity and history accompanying legislative proposals. Further, the scope and extent of committee reports, hearings, and debates accompanying a non-initiative proposed constitution amendment vary from state to state and often are very limited. [FN197] In regard to deliberation and debate, the election itself provides an opportunity for the people to become involved in this process without being frustrated by stacked legislature committee assignments, arcane rules of procedure, and legislative privilege and arrogance. The existence of a committee system and public debate did little to further William Weld's chances of becoming the United States Ambassador to Mexico, once the Chairman of the Senate Foreign Relations Committee, Senator Jesse Helms, decided that he did not want Weld's nomination considered. [FN198] Nor is this example isolated. There are a number of instances in which the legislative process has been intentionally used to mislead and confuse the issues being presented to the electorate. [FN199]

Nonetheless, the citizen initiative process, as currently administered in most states, is susceptible to criticism, particularly when the initiative attempts to address very technical and complex matters. As our society has become more complex, so ***260** have our constitutions, laws, and regulations. In recent years, after enacting major legislations, it has been commonplace for legislatures to enact "Reviser," or "Technical Correction Bills," to correct inadvertent errors in the original legislation. While this approach works reasonably well for legislative enactments, constitutional errors are not as easily rectified. Thus, when the electorate adopts an initiative amendment that contains inadvertent, but obvious errors, there is little remedy short of radical judicial reconstruction or subsequent amendment to address the flaw. Some have suggested that if citizen initiative petitions proceeded through a drafting process akin to the legislative process, such flaws would be remedied prior to any election on the question. This suggestion, as well as others, will be considered in the next section.

C. Criticism of the Manner by Which Citizen Initiative Petitions Are Currently Administered

1. Impact of special interests and paid petition gatherers.

The number of criticisms of citizen initiative petitions has escalated within the last few years. The criticisms that are most disturbing are those relating to the actual administration of these petitions.

The original proponents of the citizen initiative petition saw it as a way for the common people to bypass

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corrupt legislators and activist judges, and to provide a means of enacting the constitutional provisions most responsive to their collective concerns. To insure that the process was not misused, the drafters of the provisions intentionally made it difficult for proposals to reach the ballot. This difficulty was accomplished by imposing substantial signature requirements to insure a proposition had fairly broad support before it was placed on the ballot. These signature requirements range from three to fifteen percent of the voting electorates, calculated from a measuring election, usually a recent statewide election such as a gubernatorial race. [FN200]

Although never imposed as an explicit requirement, the original sponsors of the initiative process apparently contemplated that signatures would be gathered by armies of volunteers committed to the cause of the petition. To a limited extent, the original sponsors' vision has occurred. The signatures on the "Ethics in Government" Amendment to the Florida Constitution were gathered exclusively by unpaid volunteers. [FN201] Until the 1970s, the signatures for most California initiatives were obtained by unpaid volunteers. [FN202] However, in large part because of a decision of the United States Supreme Court, the original sponsors' vision of armies of unpaid signature-gatherers moving door-to-door in pursuit of their political goals has been replaced by a business fueled by capitalism and compensated in cash rather than political satisfaction.

***261** Colorado enacted a statute making it a felony to pay individuals to circulate initiative petitions. [FN203] In 1988, the United States Supreme Court invalidated this statute, asserting it represented an unconstitutional infringement on the First Amendment rights of the paid signature gatherers. [FN204] In its holding, the Court specifically rejected Colorado's argument that the statute was essential to protect the integrity of the initiative process. "The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns." [FN205]

The Court's use of the First Amendment to protect paid petition circulators has not gone uncriticized, [FN206] and the Meyers decision has been described as removing from "consideration by the states . . . a salutary and timely device for the reform of the initiative process." [FN207] Although not all initiative states had similar bans at the time of the Meyers decision, and the "initiative industry" [FN208] had grown to different levels of maturity in the various states, the Meyers decision had a tremendous negative impact on initiative reform attempts. [FN209] With the imprimatur of the United States Supreme Court, the "initiative industry" took center stage in the initiative debate. Representatives of "initiative industries" openly were quoted as stating that "if you have enough money, you can get on the ballot. Yeah, no question." [FN210]

An article in the Los Angeles Times articulated the concerns of many over the impact that well-funded special interest groups were having on initiative petitions:

It is not just the number of initiatives nor the complexity that is prompting concern. It is that the system seems to have slipped away from the citizens it was invented to serve into the hands of the very kind of wealthy special interests it was meant to contain.

Merely qualifying a measure for the ballot can cost as much as $700,000 and consume more time than most citizen groups can muster. Taking their place is a whole new industry of consultants, professional petition circulators, pollsters and media gurus who have been lured away from traditional campaigns by special interests willing to spend whatever it takes to promote or fend off these measures. [FN211]

Not all initiative observers believe that the initiative process has been totally captured by the economic special interests that it was originally created to ***262** control. [FN212] Regardless, the sponsoring of initiative petitions by economic interests, and the use of their financial resources to obtain the signatures necessary to qualify a question for ballot inclusion, undoubtedly have eroded confidence in the process.

While the evidence is unclear whether the practices are isolated or representative, "horror stories" concerning the involvement of special economic interests in state initiatives commonly are reported. The National Rifle Association allegedly invested $6,000,000 in a Maryland gun control referendum, and the tobacco industry has also been reported to have invested $21,000,000 in a losing campaign opposing an increase in California's tobacco tax. [FN213] The same source estimated that, in 1992, over $17,000,000 was spent on initiative

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measures in twenty-one states. [FN214] In the 1996 general election in Florida, an initiative proposal to impose a tax on sugar to fund the environmental cleanup of the Everglades attracted $35,000,000 in campaign spending by both sides. [FN215]

However, concerns over the impact of special interests and their financial resources no more call for the abolition of the initiative than evidence of legislative corruption calls for abolition of the legislature. While concerns over special interest groups and their resources erode confidence in the initiative, these same forces also erode confidence in the integrity of our legislators.

Private wealth and special interests dominate the financing of candidate elections as well as initiative petition drives and ballot proposition campaigns. Inequalities of wealth and organization influence both the outcome of elections and the post-election behavior of legislators. Indeed, heavy affirmative spending seems to be even more effective in candidate elections than in initiative balloting. More significantly, campaign contributions influence the conduct of government. A legislator comes to represent a financial constituency in addition to his geographic constituency, so that campaign contributions provide access to the legislative agenda. Although voter turnout may be slightly lower in initiative contests than in candidate elections, the number of Americans who influence the political arena through financial contributions is much more limited. That group-like the initiative electorate-is composed disproportionately of persons of above-average income and education. . . . The problems of wealth and organizational limits on access are common to both direct and representative government; Magleby certainly makes no showing that the legislative process is less skewed by campaign finance and special interest lobbying than is direct democracy. [FN216]

What, then, is the solution to the negative impact of special economic interests and their financial resources on legislatures and the initiative process? In regard to the initiative process, a number of interesting proposals have been suggested. [FN217] This Article will discuss a few that attempt to counter the impact of special interest money.

The first recommendation is simply disclosure. The problem confronted is dual. On the one hand, there is concern over special economic interests funding or sponsoring, directly or indirectly, citizen initiative petitions. The states can constitutionally require such information to be reported to a state agency without interfering with the First Amendment rights of such entities. The sponsorship and funding of citizen initiative petitions can then be exposed to public inspection through its release to the media. The publicizing of such information, particularly the extent of financial support, will then regularly become part of the political discourse accompanying the initiative campaign. Thus, the voters can intelligently factor this information into their decisionmaking process.

The second part of this problem involves the payment of signature gatherers, and the compensation paid to businesses in the "initiative industry" for coordinating and conducting the signature-gathering process. In the wake of Meyers, it is constitutionally questionable whether a state can criminalize the payment of compensation for gathering signatures. [FN218] However, nothing in that decision would appear to preclude paid signature gatherers from being required to disclose that fact and the amount of such compensation to a regulatory state agency, or to those from whom they solicit signatures. Until fairly recently, I have always assumed that signature gatherers for citizen petitions were gathering signatures solely out of their ***264** personal commitment to their cause. Presumably, many undecided voters, who might be unfamiliar with the specifics of a particular petition, might be favorably inclined to let the matter be placed on a statewide ballot, as a result of the apparent political commitment of the signature-gatherers. The same voters might feel differently if they realized the signature-gatherers were driven by a desire for compensation. [FN219] Nonetheless, such requirements might aid in reforming the process without intruding unnecessarily into its operation.

Another proposal involves a somewhat complicated "two-tier signature" requirement. [FN220] Under this proposal, signatures obtained by politically motivated volunteers and compensated professional petition circulators would both be considered, but volunteer gathered signatures would ultimately count more towards the final number of required signatures than signatures gathered by paid circulators. [FN221] If this proposal

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were adopted, a petition drive relying exclusively on volunteers would require fewer overall signatures to be placed on the ballot than one relying on paid signature gathers. [FN222] Although such an approach would clearly complicate the governmental responsibilities of verifying petitions, the additional burden on government might be justified by a necessary reform of the system.

2. Ambiguities, errors, and omissions in drafting citizen initiative petitions and ballot clutter.

Another common criticism that has been directed at citizen initiative petitions is that there are too many of them and that they are too technical, too lengthy, too misleading, too confusing, contradictory, inflexible, and poorly drafted. [FN223] Sometimes these latter criticisms are directed exclusively at the ballot title and summary; sometimes the same criticisms have been made of the substantive provisions of the initiative petitions themselves. Frequently, the absence of legislative-type committee hearings, public testimony, debates, and deliberations in the preparation of the provision is blamed for this alleged shortcoming. [FN224]

This has proven a difficult problem to remedy. Although the problem has been frequently identified and many solutions proposed, [FN225] few concrete proposals have been adopted in the various states with initiative provisions. Part of the explanation for the lack of any reforms has probably been concern over anticipated electoral hostility, should the legislature begin to tinker with a power historically reserved to the people.

One proposal to deal with voter confusion attributable to the presence of multiple initiative petitions at a particular election is almost startling in its simplicity. [FN226] Although the original proposal being referenced was directed at amendments proposed by a legislature, the same concept might be adopted and workable in an ***265** initiative setting. Basically, this proposal would limit the number of initiative petitions that can be presented to the electorate in any given general election to an arbitrary number, such as three. [FN227] Illinois has essentially adopted this approach by imposing a quota of three initiatives per election, on a first come, first served basis. [FN228] Petitions qualified but unable to be placed on the ballot because of the numerical limitation would be placed on the ballot of the next general election based on their date of qualification. [FN229]

A numerical limit would create a barrier and otherwise interfere to a limited extent with the electorate's right of initiative. The extent of this interference would be determined primarily by the current level of frustration the voters felt toward their state government. Conceivably, the number of allowable petitions in a general election ought to be more or less than three. Although any impairment of the people's right to use of the initiative is unsettling, a numerical restriction of allowable questions might be a worthwhile reform to consider. Although it may interfere slightly with the use of the initiative, it can be justified as an attempt to maximize the quality of the political discourse during a particular election by limiting the number of issues presented to the voters to a manageable number that can be studied and debated. It would also give citizens an additional reason not to sign petitions.

In the voting booth, the voter is confronted with the title and ballot summary of a particular proposal. In many instances, the voter may not have read the substantive provisions included in the petition itself. Thus, the quality and clarity of the ballot title and summary can play an important role in the election. In some states, the proponents of the petition prepare the proposed ballot title and summary. [FN230] Even assuming a title drafted in this fashion survives pre-election judicial review, the lack of uniformity in drafting styles from question to question may tend to confuse ***266** voters. Some states have attempted to address this concern by involving various state officials in drafting the ballot title and summary.

California, for example, imposes an obligation on its Attorney General to prepare the ballot summary presented to the electorate describing initiative petitions. [FN231] By focusing the responsibility for this function in one state office, the concern for uniform drafting of ballot summaries would appear to be solved. The cost of solving this problem is to deprive the sponsors of participation in the drafting process. While the objectivity of an independent state drafter might overcome this concern, it does create other problems.

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Oklahoma, for example, relocated the ballot summary drafting responsibility from its Attorney General's office to the Secretary of State as assisted by the Superintendent of Public Instruction. [FN232] Although the Oklahoma legislature has been the target of many jokes concerning its solution, which requires all ballot summaries to be prepared at an eighth grade reading level, [FN233] the legislature was presumably motivated by a desire to improve the quality of the communication of the content of initiative petitions. [FN234]

Arkansas has opted for a compromise approach on the drafting of ballot titles. Under the Arkansas version, the sponsors of a proposal must submit a draft of the petition to the State Attorney General, along with a proposed title and popular name. [FN235] The Attorney General either approves the proposal or prepares a more ***267** suitable one if he finds the proposed rule defective. [FN236] This procedure allows the sponsors the first option to draft the title, while insuring some independent mechanism to timely identify potential defects.

Without identifying any particular preference, the involvement of an unbiased state agency in either reviewing or collaborating in the preparation of ballot titles or summaries would improve the quality of communication with the electorate without sacrificing the people's rights to participate in the process. Perhaps the creation of an independent state commission, with responsibility for drafting ballot summaries and titles, might also be considered.

Related problems generally arising after the approval of a citizen initiative petition are drafting problems in the substantive provisions of the petition itself. Substantive problems are thornier than the ballot summary and title issue.

Some states have attempted to adopt the legislative committee hearing system to aid in drafting initiative petitions. California, which has long experience with initiative petitions, requires that copies of the summary of an initiative, [FN237] and upon certification, copies of the initiative measure the petition [FN238] be transmitted to both houses of the California legislature. In both instances, the respective chambers of the legislature are empowered to hold public hearings on the measure, but the legislature may not alter the proposal or prevent it from appearing on the ballot. [FN239] California also has adopted a process by which, at state expense, arguments pro and con on a proposal are printed and distributed to the voters in advance of an election. [FN240]

While these aids may assist in the public's understanding of a particular initiative petition, none address the more basic problem of poor draftsmanship in the petition itself. One state that has attempted to confront this more basic underlying problem is Colorado.

Colorado law requires the original drafts of all initiative proposals to the state constitution to be submitted to the directors of the Legislative Council and the ***268** Office of Legislative Legal Services for review and comment. [FN241] All executive agencies are authorized to assist in reviewing and preparing comments on a proposed petition. [FN242] After a hearing between the proponents of the petition and the involved state officials, the proponents are afforded an opportunity to amend the petition in response to the comments and observation of the state officials. [FN243] This procedure would appear to retain sponsor autonomy in the actual drafting of the petition, while assuring the sponsors sufficient technical legal and drafting advice to insure that the petition reflects their actual intent.

CONCLUSIONS

Citizen initiative petitions are not perfect. Like any political process, they must be examined from time to time to determine whether any reforms are needed. The increased use and scrutiny placed on citizen initiatives in the past few years indicates rather strongly that the electorate views them as a necessary complement to the legislative system. Initiatives serve as a necessary outlet for voter frustration, and permit a level of involvement in politics that the legislature cannot provide. Citizen initiatives are an important component of

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the landscape of America's democratic system. They are one of the very few participatory democratic devices available in our system, and one of the few devices the electorate can use to control an unresponsive legislature.

Recent experience indicates increasing problems in the perception and administration of citizen initiatives. These problems are attributable in part to the large-scale interjection of special interest economic resources into the initiative process. Before deciding to place unnecessary restrictions on the use of citizen initiatives, states should attempt to control the effects of special interest financial resources on initiative elections by imposing financial reporting and disclosure requirements on all participants in the initiative process, and by then enforcing them vigorously.

Similarly, concerns over unnecessary complexities, ballot clutter, and drafting ambiguities in initiative petitions also need to be confronted. While not recommending any particularly novel or radical solutions, this Article has attempted to identify some approaches that might provide necessary reform without unduly interfering with the electorate's use of the initiative.

It is possible to improve the drafting of initiatives, limit the numbers of initiatives confronting the electorate at a particular election, and regulate the for-profit industry that collects qualifying signatures for an initiative. These reforms can be accomplished while still permitting the electorate to benefit from the process William Jennings Bryan identified as "the most effective means yet proposed for giving the people absolute control over their government." [FN244]

As a final note, I would merely observe that the Federal Constitution was originally ratified by the non-popularly elected legislatures of only thirteen states, ***269** but not the electorate themselves. State constitutions are the exclusive property of the state's electorate; statewide electorates adopted them and only statewide electorates can change them. The people own their state constitution. While the evolution of state constitution requires judges, lawyers and legal scholars to envision ways of improving state constitutions, the ultimate decision as to what should be contained in a state constitution and how a state constitution should be amended rests not on what those lawyers, judges and academics think are best for the state, but what the electorate of the state feels is best for them.

[FNa1]. John F. Cooper is a Professor of Law at Stetson University College of Law. I would like to thank my friend, colleague, and frequent collaborator Professor Thomas C. Marks, Jr., of Stetson University College of Law for his assistance during the preparation of this article. Tom disagrees with most of the arguments presented but always was willing to listen and discuss the merits of the article.

[FN1]. See Arne R. Leonard, In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change, 69 Temp. L. Rev. 1203, 1205-10 (1996) (providing an historical summary of the development of the ways by which state constitutions can be amended).

[FN2]. These states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Missouri, Mississippi, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. The constitutional provisions in these states recognizing the availability of constitutional initiatives are: Ariz. Const. art. XXI, § 1; Ark. Const. amend. 7; Cal. Const. art. XVIII, § 3; Colo. Const. art. V, § 1; Fla. Const. art. XI, § 3; Ill. Const. art. XIV, § 3; Mass. Const. art. XLVIII; Mich. Const. art. XII, § 2; Miss. Const. art. XV, § 273; Mo. Const. art. III, § 50; Mont. Const. art. XIV, § 9; Neb. Const. art. III, § 2; Nev. Const. art. 19, § 2; N.D. Const. art. III, § 1; Ohio Const. art. II, § 1a; Okla. Const. art. V, § 2; Or. Const. art. XVII, § 1; S.D. Const. art. XXIII, § 1.

[FN3]. Many states also contain statutory initiative petitions provisions. Although many of the issues are interrelated and overlap, this paper is concerned only with the process whereby a state constitution may be

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amended.

[FN4]. See Leonard, supra note 1, at 1207-10 (chronicling the growth of the constitutional initiative process in the states). In his article Leonard writes:

Prior to 1898, a proposition submitted by the legislature was the only kind of statewide initiative or referendum used in the United States. In that year, South Dakota became the first state to include a provision in its constitution allowing direct, statewide initiatives at both the statutory and constitutional level. Oregon was the first state to make law using the initiative process, enacting two statutes by initiative in 1904, followed by four constitutional amendments in 1906. The initiative's success in Oregon fueled an explosive growth of initiative and referendum provisions in the constitutions and statutes of western states during the first part of the twentieth century. In 1907, Oklahoma became the first state to provide for initiative and referendum provisions in its original state constitution, and Arizona followed in 1912. Between 1898 and 1918, nineteen states adopted the initiative in some form, and fourteen of these states allowed the proposal of constitutional amendments by initiative.

See id. at 1207 (footnotes omitted).

[FN5]. See Mass. Const. art. XLVIII.

[FN6]. See Okla. Const. art. V, § 2.

[FN7]. See, e.g., David S. Broder, Californocracy in Action, Wash. Post, Aug. 13, 1997, at A21. The flavor of such attacks can be gleaned from a recent column:

California, which fancies itself the pacesetter for all things American, has invented a truly amazing form of government. It bears no resemblance to the traditional notions of a republic that filled the heads of the Founders in Philadelphia. But what the heck! No one wears powdered wigs to the beach either. In California, the voters do their thing by passing initiatives that determine taxes, set budget priorities and chart social policy-all the big questions. Then the courts step in and do their thing, often declaring the initiatives partly or wholly unconstitutional. On the sidelines in this whole process are the elected representatives of the people-the very folks we thought of, in our naive days as a nation, as the proper repository of governmental power. It is really weird to watch Californocracy in action, as I have been doing for the last couple of weeks.

Id.

[FN8]. See Elizabeth R. Leong, Ballot Initiatives and Identifiable Minorities: A Textual Call to Congress, 28 Rutgers L.J. 677 (1997); Hans A. Linde, When Initiative Law Making Is Not "Republican Government": The Campaign Against Homosexuality, 72 Or. L. Rev. 19 (1993).

[FN9]. See, e.g., Richard Fitch, Initiative Mania, San Diego Union-Trib., Sep. 16, 1990, at C2.

[FN10]. See, e.g., Sneed v. Greensboro City Bd. of Educ., 264 S.E.2d 106, 122 (N.C. 1980).

[FN11]. James v. Valtierra, 402 U.S. 137, 141 (1971).

[FN12]. See City of Eastlake v. Forest City Enters., 426 U.S. 668, 672- 73 (1976).

[FN13]. Id. at 673.

[FN14]. 369 U.S. 186, 251 (1962) (Clark, J., concurring).

[FN15].

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and

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referendum.
Id. at 258- 59.

[FN16]. See, e.g., Leonard, supra note 1, at 1211-19.

[FN17]. See S.D. Const. art. XXIII, § 1.

[FN18]. See David B. Magleby, Direct Legislature: Voting On Ballot Propositions in the United States, 38-39 (1984).

[FN19]. See Leonard, supra note 1, at 1207, and sources cited therein.

[FN20]. See Dorothy I. Cline, New Mexico's 1910 Constitution: A 19th Century Product, 49-45 (1985); Edward D. Tittmann, New Mexico Constitutional Convention: Recollections, 27 N.M. Hist. Rev. 177 (1952).

[FN21]. See Thomas E. Cronin, Direct Democracy-The Politics of Initiative, Referendum, and Recall, 43-50 (1989); see also P.K. Jameson & Marsha Hosack, Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues and Alternatives, 23 Fla. St. U. L. Rev. 417, 421- 22 (1995). See generally John D. Hicks, The Populist Revolt, 404-07 (1961).

[FN22]. See Hicks, supra note 21, at 406-07.

[FN23]. See George McKenna, American Populism, xi-xii (1974).

[FN24]. See id. at xii.

[FN25]. See id.

True, historic Populism lasted no more than a decade, but the soil that nourished it was rich enough to support other strains of populism, and these have cropped up with seasonal regularity down to our present time. Populism, then, is not a sometime thing which puts in an occasional appearance in America. It is the perennial American "ism," with its roots extended at least as far back as the American Revolution and a development which, while directed toward different objects at different times, has never obliterated the essential qualities which stamp it as a uniquely American movement. . . . . Like socialism and communism, populism raises the question of income distribution and protests against economic privilege . . . But, unlike socialism or communism, populism proceeds not on the basis of class analysis but on the division of the nation into an overwhelming majority of "plain people," on the one hand, and a relative handful of very un-plain, very sophisticated, very scheming conspirators, on the other. . . . . But beyond this reason was a deeper one, connected with a central assumption of the populist credo. The populist believes that the "plain people" of America, which for him includes almost everyone, are in basic agreement with one another about what is right and wrong, fair and foul, legitimate and crooked. Fancy dialectics are unnecessary to discover these kinds of truths: we need only search our hearts. And our hearts are basically the same. The populist cannot bring himself to believe that the social environments of different Americans can set them thinking differently about fundamentals. Economic determinism is anathema to him. So is anything, e.g., black power, which might divide his countrymen by ethnic or racial lines.
Id. at xii-xiv.

[FN26]. Letter from Thomas Jefferson to William Jarvis (Sept. 28, 1820), reprinted in McKenna, supra note 23, at 22.

[FN27]. See Leonard, supra note 1, at 1207 & n.23.

[FN28]. See Transcript of Proceedings of Oklahoma Constitutional Convention 89 (1906 - 1907)(on file with the author and available upon request) (hereinafter Oklahoma Convention Transcript).

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More than a hundred years of experience in popular government in the United States has demonstrated that the great problem confronting the American people in constitution making is not so much to control or limit the executive as to control and properly limit the legislative department. By this latter department have people been despoiled. And while the Constitutions of the different states contain the germ and principles of good government, and while it is true of law as it is of farming that out of the old fields cometh the new corn, nevertheless these principles have been stated in such general terms and with so little provisions for their application to the affairs of the people that little assistance can be derived from them in the way of administrative government.
Id.

[FN29]. Nor was this general distrust of government limited to the legislative branch. During the decades immediately preceding the Oklahoma Constitutional Convention, courts in other states had evidenced in their decisions an unbridled hostility to social legislation. Frequently, state courts invalidated such legislation through resort to expansive and innovative interpretation of state and federal constitutional law. Increasingly, state courts attempted to restrain such legislative action though resort to "uncertain, ill-defined concepts of natural law." The availability of the citizen initiative engrafted into the state constitution a means by which the people could amend this basic governing document, and in so doing overturn the actions of corrupt or and activist judges pursuing their personal political agendas through their rulings. See discussion at Thornton, Oklahoma Constitutional Studies of the Oklahoma Constitutional Survey and Citizen Advisory Committee (1950).

[FN30]. Oklahoma Convention Transcript, supra note 28, at 22-23 (emphasis added).

[FN31]. Id. at 23.

[FN32]. See id.

[FN33]. See David D. Schmidt, Citizen Law Makers-The Ballot Initiative Revolution, 9 (1989).

[FN34]. Id.

[FN35]. Id. at 10. Wilson subsequently reiterated his conversion in 1911.
For twenty years I preached to the students of Princeton that the Referendum and the Recall was bosh. I have since investigated and I want to apologize to those students. It is the safeguard of politics. It takes power from the boss and places it in the hands of the people.
Cronin, supra note 21, at 38.

[FN36]. See Thomas C. Marks, Constitutional Change Initiated by the People: One State's Unhappy Experience, 68 Temp. L. Rev. 1241 (1995).

[FN37]. Florida Constitution article II, section 8 provides:
SECTION 8. Ethics in government-A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right: (a) All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests. (b) All elected public officers and candidates for such offices shall file full and public disclosure of their campaign finances. (c) Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by such actions. The manner of recovery and additional damages may be provided by law. (d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law. (e) No member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office. No

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member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals. Similar restrictions on other public officers and employees may be established by law. (f) There shall be an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission. (g) This section shall not be construed to limit disclosures and prohibitions which may be established by law to preserve the public (h)Schedule-On the effective date of this amendment and until changed by law: (1) Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following: a. A copy of the person's most recent federal income tax return; or b. A sworn statement which identifies each separate source and amount of income which exceeds $1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in subsection (f), and such rules shall include disclosure of secondary sources of income. (2) Persons holding statewide elective offices shall also file disclosure of their financial interests pursuant to subsection (h)(1). (3) The independent commission provided for in subsection (f) shall mean the Florida Commission on Ethics.
Fla. Const. art. II, § 8.

[FN38]. An op-ed article in the Washington Post in 1979 by David Cohen, then president of Common Cause, described the Florida experience:

The Florida disclosure provision was a result of a series of political scandals that rocked the state in the early 1970s. Florida's comptroller, treasurer, superintendent of education and three judges were involved in scandals. The state legislature repeatedly refused to take effective steps to correct the conflict-of-interest abuses. In response to this record of official misconduct, Florida voters in the 1976 election overwhelmingly supported an initiative known as the Sunshine Amendment. Approved by 79 percent of the voters, the amendment mandates disclosure of campaign finances, sets standards for official conduct and requires public officials to file financial-disclosure statements.

David Cohen, Sunshine is Good For You, Wash. Post, Feb. 28, 1979, at A23.

[FN39]. See, e.g., Petition Bill is Unconstitutional, St. Petersburg Times, Apr. 27, 1991, at 26A, describing the citizens petition to add the ethics provision to the Florida Constitution:

It's hard to get enough signatures (currently required: 363,886) to put a proposed constitutional amendment on a Florida ballot so hard, in fact, that former Gov. Reubin Askew is the only sponsor who ever succeeded in doing it without paying people to circulate the petitions. His "Sunshine Amendment," requiring public officials to disclose their finances, was the result.

Id.

[FN40]. See Cohen, supra note 38, at A23.

[FN41]. See Plante v. Gonzalez, 437 F. Supp. 536 (N.D. Fla. 1977); Plante v. Smathers, 372 So. 2d 933 (Fla. 1979).

[FN42]. Some observers question the appropriateness of including provisions regulating gill nets in a state constitution. This issue is addressed infra at Section II B(i).

[FN43]. Florida Constitution article 10, section 16 provides:

Section 16. Limiting Marine Net Fishing.-(a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing and waste. (b) For the purpose of catching or taking any saltwater finfish, shellfish or other marine animals in Florida waters: (1) No gill nets or other entangling nets shall be used in any Florida waters; and (2) In addition to the prohibition set forth in (1), no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters. Additionally, no more than two such nets, which shall not be connected,

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shall be used from any vessel, and no person not on a vessel shall use more than one such net in nearshore and inshore Florida waters. (c) For purposes of this section: (1) "gill net" means one or more walls of netting which captures saltwater finfish by ensnaring or entangling them in the meshes of the net by the gills, and "entangling net" means a drift net, trammel net, stab net, or any other net which captures saltwater finfish, shellfish, or other marine animals by causing all or part of heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net, but a hand thrown cast net is not a gill net or an entangling net (2) "mesh area" of a net means the total area of netting with the meshes open to comprise the maximum square footage. The square footage shall be calculated using standard mathematical formulas for geometric shapes. Seines and other rectangular nets shall be calculated using the maximum length and maximum width of the netting. Trawls and other bag type nets shall be calculated as a cone using the net mouth to the tail end of the net to derive the slant height. Calculations for any other nets or combination type nets shall be based on the shapes of the individual components (3) "coastline" means the territorial sea base line for the State of Florida established pursuant to the laws of the United States of America (4) "Florida waters" means the waters of the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida, and any other bodies of water under the jurisdiction of the State of Florida, whether coastal, intracoastal, or inland, and any port thereof; and (5) "nearshore and inshore Florida waters" means all Florida waters inside a line three miles seaward of the coastline along the Gulf of Mexico and inside a line one mile seaward of the coastline along the Atlantic Ocean. (d) This section shall not apply to the use of nets for scientific research or governmental purposes. (e) Persons violating this section shall be prosecuted and punished pursuant to the penalties provided in section 370.021(2)(a),(b),(c)6, and 7, and (e), Florida Statutes (1991), unless and until the legislature enacts more stringent penalties for violations thereof. On and after the effective date of this section, law enforcement officers in the state are authorized to enforce the provisions of this section in the same manner and authority as if a violation of this section constituted a violation of Chapter 370, Florida Statutes (1991). (f) It is the intent of this section that implementing legislation is not required for enforcing any violations hereof, but nothing in this section prohibits the establishment by law or pursuant to law of more restrictions on the use of nets for the purpose of catching or taking any saltwater finfish, shellfish, or other marine animals. (g) If any portion of this section is held invalid for any reason, the remaining portion of this section, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application. (h)This section shall take effect on the July 1 next occurring after approval hereof by vote of the electors.
Fla. Const. art. X, § 8.

[FN44]. Lawmakers Launch Coastal Attack, Tampa Trib., Mar. 23, 1995, at 14.

[FN45]. The Orlando Sentinel reported:

Even some who wanted to avoid the constitutional amendment approach can see no other way. One of those is Tom Fraser, a highly regarded fisheries biologist who is the immediate past chairman of the Florida Marine Fisheries Commission, the body that is supposed to regulate netting. Fraser had hoped to lead the Marine Fisheries Commission to adopt adequate measures. But every attempt was stymied, and it became clear that certain old-guard powers in the Legislature with cozy ties to netting would see that nothing substantial was ever accomplished. Finally, Fraser and the immediate past vice chairman, Ebbie LeMaster, concluded that only a constitutional amendment would stop the overkills.

Jerry Sansom, The Big Net Debate: Is Ban the Way to Save Sealife? Yes: Runaway Netting Causing Fishing Crisis, Orlando Sentinel, Oct. 30, 1994, at G4.

[FN46]. See Martin Dyckman, Constitution Tampering, St. Petersburg Times, Aug. 8, 1993, at 3D. Although Dyckman is generally contemptuous of both the Florida Legislature and the initiative process, he identified the concern:

Secretary of State Jim Smith may be wrong about the need for a Florida tax cap, but he is dead right in saying that the Legislature had better propose one before the voters take to the streets again. There is probably no dumb thing Florida voters won't do if they think it will cut their taxes. Whatever gets to the ballot first-whether by public petition or by act of the Legislature-is guaranteed to pass. Who will write the better version: the Republican Party, which is planning its own initiative petition, or the Legislature that has to pay Florida's bills?

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Id.

[FN47]. The following letter supporting the amendment captures some of the flavor of the electorate's feelings:
True Grass-roots Movement Spawned Net-Ban Petition Your June 28 editorial "State net-ban petition exemplifies wrong use of amendment process" is your second on this subject, and you are grossly misinformed. I have some unpleasant news for you. Salt-water fishing in Florida stinks. Whether you fish from a bridge, a boat or a sea wall, your odds of landing something worth keeping have plummeted from just a few years ago. Anglers have long appealed to state legislators and the Florida Marine Fisheries Commission to curtail the destruction caused by in-shore commercial netters, to no avail. Gill nets are not discriminatory. They kill everything hapless enough to swim into them, including dolphins and endangered turtles. Shrimp nets scrape the bottom of inshore estuaries, killing grass and destroying the habitat of young fish. In short, netters have destroyed what was once regarded as America's fishing paradises. You state "the initiative process was supposed to be a way for the little guy to make his voice heard." That's exactly what the net-ban amendment is, a true grass-roots movement of Florida citizens who are fed up with the unresponsive politicians. It's a shame this was necessary, but once it passes all Floridians will benefit.
Craig Wallace, Letter to the Editor, Fort Lauderdale Sun-Sentinel, June 30, 1993, at 1A.

[FN48]. Fla. Const. art. VII, § 1(e).

[FN49]. Schmidt, supra note 33, at 34.

[FN50]. Id.

[FN51]. See id.

[FN52]. See, e.g., Romer v. Evans, 517 U.S. 620 (1996); Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

[FN53]. Schmidt, supra note 33, at 34.

[FN54]. 323 U.S. 214 (1945).

[FN55]. See id. at 216.

[FN56]. 198 U.S. 45 (1905).

[FN57]. See id.

[FN58]. 60 U.S. (19 How.) 393 (1856).

[FN59]. 163 U.S. 537 (1896).

[FN60]. A detailed but ultimately incomplete list of state legislatures' interference with minority rights was prepared by Henry Steele Commager. (Quoted in Cronin, supra note 21, at 91-92.)
A cumulative list of these might well dishearten even the most optimistic Jeffersonian. Censorship laws, anti-evolution laws, flag-salute laws, red- flag laws, anti-syndicalists, anti-socialist, anti-communist laws, sedition and criminal-anarchy laws, anti-contraceptive information laws-these and others come all too readily to mind. The New York legislature purged itself of socialists; the Massachusetts legislature imposed loyalty oaths on teachers; the Oregon legislature outlawed private schools and the Nebraska legislature forbade the teaching of German in public schools; the Tennessee legislature prohibited the teaching of evolution; the Pennsylvania legislature authorized the requirement of a flag-salute from school children; the Louisiana legislature imposed a discriminatory tax upon newspapers. . . . The list could be extended indefinitely.
Cronin, supra note 21, at 91-92.

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[FN61]. In Thomas Jefferson's view, leaving the protection of individuals rights to judges employed for life was a serious error:

You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions, a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps. Their maxim in boni judicis est ampliare jurisdictionem, and their power the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control. The constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party its members would become despots.

Letter from Thomas Jefferson to William Jarvis (Sept. 28, 1820), reprinted in McKenna, supra note 23, at 22.

[FN62]. Initiative elections are frequently viewed, at least by academics, as more likely to produce provisions that disadvantage racial minorities, when contrasted with legislature. See, e.g., Derrick A. Bell, Jr., The Referendum: Democracy's Barrier to Racial Equality, 54 Wash. L. Rev. 1 (1978). Like many assumptions in this area, there is little empirical support for this conclusion. Some studies question the validity of this common academic assumption. See Lynn A. Baker, Direct Democracy and Discrimination: A Public Choice Perspective, 67 Chi.-Kent L. Rev. 707 (1991). A succinct response to the general assumption concerning direct democracy and minority rights appears in a book review:

Magleby's third point, that legislatures are more sensitive to the interests of minority groups than the initiative electorate, also has a logical appeal. Other critics of direct democracy have made the same point. Pluralist theorists argue that because legislatures represent so many different interests, building a legislative majority requires the formation of coalitions among various minorities. Legislators deal with the broad range of issues that come before government, so that minority groups with differing intensities of preference on different issues may bargain with other groups for their votes. This legislative log-rolling over a broad agenda brings minorities into the process and ensures that the resulting compromises will accommodate their interests. In contrast, the initiative agenda is thin, presenting only a few isolated questions to the electorate seriatim. Various groups in a statewide electorate cannot sit down and bargain with each other, with one group pledging support on one initiative in one year in exchange for support from another group on another ballot proposition in the next year. In theory, then, it is reasonable to believe that legislatures are more responsive to minority groups than is the electorate as a whole. Yet, as with Magleby's praise of legislative rationality, the greater potential for attentiveness to minority groups has not always been matched in practice. Indeed, it is difficult to argue that historically minorities-in particular, blacks and other racial minorities- did all that well in state legislatures. Racial discrimination was largely a product of state legislative action, not initiative votes. Nor are the great advances of minorities in recent decades attributable to state legislative action. The initial successes of the civil rights movement were won in the courts or on the streets. The legislatures resisted and delayed and became more responsive only under extraordinary political and legal pressures. Even today, in times of fiscal stringency, states may be more prone to cut programs that help minorities and the poor than those that serve more politically powerful groups. At another level, the challenge to the initiative for lack of sensitivity to minority interests is misguided; the initiative, like other devices of direct democracy, was designed as a majoritarian tool, to be used when the legislature failed to act on a program the majority desires. The appropriate question here is whether the initiative is more likely than the legislature to be a source of measures that discriminate against minorities or infringe upon the rights of the politianswer, I suggest that there are two institutions that tend to mitigate the anti-minority potential of direct legislation: the judiciary and the initiative process itself. The electorate-as-legislature can no more infringe upon constitutionally protected rights than can the representative legislature. Although the courts frequently bestow rhetorical plaudits on direct democracy, they have not hesitated to invalidate initiative measures as unconstitutional. Indeed, the recent enhanced use of direct legislation appears to have called forth a more aggressive judicial policing of the initiative process and a judicial scrutiny of initiative proposals for constitutional violations. In 1983, the California Supreme Court reversed its long standing rule of not engaging in pre-election review of initiative proposals and struck a proposition from the ballot on constitutional grounds. In 1984, the same court invalidated a second measure before it could be submitted to the voters and the Florida Supreme Court twice removed measures from the ballot on constitutional grounds. This judicial enforcement of the federal and state constitutions goes far to

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constrain whatever threat direct legislation may pose to "majority tyranny" than the legislature itself. See Richard Briffault, Distrust of Democracy, 63 Tex. L. Rev. 1347, 1363-65 (1985) (reviewing Magleby, supra note 18)(emphasis added) (footnotes omitted).

[FN63]. See, e.g., Hopwood v. Texas, 84 F.3d 720 (5th Cir. 1996); Taxman v. Board of Educ. of Piscataway, 91 F.3d 1547 (3d Cir. 1996). See generally Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1 (1997).

[FN64]. See Carl Rowan, Houston Voters Embrace Racial Sanity, Denver Post, Nov. 10, 1997 at B-09.

[FN65]. Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295 (1981).

[FN66]. See Julian Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503, 1505 (1990).

[FN67]. See Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 79 (1980).

[FN68]. Lawrence Tribe, American Constitutional Law 647 n.27 (2d ed. 1988).

[FN69]. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

[FN70]. See id.

[FN71]. See id.

[FN72]. See id.

[FN73]. See id. (There is an error in the court opinion indicating that the preliminary injunction was granted in 1995; it was actually granted in 1994.)

[FN74]. See id.

[FN75]. See Derrick A. Bell, Jr., California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster, 30 Loy. L.A. L. Rev. 1447 (1997).

[FN76]. See Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996).

[FN77]. Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1448 (9th Cir. 1997).

[FN78]. Id.

[FN79]. See Douglas Michael, Judicial Review of Initiative Constitutional Amendments, 14 U.C. Davis L. Rev. 461 (1980) (discussing a decision of the range of pre-enactment judicial review of citizens petitions).

[FN80]. See, e.g., Hamilton v. Vaughan, 179 N.W. 553, 556 (1920), (Sharpe, J., concurring) (finding such judicial action to represent "an unwarranted assumption by the courts of the power reserved to the people in the Constitution").

[FN81]. See, e.g., Gray v. Winthrop, 156 So. 270 (Fla. 1934).

[FN82]. See In re Initiative Petition No. 349, State Question No. 642, 838 P.2d 1 (Okla. 1992).

[FN83]. Id. at 2.

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[FN84]. Id. at 8.

[FN85]. The author disagrees with the court's opinion in this case but concedes its existence and others like it. While the author concedes the unconstitutionality of the petition, the author believes it was inappropriate to have the provision stricken from the ballot. The author's opinion is perhaps best exemplified by the concurring/dissenting opinion authored by Justice Hodges in that case, which states:

The people have a constitutional right to vent their anger and frustration through the initiative process in an effort to effect change in their government. The proponents are correct that central core political issues such as abortion should be submitted to a vote of the people when presented by an initiative petition. It appears that all parties in this case want the initiative petition submitted to a vote of the people only to be thwarted by this Court's sua sponte injection of the constitutional issues. A healing between competing sides of the abortion question may never be reached but perhaps, if allowed, a vote of the people could be a beginning.

Id. at 14.

[FN86]. James J. Seeley, The Public Referendum and Minority Group Legislature: Postscript to Reitman v. Mullkey, 55 Cornell L. Rev. 881, 908 (1970).

[FN87]. See Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

[FN88]. See Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912). The Court held:

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within reach of judicial power, it follows that the case presented is not within our jurisdiction . . . .

Id.

[FN89]. 387 U.S. 369 (1967); see Seeley, supra note 86, at 881.

[FN90]. See Linde, supra note 8, at 19; see also, Romer v. Evans, 517 U.S. 620 1620 (1996) (invalidating a Colorado initiative provision affecting gays/lesbians).

[FN91]. See generally Linde, supra note 8 (attacking the statewide initiative process).

[FN92]. See, e.g., id. at 40.

[FN93]. The Pacific States case, 223 U.S. 118 (1912), has been reaffirmed frequently by the United States Supreme Court. See Harisiades v. Shaughnessy 342 U.S. 580, 589 (1952); Rescue Army v. Municipal Court, 331 U.S. 549, 570 (1947); New York v. United States, 326 U.S. 572, 582 (1946); Coleman v. Miller, 307 U.S. 433, 455 (1939); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937); Ohio ex rel. Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 80 (1930); Mountain Timber Co. v. Washington, 243 U.S. 219, 234-35 (1917); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569 (1916); O'Neill v. Leamer, 239 U.S. 244, 248 (1915); Denver v. New York Trust Co., 229 U.S. 123, 141 (1913); Marshall v. Dye, 231 U.S. 250, 256 (1913).

[FN94]. See Baker, 369 U.S. at 115 (citing Luther, 48 U.S. (7 How.) at 1), and at 123 (citing Pacific States, 223 U.S. at 118).

[FN95]. Id. at 223.

[FN96]. New York v. United States, 505 U.S. 144, 184 (1992).

[FN97]. Id.

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[FN98]. Id. at 185.

[FN99]. See In re Pfahler, 88 P. 270, 273 (Cal. 1906) (permitting citizens of a subdivision of a state to use initiatives as to strictly WOAL affairs); Hopkins v. Duluth, 83 N.W. 536, 539 (Minn. 1900) (holding local referendums do not violate the guarantee clause); Kiernan v. Portland, 111 P. 379, 381 (Or. 1910) (recognizing the validity of local initiatives directed at local affairs); Oregon v. Pacific States Tel. & Tel., 99 P. 427, 428 (Or. 1909) (state initiatives do not violate the guarantee clause); Kadderly v. Oregon, 74 P. 710, 719 (Or. 1903) (recognizing the validity of state initiatives); Bonner v. Belsterling, 138 S.W. 571 (Tex. 1911) (recognizing the validity, under the guarantee clause, of municipal initiatives).

[FN100]. 88 P. 270 (Cal. 1906).

[FN101]. See id. at 273. Some authority exists for the conclusion that municipal governments are not subject to the guarantee clause at all. See, e.g., 16A Am. Jur. 2d, Constitutional Law § 625 (1979). However, the United States Supreme Court has held that the exercise of a municipal initiative could not be reviewed as violating the guarantee clause, because it presented a nonjusticiable question. See Kiernan v. Portland, 223 U.S. 151, 163-64 (1912). The question of whether a municipal initiative is simply not subject to guarantee clause, or whether judicial review of the applicability of the guarantee clause is nonjusticiable, is a modern version of the chicken and egg story.

[FN102]. Act of June 16, 1906, ch. 3335, (34 Stat. 267, Part I, page 2).

[FN103]. See id.

[FN104]. Id. § 3, at 269.

[FN105]. Id. § 4, at 271.

[FN106]. See Oklahoma Convention Transcript, supra note 28, at 462 (1907). President Theodore Roosevelt's Statehood Proclamation expressly found: "Whereas, it appears that the said constitution and government of the Proposed State of Oklahoma are republican in form . . . ." Id. at 462.

[FN107]. See Okla. Const., art. V, § 1 (1907).

[FN108]. See id. § 512.

[FN109]. See, e.g., Eule, supra note 66, at 1539 (citing The Federalist No. 10 (James Madison)); see also Linde, supra note 8, at 23-24 (citing The Federalist Nos. 10, 14, 39 (James Madison)); Seeley, supra note 86, at 905 n. 96 (citing The Federalist No. 10 (James Madison)); Cynthia Fountaine, Note, Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative, 61 S. Cal. L. Rev. 733, 738-39 (1988) (citing The Federalist No. 10 (James Madison)). But see Oklahoma Convention Transcript, supra note 28, at 462 (establishing Oklahoma's constitution as republican in form, in spite of initiative provisions).

[FN110]. Letter from John Adams to Mercy Warren (July 20, 1807), in "Correspondence between John Adams and Mercy Warren relating to her 'History of the American Revolution,'" Mass. Hist. Soc., 5th Ser., 4 Collections 352, quoted in William M. Wiecek, The Guarantee Clause of the U.S. Constitution 72 (1972).

[FN111]. Letter from Thomas Jefferson to John Taylor (May 28, 1816), in 15 The Writings of Thomas Jefferson 17, 23 (Andrew A. Lipscomb & Albert E. Bergh, eds., Thomas Jefferson Mem'l Ass'n 1903).

[FN112]. Eule, supra, note 66, at 1541.

[FN113]. See id.

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[FN114]. Bonner v. Belsterig, 138 S.W. 571, 574 (Tex. 1911) cited Jefferson:

As to the meaning of the phrase, "Republican form of government," there is no better authority than Mr. Jefferson, who, in discussing the matter, said: "Indeed, it must be acknowledged that the term 'republic' is of very vague application in every language. Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority; and that every other government is more or less republican in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens.* * * On this view of the import of the term republic, instead of saying, as has been said, that it may mean anything or nothing, we may say with truth and meaning that governments are more or less republican as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of the citizens is the safest depository of their own rights, and especially that the evil flowing from the duperies of the people are less injurious than those from the egotism of their agents, I am a friend to that composition of government which has in it the most of this ingredient."

[FN115]. See Eule, supra note 66, at 1541.

[FN116]. See Deborah Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1 (1988).

[FN117]. See id. at 30-31.

[FN118].

The guarantee providing for a republican form of government came about because of the insistence of men such as Madison and Jefferson who saw in monarchy the greatest threat to the life of the republic. "It would be strange indeed," writes one analyst, that a "guaranty made at the insistence of the party whose leaders are still recognized as the most pronounced advocates of democratic principles should be construed to forbid rather than to support a reform whereby the will of the people may be made more effectual in government."
Cronin, supra note 21, at 35.

[FN119]. Merritt, supra note 116, at 25 (emphasis added).

[FN120]. Professor Merritt's analysis does not directly discuss initiatives, but this conclusion is arguable using her analysis.

[FN121]. Merritt, supra note 116, at 41 (footnotes omitted).

[FN122]. By discussing this issue, this Article does not concede that federal congressional power exists to ban citizen initiative petitions at the state level. Rather, under the guarantee clause as discussed in Part II, it is this author's position that the guarantee clause would actually prohibit the federal Congress from enacting such a provision, rather than authorizing it. However, even if this interpretation is erroneous, public policy would preclude the enactment of a federal anti-initiative statute.

[FN123]. Leong, supra note 8, at 707.

[FN124]. Id. at 706. The author's rather enigmatic reference to the Fourteenth Amendment is somewhat unsettling. At first it was assumed that an argument was being presented that Congress pursuant to Section 5 of the Fourteenth Amendment could prohibit the use of statewide initiatives. However, this argument, although possibly alluded to, is never specifically addressed. As that argument is not further addressed, it will not be addressed further here, but will be left to a later date.

[FN125]. The amount of academic and judicial hyperbole that could gush from interpretations of the phrase "popularly enacted to avoid the protective structures of republican form of government" makes this reader's

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knees tremble with trepidation.

[FN126]. Leong, supra note 8, at 707.

[FN127]. See id. at nn.16 & 162.

[FN128]. Peter Galie & Christopher Bopst, Changing State Constitutions: Dual Constitutionalism and the Amending Process, 1 Hofstra Law & Pol'y Symp. 27, 46 (1996).

[FN129]. The moral judgment that many academics have reached concerning initiatives is perhaps best exemplified in the following quotation describing the initiative method:

By the last quarter of the twentieth century, however, the procedure came to be identified as a means for well financed organizations and/or groups to obtain favorable laws and as a mechanism allowing a tyrannous majority, inflamed by prejudice or temporary hysteria, to deprive minorities of basic rights.

Id.

[FN130]. Leong, supra note 8, at 707.

[FN131]. See id.

[FN132]. Scholars who have examined this area have found little historical support to conclude that citizen initiative petitions present more of a threat in individual rights, than state legislatures.

Proposals to adopt direct democracy procedures have always prompted fears that the system of checks and balances and the filtering effects of the legislative process would be bypassed, opening up even greater possibilities for abuses of minority rights and civil liberties. Yet the initiative and referendum record suggests that those direct democracy devices can only rarely be faulted for impairing the rights of the powerless. Even a general comparison of the results of ballot measures with those of legislatures reveals that although both direct and representative lawmaking have occasionally diminished the liberties of the politically powerless, neither can be singled out as more prone to this tendency. Since 1900, when various direct democracy procedures were enacted in several states and countless local governments, few measures that would have the effect of narrowing civil rights and civil liberties have been put before the voters, and most of those have been defeated. On those occasions when limiting or narrowing measures have been approved, there is little evidence state legislatures would have acted differently, and some evidence state legislators or legislatures actually encouraged the result.

Cronin, supra note 21, at 91-92.

Even critics of the initiative who have definitionally attempted to conclude that initiatives are minority rights restrictive, have been faced to concede that the answer is not as simple and straight forward as they previously thought.

Does the constitutional initiative constitute a threat to civil liberties and constitutional values as well as create constitutional confusion? In a series of articles, Janice May has addressed this question in systematic, empirical fashion. Her findings are instructive. For the 1900-1986 period, twenty-five rights-related initiatives were adopted. Ten promoted women's rights (nine granted the suffrage and one involved jury service); three extended criminal rights by abolishing the death penalty and requiring a grand jury indictment and speedy trial. Two removed the poll tax, and one extended property rights to aliens, for a total of 16 rights-extending decisions. With regard to rights-restricting amendments, May concluded: "There is considerable evidence that, although not numerous, more of the electorally successful constitutional initiatives have reduced rather than expanded rights."

These include, inter alia, repeal of fair housing, anti-busing, anti- desegregation, restoration of the death penalty, propositions limiting the rights of the accused, mandatory referendum on fair housing, and making English the official language of the states. Contrariwise, voters rejected a variety of rights-restricting measures, including denying rights to "subversives"; state aid to private schools; two anti-abortion measures; repeal of ERA measures; and measures regarding freedom of religion or expression.

The data gathered from the five year period, 1986 through 1990, also provide further support for the

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conclusion that the constitutional initiative has become the most rights restrictive mode of constitutional reform. Of the amendments adopted by all methods, 20 were restrictive and 19 rights expanding. Of the 11 constitutional initiatives adopted, 72% percent (8), were rights restrictive, contributing disproportionately to rights reducing amendments.

The largest number of amendments, nearly half, concern crime. James M. Fischer has argued that except for criminal justice and certain racial questions, voters either support or leave other civil rights alone. This conclusion is supported by May:

[T]he question of whether voters can be trusted to protect right is misguided. The desire to narrow the rights of the accused is pervasive, reaching into the Congress, the White House and the U.S. Supreme Court. In other words voters thus far have not been out of step with many political leaders and judges . . . .

Although the record of the constitutional initiative is more positive than earlier research has suggested, it is a fair conclusion that among the modes of constitutional reform the constitutional initiative is the most susceptible to misuse and demagogy. There are, however, a variety of constraints on this procedure which have reduced the danger.

Galie, supra note 128, at 48-49 (citation omitted).

[FN133]. Debra Salz, Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court, 62 Geo. Wash. L. Rev. 100, (1993).

[FN134]. One real value of initiative provisions is that they allow a diversification of political discourse, by permitting interests which are not adequately represented by the existing two major parties to place new political ideas before the electorate. As the two major parties exert virtual stranglehold over Congress, and state legislatures, the traditional forums are neither open nor receptive to these new laws. Mr. Arne Leonard raises this issue during the actual symposium. Mr. Leonard has written an exceptional article on the initiative. See Leonard, supra note 1.

[FN135]. Cronin, supra note 21, at 200 (quoting David D. Schmidt, Editor of Initiatives News Report).

[FN136]. Id. at 201.

[FN137]. See id.

[FN138]. See id. at 50-51.

[FN139]. See id. at 199.

[FN140]. See id. at 199.

[FN141]. See, e.g., Magleby, supra note 18, at 9 (citing a 1979 Field Institute Poll finding 85% of Californians supportive of citizen initiatives).

[FN142]. One observer has also identified the inconsistencies in this strain of elitism:

All the same, we should beware of the possibility that legal scholars' nearly unanimous distrust of direct democracy-and faith in the courts' ability to remedy any deficiencies-evinces an unjustified and dangerous elitism. If the ordinary citizen cannot be trusted to make the laws by which she will be governed, why should she be given the responsibility of electing the representatives who will make those laws? Indeed, why should we leave the important task of lawmaking to representatives elected by the masses when an appointed bevy of Platonic Guardians is available to do the job?

Baker, supra note 62, at 776.

[FN143]. See, e.g., Laurie Kellman, Defeat of Foley Shows Backers of Term Limits It Can Be Done, Wash. Times, May 2, 1995, at A6.

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[FN144]. H.R. Res. 21, 105th Cong. (1997).

[FN145]. See H.R. 1170, 104th Cong. (1995).

[FN146]. The Bono bill provides as follows:
AN ACT To provide that an application for an injunction restraining the enforcement, operation, or execution of a State law adopted by referendum may not be granted on the ground of the unconstitutionality of such law unless the application is heard and determined by a 3-judge court. Be it enacted by the State and House of Representatives of the United States of America in Congress assembled, SECTION 1. 3 JUDGE COURT FOR CERTAIN INJUNCTIONS. Any application for an interlocutory or permanent injunction restraining the enforcement, operation, or execution of a State law adopted by referendum shall not be granted by a United States district court or judge thereof upon the ground of the unconstitutionality of such State law unless the application for the injunction is heard and determined by a court of 3 judges in accordance with section 2284 of title 28, United States Code. Any appeal of a determination on such application shall be to the Supreme Court. In any case to which this section applies, the additional judges who will serve on the 3-judge court shall be designated under section 2284(b)(1) of title 28, United States Code, as soon as practicable, and the court shall expedite the consideration of the application for an injunction. SEC. 2. DEFINITIONS. As used in this Act- (1) the term 'State' means each of the several States and the District of Columbia; (2) the term 'State law' means the constitution of a State, or any statute, ordinance, rule, regulation, or other measure of a State that has the force of law, and any amendment thereto; and (3) the term 'referendum' means the submission to popular vote of a measure passed upon or proposed by a legislative body or by popular initiative. SEC. 3. EFFECTIVE DATE. This Act applies to any application for an injunction that is filed on or after the date of the enactment of this Act.
Id.

[FN147]. See id.

[FN148]. See P.K. Jameson & Marsha Hosack, Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives, 23 Fla. St. U. L. Rev. 417, 420 (1995).

[FN149]. See id. at 420.

[FN150]. See 620 So. 2d 997 (Fla. 1993).

[FN151]. See id. at 999.

[FN152]. Id. at 999-1000 (McDonald, J., concurring).

[FN153]. See id. at 1000.

[FN154]. See id. at 1000 n.2.

[FN155]. See id. at 1000.

[FN156]. Advisory Opinion to the Attorney General-Re: Stop Early Release of Prisoners, 642 So. 2d 724, 728 (Fla. 1994) (Grimes, C. J., dissenting).

[FN157]. See Joseph W. Little & Julius Medenblik, Restricting Legislative Amendments to the Constitution, 80 Fla. B.J. 43 (1986).

[FN158]. See id.

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[FN159]. See id.

[FN160]. See id.

[FN161]. See Joseph W. Little, Does Direct Democracy Threaten Constitutional Governance in Florida?, 24 Stetson L. Rev. 393 (1995).

[FN162]. See id. at 413.

[FN163]. See id. at 408.

[FN164]. Little stated:

This rule would secure the constitution its rightful status as the basic defining and power-limiting instrument under which state government functions. Under this rule, every amendment to the constitution would either change the definition of the constitutional structure of government or change the limits on governmental power. Every amendment proposed, whether by the legislature, a commission, or people's initiative, should be tested against this standard before being permitted on the ballot.

Id. at 410.

[FN165]. Specifically, the author asserted:

Some may criticize this proposal as depriving the people of an established means of "going over the head of the legislature" in order to constitutionalize laws or programs that the legislature declines to enact. Similarly, defenders of the legislature may complain that the measure would deprive the legislature of the power to let the people decide whether to adopt laws or programs upon which the population is deeply divided.

Id. at 410-11.

[FN166]. Article XX, section 2 of the Oklahoma Constitution provides:

Until changed by the Legislature, the flash test provided for under the laws of Oklahoma Territory for all kerosene oil for illuminating purposes shall be 115 degrees Fahrenheit; and the specific gravity test for all such oil shall be 40 degrees Baume.

Okla. Const. art XX, § 2.

[FN167]. See, e.g., Dennis W. Arrow, Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition, 17 Okla. City U. L. Rev. 3 (1992). This article states:

While I make no claim to having exhaustively researched each of the other forty-nine state constitutions, I feel confident in asserting that Oklahoma's must be among the worst. It is the third-longest state constitution, more then ten times as lengthy as Vermont's (and the United States'). Article IX of the Oklahoma Constitution (creating the Corporation Commission) is almost twice as long as the Constitution of the United States (excluding the amendments); section 13 of Article IX, which creates fifty-one exceptions to the rule prohibiting railroads from offering free passes, is more lengthy than Article III of the United States Constitution . . . . But size alone does not badness make. The constitution's weight, to be sure, would contribute to a reasonable suspicion of surplusage. That suspicion, in turn, would be confirmed by the discovery of provisions specifically authorizing the legislature to pass laws which the legislature is already generally authorized to pass, specifically authorizing the citizenry, through initiative petition, to enact laws which the citizenry is already generally authorized to enact, and exhorting-in non-self-executing provisions-the legislature to pass certain laws.

Id. at 67-68 (citations omitted).

[FN168]. See S. Res. 17, 1947 Okla. Sess. Law Serv. (West).

[FN169]. See H. V. Thornton, Oklahoma Constitutional Studies of the Oklahoma Constitutional Survey and Citizen Advisory Committee (1950).

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[FN170]. See id. The three subsections to this chapter are: 1) Why Constitutions Are Long; 2) Why Long Constitutions Are Objectionable; and 3) Framework of Government.

[FN171]. See id.

[FN172]. Id. at 1.

[FN173]. Id. at 19.

[FN174]. See id. at 2.

[FN175]. Okla. Const. art. XXIII, § 1.

[FN176]. See id. at § 4.

[FN177]. See id. at § 5.

[FN178]. See Thornton, supra note 169, at 2.

[FN179]. See also Speech of President Pro Tempre J.F. King to the Oklahoma Constitutional Convention, Oklahoma Convention Transcript, supra note 28, at 7- 12.

[FN180]. See William Howard Taft, Popular Government (1913).

[FN181]. See id. at 54. Taft's use of the term "cranks" is puzzling. Webster's New Twentieth Century Unabridged Dictionary (20th. ed. 1969), defines a "crank" as "an irritable complaining person," and a person who has odd stubborn notions about something; eccentric." See id. at 425. Since an initiative can only become law if a majority of voters approve, Taft inexplicably seems to be characterizing the majority of the American electorate as cranks. His attitude toward the electorate may explain, in part, his failure to be re-elected President in 1912.

[FN182]. See Taft, supra note 180, at 63-64.

[FN183]. Hadley Arkes, The Return of George Sutherland Restoring a Jurisprudence of Natural Rights 15-16 (1994).

[FN184]. Id.

[FN185]. See Leonard, supra note 1, at 1216-27.

[FN186]. Arrow, supra note 167, at 49.

[FN187]. See id. Moreover, the initiative process contributes to alienation amelioration: the very act of signature-solicitation conveys a message to the citizenry (whether sympathetic or unsympathetic to the particular petition in question) that individuals can directly affect the operation of their governments. At the campaign stage, large numbers of individuals (many of whom doubtless have never been similarly involved) participate in various ways. Even apart from the ancillary education-for- citizenship benefit, such involvement cannot but enhance the quality of citizen participation in self-government, both as perceived and as a matter of fact. See id.

[FN188]. See id.

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[FN189]. One is reminded of the aphorism frequently attributed to Otto Van Bismarck that "no man should see how laws or sausage are made . . . ." Thomas C. Marks & John F. Cooper, State Constitutional Law in a Nutshell, 107 (1988) (quoting Otto Van Bismarck).

[FN190]. Arrow, supra note 167, at 49-59; see also Briffault, supra note 62, at 1362-63, where the following criticisms are made of the legislative deliberative process:

Magleby's claims about the deliberative nature of the legislative process seem more plausible on the surface, but they, too, are overstated. Legislators are expert specialists in lawmaking, equipped with staffs and resources that help them reach informed decisions. They work through a process of hearings, amendments, revisions, and debates that promotes reasoned consideration of a bill. In short, as Magleby contends, the legislative process is designed to foster deliberation. But, of course, the potential for deliberation does not ensure that deliberation always occurs. In fact, much legislation is enacted without the informed, thoughtful analysis or extensive consideration contemplated by the legislative ideal. Many state legislatures act on a significant number of their bills in marathon sittings at the end of the legislative session. According to one commentator, 'The crush of end-of-session business . . . buries state legislators in the closing weeks . . . . In many states it becomes impossible even to find bills.' In one session of the New York Legislature, for example, 508 bills were passed in the last three days the legislature met. Lack of deliberation is not reserved for the end of the session. One California state senator entitled his political memoirs What Makes You Think We Read the Bills? and proceeded to explain: Legislators consistently vote on legislation without understanding what is in it, especially when the final vote is taken. Every legislator has his own system for judging how he will vote, but reading the bill usually isn't part of the procedure, and listening to debate on the bill's merits certainly isn't either. Rather, most legislators usually abide by the decision of a party caucus, follow the lead of influential members, or defer to the recommendations of lobbyists and interest groups. That the legislative process has a greater potential for deliberative decision making than does initiative voting is likely, but Magleby has simply posited the case for the legislature's greater rationality; he certainly has not proven it.

Briffault, supra note 62, at 1362-63 (emphasis added) (footnotes omitted).

[FN191]. Some observers question whether a legislative body, like Congress, is capable of considering constitutional issues. Judge Abner Mikva, a former Congressman himself, has argued that "institutionally and politically, Congress is designed to pass over the constitutional questions . . . ." Abner J. Mikva, How Well Does Congress Support and Define the Constitution?, 61 N.C. L. Rev. 587, 609 (1983). Mikva also observed that "for the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment." Id. at 606.

[FN192]. See Cronin, supra note 21, at 92.

[FN193]. Since this opinion was issued on October 7, 1997, the Ninth Circuit Court of Appeals has asked the parties whether the issues in the case should be heard by the court en banc. Larger 9th Circuit Panel May Rehear Term Limits Case, San Diego Union & Trib., Oct. 20, 1997, at A1. One proponent of the initiative that was overturned by a three-judge panel of the Ninth Circuit Court of Appeals speculated why the court acted in such an unprecedented fashion:

"It is our sense that the term limit decision by Justice Reinhardt may have been sufficiently embarrassing to the other jurists on the 9th Circuit that they want to pre-empt another reversal by the U.S. Supreme Court," said Uhler. "After all, Judge Reinhardt's last 11 opinions have been overturned by the court."

Id. See also David G. Savage, Getting the High Court's Attention-Liberal Learning 9th Circuit Is Often Reversed, 83-Nov. A.B.A. J., 46 (1997).

[FN194]. Henry Weinstein, Novel Decision With Broad Impact, L.A. Times, Oct. 8, 1997, (Metro Desk Section) at A16.

[FN195]. Id.

[FN196]. See Marks, supra note 36, at 1261.

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[FN197]. See id.

[FN198]. Letters to the Editor, USA Today, Sept. 15, 1997 at 20A.

[FN199]. See, e.g., Askew v. Firestone, 421 So. 2d 151 (Fla. 1982); Grose v. Firestone, 422 So. 2d 303 (Fla. 1982); Thomas C. Marks, The Case of the Bogus Ballot Summary: Grose v. Firestone, 5 St. Thomas L. Rev. 147 (1992).

[FN200]. See supra notes 5 and 6 and accompanying text.

[FN201]. See supra note 39 and accompanying text.

[FN202]. See Daniel Hays Lowenstein & Robert M. Stern, The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal, 17 Hastings Const. L.Q. 175, 220 (1989).

[FN203]. Col. Rev. Stat. § 1-40-110 (1980).

[FN204]. Meyer v. Grant, 486 U.S. 414 (1988).

[FN205]. Id. at 426.

[FN206]. See Lowenstein & Stern, supra note 202.

[FN207]. Id. at 176.

[FN208]. The term "initiative industry" applies to businesses that receive compensation to gather signatures for citizen petitions and was apparently coined by David Magleby. See Magleby, supra note 18, at 59.

[FN209]. One post-Meyer approach to deal with this problem is found in N.D. Cent. Code § 16.1-01-12 (Supp. 1989). In that statute, the North Dakota legislature banned payments to initiative petition circulators that were calculated on a per signature basis, but not the payment of salaries to circulators. See id. It is unclear whether this statute would survive a constitutional challenge. However, it really does not address the basic problem presented.

[FN210]. Lowenstein & Stern, supra note 202, at 175 n.1(quoting Mike Arno of American Petition Consultants on May 8, 1989).

[FN211]. Leo C. Wolensky, Are Citizens Losing the Initiative?, L.A. Times, Oct. 7, 1988, § 1 at 1, col 5.

[FN212]. See, e.g., Schmidt, supra note 33, at 35-36 (presenting empirical evidence to dispute this conclusion).

[FN213]. See Magleby, supra note 18, at 30.

[FN214]. Id.

[FN215]. Without doubt, the pervasive presence of "for profit" businesses, acting as guns-for-hire in offering to place initiative questions on the ballot and using paid signature gatherers to do so, is in the author's opinion unseeming to the democratic initiative process and has eroded confidence in it.

[FN216]. Briffault, supra note 62, at 1361-62 (citation omitted).

[FN217]. In preparation for the 1997 Constitutional Revision Commission, a number of potential reforms have

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been identified for the Commission. The citation in this Article should not be construed as agreement with all, or any proposals.

The Constitution Revision Commission should, in its hearings, explore in depth ways that direct democracy can be improved, particularly with respect to making it a more deliberative process. The following paragraphs are intended merely to illustrate some of the many issues which can and should be raised. To combat one-sided arguments and the potential for improper voter influence caused by special interest group paid advertising, the commission should consider placing a limit on campaign spending and require that all paid advertisements include the names of the main contributors. This would enable the public to know who is sponsoring an issue, associate the argument with the sponsor, discover hidden agendas, determine the credibility of the argument, and help voters better understand the initiative they are to vote on. As a way to provide for more balanced debates, initiative sponsors could be required to conduct public hearings, or there should be a provision requiring government-sponsored public hearings on ballot initiatives. While we would prefer that public financing be implemented for educating the public and the use of private funds be proscribed, we recognize that citizens often disapprove such use of public monies, so that a combination of the two may be necessary to ensure public awareness of an issue. Another issue to be considered is a provision permitting revision or amendment to initiatives qualified for the ballot. One possibility would be to permit alternations following the public hearings. The hearings would help identify drafting problems, constitutionality issues, and voters' concerns, and the sponsor, in response, would modify or refine the initiative. Such a provision would provide the voters with more access to and input in the initiative process- what direct democracy was intended to do. A second possibility would be to implement the indirect statutory initiative process. This would permit the legislature to act on the imitative prior to its placement on the ballot. The legislature would conduct hearings on the initiative, and could adopt the proposal, refine it, or offer an alternative proposal to be placed on the ballot along with the initiative. This method would alleviate the fears of those who believe that the direct initiative process does not provide the degree of debate and analysis necessary prior to implementing public policies.

John B. Anderson & Nancy C. Ciampa, Ballot Initiatives: Recommendations for Change, 71 Fla. B.J. 71, 73-74 (1997).

[FN218]. Meyer, 486 U.S. at 414.

[FN219]. But see Lowenstein & Stern, supra note 202, at 220.

[FN220]. See id. at 221.

[FN221]. See id.

[FN222]. See id.

[FN223]. See Vlae Kershner, Big Changes Urged in Law on Initiatives, S.F. Chron., April 15, 1992 at A13.

[FN224]. See supra note 188 and accompanying text.

[FN225]. See supra note 217 and accompanying text.

[FN226]. See Little, supra note 161, at 408.

[FN227]. Id.

[FN228]. See 10 Ill. Comp. Stat. Ann. 5/28-1 (West 1993).

[FN229]. See Little, supra note 161, at 408.

[FN230]. See, e.g., Fla. Stat. Ann. § 101.161 (West 1995). This statute provides:

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(1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and "no" vote will indicate rejection. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform, commission proposal, or enabling resolution or ordinance. The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of. (2) The substance and ballot title of a constitutional amendment proposed by initiative shall be prepared by the sponsor and approved by the Secretary of State in accordance with rules adopted pursuant to s.120.54. The Department of State shall give each proposed constitutional amendment a designating number for convenient reference. This number designation shall appear on the ballot. Designating numbers shall be assigned in the order of filing or certification of the amendments. The Department of State shall furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on.
Id. (emphasis added).

[FN231]. See Cal. Elec. Code § § 9002, 9004 (West 1996).
Prior to the circulation of any initiative or referendum petition for signatures, a draft of the proposed measure shall be submitted to the Attorney General with a written request that a title and summary of the chief purpose and points of the proposed measure be prepared. The title and summary shall not exceed a total of 100 words. The persons presenting the request shall be known as the "proponents." The Attorney General shall preserve the written request until after the next general election. Attorney general; preparation of title and summary; copies to secretary of state; time; fees Upon receipt of a draft of a petition, the Attorney General shall prepare a summary of the chief purposes and points of the proposed measure. The summary shall be prepared in the manner provided for the preparation of ballot titles in Article 5 (commencing with Section 9050), the provisions of which in regard to the preparation, filing, and settlement of titles and summaries are hereby made applicable to the summary. The Attorney General shall provide a copy of the title and summary to the Secretary of State within 15 days after receipt of the final version of a proposed initiative measure, or if a fiscal estimate or opinion is to be included, within 15 days after receipt of the fiscal estimate or opinion prepared by the Department of Finance and the Joint Legislative Budget Committee pursuant to Section 9005. If during the 15-day period, the proponents of the proposed initiative measure submit amendments, other than technical, nonsubstantive amendments, to the final version of the measure, the Attorney General shall provide a copy of the title and summary to the Secretary of State within 15 days after receipt of the amendments. The proponents of any initiative measure, at the time of submitting the draft of the measure to the Attorney General, shall pay a fee of two hundred dollars ($200), which shall be placed in a trust fund in the office of the Treasurer and refunded to the proponents if the measure qualifies for the ballot within two years from the date the summary is furnished to the proponents. If the measure does not qualify within that period, the fee shall be immediately paid into the General Fund of the state.

[FN232]. See Okla. Stat. Ann. tit. 34, § 9D2 (West 1994).

[FN233]. See Okla. Stat. Ann. tit. 34, § 9 (West 1994).

[FN234]. See id.

[FN235]. See Ark. Code Ann. § 7-9-107 (Michie 1987).

[FN236]. See id.

[FN237]. See Cal. Elec. Code § 9007 (West 1997). This statute states:

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Immediately upon the preparation of the summary of an initiative or referendum petition, the Attorney General shall forthwith transmit copies of the text of the measure and summary to the Senate and Assembly. The appropriate committees of each house may hold public hearings on the subject of the measure. However, nothing in this section shall be construed as authority for the Legislature to alter the measure or prevent it from appearing on the ballot.
Id.

[FN238]. See Cal. Elec. Code § 9034 (West 1997).
Upon the certification of an initiative measure for the ballot, the Secretary of State shall transmit copies of the initiative measure, together with the ballot title as prepared by the Attorney General pursuant to Section 9050, to the Senate and Assembly. Each house shall assign the initiative measure to its appropriate committees. The appropriate committees shall hold joint public hearings on the subject of such measure prior to the date of the election at which the measure is to be voted upon. However, no hearing may be held within 30 days prior to the date of the election.
Id.
Nothing in this section shall be construed as authority for the Legislature to alter the initiative measure or prevent it from appearing on the ballot.

Id.

[FN239]. Id.

[FN240]. See Cal. Elec. Code § § 9060-9096 (West 1997).

[FN241]. See Col. Rev. Stat. Ann. § 1-40-105 (West 1988).

[FN242]. See id.

[FN243]. See id.

[FN244]. Quoted in Mark Petracca, Initiative and Referendum Process is too Important to Lose, Dallas Morning News, May 17, 1993 at 15A.

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September 2002

INITIATIVE & REFERENDUM INSTITUTE

Citizen Lawmaking In-Depth

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— A Primer —

An Overview of What it is
and
How it Works Around the Country

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What is the Initiative & Referendum Institute?

In 1998, in recognition of the initiative and referendum process' influence on America, the Initiative & Referendum Institute was founded. The Institute, a 501(c)(3) non-profit non-partisan research and educational organization, is dedicated to educating the citizens about how the initiative and referendum process has been utilized, bringing litigation when necessary to protect it, and in providing information to the citizens so they understand and know how to utilize the process. No other organization does what we do.

The Initiative & Referendum Institute extensively studies the initiative and referendum process and publishes papers and monographs addressing its effect on public policy, citizen participation and its reflection of trends in American thought and culture. We also research and produce a state-by-state guide to the initiative and referendum process that can be used by activists, and we work to educate and update the public on how the process is being utilized across the country. We analyze the relationship between voters and their elected lawmakers and when and why the people turn to initiative and referendum to enact changes in state and local law. Already, the Initiative & Referendum Institute has garnered significant media attention. We have been interviewed or cited by numerous media outlets including, ABC News, Voter News Service, CBS Radio, Pacific Radio Network, CNN, *The Washington Post*, *The New York Times*, *The Chicago Tribune*, Fox News Channel, *The Christian Science Monitor*, The News Hour with Jim Lerher, *The National Journal*, *The Wall Street Journal*, *Governing Magazine*, *USA Today*, Court TV's "Supreme Court Watch" and "Washington Watch", *The Economist*, National Public Radio, *Campaigns and Elections Magazine*, *U.S. News and World Report*, *Congressional Quarterly*, and dozens of other publications, newspapers and radio stations around the world.

The Institute is uniquely qualified to undertake this mission. Comprising the Institute's Board of Directors, Advisory Board and Legal Advisory Board are some of the world's leading authorities on the initiative and referendum process, including prominent scholars; experienced activists - who know the nuts and bolts of the process and its use; skilled attorneys; and political leaders - including six governors - who have seen first hand the necessity of having a process through which citizens can directly reform their government.

Visit our two award winning websites at http://www.iandrinstitute.org and http://www.ballotwatch.org for additional information or contact Dane Waters, President of the Initiative & Referendum Institute via email at mdanewaters@iandrinstitute.org or by calling 202.429.5539.

Introduction

For whatever reason, many elected officials are still not always doing what's in the people's best interest. Fortunately, for the citizens in the 24 states with the initiative process, the people have a mechanism to propose reforms when elected officials will not act. Unfortunately, the citizens in the other 26 states without the initiative process still do not have an outlet to bypass a legislature paralyzed by inaction or self-interest.

For 100 years, the initiative and referendum process has been THE critical tool to check the power of unresponsive and unaccountable government at the state and local level. Governor William Janklow of South Dakota – the state that has the distinction of being the first to adopt statewide initiative and popular referendum – had this to say about the process, "it is a tool of true democracy to allow citizens to participate directly in making the laws that affect their lives. People can define and decide the issue themselves if their elected officials aren't doing things to their satisfaction."

After 100 years of initiative use we know the citizens do not support the initiative process as a way to destroy or abolish our representative democracy – they support it because it ensures that they, the people, are the ultimate sovereigns as envisioned by our Founding Fathers.

This report is designed to give you a basic understanding of the initiative and referendum process. It provides information on the history of the process as well as the requirements to use the process. It also includes information on the major legal and legislative challenges the process has faced. More in-depth information regarding the initiative and referendum process can be obtained through the Initiative & Referendum Institute's main website at http://www.iandrinstitute.org.

I hope you find this information helpful and please do not hesitate to contact the Institute if you need any additional information.

Section One [1]
A Look at the History of the Initiative and Referendum Process

Before we can undertake a meaningful discussion of initiative and referendum, we must first agree on what we mean when we use the term initiative and referendum. Almost every academic, reporter and activist has his or her own definition.

In many states, citizens have the ability to adopt laws or to amend the state constitution. This is commonly referred to as the initiative process (possible in 24 states — see Table 1.1). In many of the same states, as well as others, the citizens have the ability to reject laws or amendments proposed by the state legislature. This process is commonly referred to as the referendum process. There are two types of referendum in this country — popular and legislative. Popular referendum (possible in 24 states) is when the people have the power to refer, through a petition, specific legislation that was enacted by their legislature for the people to either accept or reject. Legislative referendum (possible in all states) is when the state legislature, an elected official, state appointed constitutional revision commission or other government agency or department submits propositions (constitutional amendments, statutes, bond issues, etc.) to the people for their approval or rejection. This is either constitutionally required, as in proposing constitutional amendments, or because the legislature, government official or agency voluntarily chooses to submit the proposal to the people (however, not all states allow their state legislature to place statutes on the ballot for voter approval or rejection). Every state but Delaware requires that constitutional amendments proposed by the legislature be submitted to the citizenry via legislative referendum for approval or rejection. The initiative process is used much more frequently than the referendum process and is considered by many the more important and powerful of the two processes. Additionally, there is no national initiative or referendum process in the United States.

The local initiative process is available in thousands of counties, cities and towns across the country and is utilized far more frequently than statewide I&R. Almost every major city in the country has this process including New York City, Houston, Philadelphia and New Orleans. Many states, like Louisiana and New York, have the initiative process at the local level but not statewide and 356 home rule cities in Texas have the process but the state as a whole does not.

[1] The information contained in this report was compiled from numerous sources including the ***Book of States,*** The Texas Interim Report on Initiative and Referendum, and independent research conducted by the Initiative & Referendum Institute.

There is a long and rich history of the citizens utilizing the initiative process in this country (a complete listing of initiatives that have appeared on the ballot since 1904 and that will be appearing on future ballots is available at http://www.iandrinstitute.org and http://www.ballotwatch.org).

Since the first statewide initiative on Oregon's ballot in 1904, citizens in the 24 states with the initiative process have placed approximately 1,987 statewide measures on the ballot and have only adopted 821 (41%).

In 1996, considered by many to be the "high water mark" for the initiative process, the citizens placed 102 measures on statewide ballots and adopted 45 (44%). In contrast, the state legislatures that same year in those same 24 states adopted over 17,000 laws.

Additionally, it is important to point out that very few initiatives actually make it to the ballot. In California, according to political scientist Dave McCuan, only 26% of all initiatives filed have made it to the ballot and only 8% of those filed actually were adopted by the voters. During the 2000 election cycle, over 350 initiatives were filed in the 24 initiative states and 76 made the ballot – about 22%.

Since the first statewide initiative appeared on the ballot in Oregon in 1904, the initiative process has been through periods of tremendous use as well as periods in which it was rarely utilized. From 1904 to 1976, the use of the initiative steadily declined from its peak of 291 from 1911-1920 to its low of 78 in 1961-1970.

Many factors contributed to this, but the distraction of two World Wars, the Great Depression and the Korean War are largely responsible. However, in 1978, with the passage of California's Proposition 13 (an initiative that cut state property taxes by nearly 60%), the people began to realize the power of the initiative process once again and its use began to climb. Since 1978, the two most prolific decades of initiative use have occurred 1981-90 (289 initiatives) and 1991- 2000 (approximately 396).

DECADES WITH THE LOWEST NUMBER OF STATEWIDE INITIATIVES ON THE BALLOT	NUMBER PROPOSED	NUMBER ADOPTED	PASSAGE RATE
1941-1950	131	53	40%
1951-1960	109	44	41%
1961-1970	78	33	42%

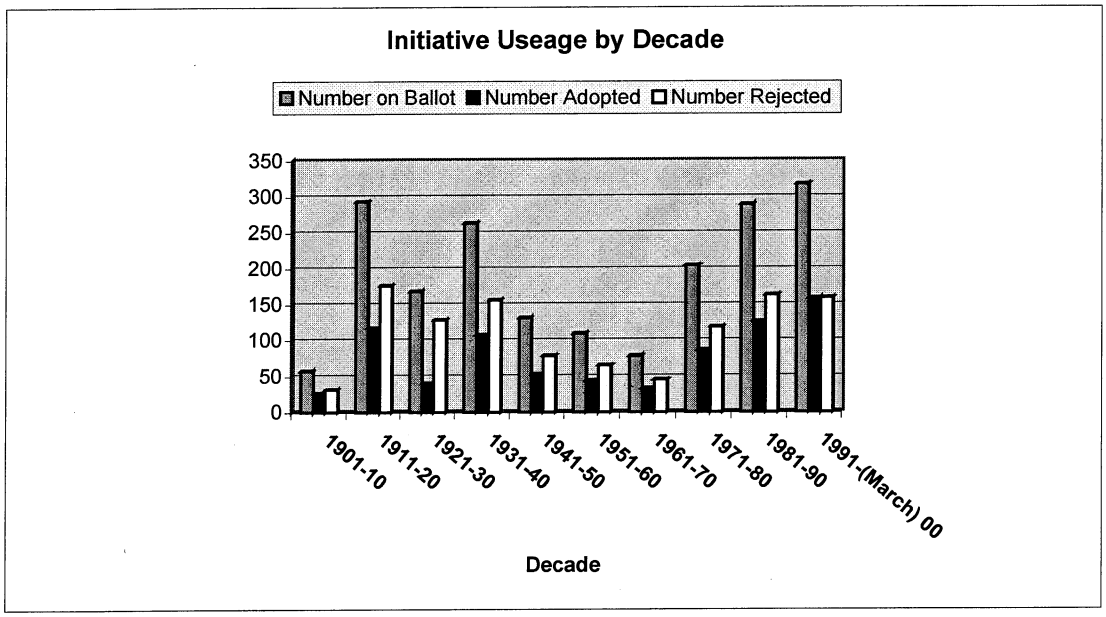
Even though 24 states have some form of statewide initiative, almost 60% of all initiative activity has taken place in just five states – Oregon, California, Colorado, North Dakota and Arizona.

STATES WITH THE HIGHEST NUMBER OF STATEWIDE INITIATIVES ON THE BALLOT (1904 – 1998 ONLY)	NUMBER PROPOSED	NUMBER ADOPTED	PASSAGE RATE
Oregon	314	105	33%
California	260	92	35%
Colorado	174	72	41%
North Dakota	165	77	47%
Arizona	144	58	40%

Since 1996, the number of initiatives actually making the ballot seems to be decreasing. Many argue that this is due to increased regulation of the process. In 1998, only 66 initiatives actually made the ballot - the lowest in a decade. In 2000 a total of 76 initiatives found their way to statewide ballots, though more than 1998, this number is still off pace with previous election cycles this decade. Even though the decade of 1991 - 2000 will go into the record books as the most prolific - with close to 400 initiatives making the ballot, it is uncertain what the future holds for the I&R process.

DECADES WITH THE HIGHEST NUMBER OF STATEWIDE INITIATIVES ON THE BALLOT	NUMBER PROPOSED	NUMBER ADOPTED	PASSAGE RATE
1991-2000	396	194	48%
1911-1920	291	117	40%
1981-1990	289	127	44%

There is no doubt that the desire to use the process is high with the public, with poll after poll showing on average 70% support for the process, but the new regulations and restrictions being placed on the process - like the prohibition on signature collection at post offices - have shown that the citizens are having a much harder time utilizing this important tool.



Section Two
Comparison of Initiative Processes

Although the initiative process is different in every state, there are certain aspects of the process that are common to all. The five basic steps to any initiative process are:

1) Preliminary filing of a proposed initiative with a designated state official;
2) Review of the initiative for compliance with statutory requirements prior to circulation;
3) Circulation of the petition to obtain the required number of signatures;
4) Submission of the petition signatures to the state elections official for verification of the signatures;
5) The placement of the initiative on the ballot and subsequent vote

Twenty-four states have the initiative process. Of the 24, 18 allow ***constitutional initiatives***. 16 of the 18 allow through the direct initiative process and 2 allow constitutional initiatives through the indirect initiative process. The direct initiative process is where the initiative is placed directly on the ballot once the petition signatures are certified and the indirect is where the initiative must be considered by the state legislature first. In the indirect process, the legislature is given a certain amount of time to act on the initiative. If the legislature rejects it, submits a different proposal or takes no action, the initiative automatically goes on the ballot of the next general election.

21 of the 24 initiative states allow ***statutory initiatives***. 14 of the 21 allow statutory initiatives through the direct initiative process and 9 allow statutory initiatives through the indirect initiative process. I know that adds up to 23 – which is greater than the universe of 21 states that allow statutory initiatives. The reason for the difference is that 2 states – UT and WA – allow statutory initiatives through the direct and indirect process. In every state, statutory initiatives require a simple majority of those voting to adopt the measure.

The Indirect Initiative Process

As stated above, the indirect initiative process is available in some form in 10 states: Alaska, Maine, Massachusetts, Michigan, Mississippi, Nevada, Ohio, Utah, Washington, and Wyoming.

In 7 of the 10 states, the citizens must collect the full number of signatures required before the initiative is placed before the legislature for

consideration. In the other three states (Massachusetts, Utah, and Ohio) the citizens must collect a smaller number of signatures for the initiative to be considered by the legislature. If the legislature doesn't adopt the initiative then they must collect additional signatures to place the measure on the ballot.

This two-step process would in theory seem to lead to large numbers of initiatives being proposed since initiative sponsors would only have to collect half of the number of signatures normally required to get their issued addressed by their lawmakers, but in reality that hasn't occurred. This is due to the fact that very rarely do state legislatures actually adopt the initiatives that are placed before them through the indirect process. California and South Dakota, which had both direct and indirect initiative, repealed the indirect initiative in 1966 and 1988, respectively, for lack of use. The Utah Legislature has never adopted an initiative measure and the Massachusetts Legislature, according to the Secretary of State's Office, hasn't adopted an initiative measure in the last decade. The Maine Legislature has only adopted two laws placed before them.

Pre-Circulation Filing Requirements and Review

Prior to circulating a petition, the proposed initiative and a request to circulate must be submitted to the designated public officer such as the lieutenant governor, attorney general or secretary of state for approval. Nine states require the proposed initiative to be submitted with a certain number of signatures – ranging from five in Montana to 100 in Alaska. Three states require a deposit that is refunded when the completed petition has been filed – Alaska ($100), Washington State ($5), and Wyoming ($500).

Depending, on the state the petition may be reviewed for form, language and/or constitutionality. Ten states require the secretary of state's office or the attorney general to review initiatives for proper form only.

Eleven states (CO, AR, FL, ID, MS, MT, NE, OR, SD, UT, WA) and the District of Columbia ***require*** some form of pre-circulation/certification review regarding language, content or constitutionality. However, in all but four of these states, the results of the review are advisory only. In Arkansas, the attorney general has authority to reject a proposal if it utilizes misleading terminology. In Utah, the Attorney General can reject an initiative if it is patently unconstitutional, nonsensical, or if the proposed law could not become law if passed. In Oregon, the Attorney General can stop an initiative from circulating if he believes it violates the single amendment provision for initiatives and in Florida, the State Supreme Court – during its mandatory review – can stop an initiative if it is unconstitutional or violates the state's very strict single subject requirement for initiatives.

At two points in the petition process, an official summary and title must be prepared. A circulation title must be prepared for the signature collection phase, and a ballot title must be prepared for the voter pamphlet (if there is one) and the actual ballot. Typically, the circulation and ballot titles are the same. Procedures for writing the circulation title vary. Some states allow the sponsors to write the title; other states use a committee (see attached chart). Eleven states provide for expedited court challenges to the circulation title.

Every initiative state requires review and approval of the election-day ballot title, caption and summary. Arizona, Arkansas, Florida, Illinois, Ohio and Oklahoma permit proponents to write the ballot title, but it is subject to approval by the attorney general or secretary of state. Oklahoma additionally requires that the ballot title be certified by the superintendent of public instruction for readability at the eighth-grade level. Eleven states (AK, CA, ID, MS, MO, MT, NE, OR, UT, WA, WY) place responsibility for drafting the ballot title and summary with the attorney general, secretary of state or comparable official. Five states (CO, IL, MI, NV, SD) assign the task to a special committee or drafting board. Colorado, Oregon and Washington, DC allow public comment in drafting the ballot title. Fourteen states make available expedited court review of contested ballot title wording.

Subject Limitations

Every state prohibits initiatives from adopting policies that are beyond the permissible boundaries of the legislature. Some states have prohibited initiatives in the subject areas of taxes or appropriations. Nevada, for example, forbids any appropriation by initiative unless the measure also includes a tax sufficient to cover the appropriation. Alaska, Wyoming and Washington, DC prohibit initiatives from dedicating revenues, making or repealing appropriations, creating courts, and affecting the judicial process. Several states, like Montana, distinguish between constitutional amendments, which are permitted and constitutional revisions, which are not.

Several states impose a single subject rule for initiatives. Single subject rules are of the greatest concern to supporters of the initiative process and are proving to be a serious obstacle to the use of the initiative process. However, the Institute supports the concept of requiring that initiatives be limited to a single subject, be we believe that; a) a standard interpretation of what constitutes a violation of single subject needs to be adopted, b) single subject requirements should apply to laws proposed by the state legislature as well, c) single subject challenges should be brought prior to circulation so initiative proponents are not "blind sided" after spending substantial resources in qualifying a measure for the ballot and d) the courts should offer a remedy to initiative proponents when they are in violation of the

single subject laws so proponents know what would pass judicial review versus having to guess time and time again.

Limits on the Number and Frequency of Ballot Measures

Five states (IL, MS, NE, OK and WY) place restrictions on the number and frequency of ballot measures. In Nebraska, an initiative petition may not be filed that is substantially the same as one that failed on the ballot within the preceding three years. Wyoming has a similar provision, except the time period is five years.

Mississippi limits the number of initiative proposals to five: the first five measures meeting the submission requirements will be placed on the ballot. Initiatives rejected by the voters cannot be placed on the ballot for two years after the election.

Petition Circulator Requirements

Up until early 1999, several states required that petition circulators be registered voters. The U.S. Supreme Court in ***Buckley v. ACLF*** ruled that states couldn't require circulators to be registered voters. However, almost all of the states with prior registered voter requirements have now adopted laws requiring that circulators be residents of the state. This new law will most likely be litigated as well.

Circulation Period

Circulation periods range from as brief as 64 days in Massachusetts to an unlimited duration – though there are limits on how long a petition signature is valid. Most states also have deadlines for submitting initiative petitions, so that officials will have time to verify the signatures, publish the initiative, and prepare the ballot.

Arkansas, Ohio, Oregon, and Utah – have no time limit for signature gathering. Oklahoma at 90 days, California at 150 days, and Massachusetts at 64 days have the shortest circulation periods.

Signature Requirements

Central to the initiative process is getting the required number of valid signatures. Although the requirements and formulas may differ, all states set the signature threshold at some percentage of the voting public, rather than an absolute number of signatures. Some states require that the number of signatures match a predetermined percentage of the registered voters for the state. Others require a percentage of a previous vote for a designated office to qualify. Signature thresholds vary from a high of 15

percent of qualified voters based on votes cast in the last general election in Wyoming to a low of two percent of the state's resident population in North Dakota.

Most states, which have both constitutional and statutory initiatives, require a higher percentage of signatures for constitutional initiatives with Colorado and Nevada being the exceptions.

Geographic Distribution Requirements

Thirteen states require some geographic distribution of signatures, often a specified number of signatures from each of a certain number of counties or districts. Distribution requirements can be a deterrent to the use of the initiative process. Over 60% of all initiative activity has taken place in just five states (AZ, CA, CO, ND and OR) – all without a geographic distribution requirement. States with severe distribution requirements (ID, MS and WY) rarely have initiatives on their ballot.

Verification of Petition Signatures

There are three methods to verifying signatures: presumed valid, random sampling, and full certification. Three states (ND, OH, OK) use the presumed valid test. This means that the state simply counts the names and assumes that all of the signatures are legitimate. Twelve states (AK, AR, FL, IL, ME, MA, MS, MT, NE, SD, UT, WY) require full certification and ten states (AZ, DC, CA, CO, ID, MI, MO, NV, OR, WA) use the random sampling method.

Publication of Initiatives

Fourteen states (AK, AZ, CA, CO, ID, ME, MA, MS, MT, NV, OH, OR, UT, WA) distribute a voter pamphlet. Fourteen states also inform the electorate about ballot measures through publication in major newspapers. Five states (ID, MT, OH, UT, WY) use both methods. States that use the newspaper as their medium for voter information use a variety of styles and format. Some states will publish the entire initiative text in the newspaper; most publish an impartial analysis along with an argument for and against.

The voter pamphlet usually includes the official ballot title, an "impartial" analysis by public official and arguments and rebuttals for and against each measure. States that do not include arguments in the ballot pamphlet or newspaper notice are: Maine, Michigan, Nevada, North Dakota, and Wyoming. Five states (CA, ME, NV, OR, UT) specifically mandate that a fiscal impact statement be printed in the pamphlet. All states, except Ohio, print the entire text of all propositions in their voter pamphlet.

Both Oregon and Montana use a committee system to draft the voter pamphlet analyses. In Oregon, the committee is two proponents and two opponents selected by the secretary of state. These individuals then select a fifth committee member. Montana establishes a similar committee for each analysis, however the fifth committee member is the attorney general.

Massachusetts makes full use of legislative hearings to assist in voter information. A summary of the majority and minority reports of the legislative committee that conducted public hearings on the proposal is printed in the pamphlet. Committee members representing both the majority and minority opinions on the issue draft a brief summary of their reasons for supporting or opposing the measure.

The majority of states produce a voter pamphlet essentially at state expense with the exception of Alaska, Arizona, and Oregon. Alaska does not charge to print ballot measure arguments, but it does charge political parties and candidates a "per page" fee to have information included in the pamphlet. Arizona charges $100 per argument printed in its pamphlet. Oregon charges $500 per argument. This fee may be waived if the submitter collects 2,500 valid signatures in support of the argument.

Voter Approval

Once an initiative is on the ballot, the general requirement for passage is a majority vote. Exceptions are Nebraska, Massachusetts and Mississippi. These states require a majority, provided the votes cast on the initiative equals a percentage of the total votes cast in the election (35 percent in Nebraska, 30 percent in Massachusetts, and 40 percent in Mississippi.) Wyoming requires "an amount in excess of 50 percent of those voting in the preceding general election." An initiated constitutional amendment in Nevada must receive a majority vote in two successive general elections. Washington requires a simple majority approval for all measures except those concerning gambling (which requires 60 percent affirmative vote for passage.)

Conflicting Measures

Most states have adopted a policy addressing conflicting propositions especially in states that allow the state legislature to place an "alternative" measure on the ballot. Fifteen states have determined that if two or more conflicting initiatives receive voter approval, the one with the most affirmative vote controls.

In Utah, the governor makes the initial decision whether provisions conflict and declares which proposal controls based on the highest number of votes. Voters may challenge this determination within 30 days.

In Washington, voters are asked to express two preferences: first, between either measure or neither; second, between one or the other. Maine also forces voters to choose between competing propositions or against both, with a warning that a "yes" vote for both measures will invalidate the ballot. In Massachusetts, the legislature designates prior to the election which initiatives conflict. Voters are then encouraged to choose between one or the other.

Amending Initiative Statutes and Veto Authority

In no state does the governor have the right to veto laws passed by initiative. In California, Florida and Mississippi the legislature may not repeal or amend the initiative. Eleven states (CO, ID, ME, MA, MO, MT, NE, OH, OK, OR, SD) allow their legislatures to amend or repeal an initiative statue at any time after its adoption by a simple majority vote of both houses. Nine states (AK, AR, AZ, MI, NV, ND, UT, WA, WY) impose restrictions on changes to initiative statutes. Nevada, for example, prohibits legislative amendment or repeal for three years after passage of the initiative. Alaska and Wyoming permit simple majority amendments at any time but prohibit a legislative repeal of the initiative for two years after its passage. Michigan requires a three-fourths vote of the legislature to amend to repeal an initiative (unless otherwise specified by the initiative.) Arkansas imposes a two-thirds legislative vote requirement, and North Dakota requires a two-thirds legislative vote but only in the first seven years after enactment.

LIMITS ON THE NUMBER AND FREQUENCY OF BALLOT MEASURES

STATE	LIMITS ON FREQUENCY OF BALLOT MEASURES
Illinois	Limits the number of citizen initiated non-binding advisory questions to no more than three on the same ballot.
Mississippi	Limits the number of ballot initiatives on the same ballot to five. The first five measures meeting the submission requirements are the ones placed on the ballot. Additionally, an initiative rejected by the voters cannot be placed on another ballot for two years after the election.
Nebraska	The same subject cannot appear on the ballot more than once in three years.
Oklahoma	The same subject cannot appear on the ballot more than once in three years.
Wyoming	No measure can be put on the ballot that is similar to a measure that has been defeated at the ballot within 5 years.

INITIATIVE SUBJECT RESTRICTIONS

STATE	RESTRICTIONS
Alaska	Single subject only. No revenue measures, appropriations, acts affecting the judiciary, or any local or special legislation. Also, no laws affecting peace, health or safety.
Arizona	Single subject only; legislative matters only.
Arkansas	Limited to legislative measures.
California	Single subject only.
Colorado	Single subject only.
Florida	Single subject only.
Idaho	No restrictions.
Illinois	Legislative matters only. Must also only deal with structural and procedural subjects.
Maine	Any expenditure in excess of appropriations is void 45 days after legislature convenes.
Massachusetts	No measures involving religion, the judiciary, local or special legislation, or specific appropriations.
Michigan	Applicable to statutes that Legislature may enact.
Mississippi	No modifications of bill of rights and no modifications of public employees' retirement system or labor-related items. Initiatives rejected by the voters cannot be placed on the ballot for two years after the election.
Missouri	Single subject only; no appropriations without new revenue, and nothing that is prohibited by the constitution.
Montana	Single subject only; no appropriations, and no special or local legislation.
Nebraska	Single subject only. Limited to matters that can be enacted by the legislature. Same subject can't appear on the ballot more than once in three years.
Nevada	No appropriations or expenditures of money, unless the measure includes a sufficient tax not prohibited by Nevada's constitution.
North Dakota	No emergency measures, or appropriations for support and maintenance of state departments and institutions.
Ohio	Single subject only. No measures involving property taxes. Legislative matters only.
Oklahoma	Single subject only. The same subject cannot appear on the ballot more than once every three years. Legislative matters only.
Oregon	Single subject only. Legislative matters only.
South Dakota	Except laws as necessary for the immediate preservation of public peace, health or safety support of state government and existing public institutions.
Utah	Legislative matters only.
Washington	Single subject only. Limited to legislative matters.
Wyoming	Single Subject. No earmarking, making or repealing appropriations, creating courts, defining jurisdiction of courts or court rules, and no local or special legislation. No measure that is similar to a measure that has been defeated at the ballot within 5 years.

PRE-CIRCULATION STATE REVIEW OF CIRCULATION TITLE/ SUMMARY/BALLOT TITLE/CONSTITUTIONALITY/SINGLE SUBJECT

STATE	ASSISTANCE
Alaska	Lieutenant Governor reviews for form and legal restrictions on content.
Arizona	Secretary of State reviews for form only.
Arkansas	Attorney General may reject confusing title and summary and instruct petitioners to redesign proposal.
California	Optional assistance from Legislative Council.
Colorado	Mandatory content review by Legislative Council.
Florida	Supreme Court reviews for constitutionality and compliance to single subject after petitioners gather 10% of the signature requirements.
Idaho	Mandatory review of content by Attorney General.
Illinois	None
Maine	Secretary of State reviews for form only.
Massachusetts	Mandatory review of subject by Attorney General
Michigan	Optional public hearing on draft before the Board of State Canvassers.
Mississippi	The state makes advisory recommendations regarding the initiative language. The sponsor may accept or reject any of these recommendations.
Missouri	Attorney General reviews for form only.
Montana	Mandatory review of content by Legislative Council. The sponsor may accept or reject any of these recommendations.
Nebraska	The state makes advisory recommendations regarding the initiative language. The sponsor may accept or reject any of these recommendations.
Nevada	Secretary of State reviews for form only.
North Dakota	Secretary of State reviews for form only.
Ohio	Petitioners may revise draft after the indirect initiative legislative hearing.
Oklahoma	Secretary of State reviews for form only.
Oregon	Mandatory review for single subject.
South Dakota	Legislative Research Council reviews for style and form, and makes advisory recommendations regarding the initiative language.

STATE	ASSISTANCE
Utah	Attorney General reviews for constitutionality and will reject the measure if it is patently unconstitutional, nonsensical; or if the proposed law could not become a law if passed.
Washington	Mandatory review by Code Reviser. The sponsor may accept or reject any recommendations.
Wyoming	Secretary of State reviews for form only.

CIRCULATION TITLE AND SUMMARY

State	Title and Summary	Expedited Review
Alaska	Proponent writes caption and summary, subject to approval by Lt. Governor.	Superior Court
Arizona	Proponent writes caption; no summary.	No
Arkansas	Proponent proposes caption and summary, subject to approval by Attorney General.	Supreme Court
California	Attorney General writes caption and summary.	No
Colorado	Drafting board prepares caption and summary in conduct of public hearings with input from proponent.	Rehearing: Supreme Court
Florida	Proponent writes caption and summary.	No
Idaho	Attorney General writes caption and summary.	Superior Court
Illinois	Proponent writes caption and summary, subject to approval by Board of Elections.	No
Maine	Ballot question written by Secretary of State; no summary.	No
Massachusetts	Proponent writes caption; Secretary of Commonwealth writes summary, approval by Attorney General.	No
Michigan	Proponent writes caption; no summary	No
Mississippi	The Attorney General writes the title and summary.	District Court
Missouri	No caption or summary.	No
Montana	The Attorney General writes the title and summary.	District Court
Nebraska	No caption; proponents writes summary.	No
Nevada	No caption or summary.	No

State	Title and Summary	Expedited Review
North Dakota	No caption; summary drafted by Secretary of State, subject to approval by Attorney General.	No
Ohio	Proponents write caption and summary, subject to approval by Attorney General.	No
Oklahoma	No caption, proponent writes summary.	No.
Oregon	Attorney General writes caption and summary after receiving public comments.	Supreme Court
South Dakota	No caption or summary.	No
Utah	No caption or summary.	No
Washington	Attorney General writes caption and summary.	Superior Court
Wyoming	No caption; Secretary of State writes summary.	District Court

OFFICIAL BALLOT TITLE AND SUMMARY

State	Title and Summary Procedures	Expedited Review
Alaska	Written by Attorney General; but proponent may negotiate wording with Lt. Governor.	Yes
Arizona	Proponent writes the caption and the Secretary of State drafts the summary, subject to approval by Attorney General.	No
Arkansas	Proponent proposes caption and summary, subject to approval by Attorney General.	Yes
California	Attorney General writes caption and summary.	Yes
Colorado	Drafting Board prepares caption and summary in conduct of public hearings, with input from proponents.	Yes
Florida	Proponent writes caption and summary, subject to approval by Secretary of State.	No
Idaho	Attorney General writes caption and summary.	Yes
Illinois	Proponent writes caption and summary, subject to approval by Board of Elections.	No
Maine	Ballot question and summary written by Secretary of State.	No
Massachusetts	Secretary of Commonwealth writes caption and summary, subject to approval by Attorney General.	Yes
Michigan	No caption; Board of State Canvassers writes summary.	Yes
Mississippi	The Attorney General writes the title and summary.	Yes
Missouri	No caption, Attorney General writes summary.	Yes
Montana	Attorney General writes ballot title and summary.	Yes
Nebraska	Attorney General writes caption and summary.	Yes
Nevada	No caption; Secretary of State writes summary, subject to approval by the Nevada Legislative Commission.	No
North Dakota	No caption; summary drafted by Secretary of State, subject to approval by Attorney General.	No
Ohio	Proponent writes caption and summary, subject to approval by Attorney General and Secretary of State.	No
Oklahoma	Proponent proposes caption and summary, subject to approval by Attorney General.	Yes

State	Title and Summary Procedures	Expedited Review
Oregon	Attorney General drafts preliminary caption and summary, receives public comments and writes final version.	Yes
South Dakota	Drafted by State Board of Elections.	No
Utah	Attorney General writes caption and summary.	Yes
Washington	Attorney General writes caption and summary.	Yes
Wyoming	No caption; Secretary of State, with assistance of Attorney General, writes summary.	Yes

LEGISLATIVE AND EXECUTIVE POWER TO CHANGE OR REPEAL INITIATIVE LAWS

State	Legislative Power	Executive Power
Alaska	Can repeal only after two years; can amend anytime. (ALC. XI, §6)	Cannot veto.
Arizona	Cannot repeal; but, can amend an initiative law if the amending legislation furthers the purposes of such measure and at least three-fourths of both houses, by a roll call vote, vote to amend the measure. (Const. Art. 4, pt. 1, §1 (6) Also, see *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952.))	Cannot veto.
Arkansas	Can repeal or amend by a 2/3 vote of each house. (C.A. No. 7)	Cannot veto.
California	Can not repeal or amend unless permitted by the initiative (Const. art. 2, §10(c))	Cannot veto.
Colorado	Can repeal and amend. (*Zimmerman v. Herder*, 122 Colo. 456, 233 P.2d 197 (1950))	Cannot veto.
Florida	Florida's initiative process only allows constitutional amendments.	Cannot veto.
Idaho	Can repeal (by court ruling, see *Luker v. Curis*, 64 Idaho 703, 136 P. 2d 978 (1943)) and amend (by common practice.)	Cannot veto.
Maine	Can both repeal and amend. (By common practice.)	Cannot veto.
Massachusetts	Can repeal and amend. (Mass. Const. amend. Art. 48)	Cannot veto.
Michigan	Can repeal and amend by a ¾ vote of each house or as otherwise provided by the initiative (Mich. Const. art. 2, §9)	Cannot veto.
Mississippi	Mississippi's initiative process only allows constitutional amendments.	Cannot veto.
Missouri	Can both repeal and amend. (*Halliburton v. Roach*, 230 Mo. 408, 130 S.W. 689 (1910))	Cannot veto.
Montana	Can both repeal and amend. (By common practice.)	Cannot veto.
Nebraska	Can both repeal and amend. (By common practice.)	Cannot veto.
Nevada	Can only repeal or amend after three years of enactment. (Nevada Const. art. 19, §2)	Cannot veto.
North Dakota	Can repeal or amend by a 2/3 vote of each house for seven year after passage, majority vote thereafter. (N.Dak. Const. art. III, §8)	Cannot veto.
Ohio	Can both repeal and amend. (*Singer v. Canledge*, 129 Ohio St. 279, 195 N.E. 237 (1935))	Cannot veto.
Oklahoma	Can both repeal and amend. (*Expane Haley*, 202 Okla. 101, 210 P.2d 653 (1949))	Cannot veto.
Oregon	Can both repeal and amend. (*Pierce v. Shisher*, 119 Or. 141, 249 P. 358 (1926))	Cannot veto.

State	Legislative Power	Executive Power
South Dakota	Can both repeal and amend. (*Richards v. Whisman*, 36 S.D. 260, 154 N.W. 707 (1915))	Cannot veto.
Utah	Can amend only at subsequent sessions. (Utah code Ann. §20-11-6).	Cannot veto.
Washington	Can repeal or amend by a 2/3 vote of each house during the first two years of enactment, majority vote thereafter. (Wash. Const. art. 11, §41)	Cannot veto.
Wyoming	Cannot repeal for at least two years after enactment, but may amend at any time. (Wy. Const. art. 3, §52(f))	Cannot veto.

Section Three
A State-by-State Account of The Indirect Initiative Process

By Fred Silva [2]

The indirect initiative is a process by which voters can submit a measure to their state legislature for consideration. In general, the legislature has a set period of time to adopt or reject the proposal. If it is adopted by the legislature, the measure becomes law (albeit one subject to referendum). If the measure is rejected or the legislature fails to act within a set period of time, the measure is generally placed on the ballot at the next general election. Currently, the constitutions and provisions of ten states provide for an indirect initiative process: Alaska, Maine, Massachusetts, Michigan, Mississippi, Nevada, Ohio, Utah, Washington, and Wyoming.

Alaska[3]

Alaska uses a form of the indirect initiative called the legislature's option, and only statutes are eligible. Here, after collecting the proper amount of signatures (10% of those who voted in the preceding election), the petitioners must submit their request prior to the beginning of the legislative session. The legislature is not required to consider the measure, however, and if it does not, the measure goes on the next ballot. If the legislature adopts the measure or a measure that is substantially similar, the initiative does not go on the ballot. Other than Wyoming, Alaska is the only state in which the legislature may vary indirect initiative statutory proposals without creating the possibility of a vote on the amended measure.

Maine[4]

After Massachusetts, Maine is the second largest user of the indirect initiative. Only statutes are allowed. The required number of signatures is 10% of the total votes cast for governor in the last election. The legislature has the entire session in which to act and may decide to place an alternative proposal or recommendation on the ballot. If it chooses to do this, it must construct the ballot so that voters can choose between competing versions (one or more) or reject both. The Legislature can also reject the initiative, in which case it is placed on the ballot. Following enactment, the Legislature can both repeal and amend initiatives.

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[2] Fred Silva is a Senior Fellow at the Public Policy Institute of California

[3] Alaska Constitution Article XI; Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

[4] Maine Constitution Article IV; Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

Massachusetts[5]

Massachusetts is by far the largest user of the indirect initiative. Both constitutional amendments and statutes may be proposed, and signatures that total only 3% of the entire vote cast for Governor are required. The Massachusetts procedure for constitutional amendments is the most indirect of any American initiative procedure, as the proponents have no right to submit their proposal to a vote of the people unless the legislature places the measure on the ballot. The process involves a two-step procedure. In the first step the sponsor must obtain a fairly low number of signatures (3 percent) to have the legislature consider the proposal. Initiative amendments are acted upon by a joint session of the House and Senate; the Legislature can only amend the initiative by a ¾ majority vote in a joint session of both houses. If the legislature fails to adopt the proposal, the sponsors must seek additional signatures to get on the ballot. An initiative amendment to the Constitution will not appear on the ballot if, when it comes to a vote in either joint session, less than 25% of the legislators vote in favor of it or if no vote is taken before the legislative term ends. Following enactment, the Legislature can both repeal and amend initiatives. In practice, the indirect initiative process is rarely used for constitutional amendments.

Michigan[6]

Only statutes may be proposed in Michigan's indirect initiative process, and the number of signatures required to qualify is at least 8% of the total votes cast for Governor in the last general election. Once submitted, the legislature has 40 days to act on a petition and may also place an alternative on the ballot. It can approve or reject an initiative, but it cannot amend one. However, it can submit an alternative to an initiative to the ballot. If rejected, the measure can be placed on the next ballot. Following enactment, the Legislature can both repeal and amend initiatives.

Mississippi[7]

Mississippi is the only state in which the indirect initiative process is used for constitutional amendments only. To qualify an amendment for consideration, the number of collected signatures must equal 12% of all votes cast for governor in the last election. These initiatives always appear on the ballot, whether the legislature adopts, rejects, or proposes alternatives to them. If it is amended, both the amended version and the

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[5] Massachusetts Constitution amendment article XLVIII, Initiative part 5 (statutes), part 4 (cons. Amendment); Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

[6] Michigan Constitution Article II; Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

[7] Mississippi Constitution Section 273; Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

original one are submitted to the ballot. The Legislature is empowered to both repeal and amend these initiatives following enactment. This procedure was adopted in Mississippi in 1995, but has been used only very rarely.

Nevada[8]

Nevada requires that 10% of the total number of voters in the last general election sign a petition in order for it to be considered by the Legislature. After submission, the Legislature has 40 days to act on a petition and may also place an alternative on the ballot. If the measure is rejected by the Legislature or if no action is taken is 40 days, the measure is placed on the ballot. The Legislature can only repeal or amend an approved initiative three years after enactment. Nevada used an indirect procedure for initiative constitutional amendments until 1962. Since then, Nevada has required that initiative constitutional amendments be approved at two separate elections but has allowed the amendments to go directly on the ballot. Because of the two separate elections requirements, the legislature still has an opportunity to deal with any matter proposed before a final ballot. As a result, some see this as really being an "indirect" procedure.

Ohio[9]

Ohio is one of two states (along with Massachusetts) that have a two-step procedure in the indirect initiative process. In the first step the sponsor must obtain a fairly low number of signatures (3 percent of the total vote cast for governor in the last election) to have the legislature consider the proposal. Only statutes are permitted. If the legislature fails to adopt the proposal (or does not act on it), the sponsors must seek additional signatures to get on the ballot. The Legislature may amend the proposed measure.

Utah[10]

Utah (along with Washington) is one of only two states that allow the initiative sponsor to choose whether they wish to use the direct process or indirect initiative process. In Utah, there is an incentive to use the indirect initiative, since indirect initiatives can go before the legislature with signatures equal to five percent of the last vote, while the direct initiative requires twice that number. If the legislature rejects the indirect initiative, its advantages are lost, however, because sponsors must come up with signatures equal to another 5% of the vote. Only statues can be proposed

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[8] Nevada Constitution Article XIX; Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

[9] Ohio Constitution Article II; Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

[10] Utah Code Ann. Sections 2-A-7-201, -208 (Supp. 1994); Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

and signatures that total at least 5% of all votes cast for governor in the last election are required. The proposed law can only be enacted or rejected without change or amendment by the Legislature. Following enactment, the Legislature can both amend and repeal initiatives.

Washington[11]

Washington (along with Utah) is one of the two states that allow voters to choose between the indirect and direct initiative. The number of signatures required for each type of initiative is the same (8% of the votes cast for governor in the last election); thus, the sponsor chooses the type that seems most advantageous. In practice voters overwhelmingly choose the direct variant. Only statutes can be considered in the indirect process. Following submission to the legislature, the Legislature can approve an amended version of the proposed legislation, in which case both the amended version and the original proposal must be placed on the next state general election ballot. If the Legislature adopt the measure without amending it, it automatically becomes law. After enactment, the Legislature can repeal or amend an initiative by a ¾ vote of each house during the first two years of enactment, and a majority vote thereafter.

Wyoming[12]

Wyoming, like Alaska, uses the "legislature's option" form of indirect initiative. Initiative sponsors must collect their signatures (15% of those voting in the last election) prior to the beginning of the next legislative session. Only statutes can be proposed using the indirect process. The legislature is not required to consider the measure, however. If it chooses not to consider the measure, it is placed on the next ballot. If the legislature adopts the measure or a measure that is substantially similar, the initiative does not go on the ballot. As mentioned above, Wyoming and Alaska are the only states in which the legislature may vary indirect initiative statutory proposals without creating the possibility of a vote on the amended measure. After a measure is enacted, the legislature can amend it, and repeal it after two years.

[11] Washington Constitution Article II; Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

[12] Wyoming Constitution Article III, Section 52; Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons.* New York: Agathon Press, 1998.

Section Four
Major Cases Regarding the Funding of Ballot Measure Campaigns

There have been numerous attempts at regulating the amount of money spent on ballot measure campaigns. In most cases, the proposed laws have attempted to limit the amount of money corporations could spend in either support or opposition of ballot measures. State and Federal Courts, including the U.S. Supreme Court in 1977, have consistently ruled that you can not limit the amount of money in ballot measure campaigns. Their basic logic has been that you can't corrupt a piece of paper (the ballot measure) and therefore there is no need in limiting the amount of money spent on these campaigns. This is where they apply a different standard in those cases pertaining to contributions to candidate campaigns – the courts have upheld contribution limits to candidates because of the possibility of corruption. In short, any attempt to regulate the amount of money in ballot measure campaigns would be viewed as unconstitutional given the current case law.

Montana Chamber of Commerce v Argenbright (U.S. 9th Circuit of Appeals 98-36256, Opinion issued September 26, 2000)

The court of appeals affirmed judgments of the district court. The court held that the First Amendment does not permit restricting corporate expenditures as a means of expression on public issues presented through a state's ballot initiative process.

In First National Bank of Boston v. Bellotti, 435 U.S. 765(1978), the Supreme Court struck down as violative of the First Amendment a state statute limiting corporate contributions or expenditures in the ballot-issue process (initiatives or referenda), made for the purpose of influencing or affecting the vote on any question submitted to the electorate, other than one materially affecting the property, business, or assets of the corporation. The invalidated statute had also provided that no issue submitted to the voters that solely concerned individual taxation issues could be deemed to affect a corporation's property, business, or assets.

However, the Court ruled in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) that a state statutory restriction on independent corporate expenditures in connection with candidate elections was permissible, when the statute permitted corporations to make such expenditures from segregated funds used solely for political purposes, and the state justified the burden on corporations' freedom of speech as a means of avoiding the corrosive and distorting effects of huge aggregations of corporate wealth that have little correlation to the public's support for the corporations' political ideas.

Montana voters approved Initiative 125 (I-125) in November 1996. I-125 prohibited direct corporate spending in connection with ballot issues (other than by nonprofit corporations formed solely for political purposes). The measure allowed a corporation to establish and administer a separate, segregated fund that could solicit contributions from shareholders, employees, or members of the corporation.

In July 1998, I-137 (restricting certain types of mining) was certified for the November ballot. Appellee Montana Mining Association (MMA) and other organizations subject to I-125 sought to delay and then invalidate the election in which Montana's voters approved I-137 on the ground that I-125 unconstitutionally constrained their participation in the election process.

Appellee Montana Chamber of Commerce (MCC) brought a federal declaratory action, alleging that I-125 was unconstitutional, and sought an injunction against its enforcement.

MMA brought suit in September 1998, requesting a preliminary injunction that would either waive I-125 as applied to MMA, or delay a vote on I-137 until after the I-125 case was resolved. The district court consolidated the actions.

On summary judgment, the district court ruled that I-125 restricted core political speech, but concluded that a trial was necessary to determine whether a compelling state interest justified the restriction.

I-125 proponents contended that the effect of corporate spending on Montana initiatives was defeated measures.

Opponents produced evidence indicating that many factors influenced election results, and that the side spending less money won 50 percent of the time. They also showed that the Montana political system was healthy and free of corruption.

In the I-137 phase, MMA showed that I-125 limited mining companies' ability to oppose I-137, and that the measure posed a significant economic threat to its members.

The district court accepted the contentions of the I-125 opponents, ruling that at least as applied, the measure infringed the First Amendment rights of speech and association of those subject to its prohibitions; it was not narrowly tailored to address only the spending of large corporations; requiring corporations to fund ballot-issue campaign speech through segregated funds impermissibly deprived them of their ability to communicate political ideas directly to the electorate; the measure prevented the electorate from being exposed to diverse political viewpoints on matters

of public policy; and the proponents' evidence did not establish domination of the initiative process through corporate expenditures. Accordingly, the court concluded that the corporations were entitled to defend their economic interests by using their treasuries to fund their participation in ballot initiative campaigns.

Appellant Ed Argenbright, Montana's Commissioner of Political Practices, appealed from the district court's judgment for MCC, MMA and the other opponents of I-125.

[1] The constitutionality of I-125 came down to whether restricting corporate expenditures in the ballot issue process was controlled by Bellotti, even though I-125 (unlike the statute at issue in Bellotti) permitted corporations to establish segregated funds though which others might contribute.

[2] The risk of corruption perceived in cases involving candidate elections is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. The Constitution protects expression that is eloquent no less than that which is unconvincing.

[3] I-125 was similar to the statutory scheme approved in Austin to the extent that both statutes allowed corporations to set up segregated funds. However, Austin did not turn on this difference from Bellotti as much as it did on the difference between expenditures for candidate elections and ballot issues. Even if Austin could be read as undermining Bellotti, that was for the Supreme Court to say. Austin cited Bellotti and did not overrule it. Bellotti controlled.

[4] I-125 unconstitutionally restricted public discussion in the ballot issue (initiative) process. A restriction so destructive of the right of the public discussion, without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment. Its enforcement was therefore properly enjoined.

[5] The issue of whether the district court should have delayed or invalidated the I-137 election, together with the question whether MMA's pre-election request for injunctive relief should have been granted, were moot.

[6] Even though there was evidence that I-125 affected MMA's ability to campaign, there was also evidence that it had no substantial impact. And the state had a significant interest in avoiding the costs of a special election. It could not be said that the district court abused its discretion in failing to void the results of the election.

Judge McKeown concurred separately, writing to underscore that First Amendment protection of political contributions is not absolute, and that the articulation of a compelling state interest for restrictions on corporate spending in ballot issue elections could produce a different result.

Judge Hawkins dissented, concluding that Austin supported I-125's validity because Montana's initiative provided for corporate spending through a segregated fund.

Buckley v. American Constitutional Law Foundation (U.S. Supreme Court - 1999)

The Buckley case is the latest in a number of Supreme Court decisions asking how far States may go in regulating the conduct of ballot initiative campaigns. Since the success of term limit and tax limit initiatives, elected officials across the country have been restricting initiative campaigns. In 1988, the Supreme Court struck down Colorado's restriction on paid initiative signature collection, saying that initiative petitions were protected political speech. Meyer v. Grant, 486 U.S. 414 (1988). In Buckley, Colorado was asking that other restrictions on petitions be upheld.

The question before the Court in Buckley was: Whether the State of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators who verify the signatures of petition signers must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative must file reports disclosing the amounts paid to circulators and the identity of petition circulators.

In other words, Colorado attempted to regulate the collection of signatures on initiative petitions by requiring signature collectors ("circulators") to be registered to vote in Colorado and to wear badges with their names and addresses, whether they are paid or volunteer, and, if paid, the name of the person or entity who is paying them, and requiring initiative proponents to file reports disclosing the names of and compensation paid to circulators. The U.S. Court of Appeals for the Tenth Circuit 120 F.3d 1092 (1997) struck down these requirements as unconstitutional infringements on political speech.

Petitioner Colorado claimed that it needed the restrictions to prevent fraud and preserve the integrity of the electoral process, and that the restrictions are permissible under the "flexible standard" applicable to regulation of the ballot. Burdick v. Takushi. Colorado was supported by amici briefs from a group of State Attorneys General and by the Council of State Governments and a number of other governmental associations.

The respondents were a conservative legal organization and several individuals who have been involved in initiative campaigns (including Paul Grant, of Meyer v. Grant). Respondents contended that the fraud claims were a "facade," that the restrictions violated Meyer v. Grant and that the various restrictions violated petition circulators' and signers' free speech rights. Respondents were supported by a variety of organizations from across the philosophical spectrum, including the ACLU (click here to view amicus), the Initiative & Referendum Institute (click here to view amicus), and National Voter Outreach, a professional petition circulation firm. One of the amici's points was that Colorado law explicitly placed signature collection outside the electoral process (Montero v. Meyer, 861 F.2d 603 (10th Cir. 1988), cert. denied, 492 U.S. 921 (1989); accord, Delgado v. Smith, 861 F.2d 1489 (11th Cir. 1988), cert. denied, 492 U.S. 981 (1989)), making the proper standard for review the strict scrutiny applicable to private speech.

The U.S. Supreme Court ruled on January 12, 1999 striking down Colorado's regulation and restrictions on their initiative process as "undue hindrances to political conversations and the exchange of ideas," according to Justice Ruth Bader Ginsburg who wrote for the court.

The decision by the court had two major points: 1) initiative petition circulation is pure political speech and restrictions on circulation, especially at the time of discussions with voters who might potentially sign the petitions, is highly protected and 2) any restrictions on petition circulation must be justified by strong showings that the regulated practices hurt the integrity of the ballot process – in other words, that the restrictions help prevent actual fraud. This will be extremely difficult to do considering that no state has ever been able to show convincingly that rampant fraud exists during the petition process.

Planning and Conservation League, Inc., et al., Plaintiffs and respondents, vs. Daniel E. Lungren, as Attorney General, etc., Defendant and Appellant [No. C016761. COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT 38 Cal. App. 4th 497, 95 Cal. Daily Op. Service 7477, 45 Cal. Rptr. 2d 183, 95 Daily Journal DAR 12761, 1995 Cal. App. LEXIS 918 (September 22, 1995, Decided)]

This case invalidated a legislative attempt to regulate the fashion in which initiatives could qualify for the ballot.

Meyer v. Grant, 486 U.S. 414 (U.S. Supreme Court - 1988)

A handful of states sought to protect the integrity of the initiative process by prohibiting the payment of petition circulators. Colorado, Idaho and Nebraska each made it illegal to accept financial reward for signatures

raised. The United States Supreme Court overturned these laws in the 1988 decision, Meyer v. Grant, 486 U.S. 414 (1988). Such a law, the Court ruled unanimously, restricts freedom of expression guaranteed by the First Amendment: it restricts access to the most effective fundamental and perhaps economical avenue of political discourse, direct one-on-one communication.

The case arose out of an initiative proposal sponsored by a group known as Coloradans for Free Enterprise, which wanted to remove motor carriers from the jurisdiction of the Public Utility Commission. Proponents had to raise 46,737 signatures to qualify the initiative. Because they lacked the necessary resources for a volunteer circulation effort, they filed suit seeking an injunction against enforcement of the state's criminal statute prohibiting paid signature gathering. A federal district court upheld the Colorado statute but its decision was reversed by the U.S. Supreme Court. In a unanimous decision, the Court concluded that the circulation of petitions is political expression of either dissent with existing public policy or a desire to create new policy. Justice Stevens buttressed the point with a description of the petition process that assumes extensive political discussion between solicitors and the public. The prohibition against paid circulators, Stevens wrote, is a violation of free speech because it curtails the number of [circulators'] voices that will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach.

Michigan Chamber of Commerce v. Austin, 832 F. 2d 947 (1987)

The federal appellate court rules that Michigan's provisions limiting corporate contributions to ballot measure campaigns violates the right of association and free speech guarantees of the First Amendment. Another portion of the Michigan statute, prohibiting corporations from making independent expenditures on behalf of political candidates from general treasury funds, was upheld by the U.S. Supreme Court in Austin v. Michigan State Chamber of Commerce, U.S., II0 S. Ct. 1391 (1990)

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981)

In Citizens Against Rent Control v. Berkeley, the U.S. Supreme Court held that a California city's ordinance to impose a limit on contributions to committees formed to support or oppose ballot measures violated the First Amendment. The Court determined that the Berkeley ordinance imposed "...a significant restraint on the freedom of expression of groups and those individuals who wish to express their views though commit tees," and that "The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure." In a forceful passage the Court said, "Whatever may be the state interest or degree of that interest in

regulating and limiting contributions to or expenditures of a candidate or a candidate's committee there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions that in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributions are identified in a public filing revealing the amounts contributed..." Again, the Court based its decision on the right of individuals to bear and obtain information. In doing so, it equated free political spending with free speech.

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1977)

The Supreme Court has supported the notion that one-sided spending is not a crucial factor in ballot issue elections. Before 1976, 18 states had laws prohibiting or limiting corporate contributions or spending in initiative campaigns. But the Court found most of these laws to violate the First and Fourteenth Amendments.

In First National Bank of Boston v. Bellotti, the U.S. Supreme Court invalidated a Massachusetts statute prohibiting business corporations from making contributions or expenditures "... for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." In reviewing the Massachusetts law, the Court said, "If the speakers here were not corporations, no one would suggest that the state could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source..?' The Court rejected Massachusetts' claim that the statute preserved the integrity of the electoral process and public confidence in democratic government with this often quoted passage: 'The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular Vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it ... Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider in making their judgment, the source and credibility of the advocate.

In the view of some, the Court was naive in its understanding of ballot measure campaign finance matters. As of 1985, Michigan was the only state still attempting to implement a statute limiting corporate contributions to ballot measure campaigns. The limitation was $40,000 in volunteer services and/or financial support "to each ballot question committee for the

qualification, passage, or defeat of a particular ballot question?' A corporation could make an independent expenditure for the qualification, passage, or defeat of a ballot question, but, if it did so, the corporation would be considered "a ballot question committee" for the purposes of the act. "Corporations formed for political purposes" were not subject to the provision. The limit on corporate financial participation in ballot questions was a provision of a broader statute regulating campaign finance in Michigan.

In view of some critics, such as Western Illinois University political science Professor John S. Shockley writing in the May 1985 issue of the University of Miami Law Review, the Court was naive in its understanding of ballot measure campaign finance matters. At the time be published his article, Michigan was the only state still attempting to implement a statute limiting corporate contributions to ballot measure campaigns. The limitation was $40,000 in volunteer services and/or financial support "...to each ballot question committee for the qualification, passage, or defeat of a particular ballot questions' A corporation could make an independent expenditure for the qualification, passage, or defeat of a ballot question, but, if it did so, the corporation would be considered "a ballot question committee" for the purposes of the act. "Corporations formed for political purposes" were not subject to the provision. The limit on corporate financial participation in ballot questions was a provision of a broader statute regulating campaign finance in Michigan. In his article, Professor Shockley thought that the Michigan statute might withstand judicial scrutiny, as the state government, in a test case, attempted to justify the limitation on corporate funding of ballot question committees with a sophisticated body of evidence on the pattern of corporate financial influence on Wolverine State ballot question campaigns. The ballot contribution limit was invalidated by the U.S. District Court decisions Michigan State Chamber of Commerce v. Austin, 637 F. Supp. 1192 (E.D. Mich. 1986) and Michigan State Chamber of Commerce v. Austin, 642 F. Supp. 1078 (Efl. Mich. 1986). However, another portion of the Michigan statute, prohibiting corporations from making independent expenditures on behalf of political candidates from general treasury funds, was upheld by the U.S. Supreme Court in Austin v. Michigan State Chamber of Commerce, U.S., II0 S. Ct. 1391 (1990).

In the Austin case, the Supreme Court eroded the high level of First Amendment protection accorded campaign spending in the landmark Buckley v.Valeo. 424 U.S. 1 (1976). The distinction in the litigation on the Michigan statute is important; the federal judiciary has given a greater measure of First Amendment protection to expenditures for ballot questions than for campaigns for office. With the invalidation of the portion of the Michigan campaign finance law limiting corporate contributions to ballot measure campaigns, the last significant state government effort to restrict special interest initiative and referendum related expenditures failed.

Hardie v. Eu, 18 Cal. 3d 371 (1977)

The California Supreme Court finds unconstitutional the Political Reform Act's cap on expenditures for qualifying ballot measures since it violates First Amendment rights.

Stanson v. Mott, 17 Cal. 3d 206 (1976)

The California Supreme Court rules that the use of public funds for election campaigning to promote or oppose a ballot measure is illegal

Section Five
Important Court Cases
Relating to the Initiative and Referendum Process
(Chronological Listing)

Initiative & Referendum Institute v. United States Postal Service
United States District Court for the District of Columbia (1:00CV01246)

The Initiative & Referendum Institute and a coalition of citizen groups and individuals from across the political spectrum filed a legal complaint on June 1, 2000 in the U.S. District Court for the District of Columbia against the U.S. Postal Service (USPS). The suit seeks to overturn the USPS regulation prohibiting citizens from collecting petition signatures on initiative petitions on postal property. The new postal regulation severely limits the ability of citizens around the country to place issues before their fellow voters. The case number is 1:00CV01246.

The Institute also filed a temporary restraining order request due to the urgency in needing to have this prohibition rescinded during the last two months of the 2000 petitioning season. Surprisingly, the U.S. Postal Service voluntarily agreed to not enforce the regulation prior to July 31, 2000 effectively giving initiative proponents the opportunity to utilize postal property during this critical stage in the petition process. As of publication, a final ruling had not been reached.

Initiative & Referendum Institute v. State of Utah
United States District Court of Utah (2-00-CV-837)

This case, filed in the United States District Court for the District of Utah on October 23, 2000, seeks the court to review, declare unconstitutional and enjoin enforcement of Proposition 5, the 1998 legislatively sponsored amendment to the Utah Constitution, Article VI, Section 1. The amendment to the Utah Constitution requires any citizen ballot initiative involving wildlife to pass with a two-thirds supermajority vote of the Utah electorate.

Initiative & Referendum Institute v. State of Idaho
United States District Court of Idaho (Case No. 00-668-SMHW)

This case, filed in the United States District Court for the District of Idaho on November 12, 2000, seeks the court to review, declare unconstitutional and enjoin enforcement of the state's requirement that signatures for initiative petitions must be obtained from every one of Idaho's Counties as well as other provisions of Idaho's initiative regulations. The plaintiffs argue that these requirements are unnecessary and represent a burden on the citizen's First Amendment right of Freedom of Speech.

On Our Terms '97 Pac, Plaintiffs v. Secretary of State of State of Maine United States District Court District of Maine Civil No. 98-104-B-DMC (2000)

In early 1999, the Initiative & Referendum Institute brought a lawsuit in the U.S. District Court of Maine challenging Maine's prohibition on the payment of signature-gatherers on a per-signature basis (instead of by salary). Although the Court ruled that the Institute did not have standing to bring the case (because the Institute was not engaged in any initiative campaigns in that state), the Court did allow two other plaintiffs to remain.

Even though the Initiative & Referendum Institute did not have standing in the case, the Institute was the organization that controlled the legal strategy, coordinated the lawsuit and funded the legal challenge. On December 10, 1999 the U.S. District Court ruled (in On Our Terms '97 PAC, et al., v. Secretary of State of State of Maine) that the prohibition was unconstitutional. The remaining plaintiffs, U.S. Term Limits (a group trying to get an initiative on Maine's ballot) and On Our Terms (a group contracted to collect the signatures and run the ballot campaign) argued that the regulation was so restrictive (in that it made it very difficult to collect signatures) that it caused them to stop collecting signatures and cancel their campaign, and was thus an unconstitutional burden on core political speech. Furthermore, they argued that due to the burden of the regulation they would never do an initiative in Maine until the law was changed. The State of Maine argued that the regulation was necessary to prevent fraud because paying petitioners by the number of signatures they gather encourages them to forge signatures. They also argued that while U.S. Term Limits and On Our Terms stopped their campaigns, other groups went on to qualify issues for the ballot and therefore the regulation was not burdensome.

The U.S. District Court ruled, citing Meyer v. Grant, that the circulation of an initiative or referendum petition "involves the type of interactive communication concerning change that is appropriately described as core political speech" and citing Buckley v. ACLF, that a state may not, consistent with the First Amendment, severely burden such speech unless the regulation at issue is "narrowly tailored to serve a compelling state interest." The Court ruled that although the regulation didn't have the effect of halting all initiative and referendum activity in Maine (and that the proponents probably could have put their initiative on the ballot if they had worked harder and spent more), that the Statute nevertheless severely burdened the plaintiffs' attempt to mount their drive.

Furthermore, because the State of Maine could not provide any proof of rampant fraud in the Maine initiative process through out its history or provide proof that petitioners paid by the signature, instead of salary, were more likely to commit fraud, the State fell short of demonstrating that the

Statute was narrowly tailored to meet a compelling state interest. The court added that Meyer v. Grant "makes clear that, in the context of strict scrutiny, a state's assumptions cannot be accepted at face value."

Boyette v. Galvin
Federal District Court for the District of Massachusetts (No. 98-CV-10377-GAO 2000)

On March 3, 1998, The Becket Fund filed a lawsuit on behalf of a group of Massachusetts's citizens challenging provisions of the Massachusetts Constitution which forbid citizens from petitioning the legislature for private school funding. Several provisions in the Massachusetts constitution stood in the way: the Anti-Aid Amendment, which barred any portion of the common school fund from going to "sectarian" schools, adopted at the height of anti-immigrant and anti-Catholic fervor during the 1850s; and a 1917 amendment that expanded the earlier amendment to include higher education and non-profit groups, and also created initiative and referendum procedures for the state while explicitly forbidding the use of them to amend the Anti-Aid Amendment. A separate background sheet prepared by the Beckett Fund provides more detail and is available by going to http://www.becketfund.org.

In September 1998, a federal judge signed an order permitting a petition to be circulated for signatures while the court challenge was pending. Nearly 59,000 signatures were gathered, but several thousand were disqualified, leaving the effort just short of the 57,100 needed. Another petition drive was launched in 1999, and this time more than 78,000 were certified, easily surpassing the minimum requirement. But in order for the petition to come before the legislature, and henceforth the voters, the Attorney General must certify that it is proper for the legislators to take it up. In a letter of September 1, 1999, he declared that one of the very constitutional provisions being challenged prohibits him from doing so. And thus, on April 6, 2000, The Becket Fund asked the federal district court in Boston to order the Attorney General to certify the petition so that it can be taken up by legislators before the May 10, 2000 deadline. The judge decided against the preliminary injunction request.

Amalgamated Transit Union Local 587 v The State of Washington
Superior Court of the State of Washington in and for the County of King (99-2-27054-1 SEA 2000)

This case struck down initiative I-695, after being adopted by the voters, as violating the state's single subject requirement for initiatives. The ruling was appealed to the Washington State Supreme Court which affirmed the lower courts decision.

Waremart Inc. v. Progressive Campaigns Inc.
Washington State Supreme Court 67029-3 (2000)

The State Supreme Court ruled that grocery stores do not have to allow initiative petitioning on their property.

Senate of the State of California et al., Petitioners v. Bill Jones, Respondents
California State Supreme Court S083194 (1999)

This 1999 decision struck an initiative off the California primary ballot because it violated the state's single subject provision for initiatives.

Stenberg v. Moore
Nebraska State Supreme Court No. S-98-983 (1999)

In Stenberg v. Moore, the Nebraska Supreme Court dealt with the constitutionality of a Nebraskan statute that required that the information a voter puts on an initiative petition (signature, address, etc.) be an exact match of what is in the voter registration records in order for the signature to be counted as a valid signature. The Nebraska Supreme Court ruled that this law was facially unconstitutional.

Thomas J. Walsh v. Secretary of the Massachusetts Commonwealth
Massachusetts State Supreme Court (1999)

This litigation pertained to the validity of a petition and petition signatures if the petition had been altered in any way. The court ruled that signatures on petitions could be invalidated just because a coffee stain appeared on the petition.

San Francisco Forty-Niners v. Nishioka
San Francisco County Superior Court Ct. No. 995661-1999

In this case the San Francisco superior court issued a writ of mandate prohibiting respondent San Francisco Director of Elections from qualifying an initiative measure for the ballot. The writ was issued on the grounds that the circulating initiative petition contained false statements intended to mislead voters and induce them to sign the petition.

Joytime Distributors v. The State of South Carolina
South Carolina State Supreme Court (1999)

In this case, the South Carolina Supreme Court ruled that the state legislature did not have the authority to place statutes on the ballot for a general vote of the people.

Buckley v. American Constitutional Law Foundation
United States Supreme Court (1999)

The Buckley case is the latest in a number of supreme court decisions asking how far states may go in regulating the conduct of ballot initiative campaigns. Since the success of term limit and tax limit initiatives, elected officials across the country have been restricting initiative campaigns. In 1988, the Supreme Court struck down Colorado's restriction on paid initiative signature collection, saying that initiative petitions were protected political speech. Meyer v. Grant, 486 U.S. 414 (1988). In Buckley, Colorado was asking that other restrictions on petitions be upheld.

The question before the court in Buckley was whether the State of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators who verify the signatures of petition signers must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative must file reports disclosing the amounts paid to circulators and the identity of petition circulators.

In other words, Colorado attempted to regulate the collection of signatures on initiative petitions by requiring signature collectors ("circulators") to be registered to vote in Colorado and to wear badges with their names and addresses, whether they are paid or volunteer, and, if paid, the name of the person or entity who is paying them, and requiring initiative proponents to file reports disclosing the names of and compensation paid to circulators. The U.S. Court of Appeals for the Tenth Circuit 120 F.3d 1092 (1997) struck down these requirements as unconstitutional infringements on political speech.

Petitioner Colorado claimed that it needed the restrictions to prevent fraud and preserve the integrity of the electoral process, and that the restrictions are permissible under the "flexible standard" applicable to regulation of the ballot. Burdick v. Takushi, 504 US. 428, 434 (1992). Colorado was supported by amici briefs from a group of State Attorneys General and by the Council of State Governments and a number of other governmental associations.

The respondents were a conservative legal organization and several individuals who have been involved in initiative campaigns (including Paul Grant, of Meyer v. Grant). Respondents contended that the fraud claims were a "facade," that the restrictions violated Meyer v. Grant and that the various restrictions violated petition circulators' and signers' free speech rights. Respondents were supported by a variety of organizations from across the philosophical spectrum, including the ACLU, the Initiative & Referendum Institute, and National Voter Outreach, a professional petition

circulation firm. One of the amici's points was that Colorado law explicitly placed signature collection outside the electoral process (Montero v. Meyer, 861 F.2d 603 (10th Cir. 1988), cert. denied, 492 U.S. 921 (1989); accord, Delgado v. Smith, 861 F.2d 1489 (11th Cir. 1988), cert. denied, 492 U.S. 981 (1989)), making the proper standard for review the strict scrutiny applicable to private speech.

The U.S. Supreme Court ruled on January 12, 1999 striking down Colorado's regulation and restrictions on their initiative process as "undue hindrances to political conversations and the exchange of ideas," according to Justice Ruth Bader Ginsburg who wrote for the court.

The decision by the court had two major points: (1) initiative petition circulation is pure political speech and restrictions on circulation, especially at the time of discussions with voters who might potentially sign the petitions, is highly protected and (2) any restrictions on petition circulation must be justified by strong showings that the regulated practices hurt the integrity of the ballot process — in other words, that the restrictions help prevent actual fraud. This was extremely difficult to do considering that no state has ever been able to show convincingly that rampant fraud exists during the petition process.

Canvasser Services, Inc. v. Employment Department
Oregon State Supreme Court (1999)

In this Oregon case, the courts ruled that signature gatherers cannot be independent contractors and must be paid as employees.

Initiative & Referendum Institute v. Costco
California State District Court BC 18052 (1998)

This case was filed in 1998 and seeks to require Costco stores to adhere to existing California law and establish standard and reasonable time, place and manner restrictions for petitioners. The case is pending and waiting a decision.

Initiative & Referendum Institute v. Ralph's
California State District Court BC 187162 (1998)

This case was filed in 1998 and seeks to require Ralph's stores to adhere to existing California law and establish standard and reasonable time, place and manner restrictions for petitioners. The case is pending and waiting a decision.

Campbell, Hamilton, Initiative & Referendum Institute et al. v. Buckley
Federal District Court for the State of Colorado 98B 1022 (1998)

This case was filed in 1998 and challenges Colorado's constitutional, statutory, and administrative procedures for review of initiative measures before they are placed on the ballot. The current regulations violate the First Amendment rights of petition proponents and voters. The lower court ruled against the complaint and has been appealed to the U.S. Supreme Court.

Initiative & Referendum Institute v. State of North Dakota
Federal District Court for the State of North Dakota A1-98-70 (1998)

This case seeks to overturn North Dakota's prohibition on paying circulators on a per-signature-basis and the requirement that circulators be "electors." The case is pending and waiting a decision.

Bernbeck v. Moore
8th U.S. Court of Appeals (1997)

On October 9, 1997, in Bernbeck v. Moore, the 8th U.S. Court of Appeals struck down a Nebraska law that required petitioners to be registered voters in Nebraska for at least 30 days before circulating an initiative petition. The court ruled the voter registration requirement violated the First Amendment. The court based its decision on the U.S. Supreme Court decision, Meyer v. Grant, which ruled that a ban on paid petitioners violated freedom of expression guaranteed by First Amendment.

The court further stated that nothing in Nebraska law makes it illegal for anyone to hire out-of-state campaign consultants, out-of-state printers, out-of-state canvassers, or out-of-state lobbyists. The state may still require petition circulators to provide, under penalty of perjury, their temporary and permanent addresses, so if they may be located later if necessary. Therefore, Nebraska has no compelling need to require petitioners to be registered voters.

Planning and Conservation League v. Lungren (1995)

This California case invalidated a legislative attempt to regulate the fashion in which initiatives could qualify for the ballot.

Chemical Specialties Manufacturers v. Deukinejian (1991)

The California Appellate Court found Proposition 105, which required disclosure in a wide variety of areas (campaigns, hospitals, South African contracts, etc.), to violate the single subject rule of the state constitution.

Missourians to Protect Initiative Process v. Blunt (1990)

The Missouri Supreme Court rules an initiative off the ballot because it is in violation of the single subject rule.

Finn v. McCuen (1990)

Since the title of a lottery measure was misleading, the California Supreme Court ruled that the measure should not be allowed on the ballot.

Taxpayers to Limit Campaign Spending v. FPPC (1990)

The California Supreme Court finds that when two initiatives covering the same topic appears on the same ballot, the one initiative receiving the most votes supersedes the other measure in all respects, even though some of the provisions of the one initiative with fewer voters do not conflict with the provisions of the other measure receiving the higher number of votes.

Meyer v. Grant
United States Supreme Court (1988)

Colorado had passed a law making it illegal to accept financial reward for signatures collected. The United States Supreme Court overturned this law. Such a law, the Court ruled unanimously, restricts freedom of expression guaranteed by the First Amendment and it restricts access to the most effective fundamental and perhaps economical avenue of political discourse, direct one-on-one communication.

HCHH Associates v. Citizens for Representative Government (1987)

The California Appellate Court finds that an indoor shopping mall cannot ban petition gatherers but can impose reasonable rules on circulators.

Michigan Chamber of Commerce v. Austin (1987)

The federal appellate court rules that Michigan's provisions limiting corporate contributions to ballot measure campaigns violates the right of association and free speech guarantees of the First Amendment.

Bilofsky v. Deukmejian (1981)

California statute upheld as constitutional that prevents the use of names gathered on initiative petitions.

Citizens Against Rent Control v. Berkeley (1981)

In Citizens Against Rent Control v. Berkeley, the U.S. Supreme Court held that a California city's ordinance to impose a limit on contributions to committees formed to support or oppose ballot measures violated the First Amendment. The Court determined that the Berkeley ordinance imposed ". . . a significant restraint on the freedom of expression of groups and those individuals who wish to express their views though commit tees," and that "The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure." In a forceful passage the Court said, "Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committee there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions that in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributions are identified in a public filing revealing the amounts contributed."

Pruneyard Shopping Center v. Robins
United States Supreme Court (1980)

The U.S. Supreme Court rules that state constitutional provisions that permit political activity at a privately owned shopping center does not violate federal constitutional private property rights of the owner.

First National Bank of Boston v. Bellotti
United States Supreme Court (1977)

In First National Bank of Boston v. Bellotti, the U.S. Supreme Court invalidated a Massachusetts statute prohibiting business corporations from making contributions or expenditures ". . . for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." In reviewing the Massachusetts law, the Court said, "If the speakers here were not corporations, no one would suggest that the state could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source?" The Court rejected Massachusetts' claim that the statute preserved the integrity of the electoral process and public confidence in democratic government with this often quoted passage: "The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular Vote on a public issue. To be sure, corporate

advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider in making their judgment, the source and credibility of the advocate."

Hardie v. Eu
California State Supreme Court (1977)

The California Supreme Court finds unconstitutional the Political Reform Act's cap on expenditures for qualifying ballot measures since it violates First Amendment rights.

Citizens for Jobs and Energy v. Fair Political Practices Commission
California State Supreme Court (1976)

The California Supreme Court declares that the Political Reform Act may not limit expenditures by ballot measure committees.

Stanson v. Mott
California State Supreme Court (1976)

The California Supreme Court rules that the use of public funds for election campaigning to promote or oppose a ballot measure is illegal.

Bernzen v. Boulder
Colorado State Supreme Court 186 Colo. 81, 525 P.2d 416 (1974)

In this case, the court ruled that recall, as well as initiative and referendum, were fundamental rights of a republican form of government which the people have reserved unto themselves.

State ex. rel. Nelson v. Jordan
Arizona State Supreme Court (1969)

The Arizona Supreme Court finds that when two initiatives conflict, it is the duty of the court to harmonize both.

Pacific States Tel. & Tel. Co. v. Oregon
United States Supreme Court 223 U.S. 118 (1912)

This case addressed whether Oregon's I&R system violated the Guarantee Clause of the U.S. Constitution. The court sidestepped the issue by holding that whether a state had a republican form of government is a political question, and therefore non-justiciable. The court was motivated in part by

reluctance to conclude that adoption of the initiative and referendum destroyed all government republican in form in Oregon. The Court stated "[t]his being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum." Any such determination should, the court concluded, be made by Congress. This seemed to settle the issue at the federal level.

Hartig v. City of Seattle
Washington State Supreme Court 53 Wash. 432, 102 P. 408 (1909)

In 1909, the Washington Supreme Court considered whether I&R violated the Guarantee Clause of the Federal Constitution. The Washington court did not think the question of representative government was relevant at all to the question of whether a form of government was republican. They stated: "[I]t can scarcely be contended that this plan is inconsistent with a republican form of government, the central idea of which is a government by the people. Whether the expression of the will of the people is made directly by their own acts or through representatives chosen by them is not material. The important consideration is a full expression."

In re Pfahler
California State Supreme Court 150 Cal. 71, 88 P. 270 (1906)

In this case, the California Supreme Court upheld a local initiative law against a Guarantee Clause challenge while implying that similar measures on the state level would be constitutional as well. The court stated: "In saying this, we do not wish to be understood as intimating that the people of a state may not reserve the supervisory control as to general state legislation afforded by the initiative and referendum, without violating this provision of the federal Constitution."

Kadderly v. City of Portland
Oregon State Supreme Court 44 Or. 118, 74 P. 710 (1903)

In this case, the Oregon Supreme Court sustained initiative and referendum against a Guarantee Clause attack. The court stated, "The purpose of this provision of the Constitution is to protect the people of the several states against aristocratic and monarchical invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government. Cooley, Const. Lim. (7th Ed.) 45; 2 Story, Const. (5th Ed.) § 1815. But it does not forbid them from amending or changing their Constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the Constitution as republican, nor is its exact form in any way prescribed."

The court acknowledged that James Madison had described republican government as representative, but stated, "Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the Legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed."

Section Six
Major Initiative and Referendum Legislation Since 1998

Because the people have turned to the initiative process to get real reform, the initiative process has fallen prey to its own success. Lawmakers, who feel the initiative process has taken away their power and who have been most affected by this citizen's tool, have struck back by imposing new regulations on the process. Even though it can be stated that the initiative process is in need of review and possibly reform – state legislators seem to be acting in a vacuum and have not taken the time to truly understand the effects of their regulations on the initiative process. Following is a brief overview of some of the major legislation that has been considered by state legislatures that negatively impacts the initiative and referendum process.

1998 Legislation

- Mississippi: Passed legislation requiring that only a person who is a resident of the state may circulate an initiative petition or obtain signatures on an initiative petition.

- Missouri: Changed the deadline for submitting initiative petitions from four months prior to the election to six months prior — effectively decreasing the circulation period by two months.

- Utah: Amended constitution to require a two-thirds vote of the people in order to adopt by initiative any state law allowing, limiting, or prohibiting the taking of wildlife or the season for or method of taking wildlife.

- Wyoming: Required initiative proponents to not only gather signatures equal to 15% of the number of voters in the last general election, but to gather signatures equal to 15% of the number of voters in the last general election in 2/3 of Wyoming counties — making petitioners have to collect an impossible number of signatures in very sparsely populated areas.

1999 Legislation

- Arkansas: Legislation requires the reporting of state funds in excess of $100 used to support or oppose a ballot measure.

- Arkansas: Gives the Arkansas Supreme Court original jurisdiction to determine the sufficiency of initiative and referendum petitions and proposed constitutional amendments.

- Arizona: Required that all petition circulators must be qualified to be registered to vote (i.e. a resident of the state, etc.)

- Idaho: Required that all petition circulators be a resident of the state.

- Missouri: Required that all petition circulators must be residents of the state. Also required that all signature-gatherers register with the state and provided that all signatures gathered by unregistered circulators be declared invalid.

- Montana: Required that employers of paid signature gatherers file financial disclosure reports.

- Montana: Gave Attorney General the authority to deny certification of an improper ballot measure.

- Nebraska: Passed legislation providing that in order for a constitutional amendment to become law it must be approved twice by the voters in separate elections. Also requires that initiative petitions be filed with the Secretary of State eight months prior to an election, rather than the existing requirement of four months. (Defeated by voters on November 7, 2000.)

- Oregon: Passed legislation increasing the number of signatures needed to get a constitutional amendment on the ballot from eight to twelve percent. (Defeated by voters on May 16th, 2000.)

- Oregon: Passed legislation extending the time period for the Secretary of State to verify signatures on petitions from 15 to 30 days. (Adopted by voters on May 16th, 2000.)

- South Dakota: Provided a procedure for opponents of an initiative to contest the validity of signatures.

- Utah: Required that political issues committees for initiatives and employers of paid signature gatherers file financial disclosure reports.

- Utah: Required that circulators must be a resident of the state.

2000 Legislation

- Alaska: Prohibits initiatives that permit, regulate or prohibit the taking or transportation of wildlife, or prescribes seasons or methods for the taking of wildlife. (Defeated by voters on November 7, 2000.)

- Arizona: Requires a supermajority vote of the people for all future wildlife and hunting initiatives. (Defeated by voters on November 7, 2000.)

- Arizona: Allows a person to withdraw their signature from a petition.

- Minnesota: Senate Committee kills legislation passed by the House in 1999 allowing the citizens to vote on the establishment of initiative and referendum at the state level.

- South Dakota: Changes South Dakota's circulation period for collecting signatures by not allowing collection time to roll over to future ballots. For example, South Dakota's current circulation period is one year. It use to be that if you started collecting signatures in January and the deadline to make the upcoming ballot was May and you didn't have enough signatures by then, you could keep petitioning until your one year time limit was up — and the measure would go on the next available ballot. Now you still have one year, but no matter when you start you only have until the deadline for the closest election ballot to gather signatures.

- Wyoming: Requires petition circulators be registered voters and citizens of the state.

Appendix A: Table: 1.1

States with Direct (DA)[13] and In-direct (IDA)[14] Initiative Amendments; Direct (DS)[15] and In-direct (IDS)[16] Initiative Statutes and Popular (PR)[17] Referendum[18]

States where some form of Initiative or Popular Referendum is available	Date process was adopted [19]	Type of process available		Type of *Initiative* process available		Type of Initiative process used to propose Constitutional Amendments		Type of Initiative process used to propose Statutes (Laws)	
		Initiative	Popular Referendum	Constitutional Amendment	Statute	Direct (DA)	In-direct (IDA)	Direct (DS)	In-direct (IDS)
Alaska	1956	X	X	O	X	O	O	O	X
Arizona	1911	X	X	X	X	X	O	X	O
Arkansas	1910	X	X	X	X	X	O	X	O
California[20]	1911/66	X	X	X	X	X	O	X	O
Colorado	1910	X	X	X	X	X	O	X	O
Florida	1972	X	O	X	O	X	O	O	O
Idaho	1912	X	X	O	X	O	O	X	O
Illinois [21]	1970	X	O	X	O	X	O	O	O
Kentucky	1910	O	X	O	O	O	O	O	O
Maine	1908	X	X	O	X	O	O	O	X
Maryland	1915	O	X	O	O	O	O	O	O
Massachusetts	1918	X	X	X	X	O	X	O	X
Michigan	1908	X	X	X	X	X	O	O	X
Mississippi [22]	1914/92	X	O	X	O	O	X	O	O
Missouri	1908	X	X	X	X	X	O	X	O
Montana[23]	1906/72	X	X	X	X	X	O	X	O
Nebraska	1912	X	X	X	X	X	O	X	O
Nevada	1905	X	X	X	X	X	O	O	X
New Mexico	1911	O	X	O	O	O	O	O	O
North Dakota[24]	1914	X	X	X	X	X	O	X	O
Ohio	1912	X	X	X	X	X	O	O	X
Oklahoma	1907	X	X	X	X	X	O	X	O
Oregon	1902	X	X	X	X	X	O	X	O
South Dakota[25]	1898/72/88	X	X	X	X	X	O	X	O
Utah	1900/17	X	X	O	X	O	O	X	X
Washington	1912	X	X	O	X	O	O	X	X
Wyoming	1968	X	X	O	X	O	O	O	X
Totals	***27 states***	***24 states***	***24 states***	***18 states***	***21 states***	***16 states***	***2 states***	***14 states***	***9 states***

[13] Direct Initiative amendment (DA) is when constitutional amendments proposed by the people are directly placed on the ballot and then submitted to the people for their approval or rejection.

[14] In-direct Initiative amendment (IDA) is when constitutional amendments proposed by the people must first be submitted to the state legislature during a regular session.

[15] Direct Initiative statute (DS) is when statutes (laws) proposed by the people are directly placed on the ballot and then submitted to the people for their approval or rejection.

[16] In-direct Initiative statute (IDS) is when statutes (laws) proposed by the people must first be submitted to the state legislature during a regular session.

[17] Popular Referendum (PR) is the power to refer to the ballot, through a petition, specific legislation that was enacted by the legislature for their approval or rejection.

[18] This list does not include the states with Legislative Referendum (LR). Legislative Referendum is when a state legislature places an amendment or statute on the ballot for voter approval or rejection. Every state but Delaware requires state constitutional amendments to be placed on the ballot for voter approval or rejection.

[19] This date represents the date that the citizens of the state voted to adopt the process.

[20] In 1966 California repealed indirect Initiative for statutes.

[21] In Illinois, the subject matter of a proposed constitutional amendment is severely limited to legislative matters. Consequently, Initiatives seldom appear on the ballot.

[22] Mississippi first adopted initiative and referendum in 1914 but a court ruling nullified the vote. The voters then adopted it again in 1992.

[23] In 1972 Montana adopted a provision that allows for directly initiated constitutional amendments.

[24] In North Dakota prior to 1918, constitutional amendments could be initiated only indirectly.

[25] In 1972 South Dakota adopted a provision that allows for directly initiated constitutional amendments. In 1988 South Dakota repealed In-direct Initiative for Statutes.

Appendix B: Table: 1.2

Signature, Geographic Distribution and Single-Subject Requirements for Direct (DA)[i] and In-direct (IDA)[ii] Initiative Amendments; Direct (DS)[iii] and In-direct (IDS)[iv] Initiative Statutes

State	Type	SS[v]	Net Signature Requirement for Constitutional Amendments	Net Signature Requirement for Statutes	Geographic Distribution	Deadline for Signature Submission	Circulation Period
AK	DS	Yes	Not allowed by state constitution	10% of votes cast in last general election.	At least 1 signature in 2/3 of Election Districts	Prior to the convening of the legislature[vi]	1 year
AZ	DA/DS	Yes	15% of votes cast for Governor	10% of votes cast for Governor	No geographical distribution	Four months prior to election	20 months
AR	DA/DS	No	10% of votes cast for Governor	8% of votes cast for Governor	5% in 15 of 75 counties	Four months prior to election	Unlimited
CA	DA/DS	Yes	8% of votes cast for Governor	5% of votes cast for Governor	No geographical distribution	To be determined by state each year[vii]	150 days
CO	DA/DS	Yes	5% of votes cast for SOS	5% of votes cast for SOS	No geographical distribution	Three months prior to election	6 months
FL	DA	Yes	8% of ballots cast in the last Presidential election	Not allowed by state constitution	8% in 12 of 23 Congressional Districts	90 days prior to election[viii]	4 years
ID	DS	No	Not allowed by state constitution	6% of registered voters	6% in each of the 22 counties	Four months prior to election	18 months
ME	IDS	No	Not allowed by state constitution	10% of votes cast for Governor	No geographical distribution	To be determined by state each year[ix]	1 year
MA	IDA/IDS	No	3% of votes cast for Governor	3½% of votes cast for Governor[x]	No more than 25% from a single county	To be determined each year by state[xi]	64 days
MI	DA/IDS	No	10% of votes cast for Governor	8% of votes cast for Governor	No geographical distribution	Constitutional amendment[xii] Statute[xiii]	180 days
MS	IDA	No	12% of votes cast for Governor	Not allowed by state constitution	20% from each Congressional District	90 days prior to the convening of the legislature	1 year
MO	DA/DS	Yes	8% of votes cast for Governor	5% of votes cast for Governor	5% in 6 of 9 Congressional Districts	Eight months prior to election	18 months
MT	DA/DS	Yes	10% of votes cast for Governor	5% of votes cast for Governor	Statute: 5% in 34 of 50 Legislative Districts Amendment: 10% in 40 of 50 Legislative Districts	Second Friday of the fourth month prior to election	1 year
NE	DA/DS	Yes	10% of registered voters	7% of registered voters	5% in 38 of 93 counties	Four months prior to election	1 year
NV	DA/IDS	No	10% of registered voters	10% of votes cast in last general election.	10% in 13 of 17 counties	Constitutional amendment[xiv] Statute [xv]	CA: 11 months[xvi] Statute: 10 months[xvii]
ND	DA/DS	No	4% of population	2% of population	No geographical distribution	90 days prior to election	1 year
OH	DA/IDS	Yes	10% of votes cast for Governor	6% of votes cast for Governor[xviii]	Statute: 1½% in 44 of 88 counties Amendment: 5% in 44 of 88 counties	Constitutional amendment[xix] Statute[xx]	Unlimited
OK	DA/DS	Yes	15% of votes cast for Governor	8% of votes cast for Governor	No geographical distribution	Eight months prior to election [xxi]	90 days
OR	DA/DS	Yes	8% of votes cast for Governor	6% of votes cast for Governor	No geographical distribution	Four months prior to election	Unlimited
SD	DA/DS	No	10% of votes cast for Governor	5% of votes cast for Governor	No geographical distribution	Constitutional amendment[xxii] Statute[xxiii]	1 year
UT	DS/IDS	No	Not allowed by state constitution	Direct statute: 10% of votes cast for Governor In-direct statute: 10% of votes cast for Governor[xxiv]	10% in 20 of 29 counties	Direct statute[xxv] In-direct statute[xxvi]	Direct: Unlimited In-direct: Unlimited
WA	DS/IDS	No	Not allowed by state constitution	8% of votes cast for Governor	No geographical distribution	Direct: statute[xxvii] In-direct statute[xxviii]	Direct: 6 months In-direct: 10 months
WY	DS	Yes	Not allowed by state constitution	15% of votes cast in the last general election.	15% of total votes cast in the last election from at least 2/3 of the counties	One day prior to the convening of the legislature[xxix]	18 months

[i] Direct Initiative amendment (DA) is when constitutional amendments proposed by the people are directly placed on the ballot and then submitted to the people for their approval or rejection.

[ii] In-direct Initiative amendment (IDA) is when constitutional amendments proposed by the people must first be submitted to the state legislature during a regular session.

[iii] Direct Initiative statute (DS) is when statutes (laws) proposed by the people are directly placed on the ballot and then submitted to the people for their approval or rejection.

[iv] In-direct Initiative statute (IDS) is when statutes (laws) proposed by the people must first be submitted to the state legislature during a regular session.

[v] This column denotes whether or not a state has a requirement that every Initiative or Referendum be limited to one subject.

[vi] In Alaska, signatures must be submitted prior to the convening of the legislative session in the year in which the initiative is to appear on the ballot. The lieutenant governor shall place the initiative on the election ballot of the first statewide general, special, or primary election that is held after (1) the petition and any supplementary petition have been submitted, (2) a legislative session has convened and adjourned, and (3) a period of 120 days has expired since the adjournment of the legislative session.

[vii] In California, each year the Secretary of State will set a complete schedule showing the maximum filing deadline and the certification deadline by the counties to the Secretary of State. There is a recommended submission date for "full check" and "random check". These dates are only recommended. Notwithstanding any other provision of law, no initiative shall be placed on a statewide election ballot which qualifies less than 131 days before the date of the election.

[viii] In Florida, certification must be received by the Secretary of State from the county supervisors stating the number of valid signatures submitted by the initiative proponent no later than 90 days prior to the general election ballot for the initiative to be considered for that ballot. However, there are several additional criteria that must be met prior to the certification of an initiative for the ballot. This includes the requirement that the proposed initiative has been approved for the ballot by the state supreme court. An initiative can only be submitted to the court for review after 10% of the required number of signatures have been collected and certified to the Secretary of State by the county supervisors. The court is under no statutory time frame to render a decision. Therefore, there is no precise date in which the signatures must be submitted in order to insure that you qualify for any specific general election ballot.

[ix] In Maine, signatures must be submitted on or before the 50th day after the convening of the Legislature in the first regular session or on or before the 25th day after the convening of the Legislature in the second regular session.

[x] In Massachusetts, the initial petition must include three percent of the total votes cast for Governor. If the legislature has not passed an initiated statute by the first Wednesday in May, petitioners must file a supplementary petition with petitions equal in number to one-half of one percent of the total votes cast in the previous gubernatorial election to place the issue on the ballot.

[xi] In Massachusetts, the initial petition signatures shall be submitted no later than the first Wednesday in December in the year in which the Initiative was submitted. If the legislature has not passed the initiated statute by the first Wednesday in May, petitioners must file a supplementary petition with petitions equal in number to one-half of one percent of the total votes cast in the previous gubernatorial election no sooner than the first Wednesday in June and no later than the first Wednesday in July in order for the initiative statute to be placed on the ballot.

[xii] In Michigan, signatures for constitutional amendments must be submitted not less than 120 days prior to the general election.

[xiii] In Michigan, signatures for statutes must be submitted ten days prior to the start of the legislative session.

[xiv] In Nevada, signatures for constitutional amendments must be submitted 90 days prior to the election.

[xv] In Nevada, signatures for statutes must be submitted 30 days prior to the convening of the legislature.

[xvi] In Nevada, petition language for constitutional amendments can be filed no sooner than September 1 of the year preceding the election and all signatures are due 90 days prior to the election.

[xvii] In Nevada, petition language for statutes can be filed no sooner than January 1st of an even number year and signatures must be submitted no later than November 1st of that same even numbered year.

[xviii] In Ohio, the initial petition must include three percent of the total votes cast for Governor. A supplementary petition containing an additional three percent is required in the event the proposed statute is defeated, amended or left idle by the legislature.

[xix] In Ohio, signatures for amendments must be submitted 90 days prior to the election.

[xx] In Ohio, signatures for statutes must be submitted 10 days prior to the convening of legislature.

[xxi] In Oklahoma, an initiative must be submitted to the state Supreme Court for review before it can be certified for the ballot by the Secretary of State. Due to the fact that there is no statutory deadline for the court to make this determination, the state recommends that you submit your signatures eight months prior to the election that you desire the measure to be considered for.

[xxii] In South Dakota, signatures for amendments must be submitted at least one year prior to the election.

[xxiii] In South Dakota, signatures for statutes must be submitted by the first Tuesday in May in the general election year.

[xxiv] In Utah, direct statutes require signatures equal in number to 10 percent of the votes cast for all candidates for Governor in the next preceding gubernatorial election for the statute to be placed on the ballot. In-direct statutes must contain signatures from five percent of the votes cast for all candidates for Governor in the next preceding gubernatorial election. If the legislature rejects or does not enact the proposed statute, a supplemental petition contacting additional signatures equal in number to 5 percent of the votes cast for all candidates for Governor in the next preceding gubernatorial election for the statute to be placed on the ballot.

[xxv] In Utah, signatures for direct statutes must be submitted at least four months prior to the election.

[xxvi] In Utah, signatures for in-direct statutes must be submitted at least 10 days before the commencement of the annual general legislative session.

[xxvii] In Washington, signatures for direct statutes must be submitted four months prior to the election.

[xxviii] In Washington, signatures for in-direct statutes must be submitted ten days prior to the convening of the regular session of the legislature.

[xxix] In Wyoming, signatures must be submitted prior to the convening of the legislature. The state constitution states that the legislature shall convene at noon on the second Tuesday in January.

IRI

Initiative & Referendum Institute

Post Office Box 6306
Leesburg, VA 20178
Phone: 703.723.9621 / Fax: 703.723.9619
http://www.iandrinstitute.org
http://www.ballotwatch.org

M. Dane Waters
President
mdanewaters@iandrinstitute.org

Have Voter Initiatives Paralyzed the California Budget?

John G. Matsusaka
University of Southern California & Initiative & Referendum Institute

Abstract. Many observers blame the California budget crisis on a series of voter initiatives that unrealistically appropriated spending while prohibiting tax increases. However, a review of all initiative measures approved by the voters since 1912 shows that no more than 32 percent of appropriations in the 2003-04 budget were locked in by initiatives. Virtually all of the earmarked spending was for education, and would have been appropriated by the legislature even without an initiative mandate. Initiatives placed only minimal constraints on the legislature's ability to raise revenue. The facts suggest that voter initiatives are not a significant obstacle to balancing the budget in California.

November 2003

Have Voter Initiatives Paralyzed the California Budget?

IN EARLY 2003 California faced a projected budget deficit in the vicinity of $30 billion for the oncoming fiscal year. The staggering size of the shortfall fueled the recall campaign that removed the incumbent Democratic governor from office, and installed a fiscally conservative Republican in his place. However, there is substantial disagreement about what actually caused the budget crisis. Recall proponents blamed the governor for "gross mismanagement of the California finances by overspending taxpayers' money."[1] But others placed the blame on the voters, asserting that a series of popular initiatives locking in spending and preventing tax increases has paralyzed the budget process, making it impossible for the governor and legislature to make rational decisions (see Table 1).

The argument that direct democracy has brought California to the edge of fiscal calamity became almost a mantra among pundits leading up the election. If true, the California example would raise some troubling questions about the initiative and referendum, two increasingly popular institutions of direct democracy. Yet the assertions that initiatives have paralyzed the budget seem to be based on an impressionistic view of the measures approved by the voters; I am not aware of any systematic study of the extent to which the budget process is constrained by voter initiatives.

The purpose of this paper is provide, I believe for the first time, a systematic accounting of the constraints placed on the California budget by the initiative process. I review all 98 initiatives that the voters have approved since the initiative process was approved in 1912 and "add up" the constraints that have been placed on appropriations and revenues. It turns out that there are some serious constraints, but fewer than is often claimed. At most 32 percent of the 2003-04 state spending was locked in by initiatives,

[1] Page 5 of *Official Voter Information Guide for the California Statewide Special Election, Tuesday, October 7, 2003*, published by the California Secretary of State, Sacramento, California.

and almost all of that money would have been spent for its dedicated purpose even without a constitutional requirement. On the revenue side, initiatives have not placed any significant constraints on the three most important revenue sources for state governments: income taxes, sales taxes, and corporate taxes. It is hard to see a factual basis for the claim that the deficit was caused by voter initiatives, or that direct democracy has paralyzed the state budget.

1. Initiatives in California

The initiative is a process by which ordinary citizens can propose laws and constitutional amendments by collecting a predetermined number of signatures from fellow citizens. If the required number of signatures is collected, the proposal is placed on the ballot and becomes law if it receives a majority vote. Initiatives are different from referendums placed on the ballot by the legislature—I will not be focusing on legislative measures in this paper.

The initiative process is common in the United States. Twenty-four of 50 states and about half of all cities provide for the process. All told, about 70 percent of the population lives in either a state ~~of~~ or city where the initiative is available, making it the norm for American democracy.[2] The initiative process is also quite old. It was first adopted by South Dakota in 1898, making it more venerable than universal women's suffrage, the federal income tax, and social security.

California's initiative process is fairly similar to that of other states. Statutory measures can qualify for the ballot if petitioners collect signatures equal to 5 percent of the vote cast at the last gubernatorial election (currently about 373,816 signatures), and constitutional amendments qualify with 8 percent of the vote cast (currently 598,105 signatures.) Since all signatures must be collected within a 150 day period, initiative sponsors typically employ paid signature collectors. Contrary to conventional wisdom, paid signature collectors are not a modern invention; they were being used in Oregon

[2] This and other background information throughout the paper is taken from John G. Matsusaka, *For the Many or the Few: How the Initiative Process Changes American Government*, University of Chicago Press, forthcoming, 2004.

before 1910. Measures are supposed to pertain to a single subject, but California courts have interpreted this provision liberally. One important feature of the initiative process in California that is not shared by other states is that a measure approved by the voters—whether statutory or constitutional amendment—cannot be modified by the legislature. It can only be changed by the voters themselves. As a result, successful initiatives are binding on the legislature and governor.

A grand total of 288 initiatives have been voted on in California through 2003, of which 34 percent have passed. Of the successful measures, just over 50 percent had direct implications for either spending or taxes. Perhaps the best known of these measures is Proposition 13, approved by the voters in 1978, that capped property taxes at 1 percent of assessed value, and prohibited assessment increases in excess of the rate of inflation.[3]

2. Constraints on Spending

"Constraints" can take many forms. Expenditure can be locked in ("spend at least $1 million on education") or capped ("spend no more than $1 million on education.") Constraints can be fixed ("spend at least $1 million on education") or conditional ("spend at least 1 percent of the budget on education"; "spend at least $1 million on education except during a recession year," etc.) Constraints can be absolute ("spend $1 million no matter what") or flexible ("spend $1 million on education unless the legislature decides otherwise by a 3/5 vote.") To focus the analysis, I will concentrate on constraints that make it difficult to balance the budget, that is, appropriations that cannot be reduced and revenue sources that cannot be tapped or increased. Moreover, I will be looking only at constraints imposed by voter initiatives. The budget is constrained by other factors, such as federal and state constitutions and federal mandates; I will discuss these other constraints after describing the constraints imposed by voter initiatives.

Another conceptual issue is related to the fact that constraints vary over time. For example, the spending guarantees of Prop. 98 in 1988 depend on how much was spent on

[3] The numbers in this paragraph are based on data in M. Dane Waters, *The Initiative and Referendum Almanac*, Carolina Academic Press, 2003, updated with information from the California Secretary of State web page.

education in the previous year, and the costs of a bond issue depend on how much debt is currently outstanding. To make things concrete, I focus on a particular fiscal year 2003-04. That is, I ask what constraints were in effect during the budget process for 2003-04.

Consider first appropriations (revenue is studied in the next section). To find the constraints on appropriations imposed by voter initiatives, I read through the ballot descriptions and arguments for and against each initiative approved by the voters since the process became available in 1912. This led to an initial list of initiatives with potential fiscal impact (a spending impact of at least $1 million.) I eliminated from the list any measures that had expired (such as a bond issue from early in the 20th century that had been paid off long ago), had been repealed or superseded by another measure, had been struck down by a court, or was otherwise ineffective for 2003-04. This left a list of initiatives with fiscal impact that are currently in effect.[4] I then calculated how much money was locked in by each initiative by reading through the precise statutory and constitutional provisions of the measures, and consulting the current budget situation where relevant. When faced with uncertainty about the amounts, I took the largest reasonable number. For example, the lock-in attributed to Prop. 21 in 2000 (juvenile crime) was the official estimate from the Legislative Analyst in 2000 (adjusted for inflation). However, courts have weakened the initiative and the actual costs are turning out to be much lower than anticipated. Because I report the largest plausible amounts, the final numbers are probably overestimates of the true constraints.

Table 2 lists the 15 initiatives that locked in state spending for the 2003-04 fiscal year, as well as the amount committed by each initiative. The details of how each number was calculated are given in the appendix. The most important initiative by far is Prop. 98 from 1988 that locked in $30 billion for K-14 education.[5] After this, the next most costly measure was Prop. 10 from 1998 that committed $522 million to early childhood development. The impact of Prop. 99 in 1988 (tobacco) was comparable.

All told, initiatives locked in $32.132 billion for the 2003-04 fiscal year. As noted above, this number probably overestimates the amount of money locked in. To put the

[4] It is possible that my search missed an initiative or two, but I am confident that no measure with any significant fiscal impact was omitted.

[5] The initiative locked in $45.7 billion total spending for K-14 education. A projected $15.7 billion was anticipated from local property taxes, leaving the state responsible for the remaining $30 billion.

$32 billion figure in perspective, total state appropriations for the fiscal year were $101 billion. So voter initiatives locked in about 32 percent of the budget. Clearly, the claim that 70 percent of the budget has been earmarked in advance by initiatives is far off the mark. Whether 32 percent is a big or small number is open for debate. To me, the number is surprisingly small. It implies that fully 68 percent of the budget is unconstrained by initiatives, more than enough room to close a budget deficit with spending cuts alone. Moreover, most of the $30 billion committed to education by Prop. 98 would have been appropriated even without the initiative. Any amount more than a few billion below this number would leave education with a lower share of the state budget than in any of the 20 years preceding the passage of Prop. 98.

Table 2 challenges the paralysis view in another way. While some commentators paint a picture of the budget collapsing under the weight of a flurry of initiatives, we can see that the problem (if it is a problem) is almost entirely the result of a single initiative, Prop. 98. Without Prop. 98, only 2 percent of the budget is locked in by initiatives, a small number in anyone's book. It seems overly broad to issue a blanket condemnation of the initiative process based on essentially a single questionable outcome, especially since every political process (including the legislative) is inherently imperfect, and liable to make mistakes from time to time.

3. Constraints on Revenue

A deficit can be closed by cutting spending or by raising revenue (or some combination of the two). We have seen that with the exception of Prop. 98, voter initiatives place few constraints on the legislature's ability to cut spending. Consider now the limits on raising revenue that arise from voter initiatives.

Table 2 lists the main revenue sources for state governments and the constraints placed on them by voter initiatives. To put things in perspective, the taxes are listed in order of importance for state governments nationwide (taxes comprise about 77 percent of general revenue from own sources, with the rest coming mostly from charges for services and user fees). That is, nationwide, the most important revenue source for state

governments is the personal income tax, the second most important is the general sales tax, and so on.

As can be seen, initiatives impose no barriers to raising the personal income tax (other than a requirement that rates be indexed) and only a modest constraint on raising the sales tax (it cannot be applied to food), by far the two most important revenue sources for state governments. The five most important revenue sources are essentially unconstrained by voter initiatives. The sixth most important revenue source, alcohol and tobacco taxes, has been constrained from below by voter initiatives—tobacco taxes cannot be lowered below 75 cents a pack. Prop. 37 in 1984 mandates a state lottery, creating a revenue source.

There are two major obstacles to tax increases. Prop. 13 in 1978 set the maximum property tax rate at 1 percent of assessed value, and limited assessment increases. Prop. 6 in 1982 essentially eliminated death and gift taxes. However, these taxes are relatively unimportant source of revenue for state governments.

The message of Table 3 is even clearer than Table 2: voter initiatives do not stand in the way of revenue increases.

4. Discussion

Tables 2 and 3 list every voter initiative in California that either earmarks state spending or restricts tax increases. At most 32 percent of budget is locked in by initiatives, and most of that is for education and would be appropriated even without an initiative requiring it. Except for two taxes that are relatively unimportant for state governments, on property and inheritance, initiatives place no material constraints on the raising of revenue. Initiatives do remove some of the legislature's discretion, but as a whole they do not stand in the way of closing a budget deficit with either spending cuts or tax increases.[6]

[6] It is probably worth noting that even the written constraints may not be binding. Even apparently clear initiative provisions can be evaded by elected officials. For example, the governor and legislature for many years diverted revenue from the Cigarette and Tobacco Products Surtax Fund that Prop. 99 in 1988 had dedicated to anti-smoking education, and spent it on health care. See Elisabeth R. Gerber, Arthur Lupia,

The conclusion that voter initiatives have not caused the California budget crisis squares with other research on the effect of direct democracy nationwide. In another study, I compared the fiscal policies of states with and without the voter initiative over a 30 year period. Initiative states spent and taxed less than noninitiative states all else equal, and there was no difference in net borrowing by initiative and noninitiative states.[7] Similarly, D. Roderick Kiewiet and Kristin Szakaly found that mandatory referendums on debt issues have fairly modest effects on the amount of debt outstanding.[8]

Lest these results be misinterpreted, let me emphasize that the evidence here only pertains to constraints arising from voter initiatives. It is possible that the California budget crisis was caused by *noninitiative* constraints. State spending is restricted by the U.S. Constitution (for example, prison spending can only be cut so much before prison conditions will run afoul of the Constitutional prohibition against cruel and unusual punishment) and the California Constitution (for example, the California Supreme Court has placed limits on the state's ability to refuse to pay for abortions for MediCal recipients). There are also federal mandates, and obligations created by previous actions of the legislature. I have not attempted to quantify these constraints, but my sense based on a casual investigation is that they are not particularly severe.

There are also constraints arising from propositions placed on the ballot by the legislature, often called legislative measures or referred measures. Most states require legislatures to receive voter approval for certain actions, such as constitutional amendments or bond issues. To get a sense of the magnitude of the constraints imposed by legislative measures, I reviewed all of them that have passed since 1990 and identified the ones with a fiscal impact. Easily the most important are measures that authorize a bond issue for a specific purpose. Bond issues commit the state to appropriate funds to service the debt. As of July 2003, the total general obligation debt was $27.6 billion. The estimated debt service for 2003-04 was $2.6 billion (see Appendix). If we subtract the $181 million of this that arises from initiative bonds, we end up with an earmarked sum

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Mathew D. McCubbins, and D. Roderick Kiewiet, *Stealing the Initiative: How State Government Responds to Direct Democracy*, Prentice Hall, 2001.

[7] John G. Matsusaka, "Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years," *Journal of Political Economy*, June 1995, Vol. 103, 587-623. See also Matsusaka, *For the Many or the Few*, cited above.

[8] D. Roderick Kiewiet and Kristin Szakaly, "Constitutional Limitations on Borrowing: An Analysis on State Bonded Indebtedness," *American Journal of Political Science*, April 1996, Vol. 12, 62-97.

of about $2.4 billion for debt service of legislative bond issues. This is not a small amount, but it does not change the basic picture of the overall size of the constraints facing the governor and legislature. Other than bond issues, there were no legislative measures that committed sizable funds or inhibited revenue increases.

In short, the evidence suggests that the California budget has not been paralyzed by voter initiatives. It seems the initiative process is a scapegoat for the inability of elected officials to manage the competing demands for public funds in a period of declining revenues.

John G. Matsusaka is Professor of Finance and Business Economics at the USC Marshall School of Business and a Senior Fellow at the Initiative & Referendum Institute. Comments are welcome: matsusak@usc.edu or Marshall School of Business, University of Southern California, Los Angeles, CA 90089-1427. *This document is available at www.iandrinstitute.org and lawweb.usc.edu/cslp. Updates will be posted at www-rcf.usc.edu/~matsusak.*

Appendix

This appendix describes how the numbers in Table 2 were calculated. References to the "Legislative Analyst's estimates" refer to the estimates provided in the *California Ballot Pamphlet*, published by the California Secretary of State (Sacramento, CA) prior to each election. "Angelides" refers to *California at the Fiscal Crossroads: Cutting Our Debt and Building Our Future*, Phil Angelides, California State Treasurer, Sacramento, CA, November 2003.

Prop. 9 (1974)
The measure required an appropriation of not less than $1 million (adjusted for inflation) for the California Fair Political Practices Commission. The number in Table 2 is $1 million adjusted for inflation since 1975 using the consumer price index. The Commission is typically funded well in excess of the minimum requirement.

Prop. 86 (1986)
The number is the Legislative Analyst's estimated enforcement cost, adjusted for inflation since 1986.

Prop. 70 (1988)
Authorized $776 million in bonds to purchase and maintain wildlife, coastal, and park lands. Outstanding general obligation debt July 1, 2003 was $27.607 billion. Estimated debt service for 2003-04 was $2.616 billion (Angelides). The ratio of debt service to debt was thus 0.1 overall. I assumed the debt service was equal to 0.1 of the $419 million outstanding Prop. 70 bonds.

Prop. 97 (1988)
The measure required the state to maintain its own OSHA program. The number in Table 2 is the amount the governor proposed for the Cal/OSHA Targeted Inspection and Consultation Fund (part of Division of Occupational Safety and Health, part of California Labor and Workforce Agency) in his January 2003 budget, presumably more than the minimum required expenditure.

Prop. 98 (1988)
The measure guaranteed minimum state spending for K-14 education. The total Prop. 98 guarantee for 2003-04 was $45.7 billion, of which $15.7 billion was projected to come from local property taxes. From the Legislative Analyst's *California Spending Plan 2003-04* (Sacramento, CA).

Prop. 99 (1988)
The initiative locked in spending equal to the revenue that flows into the Cigarette and Tobacco Products Surtax Fund from tobacco surtaxes. The governor's proposed budget in January 2003 estimated revenue for the Fund of $522 million. Of the 25% unallocated part of the Fund, 10 percent ($13.05 million) goes to the Habitat Conservation Fund.

Prop. 103 (1988)
The measure regulated auto insurance rates. The number in Table 2 is the Legislative Analyst's upper bound estimate for administrative costs adjusted for inflation since 1988.

Prop. 116 (1990)
The measured authorized $1.99 billion in bonds for rail transportation. The number in Table 2 is 0.1 of the $1.3 billion of outstanding bonds. See the discussion for Prop. 70 (1988).

Prop. 132 (1990)
The measured banned the use of gill nets off the coast of Southern California. The number is the Legislative Analyst's estimated cost of enforcing the ban number adjusted for inflation since 1990.

Prop. 184 (1994)
"Three strikes and you're out:" the measure toughened sentences on repeat offenders. The number is 10 percent of the Legislative Analyst's estimate in 1994. The original spending projections by RAND that were used by the Legislative Analyst were predicated on universal application of the law. However, the California Supreme Court gave judges significant leeway to ignore the initiative, and the original estimates turned out to be way too high. A RAND study some years after the initiative noted that there is no evidence that any of the costs have actually materialized (Peter W. Greenwood, Susan S. Everingham, Elsa Chen, Alan F. Abrahamse, Nancy Merritt, James Chiesa, *Three Strikes Revisited: An Early Assessment of Implementation and Effects*, National Institute of Justice, U.S. Department of Justice, Document 194106, August 1998: "[T]he impact of the California three-strikes law on incarceration has been modest.") The RAND study argues for assigning no net costs to the measure, but I (rather arbitrarily) assume the true number is 10 percent of the Legislative Analyst's estimate of $3 billion per year. In real terms, state spending on corrections has increased by just under $1 billion since 1994. My estimates assume that Prop. 194 and Prop. 21 in 2000 alone account for $728 million, almost surely an overestimate of their impact.

Prop. 10 (1998)
The measure increased the tax on tobacco products by 50 cent a pack, and dedicated the money to a variety of uses, chiel among them early childhood development programs. The initiative locks in spending equal to the amount raised from tobacco surtaxes for the California Children and Families First Trust Fund. I used the revenue estimate in the governor's proposed budget in January 2003.

Prop. 21 (2000)
The measure toughened sentences for juvenile offenders. The number in Table 2 is the Legislative Analyst's estimate of additional prison operating costs adjusted for inflation since 2000, plus 0.1 of the estimated new construction costs (implicit debt service), not adjusted for inflation. Early indications were that the measure was having a modest effect, for example, the number of juveniles serving time as adults declined after the measure passed, so this number again is likely to be an overestimate.

Prop. 50 (2002)
The measure authorized $3.44 billion of bonds for water projects. The number in Table 2 is 0.1 of the $74 million of outstanding bonds. See the discussion for Prop. 70 (1988).

Table 1
Budget Paralysis by Voter Initiatives: According to the Pundits

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"Whoever is elected governor is essentially running up against the same wall, a budget that is increasingly paralyzed by initiatives."

-- Leon Panetta[1]

"A series of popular initiatives, stretching back 25 years to the famous Proposition 13, has put limits on the taxing power of the state and local communities, while other initiatives have mandated spending on schools, prisons and other projects. The net result: The governor and legislature have little room to maneuver in tough times"

-- David S. Broder[2]

"[D]irect democracy provisions of California's constitution have rendered the state ungovernable. As a result of several voter initiatives, about 70% of state spending is earmarked in advance, limiting the discretion necessary to make trade-offs in a crisis."

-- Laura D'Andrea Tyson[3]

"Empowering the people sounds nice in theory; in practice, it makes it very hard for Sacramento politicians to balance the budget and take care of other state business."

-- *The Economist*[4]

"The accumulating effects of 25 years of initiatives—from the tax limitations of Proposition 13 in 1978, to Proposition 98, the school spending formula passed in 1988, to term limits (1990), to the latter-day ballot-box budgeting that mandates spending on everything from parklands to roads to after-school day care—have so hamstrung both state and local governments that elected legislators, county supervisors and school board members have become the handmaidens, not the leaders, of policymaking in California."

-- Peter Schrag[5]

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[1] Quoted in "Voter Initiatives Limit California's Wiggle Room," by Jonathan Weisman, *Washington Post*, August 14, 2003.

[2] "Million-Dollar Recall," *Washington Post*, July 30, 2003.

[3] "A New Governor Won't Fix What Ails California," *Business Week*, September 22, 2003.

[4] October 6, 2003.

[5] "Voter early, vote often—but vote on everything?," *Sacramento Bee*, October 15, 2003.

Table 2
Amount Appropriated by Initiatives for 2003-04

Year	Prop.	Description	$Billions
1988	98	Education	30.000
1998	10	Early childhood development	0.522
1988	99	Tobacco tax [funds for anti-smoking, wildlife, research]	0.509
2000	21	Juvenile crime [for prisons]	0.428
1994	184	Three strikes and you're out [for prisons]	0.300
1990	116	Rail bonds [authorized $1.99 billion]	0.131
2000	36	Drug treatment	0.120
1988	70	Natural land preservation bonds [authorized $776 million]	0.042
1990	117	Wildlife protection	0.030
1988	103	Auto insurance [administrative spending]	0.023
1988	97	Cal/OSHA	0.013
2002	50	Water projects bonds [authorized $3.44 billion]	0.007
1974	9	Political reform [California FPPC administration]	0.003
1990	132	Gill net ban [enforcement spending]	0.002
1986	86	Toxic discharge [enforcement spending]	0.002
TOTAL			32,132.262

Note. The appendix describes how the numbers are calculated.

Table 3
Initiative Constraints on Revenue Increases

Revenue source	% tax revenue nationwide	Constraints	Initiative
Taxes			
Personal income	34.6	. . .	
Sales (general)	32.9	Prohibited on food	Prop. 163 (1992)
Corporate income	6.2	. . .	
Gas	5.8	. . .	
Motor vehicle	3.1	. . .	
Alcohol & tobacco	2.4	At least 75¢/pack	Prop. 99 (1988), Prop. 10 (1998)
Property	2.3	No more than 1%	Prop. 13 (1978)
Death & gift	1.5	Prohibited	Prop. 6 (1982)
Charges	. . .	. . .	. . .
Lottery	. . .	Required	Prop. 37 (1984)

Note. "% tax revenue nationwide" is the percentage of tax revenue raised from a particular tax by all state governments in 1999 (*Statistical Abstract of the United States, 2002*, Table 417).

U.S. SUPREME COURT DECISIONS RE BALLOT INITIATIVES

Following is a review of the ***Meyer v. Grant*** and ***Buckley v. American Constitutional Law Foundation, Inc.***, cases, regarding restrictions which states may place on sponsors and circulators of ballot initiative amendments/petitions. This does not represent an exhaustive or complete research of the topic.

The U.S. Supreme Court, In ***Meyer v. Grant,*** 108 S.Ct. 1886 (1988), held that circulation of initiative petitions is core political speech, for which "First amendment protection is at its zenith," and restrictions placed by states on same are subject to "exacting scrutiny." Colorado's **prohibition against paying circulators** of petitions was held unconstitutional.

In ***Buckley v. American Constitutional Law Foundation, Inc.***, 1999 WL 7723 (1999), the Supreme Court reviewed the restrictions and requirements Colorado continued to place on the sponsors and circulators of initiative petitions and amendments.

Colorado statutes required:

1) That circulators be registered Colorado electors and at least 18 years old;
2) That circulators be Colorado residents;
3) That circulators wear identification badges which bore the circulator's name and
   a) the words VOLUNTEER CIRCULATOR, or
   b) the words PAID CIRCULATOR and the name and phone number of the person who paid the circulator;
4) That the sponsors file the name, address, and county of voter registration of all paid circulators, the amount paid per signature and total paid the circulator; and
5) That the sponsors file monthly reports containing: names of proponents; name and business and residential addresses of paid circulators; the amount of money paid and owed to each paid circulator.

The Court held, regarding the following requirements, that:

1) **Registered voters:** The requirement that circulators be registered voters is restrictive of the political speech of those who protest by not registering to vote, and thus is **invalid**. The age requirement was upheld the Tenth Circuit, not addressed by the Supreme Court.

2) **Residency:** Not challenged. The Supreme Court noted that the affidavit of residence achieved the objective of being able to serve subpoenas upon circulators.

3) **Identification badges:** The court held that the requirements for the circulator's name and address were invalid restrictions. The Tenth Circuit and the Supreme Court declined to address the constitutionality of the requirement for badges disclosing the circulator's volunteer or paid status, or if paid, by whom.

4) **Filing name address and amount paid to each circulator.** The court held this requirement to be invalid, based on the same rationale applied to identification badges, above.

5) **Monthly reports:** The requirements regarding the amounts paid to individual circulators was held invalid; the Court upheld the requirements for monthly reports containing names and addresses of proponents and the amount of money raised and that paid for circulation generally.

Briefs and Other Related Documents

Supreme Court of the United States

Natalie MEYER, Colorado Secretary of State, and Duane Woodard, Colorado Attorney General, Appellants,
v.
Paul K. GRANT et al.

No. 87-920.

Argued April 25, 1988.
Decided June 6, 1988.

Proponents of initiative to amend Colorado Constitution brought action to challenge constitutionality of Colorado's prohibition against paying circulators of initiative petitions. The United States District Court for the District of Colorado, John P. Moore, J., upheld statute. Proponents appealed. The Court of Appeals, 828 F.2d 1446, reversed and remanded in en banc decision. Certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) circulation of petition to amend Colorado Constitution and to deregulate trucking industry involved political speech, and (2) prohibition against paying circulators violated First Amendment.

Affirmed.

West Headnotes

[1] Federal Courts 13
170Bk13 Most Cited Cases

Controversy arising out of challenge to constitutionality of Colorado's prohibition against paying circulators of initiative proposal, was capable of repetition, yet evading review, and, therefore, was not rendered moot by prior election in which proponents of Colorado constitutional amendment had first hoped to present their proposal; proponents of initiative had only six months in which to obtain necessary signatures. C.R.S. 1-40-101 to 1-40-119; Colo. Const. Art. 5, § § 1, 1(6); U.S.C.A. Const.Amends. 1, 14.

[2] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

Colorado's prohibition against paying circulators of initiative or referendum petition limited political expression and was subject to exacting scrutiny under First Amendment. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-40- 110.

[3] Constitutional Law 90.1(1)
92k90.1(1) Most Cited Cases

Whether trucking industry should be deregulated in Colorado was matter of societal concern that proponents of Colorado constitutional amendment had First Amendment right to discuss publicly without risking criminal sanctions. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-40-110.

[4] Constitutional Law 90.1(1.1)
92k90.1(1.1) Most Cited Cases

For First Amendment purposes circulation of initiative petition necessarily involves expression of desire for political change and discussion of merits of proposed change. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

Circulation of initiative petition involves type of interactive communication concerning political change that is appropriately described as "core political speech." U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

Circulation of petition to amend Colorado Constitution and to remove motor carriers from jurisdiction of Colorado Public Utilities Commission involved "core political speech," for which First Amendment protection was at its zenith. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[7] Statutes 302
361k302 Most Cited Cases

Refusal to permit payment to circulators of initiative petition to amend Colorado Constitution restricted political expression in two ways: it limited number of voices who could convey message, hours they

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could speak, and size of audience; and it decreased likelihood that proponents would garner necessary signatures. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-40-110.

[8] Constitutional Law 90.1(1.1)
92k90.1(1.1) Most Cited Cases

Solicitation of signatures for petition involves protected speech. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

Freedom of proponents of initiative petition to employ means other than paid circulators to disseminate their ideas did not take their speech through petition circulators outside First Amendment protection and did not make the burden on speech acceptable. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1- 40-110.

[10] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[10] Statutes 302
361k302 Most Cited Cases

Colorado's prohibition against paying circulators of initiative or referendum petition restricts access to most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-40-110.

[11] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[11] Statutes 302
361k302 Most Cited Cases

Fact that Colorado's prohibition against paying circulators of initiative or referendum petition leaves open more burdensome avenues of communication does not relieve burden of statute on First Amendment expression. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-40-110.

[12] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

First Amendment protected right of proponents of initiative petition to advocate their cause and to select what they believe to be most effective means for doing so. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-40-110.

[13] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[13] Statutes 301
361k301 Most Cited Cases

Colorado's alleged power to ban initiatives did not include power to limit discussion of political issues raised in initiative petitions and to criminalize payment of circulators of initiative petition, and, thus, Colorado's alleged authority to impose limitations on scope of state-created right to legislate by initiative did not render acceptable the burden on First Amendment rights. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-40-110.

[14] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[14] Statutes 302
361k302 Most Cited Cases

Colorado's interest in ensuring that initiative had sufficient grass roots support to be placed on ballot did not justify limitation on First Amendment rights by prohibition against paying circulators of petition; requirement that no initiative proposal could be placed on ballot unless required number of signatures was obtained adequately protected that interest. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-40-101 to 1-40-119; Colo. Const. Art. 5, § § 1, 1(6).

[15] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[15] Statutes 302
361k302 Most Cited Cases

Colorado's apparent concern that persons who could pay petition circulators could succeed in getting measures on ballots when they could otherwise have failed could not defeat First Amendment rights of petition proponents. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-40-110.

[16] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[16] Statutes 302
361k302 Most Cited Cases

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Colorado's prohibition against paying circulators of initiative or referendum petition and resulting limitation on speech were not necessary in order to satisfy Colorado's interest in protecting integrity of initiative process and, therefore, were not justified by that interest; no evidence was offered to support speculation that paid circulator would be tempted to disregard duty to verify authenticity of signatures; other provisions of Colorado statutes dealt with potential danger that circulators could be tempted to pad petitions with false signatures. U.S.C.A. Const.Amends. 1, 14; C.R.S. 1-13-106, 1-40-106, 1-40-110, 1-40-119.

*****1888 *414** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

A Colorado statute allows a proposed state constitutional amendment to be placed on a general election ballot if its proponents can obtain the signatures of at least five percent of the total number of qualified voters on an "initiative petition" within a 6-month period, but makes it a felony to pay petition circulators. Concluding that they would need the assistance of paid personnel to obtain the required signatures within the allotted time, appellee proponents of a constitutional amendment that would remove motor carriers from the Colorado Public Utilities Commission's jurisdiction brought suit under 42 U.S.C. § 1983 against appellant state officials seeking a declaration that the statutory payment prohibition violated their First Amendment rights. The District Court upheld the statute, but the Court of Appeals ultimately reversed, holding that the statute violates the First Amendment, as made applicable to the States by the Fourteenth Amendment.

Held: The statutory prohibition against the use of paid circulators abridges appellees' right to engage in political speech in violation of the First and Fourteenth Amendments. Pp. 1891-1895.

(a) The statute is subject to exacting scrutiny, since the circulation of an initiative petition seeking to deregulate the Colorado trucking industry necessarily constitutes "core political speech," for which First Amendment protection is at its zenith. The statute burdens such speech in two ways: First, it limits the number of voices that will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of necessary signatures, thus limiting their ability to make the matter the focus of statewide discussion. The statute's burden on speech is not relieved by the fact that other avenues of expression remain open to appellees, since the use of paid circulators is the most effective, fundamental, and perhaps economical means of achieving direct, one-on-one communication, and appellees' right to utilize that means is itself protected by the First Amendment. Nor is the statutory burden rendered acceptable by the State's claimed authority to impose limitations on the scope of the state-created right to legislate by initiative; the power to ban initiatives entirely does not include ***415** the power to limit discussion of political issues raised in initiative petitions. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266, distinguished. Pp. 1891-1894.

(b) The State has failed to sustain its burden of justifying the statutory prohibition. The argument that justification is found in the State's interest in assuring that an initiative has sufficient grass roots support to be placed on the ballot is not persuasive, since that interest is adequately protected by the requirement that the specified number of signatures be obtained. Nor does the State's claimed interest in protecting the integrity of the initiative process justify the prohibition, because the State has failed to demonstrate the necessity of burdening appellees' ability to communicate in order to meet its concerns. It cannot be assumed that a professional circulator--whose qualifications for similar future assignments may well depend on a reputation for competence and integrity--is any more likely to accept false signatures than a volunteer motivated entirely by an interest in having the proposition placed on the ballot. Moreover, other statutory provisions dealing expressly with the potential danger of false signatures are adequate to minimize the risk of improper circulation conduct. Pp. 1894-1895.

828 F.2d 1446 (CA10 1987), affirmed.

****1889** STEVENS, J., delivered the opinion for a unanimous Court.

Maurice G. Knaizer, First Assistant Attorney General of Colorado, argued the cause for appellants. With him on the briefs were *Duane Woodard,*

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Attorney General, *pro se, Richard H. Forman,* Solicitor General, and *Charles B. Howe* and *Billy J. Shuman,* Deputy Attorneys General.

Willaim C. Danks argued the cause and filed a brief for appellees.*

* Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *James J. Sandman, Steven R. Shapiro,* and *John A. Powell;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar.*

Justice STEVENS delivered the opinion of the Court.

In Colorado the proponents of a new law, or an amendment to the State Constitution, may have their proposal placed on the ballot at a general election if they can obtain enough signatures of qualified voters on an "initiative petition" within ***416** a 6-month period. One section of the state law regulating the initiative process makes it a felony to pay petition circulators. [FN1] The question in this case is whether that provision is unconstitutional. The Court of Appeals for the Tenth Circuit, sitting en banc, held that the statute abridged appellees' right to engage in political speech and therefore violated the First and Fourteenth Amendments to the Federal Constitution. We agree.

FN1. Colorado Rev.Stat. § 1-40-110 (1980) provides:
"Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of an initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. (1973)."

I

Colorado is one of several States that permits its citizens to place propositions on the ballot through an initiative process. Colo. Const., Art. V, § 1; Colo.Rev.Stat. § § 1-40-101 to 1-40-119 (1980 and Supp.1987). Under Colorado law, proponents of an initiative measure must submit the measure to the State Legislative Council and the Legislative Drafting Office for review and comment. The draft is then submitted to a three-member title board, which prepares a title, submission clause, and summary. After approval of the title, submission clause, and summary, the proponents of the measure then have six months to obtain the necessary signatures, which must be in an amount equal to at least five percent of the total number of voters who cast votes for all candidates for the Office of Secretary of State at the last preceding general election. If the signature requirements are met, the petitions may be filed with the Secretary of State, and the measure will appear on the ballot at the next general election. Colo.Rev.Stat. § § 1-40-101 to 1-40-105 (1980 and Supp.1987).

***417** State law requires that the persons who circulate the approved drafts of the petitions for signature be registered voters. Colo. Const., Art. V, § 1(6). Before the signed petitions are filed with the Secretary of State, the circulators must sign affidavits attesting that each signature is the signature of the person whose name it purports to be and that, to the best of their knowledge and belief, each person signing the petition is a registered voter. Colo.Rev.Stat. § 1-40-109 (Supp.1987). The payment of petition circulators is punished as a felony. Colo.Rev.Stat. § 1-40-110 (1980), n. 1, *supra.*

[1] Appellees are proponents of an amendment to the Colorado Constitution that would remove motor carriers from the jurisdiction of the Colorado Public Utilities Commission. In early 1984 they obtained approval of a title, submission clause, and summary for a measure proposing the amendment and began the process of obtaining the 46,737 signatures necessary to have the proposal appear on the November 1984 ballot. Based on their own experience as petition circulators, as well as that of other unpaid circulators, appellees concluded that they would need the assistance of paid personnel to obtain the required number of signatures within the allotted time. ****1890** They then brought this action under 42 U.S.C. § 1983 against the Secretary of State and the Attorney General of Colorado seeking a declaration that the statutory prohibition against the use of paid circulators violates their rights under the First Amendment. [FN2]

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FN2. Although the November 1984 election in which appellees had first hoped to present their proposal to the citizens of Colorado is long past, we note that this action is not moot. Neither party suggests that the action is moot. Rather, both assert that the controversy between them is one capable of repetition, yet evading review.
We may exercise jurisdiction over this action if " '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.' " *Murphy v. Hunt,* 455 U.S. 478, 482, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (*per curiam*), quoting *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975) (*per curiam*). We are satisfied that both elements are present in this case. Colorado grants the proponents of an initiative only six months in which to obtain the necessary signatures. The likelihood that a proponent could obtain a favorable ruling within that time, much less act upon such a ruling in time to obtain the needed signatures, is slim at best. Further, the initiative sought by appellees has not been enacted. Appellees, however, continue to advocate its adoption and plan future attempts to obtain the signatures necessary to place the issue on the ballot. Tr. of Oral Arg. 37. Consequently, it is reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review. See *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 774-775, 98 S.Ct. 1407, 1414-1415, 55 L.Ed.2d 707 (1978); *Moore v. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969).

***418** After a brief trial, the District Judge entered judgment upholding the statute on alternative grounds. First, he concluded that the prohibition against the use of paid circulators did not burden appellees' First Amendment rights because it did not place any restraint on their own expression or measurably impair efforts to place initiatives on the ballot. [FN3] The restriction on their ability to hire paid circulators to speak for them was not significant because they remained free to use their money to employ other spokesmen who could advertise their cause. Second, even assuming, *arguendo,* that the statute burdened appellees' right to engage in political speech, the District Judge concluded that the burden was justified by the State's interests in (a) making sure that an ***419** initiative measure has a sufficiently broad base to warrant its placement on the ballot, and (b) protecting the integrity of the initiative process by eliminating a temptation to pad petitions.

FN3. In support of its conclusion that the prohibition against the use of paid circulators did not inhibit the placement of initiative measures on the general ballot, the District Court compared Colorado's experience with that of 20 States which have an initiative process but do not prohibit paid circulators. It noted that since 1910, Colorado has ranked fourth in the total number of initiatives placed on the ballot. This statistic, however, does not reject the possibility that even more petitions would have been successful if paid circulators had been available, or, more narrowly, that these appellees would have had greater success if they had been able to hire extra help. As the District Court itself noted, "the evidence indicates [appellees'] purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers." 741 F.2d 1210, 1212 (CA10 1984) (Appendix).

A divided panel of the Court of Appeals affirmed for the reasons stated by the District Court. After granting rehearing en banc, however, the court reversed. The en banc majority concluded that the record demonstrated that petition circulators engage in the communication of ideas while they are obtaining signatures and that the available pool of circulators is necessarily smaller if only volunteers can be used.

"Thus, the effect of the statute's absolute ban on compensation of solicitors is clear. It impedes the sponsors' opportunity to disseminate their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached.... In short, like the campaign expenditure limitations struck down in *Buckley,* the Colorado statute imposes a direct restriction which 'necessarily reduces the quantity of expression....' ****1891** *Buckley* [*v. Valeo*], 424 U.S. [1,] 19 [96 S.Ct. 612, 634, 46 L.Ed.2d 659 (1976)]." 828 F.2d 1446, 1453-1454 (CA10 1987) (citations omitted).

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The Court of Appeals then rejected the State's asserted justifications for the ban. It first rejected the suggestion that the ban was necessary either to prevent fraud or to protect the public from circulators that might be too persuasive:

> "The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' *NAACP v. Button,* [371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963)]. 'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.... In this field every person must be his ***420** own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.' *Thomas v. Collins,* [323 U.S. 516, 545 [65 S.Ct. 315, 329, 89 L.Ed. 430], (1945)] (Jackson, J., concurring)." *Id.,* at 1455.

The court then rejected the suggestion that the ban was needed to assure that the initiative had a broad base of public support because, in the court's view, that interest was adequately protected by the requirement that the petition be signed by five percent of the State's eligible voters. Finally, the Court of Appeals rejected an argument advanced by a dissenting judge that since Colorado had no obligation to afford its citizens an initiative procedure, it could impose this condition on its use. Having decided to confer the right, the State was obligated to do so in a manner consistent with the Constitution because, unlike *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), which involved only commercial speech, this case involves "core political speech."

II

[2] We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny. *Buckley v. Valeo,* 424 U.S. 1, 45, 96 S.Ct. 612, 647, 46 L.Ed.2d 659 (1976). The First Amendment provides that Congress "shall make no law ... abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment makes that prohibition applicable to the State of Colorado. As we explained in *Thornhill v. Alabama,* 310 U.S. 88, 95, 60 S.Ct. 736, 740, 84 L.Ed. 1093 (1940), "[t]he freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."

[3] ***421** Unquestionably, whether the trucking industry should be deregulated in Colorado is a matter of societal concern that appellees have a right to discuss publicly without risking criminal sanctions. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.,* at 101- 102, 60 S.Ct., at 744. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957). Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.

> [4][5][6] The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator ****1892** may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. [FN4] Thus, the circulation of a petition involves the type of ***422** interactive communication concerning political change that is appropriately described as "core political speech." [FN5]

FN4. The record in this case demonstrates that the circulation of appellees' petition involved political speech. Paul Grant, one of the appellees, testified about the nature of his conversations with voters in an effort to get them to sign the petition:

> "[T]he way we go about soliciting signatures is that you ask the person-- first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them and ask them, "Are you a registered

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voter?

* * *

"If you get a yes, then you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, 'Please let me know a little bit more.' Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from [State Public Utilities Commission] regulations.

"Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign.

* * *

"[We try] to explain the not just deregulation in this industry, that it would free up to industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.

"We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them." 2 Record 10-11.

This testimony provides an example of advocacy of political reform that falls squarely within the protections of the First Amendment.

FN5. Our recognition that the solicitation of signatures for a petition involves protected speech follows from our recognition in *Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), that the solicitation of charitable contributions often involves speech protected by the First Amendment and that any attempt to regulate solicitation would necessarily infringe that speech:

"Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests--communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes--that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.,* at 632, 100 S.Ct., at 833.

[7][8] The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the ***423** hours they can speak and, therefore, limits the size of the audience they can reach. [FN6] Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion. The Colorado Supreme Court has itself recognized that the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue. When called upon to consider the constitutionality of the statute at issue here in another context in *Urevich v. Woodard,* 667 P.2d 760, 763 (1983), that ****1893** court described the burden the statute imposes on First Amendment expression:

FN6. Paul Grant testified that compensation resulted in more people being "able and willing" to circulate petitions. 2 Record 19-20. As he succinctly concluded: "[M]oney either enables people to forego leaving a job, or enables them to have a job." *Ibid.*

"As mentioned previously, statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed. That the statute in question acts as a limitation on ACORN's ability to circulate petitions cannot be

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doubted. We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay. As the dissent in *State v. Conifer Enterprises, Inc.*, 82 Wash.2d 94, [104,] 508 P.2d 149 [,155] (1973) (Rosellini, J., dissenting), observed:

" 'The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking. Unless the proponents of a measure can find a large number of volunteers, they must hire persons to solicit signatures or abandon the project. I think we can take judicial notice of the fact that the solicitation of signatures on petitions is work. It is time-consuming and it is tiresome ***424** so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.' "

Appellants argue that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open to appellees and because the State has the authority to impose limitations on the scope of the state-created right to legislate by initiative. Neither of these arguments persuades us that the burden imposed on appellees' First Amendment rights is acceptable.

[9][10][11][12] That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). Cf. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296, 299, 102 S.Ct. 434, 437, 439, 70 L.Ed.2d 492 (1981). The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.

[13] Relying on *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), Colorado contends that because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right. That reliance is misplaced. In *Posadas* the Court concluded that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.*, at 345-346, 106 S.Ct., at 2979. The Court of Appeals quite properly pointed out the logical flaw in Colorado's attempt to draw an analogy between the present case and *Posadas*. The decision in *Posadas* does not suggest that "the power to ***425** ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling." 828 F.2d, at 1456. Thus it does not support the position that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions. And, as the Court of Appeals further observed:

"*Posadas* is inapplicable to the present case for a more fundamental reason--the speech restricted in *Posadas* was merely 'commercial speech which does "no more than propose a commercial transaction...." ' *Posadas*, [478 U.S., at 340, 106 S.Ct., at 2976] (quoting ****1894***Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976))..... Here, by contrast, the speech at issue is 'at the core of our electoral process and of the First Amendment freedoms,' *Buckley*, 424 U.S., at 39, 96 S.Ct., at 644 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968))--an area of public policy where protection of robust discussion is at its zenith." *Id.*, at 1456-1457.

We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is "at its zenith." For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.

III

[14][15] We are not persuaded by the State's arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process. As the Court of Appeals correctly held, the former interest is adequately protected by the requirement that no initiative proposal may be placed on the ballot ***426** unless the required number of signatures has been obtained. *Id.*, at 1455. [FN7]

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FN7. Colorado also seems to suggest that it is permissible to mute the voices of those who can afford to pay petition circulators. See Brief for Appellants 17. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo,* 424 U.S. 1, 48-49, 96 S.Ct. 612, 648-649, 46 L.Ed.2d 659 (1976). The concern that persons who can pay petition circulators may succeed in getting measures on the ballot when they might otherwise have failed cannot defeat First Amendment rights. As we said in *First National Bank of Boston v. Bellotti,* 435 U.S., at 790-791, 98 S.Ct., at 1423-1424, paid advocacy "may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it.... '[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment....' *Buckley,* 424 U.S., at 48-49, 96 S.Ct., at 648-649.... [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." Cf. *Brown v. Hartlage,* 456 U.S. 45, 60, 102 S.Ct. 1523, 1532, 71 L.Ed.2d 732 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech").

[16] The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator--whose qualifications for similar future assignments may well depend on a reputation for competence and integrity--is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

Other provisions of the Colorado statute deal expressly with the potential danger that circulators might be tempted ***427** to pad their petitions with false signatures. It is a crime to forge a signature on a petition, Colo.Rev.Stat. § 1-13-106 (1980), to make false or misleading statements relating to a petition, Colo.Rev.Stat. § 1-40-119 (Supp.1987), or to pay someone to sign a petition, Colo.Rev.Stat. § 1-40-110 (1980). Further, the top of each page of the petition must bear a statement printed in red ink warning potential signatories that it is a felony to forge a signature on a petition or to sign the petition when not qualified to vote and admonishing signatories not to sign the petition unless they have read and understand ****1895** the proposed initiative. [FN8] These provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting. Cf. ***428***First National Bank of Boston v. Bellotti,* 435 U.S. 765, 790, 98 S.Ct. 1407, 1423, 55 L.Ed.2d 707 (1978) ("The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue").

FN8. Section 1-40-106 provides in part:
"(1) At the top of each page of every initiative or referendum petition shall be printed, in plain red letters no smaller than the impression of ten-point, boldface type, the following:

"WARNING
"IT IS A FELONY:

"For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to sign such petition when not a qualified elector.

"DO NOT SIGN THIS PETITION UNLESS YOU ARE A QUALIFIED ELECTOR

"TO BE A QUALIFIED ELECTOR, YOU MUST BE:
"(a) At least eighteen years of age.
"(b) A citizen of the United States.
"(c) A resident of the state of Colorado and have resided in the state at least thirty-two days.

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> "(d) A resident of the precinct in which you live for at least thirty-two days.
> "Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning."

"[L]egislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo,* 424 U.S., at 50, 96 S.Ct., at 650. That principle applies equally to "the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Id.,* at 48, 96 S.Ct., at 648. The Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify. The Court of Appeals correctly held that the statute violates the First and Fourteenth Amendments. Its judgment is therefore affirmed.

It is so ordered.

108 S.Ct. 1886, 486 U.S. 414, 100 L.Ed.2d 425, 56 USLW 4516

Briefs and Other Related Documents (Back to top)

- 1988 WL 1031634 (Appellate Brief) Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the Washington Legal Foundation and the California Republican Party in Support of Appellees (Apr. 04, 1988)

- 1988 WL 1031635 (Appellate Brief) Brief of the American Civil Liberties Union, the American Civil Liberties Union Foundation of Colorado, and the American Civil Liberties Union of the National Capital Area as Amici Curiae in Support of Appellees (Apr. 04, 1988)

- 1988 WL 1031633 (Appellate Brief) Brief of Appellees (Mar. 31, 1988)

- 1987 WL 880992 (Appellate Brief) Brief for Appellants (Oct. Term 1987)

- 1987 WL 880993 (Appellate Brief) Reply Brief (Oct. Term 1987)

END OF DOCUMENT

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Briefs and Other Related Documents

Supreme Court of the United States

Victoria BUCKLEY, Secretary of State of Colorado, petitioner,
v.
AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., et al.

No. 97-930.

Argued Oct. 14, 1998.
Decided Jan. 12, 1999.

Nonprofit public interest organizations and individuals who regularly participated in Colorado's initiative and referendum petition process brought § 1983 action against state officials, challenging statutes regulating petition process. The United States District Court for the District of Colorado, 870 F.Supp. 995, upheld certain statutes and struck others. Parties cross-appealed. The Court of Appeals for the Tenth Circuit, 120 F.3d 1092, affirmed in part and reversed in part. Certiorari was granted. The Supreme Court, Justice GINSBURG, held that: (1) Colorado statute requiring that initiative-petition circulators be registered voters violated First Amendment free speech guarantee; (2) Colorado statute requiring that initiative-petition circulators wear identification badge bearing the circulator's name violated First Amendment free speech guarantee; and (3) Colorado statute requiring that proponents of an initiative report names and addresses of all paid circulators and amount paid to each circulator violated First Amendment free speech guarantee.

Affirmed.

Justice Thomas concurred in judgment and filed opinion.

Justice O'Connor concurred in judgment in part and dissented in part and filed opinion in which Justice BREYER joined.

Chief Justice Rehnquist dissented and filed opinion.

West Headnotes

[1] Statutes 301
361k301 Most Cited Cases

States allowing ballot initiatives have considerable leeway to protect integrity and reliability of initiative process, as they have with respect to election processes generally.

[2] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

First Amendment requires Supreme Court to be vigilant in making judgments separating valid ballot-access provisions from invalid interactive speech restrictions, to guard against undue hindrances to political conversations and exchange of ideas. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[3] Statutes 302
361k302 Most Cited Cases

Colorado statute requiring that initiative-petition circulators be registered voters imposed burden on political expression that Colorado failed to justify, and thus, statute violated First Amendment free speech guarantee; Colorado's dominant justification appeared to be its strong interest in policing lawbreakers among petition circulators, but that interest was served by requirement, upheld below, that each circulator submit affidavit setting out, among several particulars, the address at which he or she resided. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(1).

[4] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[4] Statutes 302
361k302 Most Cited Cases

Colorado statute requiring that initiative-petition circulators wear identification badge bearing the circulator's name discouraged participation in petition circulation process by forcing name identification without sufficient cause, and thus, statute violated First Amendment free speech guarantee; Colorado claimed that badge enabled public to identify, and Colorado to apprehend, petition circulators who engaged in misconduct, but that concern was served

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by requirement, upheld below, that each circulator submit affidavit setting out, among several particulars, the address at which he or she resided. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-112(2).

[5] Constitutional Law 90.1(1.2)
92k90.1(1.2) Most Cited Cases

[5] Statutes 302
361k302 Most Cited Cases

Colorado statute requiring that proponents of an initiative report names and addresses of all paid circulators and amount paid to each circulator violated First Amendment free speech guarantee; Colorado stressed importance of disclosure as control or check on domination of initiative process by affluent special interest groups, but required disclosure of names of initiative sponsors, and of amounts they spent gathering support for their initiatives, responded to that substantial state interest. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 1-40-121.

West Codenotes
Held Unconstitutional

West's C.R.S.A. § § 1-40-112(1,2), 1-40-121.

****637** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*****1** Colorado allows its citizens to make laws directly through initiatives placed on election ballots. The complaint in this federal action challenged six of the State's many controls on the initiative-petition process. Plaintiffs-respondents, the American Constitutional Law Foundation, Inc., and several individuals (collectively, ACLF), charged that the following prescriptions of Colorado's law governing initiative petitions violate the First Amendment's freedom of speech guarantee: (1) the requirement that petition circulators be at least 18 years old, Colo.Rev.Stat. § 1-40- 112(1); (2) the further requirement that they be registered voters, *ibid.;* (3) the limitation of the petition circulation period to six months, § 1-40-108; (4) the requirement that petition circulators wear identification badges stating their names, their status as "VOLUNTEER" or "PAID," and if the latter, the name and telephone number of their employer, § 1-40-112(2); (5) the requirement that circulators attach to each petition section an affidavit containing, *inter alia,* the circulator's name and address, § 1-40-111(2); and (6) the requirements that initiative proponents disclose (a) at the time they file their petition, the name, address, and county of voter registration of all paid circulators, the amount of money proponents paid per petition signature, and the total amount paid to each circulator, and (b) on a monthly basis, the names of the proponents, the name and address of each paid circulator, the name of the proposed ballot measure, and the amount of money paid and owed to each circulator during the month, § 1-40-121. The District Court struck down the badge requirement and portions of the disclosure requirements, but upheld the age, affidavit, and registration requirements, and the six-month limit on petition circulation. The Tenth Circuit affirmed in part and reversed in part. That court properly sought guidance from this Court's recent decisions on ballot access, see, *e.g., Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589, and on handbill distribution, see, *e.g., McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426. The Tenth Circuit upheld, as reasonable regulations of the ballot- initiative process, the age restriction, the six-month limit on petition circulation, and the affidavit requirement. The court struck down the ***183** requirement that petition circulators be registered voters, and also held portions of the badge and disclosure requirements invalid as trenching unnecessarily and improperly on political expression. This Court agreed to review the Court of Appeals dispositions concerning the registration, badge, and disclosure requirements. See 522 U.S. 1107, 118 S.Ct. 1033, 140 L.Ed.2d 100.

Precedent guides this review. In *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425, this Court struck down Colorado's prohibition of payment for the circulation of ballot-initiative petitions, concluding that petition circulation is "core political speech" for which First Amendment protection is "at its zenith." *Id.,* at 422, 425, 108 S.Ct. 1886. This Court has also recognized, however, that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order ... is to

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accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714; see Timmons, 520 U.S., at 358, 117 S.Ct. 1364; Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547.

***2 *Held:* The Tenth Circuit correctly separated necessary or proper ballot- access controls from restrictions that unjustifiably **638 inhibit the circulation of ballot-initiative petitions. Pp. 642-649.

(a) States have considerable leeway to protect the integrity and reliability of the ballot-initiative process, as they have with respect to election processes generally. "[N]o litmus-paper test" will separate valid ballot- access provisions from invalid interactive speech restrictions, and this Court has come upon "no substitute for the hard judgments that must be made." Storer, 415 U.S., at 730, 94 S.Ct. 1274. But the First Amendment requires vigilance in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas. See Meyer, 486 U.S., at 421, 108 S.Ct. 1886. The Court is satisfied that, as in Meyer, the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions. This judgment is informed by other means Colorado employs to accomplish its regulatory purposes. P. 642.

(b) Beyond question, Colorado's registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions. That requirement produces a speech diminution of the very kind produced by the ban on paid circulators at issue in Meyer. Both provisions "limi[t] the number of voices who will convey [the initiative proponents'] message" and, consequently, cut down "the size of the audience [proponents] can reach." Meyer, 486 U.S., at 422, 423, 108 S.Ct. 1886.

The ease with which qualified voters may register to vote does not lift the burden on speech at petition circulation time. There are individuals for whom, as the trial record shows, the choice not to register *184 implicates political thought and expression. The State's strong interest in policing lawbreakers among petition circulators by ensuring that circulators will be amenable to the Secretary of State's subpoena power is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, his or her address. ACLF did not challenge Colorado's right to require that all circulators be residents, a requirement that more precisely achieves the State's subpoena service objective. Assuming that a residence requirement would be upheld as a needful integrity-policing measure--a question that this Court, like the Tenth Circuit, has no occasion to decide because the parties have not placed the matter of residence at issue-- the added registration requirement is not warranted. Pp. 642-645.

(c) The Tenth Circuit held the badge requirement invalid insofar as it requires circulators to display their names. The District Court found from evidence ACLF presented that compelling circulators to wear identification badges inhibits participation in the petitioning process. Colorado's interest in enabling the public to identify, and the State to apprehend, petition circulators who engage in misconduct is addressed by the requirement that circulators disclose their names and addresses on affidavits submitted with each petition section. Unlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks, when reaction to the message is immediate and may be the most intense, emotional, and unreasoned. Because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest, it does not qualify for inclusion among "the more limited [election process] identification requirement [s]" to which this Court alluded in McIntyre, 514 U.S., at 353, 115 S.Ct. 1511. Like the Tenth Circuit, this Court expresses no opinion on the constitutionality of the additional requirements that the badge disclose whether the circulator is paid or volunteer, and if paid, by whom. Pp. 645- 646.

***3 (d) The Tenth Circuit invalidated the requirement that ballot-initiative proponents file a final report when the initiative petition is submitted insofar as that requirement compels disclosure of each paid circulator by name and address, and the total amount paid to each circulator. That court also rejected compelled disclosure in monthly reports of the name and address of each paid circulator, and the amount of money paid and owed to **639 each circulator during the month in question. In ruling on these disclosure requirements, the Court of Appeals looked primarily to this Court's decision in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659. In

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Buckley, the Court stated that "exacting scrutiny" is necessary when compelled disclosure of campaign-related payments is at issue, but nevertheless upheld, as substantially related to important governmental ***185** interests, the reporting and disclosure provisions of the Federal Election Campaign Act of 1971. Mindful of *Buckley,* the Tenth Circuit did not upset Colorado's disclosure requirements as a whole. Notably, the Court of Appeals upheld the State's requirements for disclosure of *payors,* in particular, proponents' names and the total amount they have spent to collect signatures for their petitions. Disclosure of the names of initiative sponsors, and the amounts they have spent to gather support for their initiatives, responds to Colorado's substantial interest in controlling domination of the initiative process by affluent special interest groups. The added benefit of revealing the names of paid circulators and amounts paid to each circulator, the lower courts fairly determined from the record as a whole, has not been demonstrated. This Court expresses no opinion whether other monthly report prescriptions regarding which the Tenth Circuit identified no infirmity would, standing alone, survive review. Pp. 646-648.

(e) Through less problematic measures, Colorado can and does meet the State's substantial interest in regulating the ballot-initiative process. To deter fraud and diminish corruption, Colorado retains an arsenal of safeguards. To inform the public about the source of funding for ballot initiatives, the State legitimately requires sponsors of ballot initiatives to disclose who pays petition circulators, and how much. To ensure grass roots support, Colorado conditions placement of an initiative proposal on the ballot on the proponent's submission of valid signatures representing five percent of the total votes cast for all candidates for Secretary of State at the previous general election. Furthermore, in aid of efficiency, veracity, or clarity, Colorado has provided for an array of process measures not contested here by ACLF. Pp. 648-649.

120 F.3d 1092, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, and SOUTER, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post,* p. 649. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BREYER, J., joined, *post,* p. 653. REHNQUIST, C.J., filed a dissenting opinion, *post,* p. 659.

Gale Norton, Denver, CO, for petitioner.

Neil D. O'Toole, Denver, CO, for respondents.

***186** Justice GINSBURG delivered the opinion of the Court.

*****4** Colorado allows its citizens to make laws directly through initiatives placed on election ballots. See Colo. Const., Art. V, § § 1(1), (2); Colo.Rev.Stat. § § 1-40-101 to 1-40-133 (1998). We review in this case three conditions Colorado places on the ballot-initiative process: (1) the requirement that initiative-petition circulators be registered voters, Colo.Rev.Stat. § 1-40-112(1) (1998); (2) the requirement that they wear an identification badge bearing the circulator's name, § 1-40-112(2); and (3) the requirement that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator, § 1-40-121.

Precedent guides our review. In *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), we struck down Colorado's prohibition of payment for the circulation of ballot-initiative petitions. Petition circulation, we held, is "core political speech," because it involves "interactive communication concerning political change." *Id.,* at 422, 108 S.Ct. 1886 (internal quotation marks ****640** omitted). ***187** First Amendment protection for such interaction, we agreed, is "at its zenith." *Id.,* at 425, 108 S.Ct. 1886 (internal quotation marks omitted). We have also recognized, however, that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); see *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *Anderson v. Celebrezze,* 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). Taking careful account of these guides, the Court of Appeals for the Tenth Circuit upheld some of the State's regulations, but found the three controls at issue excessively restrictive of political speech, and therefore declared them invalid. *American Constitutional Law Foundation, Inc. v. Meyer,* 120 F.3d 1092 (1997). We granted certiorari, 522 U.S. 1107, 118 S.Ct. 1033, 140 L.Ed.2d 100 (1998), and now affirm that judgment.

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I

The complaint in this action was filed in 1993 in the United States District Court for the District of Colorado pursuant to 42 U.S.C. § 1983; it challenged six of Colorado's many controls on the initiative-petition process. Plaintiffs, now respondents, included American Constitutional Law Foundation, Inc., a nonprofit, public interest organization that supports direct democracy, and several individual participants in Colorado's initiative process. In this opinion we refer to plaintiffs-respondents, collectively, as ACLF. [FN1] ***188** ACLF charged that the following prescriptions of Colorado's law governing initiative petitions violate the First Amendment's freedom of speech guarantee: (1) the requirement that petition circulators be at least 18 years old, Colo.Rev.Stat. § 1-40-112(1) (1998); [FN2] (2) the further requirement that they be registered voters, *ibid.;* [FN3] (3) the limitation of the petition circulation period to six months, § 1-40-108; [FN4] (4) the requirement that petition circulators wear identification badges stating their names, their status as "VOLUNTEER" or "PAID," and if the latter, the name and telephone number of their employer, § 1-40-112(2); [FN5] (5) the requirement that circulators attach to each petition section [FN6] an affidavit containing, ***189** *inter* ****641** *alia,* the circulator's name and address and a statement that "he or she has read and understands the laws governing the circulation of petitions," § 1-40-111(2); [FN7] and (6) the requirements that initiative proponents disclose (a) at the time they file their petition, the name, address, and county of voter registration of all paid circulators, the amount of money proponents paid per petition signature, and the total amount paid to each circulator, and (b) on a monthly basis, the names of the proponents, the name and address of each paid circulator, the name of the proposed ballot measure, and the amount of money paid and owed to each circulator during the month, § 1-40-121. [FN8]

FN1. Individual plaintiffs included: David Aitken, who, as chairman of the Colorado Libertarian Party, had organized the circulation of several initiative petitions; Jon Baraga, statewide petition coordinator for the Colorado Hemp Initiative; Craig Eley and Jack Hawkins, circulators of petitions for the Safe Workplace Initiative and Worker's Choice of Care Initiative; Lonnie Haynes, an initiative-supporting member of ACLF; Alden Kautz, a circulator of numerous initiative petitions; Bill Orr, executive director of ACLF and a qualified but unregistered voter, who regularly participated in the petition process and wanted to circulate petitions; and William David Orr, a minor who wanted to circulate petitions. See *American Constitutional Law Foundation, Inc. v. Meyer,* 120 F.3d 1092, 1096-1097 (C.A.10 1997); Brief for Respondents David Aitken et al. 2, 3, 5, 6.

FN2. Section 1-40-112(1) provides:
"No section of a petition for any initiative or referendum measure shall be circulated by any person who is not a registered elector and at least eighteen years of age at the time the section is circulated."

FN3. To be a registered voter, one must reside in Colorado. See § 1-2-101(1)(b). ACLF did not challenge the residency requirement in this action.

FN4. Section 1-40-108(1) provides in relevant part:
"No petition for any ballot issue shall be of any effect unless filed with the secretary of state within six months from the date that the titles, submission clause, and summary have been fixed and determined pursuant to the provisions of sections 1-40-106 and 1-40-107.... "

FN5. Section 1-40-112(2) provides:
"(a) All circulators who are not to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words 'VOLUNTEER CIRCULATOR' in bold-faced type which is clearly legible and the circulator's name.
"(b) All circulators who are to be paid for circulating petitions concerning ballot issues shall display an identification badge that includes the words 'PAID CIRCULATOR' in bold-faced type which is clearly legible, the circulator's name, and the name and telephone number of the individual

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employing the circulator."

FN6. A petition section is a "bound compilation of initiative forms ... which ... include ... a copy of the proposed [ballot] measure; ... ruled lines numbered consecutively for registered electors' signatures; and a final page that contains the affidavit required by section 1-40-111(2)." § 1-40-102(6).

FN7. Section 1-40-111(2) provides:
"To each petition section shall be attached a signed, notarized, and dated affidavit executed by the registered elector who circulated the petition section, which shall include his or her printed name, the address at which he or she resides, including the street name and number, the city or town, the county, and the date he or she signed the affidavit; that he or she has read and understands the laws governing the circulation of petitions; that he or she was a registered elector at the time the section of the petition was circulated and signed by the listed electors; that he or she circulated the section of the petition; that each signature thereon was affixed in the circulator's presence; that each signature thereon is the signature of the person whose name it purports to be; that to the best of the circulator's knowledge and belief each of the persons signing the petition section was, at the time of signing, a registered elector; and that he or she has not paid or will not in the future pay and that he or she believes that no other person has paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to affix his or her signature to the petition. The secretary of state shall not accept for filing any section of a petition that does not have attached thereto the notarized affidavit required by this section. Any signature added to a section of a petition after the affidavit has been executed shall be invalid."

FN8. Section 1-40-121 provides in relevant part:
"(1) The proponents of the petition shall file ... the name, address, and county of voter registration of all circulators who were paid to circulate any section of the petition, the amount paid per signature, and the total amount paid to each circulator. The filing shall be made at the same time the petition is filed with the secretary of state....
"(2) The proponents of the petition shall sign and file monthly reports with the secretary of state, due ten days after the last day of each month in which petitions are circulated on behalf of the proponents by paid circulators. Monthly reports shall set forth the following:
"(a) The names of the proponents;
"(b) The name and the residential and business addresses of each of the paid circulators;
"(c) The name of the proposed ballot measure for which petitions are being circulated by paid circulators; and
"(d) The amount of money paid and owed to each paid circulator for petition circulation during the month in question."

*****5 *190** The District Court, after a bench trial, [FN9] struck down the badge requirement and portions of the disclosure requirements, but upheld the age and affidavit requirements and the six-month limit on petition circulation. See *American Constitutional Law Foundation, Inc. v. Meyer*, 870 F.Supp. 995, 1001-1004 (D.Colo.1994). The District Court also found that the registration requirement "limits the number of persons available to circulate ... and, accordingly, restricts core political speech." *Id.*, at 1002. Nevertheless, that court upheld the registration requirement. In 1980, the District Court noted, the registration requirement had been adopted by Colorado's voters as a constitutional amendment. See *ibid.* For that reason, the District Court believed, the restriction was "not subject to any level of scrutiny." *Ibid.*

FN9. The record included evidence submitted in support of cross- motions for summary judgment and at a bench trial. See *American Constitutional Law Foundation, Inc. v. Meyer*, 870 F.Supp. 995, 997 (D.Colo.1994).

The Court of Appeals affirmed in part and reversed

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in part. See 120 F.3d 1092 (C.A.10 1997). That court properly sought guidance from our recent decisions on ballot access, see, *e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), and on handbill distribution, see *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). See 120 F.3d, at 1097, 1103. Initiative- petition circulators, the Tenth Circuit recognized, resemble handbill distributors, in that both seek ***191** to promote public support for a particular issue or position. See *id.*, at 1103. Initiative-petition circulators also resemble candidate-petition signature gatherers, however, for both seek ****642** ballot access. In common with the District Court, the Tenth Circuit upheld, as reasonable regulations of the ballot-initiative process, the age restriction, the six-month limit on petition circulation, and the affidavit requirement. See *id.*, at 1098-1100, 1101. [FN10] The Court of Appeals struck down the requirement that petition circulators be registered voters, and also held portions of the badge and disclosure requirements invalid as trenching unnecessarily and improperly on political expression. See *id.*, at 1100, 1101-1105.

FN10. The Tenth Circuit recognized that "age commonly is used as a proxy for maturity," and that "maturity is reasonably related to Colorado's interest in preserving the integrity of ballot issue elections." 120 F.3d, at 1101. Such a restriction, the Court of Appeals said, need not satisfy "[e]xacting scrutiny," for it is both "neutral" and "temporary"; it "merely postpones the opportunity to circulate." *Ibid.* As to the six-month limit, the Court of Appeals observed that an orderly process requires time lines; again without demanding "[e]laborate ... verification," the court found six months a "reasonable window," a sensible, "nondiscriminatory ballot access regulation." *Id.*, at 1099 (internal quotation marks omitted). Finally, the court explained that the affidavit requirement properly responded to the State's need to " 'ensure that circulators, who possess various degrees of interest in a particular initiative, exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures of only registered electors throughout the state.' " *Id.*, at 1099-1100 (quoting *Loonan v. Woodley*, 882 P.2d 1380, 1388-1389 (Colo.1994) (en banc)). We denied ACLF's cross-petition regarding these issues. See 522 U.S. 1113, 118 S.Ct. 1033, 140 L.Ed.2d 100 (1998).

II

[1][2] As the Tenth Circuit recognized in upholding the age restriction, the six-month limit on circulation, and the affidavit requirement, States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally. See ***192***Biddulph v. Mortham*, 89 F.3d 1491, 1494, 1500-1501 (C.A.11 1996) (upholding single subject and unambiguous title requirements for initiative proposals to amend Florida's Constitution), cert. denied, 519 U.S. 1151, 117 S.Ct. 1086, 137 L.Ed.2d 220 (1997); *Taxpayers United For Assessment Cuts v. Austin*, 994 F.2d 291, 293-294, 296- 297 (C.A.6 1993) (upholding Michigan procedures for checking voters' signatures on initiative petitions). [FN11] We have several times said "no litmus- paper test" will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon "no substitute for the hard judgments that must be made." *Storer*, 415 U.S., at 730, 94 S.Ct. 1274; see *Timmons*, 520 U.S., at 359, 117 S.Ct. 1364; *Anderson*, 460 U.S., at 789-790, 103 S.Ct. 1564. But the First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas. See *Meyer*, 486 U.S., at 421, 108 S.Ct. 1886. We therefore detail why we are satisfied that, as in *Meyer*, the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions. [FN12] Our judgment is informed by other means Colorado employs to accomplish its regulatory purposes.

FN11. Nothing in this opinion should be read to suggest that initiative-petition circulators are agents of the State. Although circulators are subject to state regulation and are accountable to the State for compliance with legitimate controls, see, *e.g.*, Colo.Rev.Stat. § § 1-40-111, 1-40-130 (1998), circulators act on behalf of themselves or the proponents of ballot

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initiatives.

FN12. Our decision is entirely in keeping with the "now-settled approach" that state regulations "impos[ing] 'severe burdens' on speech ... [must] be narrowly tailored to serve a compelling state interest." See *post,* at 649 (THOMAS, J., concurring in judgment).

III

***6 By constitutional amendment in 1980, see Colo. Const., Art. V, § 1(6), and corresponding statutory change the next ***193** year, see 1981 Colo. Sess. Laws, ch. 56, § 4, Colorado added to the requirement that petition circulators be residents, the further requirement that they be registered voters. [FN13] Registration, ****643** Colorado's Attorney General explained at oral argument, demonstrates "commit[ment] to the Colorado law-making process," Tr. of Oral Arg. 10, and facilitates verification of the circulator's residence, see *id.,* at 10, 14. Beyond question, Colorado's registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions. We must therefore inquire whether the State's concerns warrant the reduction. See *Timmons,* 520 U.S., at 358, 117 S.Ct. 1364.

FN13. Colorado law similarly provides that only registered voters may circulate petitions to place candidates on the ballot. See Colo.Rev.Stat. § 1-4-905(1) (1998) (only "eligible elector" may circulate candidate petitions); § 1-1-104(16) ("eligible elector" defined as "registered elector").

When this case was before the District Court, registered voters in Colorado numbered approximately 1.9 million. At least 400,000 persons eligible to vote were not registered. See 2 Tr. 159 (testimony of Donetta Davidson, elections official in the Colorado Secretary of State's office); [FN14] 120 F.3d, at 1100 ("Colorado acknowledges there are at least 400,000 qualified but unregistered voters in the state."). [FN15]

FN14. Volume 1 of the trial transcript is reprinted in Pro-Se Plaintiff's App. I in No. 94-1576 (CA10), and is cited hereinafter as 1 Tr. Volume 2 of the trial transcript is reprinted in Pro-Se Plaintiff's App. II in No. 94-1576 (CA10), and is cited hereinafter as 2 Tr.

FN15. In fact, the number of unregistered but voter-eligible residents in Colorado at the time of the trial may have been closer to 620,000. See U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 282 (1993) (Table 453).
More recent statistics show that less than 65 percent of the voting-age population was registered to vote in Colorado in 1997. See U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 289 (1997) (Table 463). Using those more recent numbers, Colorado's registration requirement would exclude approximately 964,000 unregistered but voter-eligible residents from circulating petitions. The proportion of voter-eligible but unregistered residents to registered residents in Colorado is not extraordinary in comparison to those proportions in other States. See generally *ibid.*

***194** Trial testimony complemented the statistical picture. Typical of the submissions, initiative proponent Paul Grant testified: "Trying to circulate an initiative petition, you're drawing on people who are not involved in normal partisan politics for the most part.... [L]arge numbers of these people, our natural support, are not registered voters." 1 Tr. 128.

As earlier noted, see *supra,* at 641, the District Court found from the statistical and testimonial evidence: "The record does show that the requirement of registration limits the number of persons available to circulate and sign [initiative] petitions and, accordingly, restricts core political speech." 870 F.Supp., at 1002. Because the requirement's source was a referendum approved by the people of Colorado, however, the District Court deemed the prescription "not subject to any level of [judicial] scrutiny." *Ibid.* That misjudgment was corrected by the Tenth Circuit: "The voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting

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legislation." 120 F.3d, at 1100.

[3] The Tenth Circuit reasoned that the registration requirement placed on Colorado's voter-eligible population produces a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer.* See 120 F.3d, at 1100. We agree. The requirement that circulators be not merely voter eligible, but registered voters, it is scarcely debatable given the uncontested numbers, see *supra,* at 642-643, and n. 15, decreases the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators. [FN16] Both ****644** provisions "limi[t] the number of voices who ***195** will convey [the initiative proponents'] message" and, consequently, cut down "the size of the audience [proponents] can reach." *Meyer,* 486 U.S., at 422, 423, 108 S.Ct. 1886; see *Bernbeck v. Moore,* 126 F.3d 1114, 1116 (C.A.8 1997) (quoting *Meyer*); see also *Meyer,* 486 U.S., at 423, 108 S.Ct. 1886 (stating, further, that the challenged restriction reduced the chances that initiative proponents would gather signatures sufficient in number to qualify for the ballot, and thus limited proponents' "ability to make the matter the focus of statewide discussion"). In this case, as in *Meyer,* the requirement "imposes a burden on political expression that the State has failed to justify." *Id.,* at 428, 108 S.Ct. 1886.

FN16. Persons eligible to vote, we note, would not include "convicted drug felons who have been denied the franchise as part of their punishment," see *post,* at 660 (REHNQUIST, C.J., dissenting), and could similarly be barred from circulating petitions. The dissent's concern that hordes of "convicted drug dealers," *ibid,* will swell the ranks of petition circulators, unstoppable by legitimate state regulation, is therefore undue. Even more imaginary is the dissent's suggestion that if the merely voter eligible are included among petition circulators, children and citizens of foreign lands will not be far behind. See *post,* at 661. This familiar parade of dreadfuls calls to mind wise counsel: "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." R. Bork, The Tempting of America: The Political Seduction of the Law 169 (1990). That same counsel applies to Justice O'CONNOR's floodgate fears concerning today's decision, which, like *Meyer,* separates petition circulators from the proponents and financial backers of ballot initiatives. See *post,* at 659 (opinion concurring in judgment in part and dissenting in part).

*****7** Colorado acknowledges that the registration requirement limits speech, but not severely, the State asserts, because "it is exceptionally easy to register to vote." Reply Brief 5, 6; see Brief for Petitioner 30-31. The ease with which qualified voters may register to vote, however, does not lift the burden on speech at petition circulation time. Of course there are individuals who fail to register out of ignorance or apathy. See *post,* at 655-656 (O'CONNOR, J., concurring in judgment in part and dissenting in part). But there are also individuals for whom, as the trial record shows, the choice not to register implicates political thought and expression. See 1 Tr. 14 (testimony of ballot-initiative organizer Jack ***196** Hawkins). A lead plaintiff in this case, long active in ballot-initiative support--a party no doubt " 'able and willing' to convey a political message," cf. *post,* at 655 (O'CONNOR, J., concurring in judgment in part and dissenting in part)-- testified that his refusal to register is a "form of ... private and public protest." 1 Tr. 223 (testimony of William Orr, executive director of ACLF). Another initiative proponent similarly stated that some circulators refuse to register because "they don't believe that the political process is responsive to their needs." *Id.,* at 58 (testimony of Jon Baraga). For these voter-eligible circulators, the ease of registration misses the point. [FN17]

FN17. Justice O'CONNOR correctly observes that registration requirements for primary election voters and candidates for political office are "classic" examples of permissible regulation. See *post,* at 654 (opinion concurring in judgment in part and dissenting in part). But the hired signature collector, as this Court recognized in *Meyer,* is in a notably different category. When the Court unanimously struck down a ban on paying persons to circulate petitions, it surely did not imply that the State must therefore tolerate a private sponsor's hourly or piecework payment of persons in exchange for their vote or political candidacy.

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The State's dominant justification appears to be its strong interest in policing lawbreakers among petition circulators. Colorado seeks to ensure that circulators will be amenable to the Secretary of State's subpoena power, which in these matters does not extend beyond the State's borders. See Brief for Petitioner 32. The interest in reaching law violators, however, is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, the "address at which he or she resides, including the street name and number, the city or town, [and] the county." Colo.Rev.Stat. § 1-40-111(2) (1998); see *supra,* at 641, n. 7. This address attestation, we note, has an immediacy, and corresponding reliability, that a voter's registration may lack. The attestation is made at the time a petition section is submitted; a voter's registration may lack that currency.

***197** ACLF did not challenge Colorado's right to require that all circulators be residents, a requirement that, the Tenth Circuit said, "more precisely achieved" the State's subpoena service objective. 120 F.3d, at 1100. Nor was any eligible-to-vote qualification in contest in this lawsuit. Colorado maintains that it is more difficult to determine who is a state resident than it is to determine who is a registered voter. See Tr. of Oral Arg. 10, 14. The force of that argument is diminished, however, by the affidavit attesting to residence that each circulator must submit with each petition section.

****645 ***8** In sum, assuming that a residence requirement would be upheld as a needful integrity-policing measure--a question we, like the Tenth Circuit, see 120 F.3d, at 1100, have no occasion to decide because the parties have not placed the matter of residence at issue--the added registration requirement is not warranted. That requirement cuts down the number of message carriers in the ballot-access arena without impelling cause.

IV

Colorado enacted the provision requiring initiative-petition circulators to wear identification badges in 1993, five years after our decision in *Meyer.* 1993 Colo. Sess. Laws, ch. 183, § 1. [FN18] The Tenth Circuit held the badge requirement invalid insofar as it requires circulators to display their names. See 120 F.3d, at 1104. The Court of Appeals did not rule on the constitutionality of other elements of the badge provision, namely, the "requirements that the badge disclose whether the circulator is paid or a volunteer, and if paid, by whom." *Ibid.* Nor do we.

FN18. Colorado does not require identification badges for persons who gather signatures to place candidates on the ballot. See generally Colo.Rev.Stat. § 1-4-905 (1998) (regulations governing candidate-petition circulators).

Evidence presented to the District Court, that court found, "demonstrated that compelling circulators to wear identification ***198** badges inhibits participation in the petitioning process." 870 F.Supp., at 1001. The badge requirement, a veteran ballot-initiative-petition organizer stated, "very definitely limited the number of people willing to work for us and the degree to which those who were willing to work would go out in public." 1 Tr. 127 (testimony of Paul Grant). [FN19] Another witness told of harassment he personally experienced as circulator of a hemp initiative petition. See 870 F.Supp., at 1001. He also testified to the reluctance of potential circulators to face the recrimination and retaliation that bearers of petitions on "volatile" issues sometimes encounter: "[W]ith their name on a badge, it makes them afraid." 1 Tr. 60 (testimony of Jon Baraga). Other petition advocates similarly reported that "potential circulators were not willing to wear personal identification badges." 870 F.Supp., at 1001-1002.

FN19. See 1 Tr. 133 (testimony of Paul Grant) ("I would not circulate because I don't want to go to jail. And, I won't wear the badge because I don't think it's right.").

Colorado urges that the badge enables the public to identify, and the State to apprehend, petition circulators who engage in misconduct. See Brief for Petitioner 36-37; Reply Brief 17. Here again, the affidavit requirement, unsuccessfully challenged below, see *supra,* at 642, and n. 10, is responsive to the State's concern; as earlier noted, see *supra,* at 640-641, and n. 7, each petition section must contain, along with the collected signatures of voters, the circulator's name, address, and signature. This notarized submission, available to law enforcers, renders less needful the State's provision for personal names on identification badges.

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While the affidavit reveals the name of the petition circulator and is a public record, it is tuned to the speaker's interest as well as the State's. Unlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks. As the Tenth Circuit explained, the name badge requirement "forces circulators ***199** to reveal their identities at the same time they deliver their political message," 120 F.3d, at 1102; it operates when reaction to the circulator's message is immediate and "may be the most intense, emotional, and unreasoned," *ibid.* The affidavit, in contrast, does not expose the circulator to the risk of "heat of the moment" harassment. Cf. 870 F.Supp., at 1004 (observing that affidavits are not instantly accessible, and are therefore less likely to be used "for such purposes as retaliation or harassment").

*****9** Our decision in *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), is instructive here. The complainant in *McIntyre* challenged an Ohio law that prohibited the distribution of anonymous campaign literature. The writing in question was a handbill urging voters to defeat a ballot issue. Applying "exacting scrutiny" to Ohio's fraud prevention justifications, ****646** we held that the ban on anonymous speech violated the First Amendment. See *id.,* at 347, 357, 115 S.Ct. 1511. "Circulating a petition is akin to distributing a handbill," the Tenth Circuit observed in the decision now before us. 120 F.3d, at 1103. Both involve a one-on-one communication. But the restraint on speech in this case is more severe than was the restraint in *McIntyre.* Petition circulation is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition. See Tr. of Oral Arg. 21, 25-26. That endeavor, we observed in *Meyer,* "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S., at 421, 108 S.Ct. 1886.

The injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest. See 120 F.3d, at 1102. For this very reason, the name badge requirement does not qualify for inclusion among the "more limited [election process] identification requirement [s]" to which we alluded in *McIntyre.* 514 U.S., at 353, 115 S.Ct. 1511 ("We recognize that a State's enforcement ***200** interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here."); see *id.,* at 358, 115 S.Ct. 1511 (GINSBURG, J., concurring). In contrast, the affidavit requirement upheld by the District Court and Court of Appeals, which must be met only after circulators have completed their conversations with electors, exemplifies the type of regulation for which *McIntyre* left room. [FN20]

FN20. As the Tenth Circuit observed, see 120 F.3d, at 1101, neither *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), nor *Martin v. City of Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), supports the name identification Colorado requires petition circulators to wear. *Riley* invalidated a North Carolina law restricting solicitation of charitable contributions by professional fundraisers. *Martin* invalidated a city ordinance prohibiting knocking on the door or ringing the doorbell of any residence for the purpose of distributing literature. The Court observed in *Riley* that an unchallenged portion of the disclosure law required professional fundraisers to disclose their *professional status, i.e.,* their *employer's* name and address, to potential donors. 487 U.S., at 799, and n. 11, 108 S.Ct. 2667. In dictum in *Martin,* the Court noted that "a stranger in the community" could be required to establish his identity and authority to act for the cause he purports to represent. 319 U.S., at 148, n. 14, 63 S.Ct. 862 (internal quotation marks omitted). Neither case involved a name badge requirement or any other specification that the solicitor's personal name be revealed. Nor was there in either case a counterpart to the affidavit, which puts each petition circulator's name and address on a public record.

[4] In sum, we conclude, as did the Court of Appeals, that Colorado's current badge requirement discourages participation in the petition circulation process by forcing name identification without sufficient cause. We reiterate this qualification: In its final observation, the Court of Appeals noted that ACLF's "arguments and evidence focus[ed] entirely on [the circulator identification] requirement"; therefore, that court expressed no opinion whether

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the additional requirements--that the badge disclose the circulator's paid or volunteer status, and if paid, by whom--"would pass constitutional muster standing alone." 120 F.3d, at 1104. We similarly confine our decision.

***201** V

*****10** Like the badge requirement, Colorado's disclosure provisions were enacted post-*Meyer* in 1993. See 1993 Colo. Sess. Laws, ch. 183, § 1. [FN21] The Tenth Circuit trimmed these provisions. Colorado requires ballot-initiative proponents who pay circulators to file both a final report when the initiative petition is submitted to the Secretary of State, and monthly reports during the circulation period. Colo.Rev.Stat. § 1-40-121 (1998), set out *supra,* at 641, n. 8. The Tenth Circuit invalidated the final report provision only insofar as it compels disclosure of information specific to each paid circulator, in particular, the circulators' names and addresses and the total amount paid to each ****647** circulator. See 120 F.3d, at 1104-1105. As modified by the Court of Appeals decision, the final report will reveal the amount paid per petition signature, and thus, effectively, the total amount paid to petition circulators. See *ibid.*

FN21. Colorado does not require similar disclosures for persons who gather signatures to place candidates on the ballot. See generally Colo.Rev.Stat. § 1-4-905 (1998) (regulations governing candidate-petition circulators).

The Court of Appeals next addressed Colorado's provision demanding "detailed monthly disclosures." 120 F.3d, at 1105. In a concise paragraph, the court rejected compelled disclosure of the name and addresses (residential and business) of each paid circulator, and the amount of money paid and owed to each circulator, during the month in question. See Colo.Rev.Stat. § § 1-40- 121(2)(b), (d) (1998). The Court of Appeals identified no infirmity in the required reporting of petition proponents' names, or in the call for disclosure of proposed ballot measures for which paid circulators were engaged. See § § 1-40-121(2)(a), (c). We express no opinion whether these monthly report prescriptions, standing alone, would survive review.

In ruling on Colorado's disclosure requirements for paid circulations, the Court of Appeals looked primarily to our ***202** decision in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam).* In that decision, we stated that "exacting scrutiny" is necessary when compelled disclosure of campaign-related payments is at issue. See *id.,* at 64-65, 96 S.Ct. 612. We nevertheless upheld, as substantially related to important governmental interests, the recordkeeping, reporting, and disclosure provisions of the Federal Election Campaign Act of 1971, 86 Stat. 3, as amended, 88 Stat. 1263, 2 U.S.C. § 431 *et seq.* (1970 ed., Supp. IV). See 424 U.S., at 66- 68, 84, 96 S.Ct. 612. We explained in *Buckley* that disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent," thereby aiding electors in evaluating those who seek their vote. *Id.,* at 66, 96 S.Ct. 612 (internal quotation marks omitted). We further observed that disclosure requirements "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.,* at 67, 96 S.Ct. 612; see also *Grosjean v. American Press Co.,* 297 U.S. 233, 250, 56 S.Ct. 444, 80 L.Ed. 660 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment").

*****11** [5] Mindful of *Buckley,* the Tenth Circuit did not upset Colorado's disclosure requirements "as a whole." But see *post,* at 662 (REHNQUIST, C.J., dissenting). Notably, the Court of Appeals upheld the State's requirements for disclosure of *payors,* in particular, proponents' names and the total amount they have spent to collect signatures for their petitions. See 120 F.3d, at 1104-1105. In this regard, the State and supporting *amici* stress the importance of disclosure as a control or check on domination of the initiative process by affluent special interest groups. See Reply Brief 15 ("[T]here are increasingly more initiatives that are the product of large monied interests."); Brief for Council of State Governments et al. as *Amici Curiae* 3 ("Today the initiative and referendum process is dominated by money and professional firms."). Disclosure of the names of initiative sponsors, and of the amounts they have spent gathering ***203** support for their initiatives, responds to that substantial state interest. See 870 F.Supp., at 1003 ("What is of interest is the payor, not the payees."); cf. this Court's Rule 37.6 (requiring disclosure of "every person or entity ... who made a monetary contribution to the preparation or submission of the brief").

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Through the disclosure requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot; in other words, voters will be told "who has proposed [a measure]," and "who has provided funds for its circulation." See *post,* at 658 (O'CONNOR, J., concurring in judgment in part and dissenting in part). The added benefit of revealing the names of paid circulators and amounts paid to each circulator, the lower courts fairly determined from the record as a whole, is hardly apparent and has not been demonstrated. [FN22]

FN22. Justice O'CONNOR states that "[k]nowing the names of paid circulators and the amounts paid to them [will] allo[w] members of the public to evaluate the sincerity or, alternatively, the potential bias of any circulator that approaches them." *Post,* at 658 (opinion concurring in judgment in part and dissenting in part). It is not apparent why or how this is so, for the reports containing the names of paid circulators would be filed with the Secretary of State and would not be at hand at the moment the circulators "approac[h]."

****648** We note, furthermore, that ballot initiatives do not involve the risk of *"quid pro quo"* corruption present when money is paid to, or for, candidates. See *Meyer,* 486 U.S., at 427-428, 108 S.Ct. 1886 (citing *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 790, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue.")); *McIntyre,* 514 U.S., at 352, n. 15, 115 S.Ct. 1511. In addition, as we stated in *Meyer,* "the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." 486 U.S., at 427, 108 S.Ct. 1886. Finally, absent evidence to the contrary, "we are not prepared to assume that a professional circulator--whose qualifications for similar future assignments may ***204** well depend on a reputation for competence and integrity--is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." *Id.,* at 426, 108 S.Ct. 1886. [FN23]

FN23. While testimony in the record suggests that "occasional fraud in Colorado's petitioning process" involved paid circulators, it does not follow like the night the day that "paid circulators are more likely to commit fraud and gather false signatures than other circulators." See *post,* at 658 (O'CONNOR, J., concurring in judgment in part and dissenting in part). Far from making any ultimate finding to that effect, the District Court determined that neither the State's interest in preventing fraud, nor its interest in informing the public concerning the "financial resources ... available to [initiative proponents]" or the "special interests" supporting a ballot measure, is "significantly advanced by disclosure of the names and addresses of each person paid to circulate any section of [a] petition." 870 F.Supp., at 1003. Such disclosure in proponents' reports, the District Court also observed, risked exposing the paid circulators "to intimidation, harassment and retribution in the same manner as the badge requirement." *Ibid.*

*****12** In sum, we agree with the Court of Appeals appraisal: Listing paid circulators and their income from circulation "forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts," 120 F.3d, at 1105; [FN24] no more than tenuously related to the substantial interests disclosure serves, Colorado's reporting requirements, to the extent that they target paid circulators, "fai[l] exacting scrutiny," *ibid.*

FN24. Because the disclosure provisions target only paid circulators and require disclosure of the income from circulation each receives, the disclosure reports are of course "[d]istinguishable from the affidavit," *post,* at 656-657 (O'CONNOR, J., concurring in judgment in part and dissenting in part), which must be completed by both paid and volunteer circulators, and does not require disclosure of the amount paid individually to a circulator.

VI

Through less problematic measures, Colorado can

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and does meet the State's substantial interests in regulating the ballot-initiative process. Colorado aims to protect the integrity of the initiative process, specifically, to deter fraud ***205** and diminish corruption. See Brief for Petitioner 24, 42, 45; Reply Brief 13, 14, 17. To serve that important interest, as we observed in *Meyer,* Colorado retains an arsenal of safeguards. See 486 U.S., at 426- 427, 108 S.Ct. 1886, 120 F.3d, at 1103, 1105; see, *e.g.,* Colo.Rev.Stat. § 1-40-130(1)(b) (1998) (making it criminal to forge initiative-petition signatures); § 1-40-132(1) (initiative-petition section deemed void if circulator has violated any provision of the laws governing circulation). To inform the public "where [the] money comes from," *Buckley,* 424 U.S., at 66, 96 S.Ct. 612 (internal quotation marks omitted), we reiterate, the State legitimately requires sponsors of ballot initiatives to disclose who pays petition circulators, and how much. See *supra,* at 646-647.

To ensure grass roots support, Colorado conditions placement of an initiative proposal on the ballot on the proponent's submission of valid signatures representing five percent of the total votes cast for all candidates for Secretary of State at the previous general election. Colo. Const., Art. V, § 1(2); Colo.Rev.Stat. § 1-40-109(1) (1998); see *Meyer,* 486 U.S., at 425-426, 108 S.Ct. 1886, ****649**120 F.3d, at 1105. Furthermore, in aid of efficiency, veracity, or clarity, Colorado has provided for an array of process measures not contested here by ACLF. These measures prescribe, *inter alia,* a single subject per initiative limitation, Colo.Rev.Stat. § 1-40- 106.5(1)(a) (1998), a signature verification method, § 1-40-116, a large, plain-English notice alerting potential signers of petitions to the law's requirements, § 1-40-110(1), and the text of the affidavit to which all circulators must subscribe, § 1-40-111(2).

* * *

For the reasons stated, we conclude that the Tenth Circuit correctly separated necessary or proper ballot-access controls from restrictions that unjustifiably inhibit the circulation of ballot-initiative petitions. Therefore, the judgment of the Court of Appeals is

Affirmed.

***206** Justice THOMAS, concurring in the judgment.

When considering the constitutionality of a state election regulation that restricts core political speech or imposes "severe burdens" on speech or association, we have generally required that the law be narrowly tailored to serve a compelling state interest. But if the law imposes "lesser burdens," we have said that the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. The Court today appears to depart from this now-settled approach. In my view, Colorado's badge, registration, and reporting requirements each must be evaluated under strict scrutiny. Judged by that exacting standard, I agree with the majority that each of the challenged regulations violates the First and Fourteenth Amendments, and accordingly concur only in the judgment.

I

*****13** States, of course, must regulate their elections to ensure that they are conducted in a fair and orderly fashion. See, *e.g., Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *Burdick v. Takushi,* 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). But such regulations often will directly restrict or otherwise burden core political speech and associational rights. To require that every voting, ballot, and campaign regulation be narrowly tailored to serve a compelling interest "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Ibid.* Consequently, we have developed (although only recently) a framework for assessing the constitutionality, under the First and Fourteenth Amendments, of state election laws. When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review, and a State's important regulatory interests are typically enough to justify reasonable restrictions. *Timmons, supra,* at 358-359, 117 S.Ct. 1364; ***207***Burdick, supra,* at 434, 112 S.Ct. 2059; *Anderson v. Celebrezze,* 460 U.S. 780, 788-790, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

Predictability of decisions in this area is certainly important, but unfortunately there is no bright line separating severe from lesser burdens. When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling governmental interest. See, *e.g., Burson v. Freeman,* 504 U.S. 191,

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198, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (Tennessee law prohibiting solicitation of voters and distribution of campaign literature within 100 feet of the entrance of a polling place); *Brown v. Hartlage,* 456 U.S. 45, 53-54, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) (Kentucky's regulation of candidate campaign promises); *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 786, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (Massachusetts law prohibiting certain business entities from making expenditures for the purpose of affecting referendum votes).

Even where a State's law does not directly regulate core political speech, we have applied strict scrutiny. For example, in *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), we considered a challenge to Colorado's law making it a felony to ****650** pay initiative petition circulators. We applied strict scrutiny because we determined that initiative petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.,* at 421, 108 S.Ct. 1886. In *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley,* 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), we subjected to strict scrutiny a city ordinance limiting contributions to committees formed to oppose ballot initiatives because it impermissibly burdened association and expression. *Id.,* at 294, 102 S.Ct. 434.

*****14** When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech. Indeed, in *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), the Court suggested that we only resort to our severe/lesser burden ***208** framework if a challenged election law regulates "the mechanics of the electoral process," not speech. *Id.,* at 345, 115 S.Ct. 1511; but see *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 222-223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (first determining that California's prohibition on primary endorsements by the official governing bodies of political parties burdened speech and association and then applying strict scrutiny). I suspect that when regulations of core political speech are at issue it makes little difference whether we determine burden first because restrictions on core political speech so plainly impose a "severe burden."

When an election law burdens voting and associational interests, our cases are much harder to predict, and I am not at all sure that a coherent distinction between severe and lesser burdens can be culled from them. For example, we have subjected to strict scrutiny Connecticut's requirement that voters in any party primary be registered members of that party because it burdened the "associational rights of the Party and its members." *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986). We similarly treated California's laws dictating the organization and composition of official governing bodies of political parties, limiting the term of office of a party chair, and requiring that the chair rotate between residents of northern and southern California because they "burden[ed] the associational rights of political parties and their members," *Eu, supra,* at 231, 109 S.Ct. 1013. In *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), we applied strict scrutiny to California's law denying a ballot position to independent candidates who had a registered affiliation with a qualified political party within a year of the preceding primary election, apparently because it "substantially" burdened the rights to vote and associate. *Id.,* at 729, 736, 94 S.Ct. 1274. [FN1] And in ***209***Norman v. Reed,* 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992), we determined that Illinois' regulation of the use of party names and its law establishing signature requirements for nominating petitions severely burdened association by limiting new parties' access to the ballot, and held both challenged laws, as construed by the State Supreme Court, unconstitutional because they were not narrowly tailored. *Id.,* at 288-290, 294, 112 S.Ct. 698. By contrast, we determined that Minnesota's law preventing a candidate from appearing on the ballot as the choice of more than one party burdened a party's access to the ballot and its associational rights, but not severely, and upheld the ban under lesser scrutiny. *Timmons,* 520 U.S., at 363, 117 S.Ct. 1364. We likewise upheld Hawaii's prohibition on write-in voting, which imposed, at most, a "very limited" burden on voters' freedom of choice and association. *Burdick,* 504 U.S., at 437, 112 S.Ct. 2059.

FN1. Although we did not explicitly apply strict scrutiny in *Storer,* we said that the State's interest was "not only permissible, but compelling," and that the device the State chose was "an essential part of its overall mechanism." 415 U.S., at 736, 94 S.Ct. 1274.

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II

***15 Colorado argues that its badge, registration, and reporting requirements impose "lesser" burdens, and consequently, each ought to be upheld as serving important state interests. I cannot agree.

**651 A

The challenged badge requirement, Colo.Rev.Stat. § 1-40-112(2) (1998), directly regulates the content of speech. The State requires that all petition circulators disclose, at the time they deliver their political message, their names and whether they were paid or unpaid. Therefore, the regulation must be evaluated under strict scrutiny. Moreover, the category of burdened speech is defined by its content--Colorado's badge requirement does not apply to those who circulate candidate petitions, only to those who circulate initiative or referendum proposals. See generally § 1-4-905 (candidate petition circulation requirements). Content-based regulation of speech typically must be narrowly tailored to a compelling state interest. See, *e.g.*, ***210***Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). The State's dominant justification for its badge requirement is that it helps the public to identify, and the State to apprehend, petition circulators who perpetrate fraud. Even assuming that this is a compelling interest, plainly, this requirement is not narrowly tailored. It burdens all circulators, whether they are responsible for committing fraud or not. In any event, the State has failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural, problem. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 647, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (THOMAS, J., concurring in judgment and dissenting in part). [FN2]

FN2. The majority is correct to note, *ante*, at 645-646, that the Tenth Circuit declined to address whether Colorado's requirement that the badge disclose whether a circulator is paid or a volunteer, and if paid, the name and telephone number of the payer, would be constitutionally permissible standing *alone*. Nevertheless, the District Court invalidated § 1-40-112(2) in its entirety, *American Constitutional Law Foundation, Inc. v. Meyer*, 870 F.Supp. 995, 1005 (D.Colo.1994), and the Court of Appeals affirmed that decision in full. *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092, 1096 (C.A.10 1997).

B

Although Colorado's registration requirement, Colo.Rev.Stat. § 1-40- 112(1) (1998), does not *directly* regulate speech, it operates in the same fashion that Colorado's prohibition on paid circulators did in *Meyer*--the requirement reduces the voices available to convey political messages. We unanimously concluded in *Meyer* that initiative petition circulation was core political speech. 486 U.S., at 421-422, 108 S.Ct. 1886. Colorado's law making it a felony to pay petition circulators burdened that political expression, we said, because it reduced the number of potential speakers. That reduction limited the size of the audience that initiative proponents and circulators might reach, which in turn made it less likely that initiative proposals would garner the signatures necessary to qualify ***211** for the ballot. *Id.*, at 422-423, 108 S.Ct. 1886. I see no reason to revisit our earlier conclusion. The aim of a petition is to secure political change, and the First Amendment, by way of the Fourteenth Amendment, guards against the State's efforts to restrict free discussions about matters of public concern. [FN3]

FN3. There is anecdotal evidence in the briefs that circulators do not discuss the merits of a proposed change by initiative in any great depth. Indeed, National Voter Outreach, Inc., an *amicus curiae* in support of respondents and, according to its statement of interest, the largest organizer of paid petition circulation drives in the United States, describes most conversations between circulator and prospective petition signer as "brief." Brief for National Voter Outreach, Inc., as *Amicus Curiae* 21. It gives an example of the typical conversation: " 'Here, sign this. It will really [tick off California Governor] Pete Wilson.' " *Id.*, at 21, n. 17. In my view, the level of scrutiny cannot turn on the content or sophistication of a political message. Cf. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518

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U.S. 604, 640, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) ("Even a pure message of support, unadorned with reasons, is valuable to the democratic process").

*****16** Colorado primarily defends its registration requirement on the ground that it ensures that petition circulators are residents, which permits the State to more effectively enforce its election laws against those who violate ****652** them. [FN4] The Tenth Circuit assumed, and so do I, that the State has a compelling interest in ensuring that all circulators are residents. Even so, it is clear, as the Court of Appeals decided, that the registration requirement is not narrowly tailored. A large number of Colorado's residents are not registered voters, as the majority points out, *ante,* at 643, and the State's asserted interest could be more precisely achieved through a residency requirement. [FN5]

FN4. Colorado's law requires that petition circulators be registered electors, Colo.Rev.Stat. § 1-40-112(1) (1998), and while one must reside in Colorado in order to be a registered voter, § 1-2-101(1)(b), Colorado does not have a separate residency requirement for petition circulators at this time.

FN5. Whatever the merit of the views expressed by THE CHIEF JUSTICE, *post,* at 659, 660-661 (dissenting opinion), the State did little more than mention in passing that it had an interest in having its own voters decide what issues should go on the ballot. See Brief for Petitioner 31.

***212** C

The District Court and the Court of Appeals both suggested that by forcing proponents to identify paid circulators by name, the reports made it less likely that persons would want to circulate petitions. Therefore, both concluded, the reporting requirement had a chilling effect on core political speech similar to the one we recognized in *Meyer. American Constitutional Law Foundation, Inc.* v. *Meyer,* 120 F.3d 1092 1096 (C.A.10 1997); *American Constitutional Law Foundation, Inc. v. Meyer,* 870 F.Supp. 995, 1003 (D.Colo.1994). The District Court additionally determined that preparation of the required monthly reports was burdensome for and involved additional expense to those supporting an initiative petition. *Ibid.*

In my view, the burdens that the reporting requirement imposes on circulation are too attenuated to constitute a "severe burden" on core political speech. However, "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo,* 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). In *Buckley,* because the disclosure requirements of the Federal Election Campaign Act of 1971 encroached on associational rights, we required that they pass a "strict test." *Id.,* at 66, 96 S.Ct. 612. The same associational interests are burdened by the State's reporting requirements here, and they must be evaluated under strict scrutiny.

Colorado argues that the "essential purpose" of the reports is to identify circulators. Brief for Petitioner 44. It also claims that its required reports are designed to provide "the press and the voters of Colorado a more complete picture of how money is being spent to get a measure on the ballot." *Ibid.* Even assuming that Colorado has a compelling interest in identifying circulators, its law does not serve that interest. The State requires that proponents identify only the names of *paid* circulators, not *all* circulators. The interest in requiring a report as to the money paid to each ***213** circulator by name, as the majority points out, *ante,* at 646-647, has not been demonstrated.

*****17** The State contends that its asserted interest in providing the press and the electorate with information as to how much money is spent by initiative proponents to advance a particular measure is similar to the governmental interests in providing the electorate with information about how money is spent by a candidate and where it comes from, and in deterring actual corruption and avoiding the appearance of corruption that we recognized in *Buckley, supra,* at 66-67, 96 S.Ct. 612. However, we have suggested that ballot initiatives and candidate elections involve different considerations. *Bellotti,* 435 U.S., at 791-792, 98 S.Ct. 1407 ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.... [I]f there be any danger that the people cannot evaluate the information and arguments advanced by [one source], it is a danger

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contemplated by the Framers of the First Amendment"); see also *Citizens Against Rent Control,* 454 U.S., at 296-298, 102 S.Ct. 434. Indeed, we recognized in *Meyer* that "the risk of improper conduct ... is more remote at the petition stage of an initiative." ****653** 486 U.S., at 427, 108 S.Ct. 1886. Similarly, I would think, at the very least, the State's interest in informing the public of the financial interests behind an initiative proposal is not compelling during the petitioning stage.

As it stands after the lower court decisions, proponents must disclose the amount paid per petition signature and the total amount paid to each circulator, without identifying each circulator, at the time the petition is filed. Monthly disclosures are no longer required. [FN6] Because the respondents did ***214** not sufficiently brief the question, I am willing to assume, for purposes of this opinion, that Colorado's interest in having this information made available to the press and its voters--before the initiative is voted upon, but not during circulation--is compelling. The reporting provision as modified by the courts below ensures that the public receives information demonstrating the financial support behind an initiative proposal before voting.

FN6. The Court of Appeals did not specifically identify any constitutional problem with the monthly reports to the extent that they require disclosure of proponents' names and proposed ballot measures for which persons were paid to circulate petitions. But the District Court invalidated the entire monthly reporting requirement, 870 F.Supp., at 1005, and the Court of Appeals affirmed its decision in full. See 120 F.3d, at 1096.

I recognize that in *Buckley,* although the Court purported to apply strict scrutiny, its formulation of that test was more forgiving than the traditional understanding of that exacting standard. The Court merely required that the disclosure provisions have a "substantial relation," 424 U.S., at 64, 96 S.Ct. 612, to a "substantial" government interest, *id.,* at 68, 96 S.Ct. 612. [FN7] (The majority appears to dilute *Buckley's* formulation even further, stating that Colorado's reporting requirement must be "substantially related to important governmental interests." *Ante,* at 647.) To the extent that *Buckley* suggests that we should apply a relaxed standard of scrutiny, it is inconsistent with our state election law cases that require the application of traditional strict scrutiny whenever a state law "severely burdens" association, and I would not adhere to it. I would nevertheless decide that the challenged portions of Colorado's disclosure law are unconstitutional as evaluated under the *Buckley* standard.

FN7. I have previously noted that the Court in *Buckley* seemed more forgiving in its review of the contribution provisions than it was with respect to the expenditure rules at issue, even though we purported to strictly scrutinize both. *Colorado Republican,* 518 U.S., at 640, n. 7, 116 S.Ct. 2309 (THOMAS, J., concurring in judgment and dissenting in part).

* * *

*****18** To conclude, I would apply strict scrutiny to each of the challenged restrictions, and would affirm the judgment of ***215** the Court of Appeals as to each of the three provisions before us. As the majority would apply different reasoning, I concur only in the Court's judgment.

Justice O'CONNOR, with whom Justice BREYER joins, concurring in the judgment in part and dissenting in part.

Petition circulation undoubtedly has a significant political speech component. When an initiative petition circulator approaches a person and asks that person to sign the petition, the circulator is engaging in "interactive communication concerning political change." *Meyer v. Grant,* 486 U.S. 414, 422, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). It was the imposition of a direct and substantial burden on this one-on-one communication that concerned us in *Meyer v. Grant.* To address this concern, we held in that case that regulations directly burdening the one-on-one, communicative aspect of petition circulation are subject to strict scrutiny. *Id.,* at 420, 108 S.Ct. 1886.

Not all circulation-related regulations target this aspect of petition circulation, however. Some regulations govern the electoral process by directing the manner in which an initiative proposal qualifies

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for placement on the ballot. These latter regulations may indirectly burden speech but are a step removed from the communicative aspect of petitioning and are necessary to maintain an orderly electoral process. Accordingly, these regulations should be subject to a less exacting standard of review.

****654** In this respect, regulating petition circulation is similar to regulating candidate elections. Regulations that govern a candidate election invariably burden to some degree one's right to vote and one's right to associate for political purposes. Such restrictions are necessary, however, "if [elections] are to be fair and honest." *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). To allow for regulations of this nature without overly burdening these rights, we have developed a flexible standard to review regulations of the electoral process. ***216** The Court succinctly described this standard in *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992):

> "[W]hen [First and Fourteenth Amendment] rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.,* at 434, 112 S.Ct. 2059 (internal quotation marks and citations omitted).

Applying this test, in *Burdick,* we upheld as reasonable Hawaii's prohibition on write-in voting, holding that it imposed only a limited burden upon the constitutional rights of voters. See *id.,* at 433-441, 112 S.Ct. 2059. See also *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 362- 370, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (upholding Minnesota law that banned fusion candidacies on the ground that the State had asserted a "sufficiently weighty" interest). The application of this flexible standard was not without precedent. Prior to *Burdick,* the Court applied a test akin to rational review to regulations that governed only the administrative aspects of elections. See *Rosario v. Rockefeller,* 410 U.S. 752, 756-762, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973) (upholding requirement that voters enroll as members of a political party prior to voting in a primary election on the ground that the regulation did not impose an onerous burden and advanced a legitimate state interest).

*****19** Under the *Burdick* approach, the threshold inquiry is whether Colorado's regulations directly and substantially burden the one-on-one, communicative aspect of petition circulation or whether they primarily target the electoral process, imposing only indirect and less substantial burdens on communication. If the former, the regulation should be subject to strict scrutiny. If the latter, the regulation should be subject to review for reasonableness.

***217** I

I agree with the Court that requiring petition circulators to wear identification badges, specifically name badges, see Colo.Rev.Stat. § 1-40- 112(2)(b) (1998), should be subject to, and fails, strict scrutiny. Requiring petition circulators to reveal their names while circulating a petition directly regulates the core political speech of petition circulation. The identification badge introduces into the one-on-one dialogue of petition circulation a message the circulator might otherwise refrain from delivering, and the evidence shows that it deters some initiative petition circulators from disseminating their messages. Under the logic of *Meyer,* the regulation is subject to more exacting scrutiny. As explained by the Court, see *ante,* at 645-646, Colorado's identification badge requirement cannot survive this more demanding standard of review because the requirement is not narrowly tailored to satisfy Colorado's interest in identifying and apprehending petition circulators who engage in misconduct. I also agree that whether Colorado's other badge requirement--that the badges identify initiative petition circulators as paid or volunteer--is constitutional is a question that the court below did not resolve, and this issue is not properly before us. See *ante,* at 645. Accordingly, like the Court, I do not address it.

II

Unlike the majority, however, I believe that the requirement that initiative petition circulators be registered voters, see Colo.Rev.Stat. § 1-40- 112(1) (1998), is a permissible regulation of the electoral process. It is indeed a classic example of this type of regulation. We have upheld analogous restrictions ****655** on qualifications to vote in a primary election and on candidate eligibility as reasonable regulations of the electoral process. See *Rosario v. Rockefeller, supra,* at 756-762, 93 S.Ct. 1245 (upholding qualifications to vote in primary); *Storer v. Brown, supra,* at 728-737, 94 S.Ct. 1274 (upholding

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candidate eligibility ***218** requirement). As THE CHIEF JUSTICE observes, Colorado's registration requirement parallels the requirements in place in at least 19 States and the District of Columbia that candidate petition circulators be electors, see *post,* at 642, and the requirement of many States that candidates certify that they are registered voters. [FN*] Like these regulations, the registration requirement is a neutral qualification for participation in the petitioning process.

FN* See, *e.g.,* Va. Const., Art. V, § 3; Cal. Elec.Code Ann. § 201 (West Special Pamphlet 1996); Ind. Stat. Ann. § 3-8-5-14 (1998); Mass. Gen. Laws Ann., ch. 53, § 9 (West Supp.1998); Nev.Rev.Stat. Ann. § 293.180 (1997); N.H.Rev.Stat. Ann. § 655:28 (1996); N.J. Stat. Ann. § 40:45-8 (West 1991); N.C. Gen.Stat. § 163-323 (Supp.1997); Okla. Stat., Tit. 26, § 5-111 (1997).

*****20** When one views the registration requirement as a neutral qualification, it becomes apparent that the requirement only indirectly and incidentally burdens the communicative aspects of petition circulation. By its terms, the requirement does not directly prohibit otherwise qualified initiative petition circulators from circulating petitions. Cf. *Rosario v. Rockefeller, supra,* at 758, 93 S.Ct. 1245 (holding that time limits on enrollment in political parties did not violate the right of association because individuals were not prohibited from enrolling in parties). Moreover, as THE CHIEF JUSTICE illustrates in his dissent, this requirement can be satisfied quite easily. See *post,* at 660. The requirement, indeed, has been in effect in Colorado since 1980, see *American Constitutional Law Foundation, Inc. v. Meyer,* 870 F.Supp. 995, 999 (D.Colo.1994), with no apparent impact on the ability of groups to circulate petitions, see 2 Tr. 159 (testimony of Donetta Davidson that the number of initiative proposals placed on the ballot has increased over the past few years).

In this way, the registration requirement differs from the statute held unconstitutional in *Meyer.* There, we reviewed a statute that made it unlawful to pay petition circulators, see *Meyer v. Grant,* 486 U.S., at 417, 108 S.Ct. 1886, and held that the statute directly regulated and substantially burdened speech by ***219** excluding from petition circulation a class of actual circulators that were necessary "to obtain the required number of signatures within the allotted time." *Ibid.* That is, the statute directly silenced voices that were necessary, and "able and willing" to convey a political message. *Id.,* at 422-423, and n. 6, 108 S.Ct. 1886. In contrast, the registration requirement does not effect a ban on an existing class of circulators or, by its terms, silence those who are "able and willing" to circulate ballot initiative petitions. Indeed, it does not appear that the parties to this litigation needed unregistered but voter-eligible individuals to disseminate their political messages. Cf. *id.,* at 417, 108 S.Ct. 1886.

The respondents have offered only slight evidence to suggest that the registration requirement negatively affects the one-on-one, communicative aspect of petition circulation. In particular, the respondents argue that the registration requirement burdens political speech because some otherwise- qualified circulators do not register to vote as a form of political protest. See *ante,* at 644. Yet the existence and severity of this burden is not as clearly established in the record as the respondents, or the Court, suggests.

For example, witness Jack Hawkins, whose testimony the Court cites for the proposition that "the choice not to register implicates political thought and expression," see *ibid.,* did not testify that anyone failed to register to vote as a political statement. He responded "[y]es, that's true" to the leading question "are there individuals who would circulate your petition who are non-registered voters because of their political choice?" 1 Tr. 14. But he went on to explain this "political choice" as follows:

> *****21** "They have interesting views of why they don't want to register to vote. *They're under a misconception that they won't be called for jury duty if they're not registered to vote and they're really concerned about being a jurist,* but in Colorado you ****656** can be a jurist if you drive a car or pay taxes or anything else. So, they're under a ***220** misconception, but I can't turn them around on that." *Id.,* at 15-16 (emphasis added).

Likewise, witness Jon Baraga, who testified that some potential circulators are not registered to vote because they feel the political process is not responsive to their needs, see *ante,* at 644, went on to testify that many of the same people would register to vote if an initiative they supported were placed on the ballot. See 1 Tr. 58. Considered as a whole, this testimony does not establish that the registration requirement substantially burdens alternative forms

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of political expression.

Because the registration requirement indirectly and incidentally burdens the one-on-one, communicative aspect of petition circulation, *Burdick* requires that it advance a legitimate state interest to be a reasonable regulation of the electoral process. Colorado maintains that the registration requirement is necessary to enforce its laws prohibiting circulation fraud and to guarantee the State's ability to exercise its subpoena power over those who violate these laws, see *ante,* at 644, two patently legitimate interests. See, *e.g., Timmons v. Twin Cities Area New Party,* 520 U.S., at 366-367, 117 S.Ct. 1364; *Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 636- 637, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). In the past, Colorado has had difficulty enforcing its prohibition on circulation fraud, in particular its law against forging petition signatures, because violators fled the State. See 2 Tr. 115 (testimony of Donetta Davidson). Colorado has shown that the registration requirement is an easy and a verifiable way to ensure that petition circulators fall under the State's subpoena power. See Tr. of Oral Arg. 14; see also Appellee's Supplemental App. in Nos. 94-1576 and 94- 1581 (CA10), p. 268 (describing requirement that signatories be registered voters as necessary for verification of signatures). For these reasons, I would uphold the requirement as a reasonable regulation of Colorado's electoral process.

***221** III

Most disturbing is the Court's holding that Colorado's disclosure provisions are partially unconstitutional. Colorado requires that ballot-initiative proponents file two types of reports: monthly reports during the period of circulation and a final report when the initiative petition is submitted. See Colo.Rev.Stat. § 1-40-121 (1998). The monthly reports must include the names of paid circulators, their business and residential addresses, and the amount of money paid and owed to each paid circulator during the relevant month. See § 1-40-121(2). The final report also must include the paid circulators' names and addresses, as well as the total amount paid to each circulator. See § 1-40-121(1). The Tenth Circuit invalidated the reports to the extent they revealed this information. See *ante,* at 646. The Court affirms this decision, without expressing an opinion on the validity of the reports to the extent they reveal other information, on the ground that forcing the proponents of ballot initiatives to reveal the identities of their paid circulators is tenuously related to the interests disclosure serves and impermissibly targets paid circulators. See *ante,* at 647-648. I, however, would reverse the Tenth Circuit on the ground that Colorado's disclosure provision is a reasonable regulation of the electoral process.

*****22** Colorado's disclosure provision is a step removed from the one-on-one, communicative aspects of petition circulation, and it burdens this communication in only an incidental manner. Like the mandatory affidavit that must accompany every set of signed petitions, the required disclosure reports "revea[l] the name of the petition circulator and [are] public record[s] ... [, but are] separated from the moment the circulator speaks," see *ante,* at 645. This characteristic indeed makes the disclosure reports virtually indistinguishable from the affidavit requirement, which the Court suggests is a permissible regulation of the electoral process, see *ante,* at 646, and similarly lessens any chilling effect the reports might ***222** have on speech, see *ante,* at 645 (observing that injury to speech is heightened when disclosure is made at the moment of speech). If anything, the disclosure reports burden speech less directly than the affidavits because the latter are ****657** completed by the petition circulator, while the former are completed by the initiative proponent and thus are a step removed from petition circulation. In fact, the Court does not suggest that there is any record evidence tending to show that such remote disclosure will deter the circulation of initiative petitions. To the extent the disclosure requirements burden speech, the burden must be viewed as incremental and insubstantial in light of the affidavit requirement, which also reveals the identity of initiative petition circulators.

As a regulation of the electoral process with an indirect and insignificant effect on speech, the disclosure provision should be upheld so long as it advances a legitimate government interest. Colorado's asserted interests in combating fraud and providing the public with information about petition circulation are surely sufficient to survive this level of review. These are among the interests we found to be substantial in *Buckley v. Valeo.* See 424 U.S. 1, 67, 68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)* (holding that the Government has a substantial interest in requiring candidates to disclose the sources of campaign contributions to provide the electorate with information about "the interests to which a candidate is most likely to be responsive," to

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"deter actual corruption and avoid the appearance of corruption," and "to detect violations of the contribution limitations"). Moreover, it is scarcely debatable that, as a general matter, financial disclosure effectively combats fraud and provides valuable information to the public. We have recognized that financial disclosure requirements tend to discourage those who are subject to them from engaging in improper conduct, and that "[a] public armed with information ... is better able to detect" wrongdoing. See *id.*, at 67, 96 S.Ct. 612; see also ***223***Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S.Ct. 444, 80 L.Ed. 660 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment"). " 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.' " *Buckley v. Valeo, supra*, at 67, and n. 80, 96 S.Ct. 612 (quoting L. Brandeis, Other People's Money 62 (1933)). "[I]n the United States, for half a century compulsory publicity of political accounts has been the cornerstone of legal regulation. Publicity is advocated as an automatic regulator, inducing self- discipline among political contenders and arming the electorate with important information." H. Alexander & B. Haggerty, The Federal Election Campaign Act: After a Decade of Political Reform 37 (1981). " '[T]otal disclosure' " has been recognized as the " 'essential cornerstone' " to effective campaign finance reform, *id.*, at 39, and "fundamental to the political system," H. Alexander, Financing Politics: Money, Elections, and Political Reform 164 (4th ed.1992).

*****23** In light of these many and substantial benefits of disclosure, we have upheld regulations requiring disclosure and reporting of amounts spent by candidates for election, amounts contributed to candidates, and the names of contributors, see *Buckley v. Valeo*, 424 U.S., at 60-84, 96 S.Ct. 612, while holding that the First Amendment protects the right of the political speaker to spend his money to amplify his speech, see *id.*, at 44-59, 96 S.Ct. 612. Indeed, laws requiring the disclosure of the names of contributors and the amounts of their contributions are common to all States and the Federal Government. See *id.*, at 62-64, 96 S.Ct. 612 (describing disclosure provisions of Federal Election Campaign Act of 1971); Alexander, Financing Politics, *supra*, at 135 ("All fifty states have some disclosure requirements, and all except two [South Carolina and Wyoming] call for both pre- and post-election reporting of contributions and expenditures"). Federal disclosure laws were first enacted in 1910, and early laws, like Colorado's current provision, required the disclosure of the names of contributors and the ***224** recipients of expenditures. See *Buckley v. Valeo*, 424 U.S., at 61, 96 S.Ct. 612. Such public disclosure of the amounts and sources of political contributions and expenditures assists voters in making intelligent and knowing choices in the election process and helps to combat fraud.

The recognized benefits of financial disclosure are equally applicable in the context of petition circulation. Disclosure deters circulation ****658** fraud and abuse by encouraging petition circulators to be truthful and self- disciplined. See generally *id.*, at 67, 96 S.Ct. 612. The disclosure required here advances Colorado's interest in law enforcement by enabling the State to detect and to identify on a timely basis abusive or fraudulent circulators. Moreover, like election finance reporting generally, Colorado's disclosure reports provide facts useful to voters who are weighing their options. Members of the public deciding whether to sign a petition or how to vote on a measure can discover who has proposed it, who has provided funds for its circulation, and to whom these funds have been provided. Knowing the names of paid circulators and the amounts paid to them also allows members of the public to evaluate the sincerity or, alternatively, the potential bias of any circulator that approaches them. In other words, if one knows a particular circulator is well paid, one may be less likely to believe the sincerity of the circulator's statements about the initiative proposal. The monthly disclosure reports are public records available to the press and public, see Brief for Petitioner 44, are "contemporaneous with circulation," *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092, 1105 (C.A.10 1997), and are more accessible than the other "masses of papers filed with the petitions," see 870 F.Supp., at 1004.

*****24** It is apparent from the preceding discussion that, to combat fraud and to inform potential signatories in a timely manner, disclosure must be made at the time people are being asked to sign petitions and before any subsequent vote on a measure that qualifies for the ballot. It is, indeed, during ***225** this period that the need to deter fraud and to inform the public of the forces motivating initiative petitions "is likely to be at its peak ...; [this] is the time when improper influences are most likely to be brought to light." *Buckley v. Valeo, supra*, at

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68, n. 82, 96 S.Ct. 612. Accordingly, the monthly reports, which are disseminated during the circulation period and are available to the press, see Brief for Petitioner 44, uniquely advance Colorado's interests. The affidavit requirement is not an effective substitute because the affidavits are not completed until after all signatures have been collected and thus after the time that the information is needed. See Colo.Rev.Stat. § 1-40-111(2) (1998) ("Any signature added to a section of a petition after the affidavit has been executed shall be invalid"). In addition, the public's access to the affidavits is generally more restricted than its access to monthly disclosure reports, for as the District Court found, the public will have "greater difficulty in finding [the] names and addresses [of petition circulators] in the masses of papers filed with the petitions as compared with the monthly reports." 870 F.Supp., at 1004.

To be sure, Colorado requires disclosure of financial information about only paid circulators. But, contrary to the Court's assumption, see *ante,* at 647-648, this targeted disclosure is permissible because the record suggests that paid circulators are more likely to commit fraud and gather false signatures than other circulators. The existence of occasional fraud in Colorado's petitioning process is documented in the record. See 2 Tr. 197- 198 (testimony of retired FBI agent Theodore P. Rosack); *id.,* at 102, 104- 116 (testimony of Donetta Davidson). An elections officer for the State of Colorado testified that only paid circulators have been involved in recent fraudulent activity, see *id.,* at 150-151 and 161 (testimony of Donetta Davidson); see also *id.,* at 197-198 (testimony of Theodore P. Rosack) (describing recent investigation of fraud in which only paid circulators were implicated). Likewise, respondent William C. Orr, the executive ***226** director of the American Constitutional Law Foundation, Inc., while examining a witness, explained to the trial court that "volunteer organizations, they're self-policing and there's not much likelihood of fraud.... Paid circulators are perhaps different." *Id.,* at 208-209.

Because the legitimate interests asserted by Colorado are advanced by the disclosure provision and outweigh the incidental and indirect burden that disclosure places on political speech, I would uphold the provision as a reasonable regulation of the electoral process. Colorado's interests are more than legitimate, however. We have previously ****659** held that they are substantial. See *Buckley v. Valeo, supra,* at 67, 68, 96 S.Ct. 612. Therefore, even if I thought more exacting scrutiny were required, I would uphold the disclosure requirements.

*****25** Because I feel the Court's decision invalidates permissible regulations that are vitally important to the integrity of the political process, and because the decision threatens the enforceability of other important and permissible regulations, I concur in the judgment only in part and dissent in part.

Chief Justice REHNQUIST, dissenting.

The Court today invalidates a number of state laws designed to prevent fraud in the circulation of candidate petitions and to ensure that local issues of state law are decided by local voters, rather than by out-of-state interests. Because I believe that Colorado can constitutionally require that those who circulate initiative petitions *to* registered voters actually *be* registered voters themselves, and because I believe that the Court's contrary holding has wide-reaching implication for state regulation of elections generally, I dissent.

I

Ballot initiatives of the sort involved in this case were a central part of the Progressive movement's agenda for reform at the turn of the 20th century, and were advanced as a means of limiting the control of wealthy special interests ***227** and restoring electoral power to the voters. See, *e.g.,* H. Croly, Progressive Democracy 236-237, 248-249, 254-255 (Transaction ed. 1998); H. Commager, The American Mind 338 (1950); Persily, The Peculiar Geography of Direct Democracy, 2 Mich. L. & Pol'y Rev. 11, 23 (1997). However, in recent years, the initiative and referendum process has come to be more and more influenced by out-of-state interests which employ professional firms doing a nationwide business. See, *e.g.,* Lowenstein & Stern, The First Amendment and Paid Initiative Petition Circulators, 17 Hastings Const. L.Q. 175, 176 (1989); Broder, Ballot Battle, Washington Post, Apr. 12, 1998, pp. A1, A6; Slind-Flor, Election Result: Litigation over Propositions, National Law Journal, Nov. 16, 1998, pp. A1, A8. The state laws that the Court strikes down today would restore some of this initial purpose by limiting the influence that such out-of-state interests may have on the in-state initiative process. The ironic effect of today's opinion is that, in the name of the First Amendment, it strikes down the attempt of a State to allow its own voters (rather than out-of-state persons

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and political dropouts) to decide what issues should go on the ballot to be decided by the State's registered voters.

The basis of the Court's holding is that because the state laws in question both (1) decrease the pool of potential circulators and (2) reduce the chances that a measure would gather signatures sufficient to qualify for the ballot, the measure is unconstitutional under our decision in *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). See *ante,* at 643-644. *Meyer,* which also dealt with Colorado's initiative regulations, struck down a criminal ban on *all* paid petition circulators. 486 U.S., at 428, 108 S.Ct. 1886. But *Meyer* did not decide that a State cannot impose reasonable regulations on such circulation. Indeed, before today's decision, it appeared that under our case law a State could have imposed reasonable regulations on the circulation of initiative petitions, so that some order could be established over the inherently chaotic nature of ***228** democratic processes. Cf. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *Burdick v. Takushi,* 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Today's opinion, however, calls into question the validity of *any* regulation of petition circulation which runs afoul of the highly abstract and mechanical test of diminishing the pool of petition circulators or making a proposal less likely to appear on the ballot. See *ante,* at 643-644. It squarely holds that a State may not limit circulators to registered voters, and maintains a sphinx-like silence as to whether it may even limit circulators to state residents.

****660** II

*****26** Section 1-40-112(1) of Colorado's initiative petition law provides that "[n]o section of a petition for any initiative or referendum measure shall be circulated by any person who is not a registered elector and at least eighteen years of age at the time the section is circulated." Colo.Rev.Stat. § 1-40-112(1) (1998). This requirement is obviously intended to ensure that the people involved in getting a measure placed on the ballot are the same people who will ultimately vote on that measure--the electors of the State. Indeed, it is difficult to envision why the State cannot do this, but for the unfortunate dicta in *Meyer.* The parties agree that for purposes of this appeal there are 1.9 million registered voters in Colorado, and that 400,000 persons eligible to vote are not registered. See *ante,* at 643. But registering to vote in Colorado is easy--the only requirements are that a person be 18 years of age or older on the date of the next election, a citizen of the United States, and a resident of the precinct in which the person will vote 30 days immediately prior to the election. See Colo.Rev.Stat. § 1-2-101 (1998). The elector requirement mirrors Colorado's regulation of candidate elections, for which all delegates to county and state assemblies must be registered electors, § 1-4-602(5), and ***229** where candidates cannot be nominated for a primary election unless they are registered electors, § 1-4-601(4)(a).

The Court, however, reasons that the restriction of circulation to electors fails to pass scrutiny under the First Amendment because the decision not to register to vote "implicates political thought and expression." *Ante,* at 644. Surely this can be true of only a very few of the many residents who do not register to vote, but even in the case of the few it should not invalidate the Colorado requirement. Refusing to read current newspapers or to watch television may have "First Amendment implications," but this does not mean that a state university might not refuse to hire such a person to teach a course in "today's media." The examples of unregistered people who wish to circulate initiative petitions presented by the respondents (and relied upon by the Court) are twofold [FN1]--people who refuse to participate in the political process as a means of protest, and convicted drug felons who have been denied the franchise as part of their punishment. For example, respondent Bill Orr, apparently the mastermind of this litigation, argued before the District Court that "It's my form of ... private and public protest. I don't believe that representative organs of Government are doing what they're supposed to be doing." 1 Tr. 223. And respondent Jon Baraga, a person affiliated with the "Colorado Hemp Initiative," which seeks to legalize marijuana in Colorado, testified that "there are a great many folks who are refused to participate as registered voters in the political ***230** process who would like to see our measure gain ballot status and would like to help us do that." *Id.,* at 57.

FN1. The respondents also presented the example of children who wished to circulate petitions. Indeed, one of the respondents in this case--William David Orr--was a minor when this suit was filed and was apparently included in the action to give it standing to

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challenge the age restriction element of Colo.Rev.Stat. § 1-40-112(1) (1998). Because the Court of Appeals held that the age restriction on petition circulation was constitutional, it is unnecessary to point out the absurdity of the respondents' minority argument.

***27 Thus, the Court today holds that a State cannot require that those who circulate the petitions to get initiatives on the ballot be electors, and that a State is constitutionally required to instead allow those who make no effort to register to vote--political dropouts--and convicted drug dealers to engage in this electoral activity. Although the Court argues that only those eligible to vote may now circulate candidate petitions, there is no Colorado law to this effect. Such a law would also be even harder to administer than one which limited circulation to residents, because eligible Colorado voters are that subset of Colorado residents who have fulfilled the requirements for registration, and have not committed a felony or been otherwise disqualified from the franchise. A State would thus have to perform a background check on circulators to determine if they are not felons. And one of the reasons the State wished to limit petition circulation to electors in the first place was that it is far easier to **661 determine who is an elector from who is a resident, much less who is "voter eligible." [FN2]

FN2. The Court dismisses this state interest as "diminished," by noting that the affidavit requirement identifies residents. *Ante,* at 644. Yet even if the interest is diminished, it surely is not eliminated, and it is curious that the Court relies on the affidavit requirement to strike down the elector requirement, but does not use it to preserve that part of the disclosure requirements that also contain information duplicated by the affidavits. Cf. Part V, *ante.*

In addition, the Court does not adequately explain what "voter eligible" means. If it means "eligible to vote in the State for which the petitions are circulating" (Colorado, in this case), then it necessarily follows from today's holding that a State may limit petition circulation to its own residents. I would not quarrel with this holding. On the other hand, "voter eligible" could mean "any person eligible to vote in any of the United States or its territories." In this case, *231 a State would not merely have to run a background check on out-of-state circulators, but would also have to examine whether the unregistered circulator had satisfied whatever are the criteria for voter eligibility in his place of residence, be it Georgia or Guam, Peoria or Puerto Rico.

State ballot initiatives are a matter of state concern, and a State should be able to limit the ability to circulate initiative petitions to those people who can ultimately vote on those initiatives at the polls. If eligible voters make the conscious decision not to register to vote on the grounds that they reject the democratic process, they should have no right to complain that they cannot circulate initiative petitions to people who *are* registered voters. And the idea that convicted drug felons who have lost the right to vote under state law nonetheless have a constitutional right to circulate initiative petitions scarcely passes the "laugh test."

But the implications of today's holding are even more stark than its immediate effect. Under the Court's interpretation of *Meyer,* any ballot initiative regulation is unconstitutional if it either diminishes the pool of people who can circulate petitions or makes it more difficult for a given issue to ultimately appear on the ballot. See *ante,* at 643-644. Thus, while today's judgment is ostensibly circumscribed in scope, it threatens to invalidate a whole host of historically established state regulations of the electoral process in general. Indeed, while the Court is silent with respect to whether a State can limit initiative petition circulation to state residents, the implication of its reading of *Meyer*--that being unable to hire out-of-state circulators would "limi[t] the number of voices who will convey [the initiative proponents'] message," *ante,* at 643-644 (bracketing in original)--is that under today's decision, a State cannot limit the ability to circulate issues of local concern to its own residents.

***28 May a State prohibit children or foreigners from circulating petitions, where such restrictions would also limit the number of voices who could carry the proponents' message *232 and thus cut down on the size of the audience the initiative proponents could reach? Cf. *Meyer,* 486 U.S., at 422-423, 108 S.Ct. 1886. And if initiative petition circulation cannot be limited to electors, it would seem that a State can no longer impose an elector or residency requirement on those who circulate

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petitions to place candidates on ballots, either. At least 19 States plus the District of Columbia explicitly require that candidate petition circulators be electors, [FN3] and at least one other State requires that its petition circulators be state residents. [FN4] Today's decision appears to place each of these laws in serious constitutional jeopardy.

FN3. See Ariz.Rev.Stat. Ann. § 16-315 (1996); Cal. Elec.Code Ann. § 8106(b)(4) (West 1996); Colo.Rev.Stat. § 1-4-905 (1998); Conn. Gen.Stat. § 9-410 (Supp.1998); D.C.Code Ann. § 1-1312(b)(2) (1992); Idaho Code § § 34-626, 34-1807 (Supp.1998); Ill. Comp. Stat., ch. 10, § § 5/7-10, 5/8-8, 5/10-4 (Supp.1998); Kan. Stat. Ann. § 25-205(d) (1993); Mich. Comp. Laws § 168.544c(3) (Supp.1998); Mo.Rev.Stat. § 115.325(2) (1997); Neb.Rev.Stat. § 32-630 (Supp.1997); N.Y. Elec. Law § § 6-132, 6- 140, 6-204, 6-206 (McKinney 1998); Ohio Rev.Code Ann. § 3503.06 (1996); 25 Pa. Cons.Stat. § 2869 (1994); R.I. Gen. Laws § 17-23-12 (1996); S.D. Comp. Laws Ann. § 12-1-3 (1995); Va.Code Ann. § 24.2- 521 (Supp.1998); W. Va.Code § 3-5-23 (1994); Wis. Stat. § 8.40 (1996); Wyo. Stat. § 22-5-304 (1992).

FN4. See Ga.Code Ann. § § 21-2-132(g)(3)(A), 21-2- 170(d)(1) (1993 and Supp.1997).

****662** III

As to the other two laws struck down by the Court, I agree that the badge requirement for petition circulators is unconstitutional. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). I also find instructive, as the Court notes, *ante,* at 643, n. 15, that Colorado does not require such badges for those who circulate candidate petitions. See generally Colo.Rev.Stat. § 1-4-905 (1998).

I disagree, however, that the First Amendment renders the disclosure requirements unconstitutional. The Court affirms the Court of Appeals' invalidation of only the portion of the law that requires final reports to disclose information ***233** specific to each paid circulator--the name, address, and amount paid to each. Important to the Court's decision is the idea that there is no risk of *"quid pro quo"* corruption when money is paid to ballot initiative circulators, and that paid circulators should not have to surrender the anonymity enjoyed by their volunteer counterparts. I disagree with this analysis because, under Colorado law, *all* petition circulators must surrender their anonymity under the affidavit requirement. Colorado law requires that each circulator must submit an affidavit which must include the circulator's "name, the address at which he or she resides, including the street name and number, the city or town, [and] the county." Colo.Rev.Stat. § 1-40-111(2) (1998). This affidavit requirement was upheld by the Tenth Circuit as not significantly burdening political expression, *American Constitutional Law Foundation v. Meyer,* 120 F.3d 1092, 1099 (1997), and is relied upon by the Court in holding that the registered voter requirement is unconstitutional. See *ante,* at 644. The only additional piece of information for which the disclosure requirement asks is thus the amount paid to each circulator. Since even after today's decision the identity of the circulators as well as the total amount of money paid to circulators will be a matter of public record, see *ante,* at 646-647, I do not believe that this additional requirement is sufficient to invalidate the disclosure requirements as a whole. They serve substantial interests and are sufficiently narrowly tailored to satisfy the First Amendment.

IV

*****29** Because the Court's holding invalidates what I believe to be legitimate restrictions placed by Colorado on the petition circulation process, and because its reasoning calls into question a host of other regulations of both the candidate nomination and petition circulation process, I dissent.

119 S.Ct. 636, 525 U.S. 182, 1999 WL 7723 (U.S.Colo.), 142 L.Ed.2d 599, 67 USLW 4043, 99 Cal. Daily Op. Serv. 314, 99 Daily Journal D.A.R. 349, 1999 CJ C.A.R. 235, 12 Fla. L. Weekly Fed. S 44

Briefs and Other Related Documents (Back to top)

- 1998 WL 731585, 67 USLW 3298 (Oral Argument) Oral Argument (Oct. 14, 1998)
- 1998 WL 477988 (Appellate Brief) REPLY BRIEF

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(Aug. 12, 1998)

• 1998 WL 389126 (Appellate Brief) MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF PRO-SE RESPONDENT BILL ORR (Jul. 09, 1998)

• 1998 WL 328326 (Appellate Brief) PRO SE RESPONDENT BILL ORR'S BRIEF (Jun. 19, 1998)

• 1998 WL 328332 (Appellate Brief) BRIEF OF RESPONDENTS DAVID AITKEN, JON BARAGA, AND BILL ORR, as the Parent and Guardian of WILLIAM DAVID ORR (Jun. 19, 1998)

• 1998 WL 331156 (Appellate Brief) MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO AS AMICI CURIAE IN SUPPORT OF RESPONDENTS (Jun. 19, 1998)

• 1998 WL 331150 (Appellate Brief) MOTION FOR LEAVE TO FILE AND PROPOSED AMICUS CURIAE BRIEF OF NATIONAL VOTER OUTREACH, INC., IN SUPPORT OF RESPONDENTS (Jun. 18, 1998)

• 1998 WL 331169 (Appellate Brief) MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF THE INITIATIVE & REFERENDUM INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS (Jun. 18, 1998)

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• 1998 WL 221378 (Appellate Brief) BRIEF OF THE STATES OF WASHINGTON, ALASKA, ARIZONA, CALIFORNIA, IDAHO, IOWA, KANSAS, MAINE, MISSISSIPPI, OKLAHOMA, OHIO, OREGON, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONER (Apr. 30, 1998)

• 1998 WL 221384 (Appellate Brief) PETITIONER'S BRIEF (Apr. 30, 1998)

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• 1998 WL 34081057 (Appellate Filing) Respondents' Brief in Opposition to Petitioner Victoria Buckley's Petition for Writ of Certiorari (Jan. 05, 1998)

• 1997 WL 33485681 (Appellate Filing) Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (Dec. 04, 1997)

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IDAHO COALITION UNITED FOR BEARS, a political committee; LYNN FRITCHMAN, an individual; DON MORGAN, an individual; RONALD D. RANKIN, an individual; INITIATIVE AND REFERENDUM INSTITUTE, a not-for-profit corporation, *Plaintiffs-Appellees,* v. PETE T. CENARUSSA, in his official capacity as Secretary of State for the State of Idaho, *Defendant-Appellant.*	No. 02-35030 D.C. No. CV-00-00668-BLW OPINION

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted
March 7, 2003—Seattle, Washington

Filed September 8, 2003

Before: Stephen Reinhardt, William A. Fletcher, and
Ronald M. Gould, Circuit Judges.

Opinion by Judge Reinhardt

13125

COUNSEL

Brian P. Kane, Deputy Attorney General, and Alan G. Lance, Attorney general, for the defendant-appellant.

Paul Grant for the plaintiff-appellees.

Christopher Troupis, Troupis and Summer, for the plaintiff-appellees.

OPINION

REINHARDT, Circuit Judge:

Idaho permits direct legislation through ballot initiatives. In order to appear on the ballot, an initiative must meet several conditions; one is that signatures in support of the initiative must be collected from six percent of the qualified voters in each of at least half of the state's counties. Because Idaho's counties vary widely in population, this geographic distribution requirement favors residents of sparsely populated areas over residents of more densely populated areas in their respective efforts to participate in the process of qualifying initiatives for the ballot. The district court held that this unequal treatment violates the Equal Protection Clause of the Fourteenth Amendment. We affirm.

Background

The Idaho Constitution allows citizens to make laws directly through initiatives placed on election ballots.[1] The

[1]The Idaho Constitution provides as follows:

> The people reserve to themselves the power to propose laws and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may under such

Idaho Legislature has enacted enabling legislation that defines Idaho's procedures for conducting initiative and referendum elections.[2]

Plaintiff Idaho Coalition United for Bears is an organization that seeks to advance its supporters' goals through the initiative process. Plaintiffs also include the Initiative and Referendum Institute, a group that seeks to further the rights of citizens to participate in the initiative process, and three individuals who have organized petition drives in attempts to place initiatives on the ballot in past years. We refer to the plaintiffs collectively as "the Coalition." The Coalition sued Idaho Secretary of State Pete T. Cenarrusa ("Idaho"), challenging Idaho Code section 34-1805, which requires petition

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> conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Idaho Const., art. III, § 1.

[2]In order to begin the initiative process, a proponent prepares an initiative and collects twenty signatures. Idaho Code § 34-1804. The proposed initiative is then delivered to the Secretary of State, who immediately transmits it to the Attorney General's Office. *Id.* The Attorney General's office conducts a review of the measure for matters of substantive import, form, and style, and issues a certificate of review. Idaho Code § 34-1809. The certificate of review must be issued whether or not the petitioner accepts or rejects the recommendations of the Attorney General in whole or in part. *Id.* Following issuance of the certificate of review, the petitioner may ask, within 15 working days, for the preparation of long and short titles. *Id.* Within ten days after receiving copies of the initiative for preparation of the ballot titles, the Attorney General must prepare both long and short titles. *Id.* Once the ballot titles are prepared, the petition sheets can be prepared by the petitioners with the short ballot titles affixed to the bottom of each page of the petition. *Id.* Petitioners are then free to circulate the petition. According to the law, petitioners may circulate an initiative for eighteen months following the issuance of the ballot titles. Idaho Code § 34-1802. Petitions are due at the expiration of eighteen months or on the last day of April in the year in which the proposed initiative would appear on the ballot. *Id.*

sponsors to obtain signatures of six percent of the qualified voters in the state as a whole, including six percent of the qualified voters in each of at least half of Idaho's 44 counties.[3] *Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1160 (D. Idaho 2001).

Idaho's population is unevenly distributed throughout its counties: 60% of its population resides in just nine of its 44 counties.[4] For this reason, prior to the enactment of the challenged provision, initiative sponsors generally collected the vast majority of their signatures in the most heavily populated counties. Idaho's multi-county signature requirement was designed to ensure a wider distribution of signatures. The Coalition argues, however, that the new requirement makes it nearly impossible for all but the richest of initiative propo-

[3]Section 34-1805 provides in full as follows:

> After the form of the initiative or referendum petition has been approved by the secretary of state as in sections 34-1801A through 34-1822, Idaho Code, provided, the same shall be printed by the person or persons or organization or organizations under whose authority the measure is to be referred or initiated and circulated in the several counties of the state for the signatures of legal voters. Before such petitions shall be entitled to final filing and consideration by the secretary of state there shall be affixed thereto the signatures of legal voters equal in number to not less than six percent (6%) of the qualified electors of the state at the time of the last general election. Provided that the petition must contain a number of signatures of qualified electors from each of twenty-two (22) counties equal to not less than six percent (6%) of the qualified electors at the time of the last general election in each of those twenty-two (22) counties.

Idaho Code § 34-1805. This section was enacted in 1997, along with other amendments to Idaho's procedures for conducting initiative and referendum elections.

[4]Details concerning the population of the various counties are available on the United States Census web site. *See* Census 2000 Data for the State of Idaho, *at* http://www.census.gov/census2000/states/id.html. As of the last census, 300,904 people lived in Ada, Idaho's most populous county, while the least populous county, Clark, was home to only 1022 people. *Id.*

nents to qualify initiatives for the ballot and that it favors voters in sparsely populated areas over those in more densely populated areas.

As the district court noted, even if three quarters of Idaho's citizens signed a petition, the measure could still fail to qualify for the ballot because the proponents failed to collect signatures from six percent of the registered voters in at least 22 separate counties. The court granted summary judgment in favor of the Coalition, holding that section 34-1805 violates the Equal Protection Clause by giving preferential treatment to residents of sparsely populated counties. Idaho appeals.[5]

Analysis

[1] Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). The ballot initiative, like the election of public officials, is a " 'basic instrument of democratic government,' " *Cuyahoga Falls v. Buckeye Comm. Hope Found.*, ___ U.S. ___, 123 S.Ct. 1389, 1395 (2003) (quoting *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976)), and is therefore subject to equal protection guarantees. Those guarantees furthermore apply to ballot access restrictions just as they do to elections themselves. *See Illinois*

[5]The Coalition also challenged the requirement of Idaho Code section 34-1807 that only Idaho residents may circulate petitions; the criminalization in Idaho Code section 34-1815 of willful and knowing publication or exhibition of false statements concerning the contents, purport or effect of a petition; and the criminalization of "collecting petitions for hire" contained in Idaho Code section 34-1821(a). The district court upheld section 34-1807 but invalidated sections 34-1805, 34-1815, and 34-1821(a). 234 F. Supp. 2d 1167-68. Only section 34-1805 is at issue on appeal.

State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).[6]

[2] The question of the constitutionality of Idaho's requirement that in order to qualify an initiative petitions must be signed by a fixed percentage of voters from each of 22 of the state's 44 counties—counties which vary drastically in the size of their population—is controlled by *Moore v. Ogilvie*, 394 U.S. 814 (1969). The *Moore* Court addressed an Illinois statute governing the nomination of newly formed political parties' candidates to be electors of President and Vice President of the United States. *Moore*, 394 U.S. at 818. The statute provided for a nominating process requiring each candidate to collect at least 25,000 signatures, including " 'signatures of 200 qualified voters from each of at least 50' " of the state's 102 counties. *Id.* at 815 (quoting Ill. Rev. Stat., chap. 46 § 10-3 (1967)). The asserted purpose of the law was "to require statewide support for launching a new political party rather than support from a few localities." *Id.* at 818.

[3] The constitutional flaw in the Illinois geographic distribution requirement was that, although the counties were of widely unequal population, the same "rigid, arbitrary formula" was applied to all of them. *Id.* The *Moore* Court held that the distribution requirement violated the one person, one vote principle of *Gray v. Sanders*, 372 U.S. 368 (1963), and *Reynolds*, a principle at the core of the fundamental right to vote. *Moore*, 394 U.S. at 819 ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."). In *Sanders*, the Court invalidated Georgia's "county unit" system for nominating party candidates for United States Senator in primary elections. *See* 372 U.S. at 371. Under that system,

[6]We note that state requirements for certifying ballot initiatives also implicate the free speech right and are subject to equal protection guarantees for that reason as well. *See Meyer v. Grant*, 486 U.S. 414, 421-22 (1988).

each county was entitled to a certain number of "county unit" votes, all of which would be cast for the candidate for nomination who received the greatest number of popular votes in that county. *Id.* The candidate who received the greatest total number of county unit votes would become the nominee. *Id.* The system violated the one person, one vote principle because the populations of the various counties were not in proportion to the number of county unit votes to which the counties were entitled. *Id.* In *Reynolds*, the Court invalidated an Alabama legislative apportionment scheme, under which counties of unequal population were represented in equal numbers in the state legislature. *Reynolds*, 377 U.S. at 540. In both cases, the votes cast by voters residing in the counties with larger population had less effect than the votes of those who lived in more sparsely populated rural areas.

Moore extended the principle of *Sanders* and *Reynolds*, which involved voting, to the collection of signatures on nominating petitions. Although *Moore* does not specifically discuss the applicable level of scrutiny, it is evident that under *Moore* strict scrutiny applies to state laws treating nomination signatures unequally on the basis of geography.

[4] The district court perceived no material difference between the Illinois petition requirement invalidated in *Moore* and the requirement at issue in the present case, and we agree that there is none. Even the suggested purpose of the two requirements—to ensure that all options presented on the ballot command at least a modicum of statewide support—is the same. Idaho argues that the distinction between requiring sufficient voter support of candidates (as did the Illinois provision) and requiring such support for voter initiatives (as does the Idaho statute) is legally dispositive. Idaho believes that this difference is decisive because, the state asserts, the sort of candidate signature requirements at issue in *Moore* "may or may not directly impact the entire state but the direct legislation directly involves the entire state of Idaho." The state interest in "protecting the entire state from localized legisla-

tion," Idaho argues, is therefore greater than the state interest furthered by the law invalidated in *Moore*. As noted above, however, the plaintiffs in *Moore* were candidates for the offices of electors of President and Vice President of the United States from the state of Illinois. *Moore*, 394 U.S. at 815. In our view, the question whether a new political party may place its presidential electors on the statewide presidential ballot represents at least as significant a matter of statewide concern as whether ballot initiatives may qualify. Idaho does not explain how it reaches the opposite conclusion. We therefore reject its proffered distinction as immaterial.[7] Nominating petitions for candidates and for initiatives both implicate the fundamental right to vote, for the same reasons and in the same manner, and the burdens on both are subject to the same analysis under the Equal Protection Clause.

A more plausible distinction between *Moore* and the case before us is that, whereas the Illinois law in *Moore* required

[7]One case cited by Idaho does support the materiality of the distinction between candidates and initiatives. The Supreme Judicial Court of Massachusetts, in upholding a petitioning requirement similar to section 34-1805, distinguished *Moore* on the basis that *Moore* "appears to rest primarily on the interest of qualified voters in voting for representatives of their choice," an interest that "would not be served by applying strict scrutiny . . . where no representation is involved." *Massachusetts Public Interest Research Group v. Sec'y of the Commonwealth*, 375 N.E.2d 1175, 1182 (Mass. 1978) (*MassPIRG*). The *MassPIRG* court concluded that, whereas ballot access for representatives implicates the fundamental right to vote, access for initiatives does not, because no right to participate in direct legislation is " 'explicitly or implicitly guaranteed by the Constitution.' " *Id.* (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973)). We respectfully disagree, however, because when a state chooses to grant the right to vote in a particular form, it subjects itself to the requirements of the Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98, 104 (2000). Indeed, the very right at issue in *Moore*, the right to vote for electors for President and Vice President, is granted by the state, not by the federal Constitution. *Bush*, 531 U.S. at 104. Thus, while a state may decline to grant a right to legislate through ballot initiatives, it may not grant that right on a discriminatory basis. *MassPIRG* was, therefore, not decided correctly.

the same *number* of signatures (200) regardless of a county's population, the Idaho law requires a fixed *percentage* (six percent) of a county's population. The *Moore* Court asserted that the Illinois law applied a "rigid, arbitrary formula." *Moore*, 394 U.S. at 818. If the Court's objection to the formula were merely that 200 constituted a higher percentage of the population in some counties than in others, then *Moore* would be distinguishable from the present case.

[5] We reject the argument, however, that the difference between percentages and absolute numbers serves to distinguish *Moore*. In fact, the violation here appears to be more egregious than the violation proscribed in *Moore*. At least in *Moore* the vote of every person who "voted" by signing a petition counted as long as 199 other persons also signed. Here, in the smallest county a "vote" may count where 61 others sign, whereas in the largest county it may require up to 18,054 other signatures before the individual's "vote" will count. Both the Idaho and the Illinois requirements violate the Equal Protection Clause, because they allocate equal power to counties of unequal population. Because some of Idaho's counties are far more heavily populated than others, an initiative that is popular primarily with voters in sparsely populated counties can reach the ballot with the support of many fewer voters than can an initiative that is popular primarily with voters in densely populated counties. Like the county unit system in *Sanders*, the Idaho system violates equal protection because the few voters in a sparsely populated county have a power equal to the vastly larger number of voters who reside in a populous county. In short, an electoral system, here the system governing the people's right to place initiative measures on the ballot, may not be based on treating unequal counties equally and making the electoral determination dependent on the support of numbers of counties rather than numbers of people.

Idaho's other arguments are unpersuasive. As discussed above, we reject its argument that there is "a far more compel-

ling interest in requiring a modicum of statewide support in the direct legislation context as opposed to the formation of a third party." Even if Idaho's argument were correct, however, the Idaho distributional requirement is not narrowly tailored to further any such interest. Idaho could achieve the same end through a geographic distribution requirement that does not violate equal protection, for example, by basing any such requirement on existing state legislative districts.[8]

Quoting *The Federalist* No. 3, Idaho also argues that the geographic distribution requirement is part of a system of "checks and balances," which is especially important with regard to direct legislation, as a protection against the " 'confusion of the multitude.' " The requirement is analogous, Idaho argues, to several features of the federal system, including the electoral college, *see* U.S. Const. amend. XII, which permits the loser of the popular vote to assume the presidency, as occurred most recently in the 2000 election; the veto power of the President, *see id.* art. I, § 7, which can defeat legislation approved by a majority of both houses of Congress; and the system of electing two members of the Senate from each state, *id.* § 3, which often prevents measures approved by representatives of a popular majority (in the House) from becoming law. Idaho's argument cannot succeed. Although the United States Constitution awards greater power to voters in less populous states than to those in more populous states through the Senate and the electoral college, it is well established that an analogous system on the part of the states is impermissible. *See Sanders*, 372 U.S. at 378 ("The inclusion of the electoral college in the Constitution, as

[8]Idaho argues that the challenged law is narrowly tailored because it includes, in addition to the distribution requirement, a requirement that an initiative receive signatures of six percent of the voters of the state as a whole. A similar state-wide requirement was not enough to save the statute in *Moore*, however, *see Moore*, 394 U.S. at 818, and carries little weight here, given that the state could create a distributional requirement that would achieve the ostensible end without discriminating against voters in large counties.

the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election." (footnote omitted)). To the extent that Idaho wishes to create a check on the will of the majority by a *non*discriminatory means, the equal protection clause is no bar.[9] The state may not, however, weigh the votes (or signatures) of some voters more heavily than those of others.

Idaho also argues that the geographic distribution requirement furthers other valuable purposes, including preventing a long and confusing list of initiatives from appearing on the ballot, protecting against fraud, informing the electorate, ensuring the "integrity" of the ballot process, and promoting "grassroots direct legislation efforts." Assuming that these are all valid purposes advanced by the geographic distribution requirement, they nonetheless cannot save that requirement, because these purposes could be advanced as effectively and efficiently by another system that *would* treat voters residing in different geographic areas equally. For example, most if not all of these objectives could be satisfied, even more readily, by simply increasing the statewide percentage of signatures required—from six to twelve percent or to any other percentage Idaho deemed desirable.

Idaho also cites three lower court decisions that it believes support its argument that its distribution requirement is constitutional. Two of them are readily distinguishable, because the distributional requirements they address pertain to districts of equal population. *See Libertarian Party v. Bond*, 764 F.2d 538 (8th Cir. 1985); *Udall v. Bowen*, 419 F. Supp. 746 (S.D. Ind. 1976), *aff'd*, 425 U.S. 947 (1976). The third, *MassPIRG*, which is discussed above, *see supra* footnote 7, is, as we

[9]Some restrictions are impermissible for other reasons, of course. *See, e.g., Meyer*, 486 U.S. at 415-16 (invalidating under Free Speech Clause a Colorado law making it a felony to pay petition circulators).

explained, wrongly decided. *Cf. In re Berg*, 713 A.2d 1106, 1108 (Pa. 1998) (upholding ballot-access requirement of 100 signatures from each of 10 of the state's 67 counties and, distinguishing *Moore* on the basis, among others, that Pennsylvania's counties were more evenly populated). We also note that the Supreme Court of Utah, relying on *Moore* and citing the opinion of the district court in the present case, has recently invalidated a Utah geographic distribution requirement quite similar to Idaho's. *See Gallivan v. Walker*, 54 P.3d 1069, 1094-95 (Utah 2002).

Conclusion

[6] Section 34-1805 violates the Equal Protection Clause. The decision of the district court is therefore

AFFIRMED.

C

Supreme Court of New Mexico.

STATE of New Mexico ex rel. Boston E. WITT, Attorney General, Petitioner,
v.
The STATE CANVASSING BOARD, Hon. David F. Cargo, Hon. David Chavez, Jr., and Hon. Ernestine Evans, Constituting the members of the Board, Respondents.

No. 8554.

Feb. 5, 1968.

Mandamus proceeding on relation of the attorney general to compel the state canvassing board to certify that proposition amending Constitution was passed. The Supreme Court, Moise, J., held that the constitutional requirement of a two-thirds vote in each county for amendment of constitutional provisions relating to elective franchise is itself unconstitutional under the 'one person one vote' principle, and that the constitutional requirement of ratification by 'at least three-fourths of electors voting in the whole state' was met when at least three-fourths of the voters on the particular proposition favored it.

Alternative writ made permanent.

West Headnotes

[1] Constitutional Law 225.3(1)
92k225.3(1) Most Cited Cases
(Formerly 92k225(1))

The New Mexico constitutional provision that no amendment affecting provisions as to elective franchise or education shall be valid unless ratified by vote with at least two-thirds of those voting in each county in the state voting for such amendment, is invalid under "one person one vote" principle and equal protection clause. Const. art. 7, § § 1, 3; art. 19, § 1; U.S.C.A.Const. Amend. 14.

[2] Counties 1
104k1 Most Cited Cases

[2] Municipal Corporations 1.1
268k1.1 Most Cited Cases
(Formerly 268k1)

Political subdivisions of states, such as counties, cities or whatever, are not sovereign entities but subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions.

[3] Constitutional Law 225.3(11)
92k225.3(11) Most Cited Cases
(Formerly 92k225(1))

Under "one person one vote" principle, there is no distinction between voting on representatives in legislature and voting on constitutional amendments.

[4] Elections 11
144k11 Most Cited Cases
(Formerly 144k1)

Where provisions are placed in Constitution to preserve certain rights in a minority group, there is no political equality under Fourteenth Amendment as that term applies to the Fifteenth, Seventeenth and Nineteenth Amendments to United States Constitution. U.S.C.A.Const. Amends. 14, 15, 17, 19; Const. art. 7, § 3; art. 19, § 1.

[5] Constitutional Law 9(3)
92k9(3) Most Cited Cases

Under constitutional requirement that the amendments of specified provisions must be ratified by a vote of at least three-fourths of the "electors voting in the whole state," quoted phrase does not mean "all electors voting at the election" as distinguished from those voting on the particular amendment. Const. art. 19, § 1.

[6] Constitutional Law 5
92k5 Most Cited Cases

The constitutional amendment authorizing absentee voting was validly adopted. Const. art. 7, § § 1, 3; art. 19, § 1.

***683 **144** Boston E. Witt, Atty. Gen., David Sierra, Asst. Atty. Gen., John D. Donnell, James E. Thomson, Special Asst. Attys. Gen., for petitioner.

Allen C. Dewey, Jr., William A. Sloan, Albuquerque, for respondents.

OPINION

MOISE, Justice.

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Pursuant to authority of an Enabling Act of Congress,[FN1] during fifty days in the year 1910 commencing on October 3rd, one hundred duly elected delegates to a constitutional convention composed and adopted a draft constitution for submission to the qualified voters of New Mexico.

FN1. 36 Stats. at Lge. 557, ch. 310, 1910.

As adopted by the convention the following provisions pertinent to this litigation were contained therein:

'ARTICLE VII

'Section 1. Every male citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons, persons convicted of a felonious or infamous crime unless restored to political rights, and Indians not taxed, shall be qualified to vote at all elections for public officers. All school elections shall be held at different times from other elections. Women possessing the qualifications prescribed in this section for male electors shall be qualified electors at all such school elections; provided, that if a majority of the qualified voters of any school district shall, not less than thirty days before any school election, present a petition to the board of county commissioners against women suffrage in such district, the provisions of this section relating to woman suffrage shall be suspended therein, and such provisions shall become again operative only upon the filing with said board of a petition signed by a majority of the qualified voters favoring the restoration thereof. The board of county commissioners shall certify the suspension or restoration of such suffrage to the proper school district.

'The legislature shall have the power to require the registration of the qualified electors as a requisite for voting, and shall regulate the manner, time and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections and guard against the abuse of elective franchise. Not more than two members of the board of registration and not more than two judges of election shall belong to the same ***684 **145** political party at the time of their appointment.

'Sec. 3. The right of any citizen of the state to vote, hold office, or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this Constitution; and the provisions of this section and of section one of this article shall never be amended except upon a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county of the state, shall vote for such amendment.'

Article XIX, Section 1, of the constitution, as proposed by the convention, read.

'Any amendment or amendments to this Constitution, may be proposed in either house of the legislature at any regular session thereof, and if two-thirds of all members elected to each of the two houses voting separately, shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon; or any amendment or amendments to this Constitution may be proposed at the first regular session of the legislature held after the expiration of two years from the time this Constitution goes into effect, or at the regular session of the legislature convening each eighth year thereafter, and if a majority of all the members elected to each of the two houses voting separately at said sessions shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon. The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state where a newspaper is published, once each week, for four consecutive weeks, the last publication to be not less than two weeks prior to the next general election, at which time the said amendment or amendments shall be submitted to the electros of the state for their approval or rejection. If the same be ratified by a majority of the electors voting thereon and by an affirmative vote equal to at least forty per cent of all the votes cast at said election in the state and in at least one-half of the counties thereof, then, and not otherwise, such amendment or amendments shall become part of this Constitution. Not more than three amendments shall be submitted at one election, and if two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately; provided, that no amendment shall apply to or affect the provisions of sections one and three of article seven hereof on Elective Franchise, and sections eights and ten of article twelve hereof on Education unless it be proposed by a vote of three-

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fourths of the members elected to each house.'

After a heated campaign, during which one of the most severe criticisms of the proposed constitution was that it was too difficult to amend[FN2], a sizeable majority voted in favor of its adoption at an election held January 12, 1911.

FN2. Donnelly, The Government of new Mexico, 48 (1947).

Upon presentation of the constitution as adopted to the Congress, the provisions of Art. XIX, Sec. 1, were looked upon with disfavor and accordingly, by resolution[FN3], the Congress directed that before the President of the United States should announce the results of the election therein provided for, an amended Article XIX should be submitted and voted upon. The method for conducting the election on the amendment was set forth in detail, including a provision that the ballot be printed 'on paper of a blue tint' to distinguish it from the white ballots provided for voting on candidates for office. ***685 **146** The amendment, as submitted, read as follows:

FN3. Joint Resolution of August 21, 1911, No. 8, 37 Stats. at Lge., p. 39.

'Any amendment or amendments to this Constitution may be proposed in either house of the legislature at any regular session thereof; and if a majority of all members elected to each of the two houses voting separately shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the years and nays thereon.
'The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state, where a newspaper is published once each week, for four consecutive weeks, in English and Spanish when newspapers in both of said languages are published in such counties, the last publication to be not more than two weeks prior to the election at which time said amendment or amendments shall be submitted to the electors of the state for their approval or rejection; and the said amendment or amendments shall be voted upon at the next regular election held in said state after the adjournment of said legislature, at such time as said legislature may be law provide. If the same be ratified by a majority of the electors voting thereon such amendment or amendments shall become part of this Constitution. If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately: Provided, that no amendment shall apply to or affect the provisions of sections one and three of article VII hereof, on elective franchise, and sections eight and ten of article XII hereof, on education, unless it be proposed by vote of three-fourths of the members elected to each house and be ratified by a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment.'

At the regular election wherein officers were elected, held November 7, 1911, the 'blue ballot' amendment, as it came to be known, was adopted.

A comparison of the original Art. XIX, Section 1, with the 'Blue ballot' amendment discloses a number of differences, to-wit: (1) whereas, except as to Sections 1 and 3 of Art. VII and Section 10 of Art. XII where three- fourths vote was required, the original provision required that a favorable vote of two-thirds of all members of each house of the legislature was needed to propose an amendment at all times other than at the first regular session of the legislature held after two years from the date the constitution became effective, and at the session held each eight years thereafter when only a majority vote was required, the 'blue ballot' amendment reduced the number to a simple majority as to all provisions except Sections 1 and 3 of Art. VII and Section 8 (which was added) and Section 10 of Art. XII, where three- fourths was still required; (2) the 'blue ballot' amendment removed the requirement that ratification be by a vote equal to forty percent of all votes cast at the election and in at least one-half of the counties, and substituted a simple majority vote, except as to the same two sections in each of two articles; (3) the limitation of not more than three amendments to be submitted at any one election was eliminated; (4) whereas, the original provision had no limitation on the vote required to ratify, the 'blue ballot' amendment included the limitation already provided in Art. VII Sections 1 and 3, applicable to them, and to Art. XII, Section 10, and extended it to also include Art. XII, Section 8.

In 1935, more than thirty-two years ago, only New Mexico and Kentucky had no provision for absenteee voting.[FN4] We are advised New Mexico today stands alone without such a provision.

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FN4. Donnelly, The Absentee Voter Problem in New Mexico, 7 N.M.Bus.Rev. 91 (1938).

***686 **147** Since adoption of the constitution, and admission into the union, no less than ten unsuccessful attempts were made prior to 1967 to amend the constitution so as to make absentee voting possible. The hopelessness of the situation gave rise to the description of Art. VII, Section 1, as 'the unamendable section.' [FN5] Every proposed amendment received more than a majority of favorable votes at the election wherein it was submitted, and in 1958 the proposed amendment was approved by 78% and in 1964 by 81.8% of those voting on it.[FN6] However, because of the requirement of the two-thirds majority in every county, the amendment failed. In 1964 only one county [FN7] did not give a favorable majority and only six[FN8] gave less than the required two-thirds. The total vote was 106,579 in favor and 23,694 opposed.[FN9]

FN5. New Mexico Legislative Council Service, The Unamendable Section (1965).

FN6. Folmar, New Mexico Legislative Council Service, Piecemeal Amendment of the New Mexico Constitution, 1911 to 1967 (4th Rev.1968).

FN7. Guadalupe

FN8. Guadalupe, Harding, Mora, Quay, Torrance and Union

FN9. Id. Footnote 5.

An eleventh effort to amend was made in 1967. Respondents admit that at a special election held November 7, 1967, there were 42,101 votes in favor of amending the section and 9,757 opposed, or a percentage of 81.1851 favorable votes. Again, however, in one county[FN10] less than a majority voting on the amendment favored it, and in twelve[FN11] less than two-thirds approved it. [FN12] Thus it is seen that a change of 634 votes in twelve counties was needed to meet the requirement of Art. VII. Sec. 3, and Art. XIX, Sec. 1. But, more serious and important, the votes changed had to be not less than the number indicated in each of the named counties. As a matter of fact, it is apparent that if all the counties, except Rio Arriba, had voted the two-thirds majority, and the vote remained unchanged in that one county, the amendment would have been lost, notwithstanding a vote of voer 81%, and more than 3308 votes in excess of the required three-fourths favorable statewide vote. Also, it is apparent that the failure to receive two-thirds vote in Harding County where the total vote was 135 could successfully frustrate the wishes of 90.3 percent of the 13,659 voting in Bernalillo County, thereby giving a Harding County vote more than 100 times the weight of a Bernalillo County vote.

FN10. Sandoval

FN11. Catron (12); Grant (57); Guadalupe (18); Harding (12); Hidalgo (16); Mora (35); Rio Arriba (1); Sandoval (111); San Miguel (206); Taos (30); Union (17) and Valencia (109). The numbers set forth in brackets following each county name indicate how many votes short of a two- thirds vote in favor was given by those voting thereon.

FN12. Id. Footnote 6.

It should also be mentioned that over the years several attempts have been made by the legislature to enact an absentee voting law. Because of the interpretation placed by this court on Art. VII, Section 1, N.M. Const., these efforts have been uniformly held unconstitutional.[FN13]

FN13. Thompson v. Scheier, 40 N.M. 199, 57 P.2d 293 (1936); Baca v. Ortiz, 40 N.M. 435, 61 P.2d 320 (1936); Chase v. Lujan, 48 N.M. 261, 149 P.2d 1003 (1944); State ex rel. West v. Thomas, 62 N.M. 103, 305 P.2d 376 (1956).

This brief review should serve to demonstrate the effect of the requirement of a two-thirds majority in each and every county to adopt an amendment to Art. VII, Section 1. It also serves as a basis for the discussion to follow.

In the light of the decisions cited above, it is

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eminently clear that no statute authorizing absentee voting could be expected to be upheld unless and until Art. VII, Sec. 1, is amended. It is no less clear, as already noted, that amendment is impossible until some new approach to the problem is made. In the Reapportionment cases decided from 1962 to 1964, hereinafter cited, is found a group of decisions supporting a line of reasoning***687 ****148** hitherto never advanced. Petitioner's principal reliance is placed on these authorities.

The instant original proceeding was brought by the attorney general and asks that the state canvassing board, whose duty it is to canvass the vote on constitutional amendments and declare the result, s 3--6--19, N.M.S.A. 1953, be mandamused to certify Proposition 7, amending Art. VII, Sec. 1, as passed, and asserts that Art. VII, Sec. 3, insofar as it requires a favorable vote of not less than two-thirds of those voting in each county to amend Art. VII, Sec. 1, is unconstitutional. We issued our alternative writ directed to the canvassing board who thereupon held in abeyance their canvass of the vote on Proposition 7, pending our ruling. The canvassing baord requested this court to appoint counsel to represent them and we accordingly appointed Wm. A. Sloan, Esq., and Allen Dewey, Esq., (both of Albuquerque) to appear herein as amicicuriae on their behalf. We take this opportunity to express appreciation to counsel for the very excellent briefs filed by them, and for their contribution to the solution of the very important and intriguing problems presented. They have been most helpful.

Proposition 7, as it appeared on the ballot at the November 7, 1967 special election, proposed that Art. VII, Sec. 1, be amended to read as follows:

> 'Every citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons, and persons convicted of a felonious or infamous crime unless restored to political rights, shall be qualified to vote at all elections for public officers. The legislature may enact laws providing for absentee voting by qualified electors. All school elections shall be held at different times from other elections.
>
> 'The legislature shall have the power to require the registration of the qualified electors as a requisite for voting, and shall regulate the manner, time and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections, and guard against the abuse of elective franchise. Not more than two members of the board of registration, and not more than two judges of election shall belong to the same political party at the time of their appointment.'

The position of Petitioner, generally concurred in by counsel for Respondents, that the requirement of Art. VII, Sec. 3, of a two-thirds favorable vote in each county of the state in order to amend Art. VII, Sec. 1, denies equal protection of the laws to certain citizens of the state, contrary to the Fourteenth Amendment to the Constitution of the United States. Amici, in their argument, also discuss the effect of Art. XIX, Sec. 1, under the decisions relied upon.

Support for the argument is found principally in the so-called Reapportionment Cases, starting with Baker v. Carr[FN14], followed by Gray v. Sanders [FN15], and then by Reynolds v. Sims[FN16]; WMCA, Inc. v. Lomenzo [FN17]; Maryland Committee v. Tawes[FN18]; Davis v. Mann[FN19]; Roman v. Sincock[FN20]; Lucas v. Forty-Fourth General Assembly of State of Colorado[FN21], all decided June 15, 1964.

FN14. 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

FN15. 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963).

FN16. 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506.

FN17. 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568.

FN18. 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595.

FN19. 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609.

FN20. 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620.

FN21. 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632.

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***688 **149** All of these cases deal with legislative reapportionment, not with voting rights relating to amendment of a constitution. However, we perceive of no real distinction which can or should be drawn.

As already pointed out, a vote in Harding County actually off-set or counted for more than 100 votes in Bernalillo County. This is exactly what was said in Gray v. Sanders, supra, could not be sustained in elections for legislators. We quote:

> 'If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. * * * How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote--whatever their race, whatever their, sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. * * *' (Emphasis added.)

Concerning the right to give to votes of residents of geographical areas of widely varying population equivalently disproportionate weight, the United States Supreme Court had the following to say, in Reynolds v. Sims, supra:

> 'We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State. * * * Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.
>
> 'History indicates, however, that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures. So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparties from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. * * *' (Emphasis added.)

[1] We see no escape from the conclusion that a requirement of a two-thirds favorable vote in every county, when there is a wide disparity in population among counties, must result in greatly disproportionate values to votes in the different counties. Where, as here, a vote in Harding County outweighs a hundred votes in Bernalillo County, the 'one person, one vote' concept announced in Gray v. Sanders, supra, certainly is not met. Although ***689 **150** this example provides the extremes that are present, Bernalillo County having more than four times the population of Dona Ana County, the next most populous county in 1960, no situation could be projected where the Bernalillo County voter would not be substantially discriminated against merely by virtue of the fact that artificial geographical lines of counties determine the value of a vote.

[2] As stated in Reynolds v. Sims, supra:

> 'Political subdivisions of States--counties, cities, or whatever--never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. * * *'

The following additional quotations from Reynolds v. Sims, supra, are equally illuminating, and although used in discussing elections of legislative representatives, are nevertheless particularly applicable here:

> 'To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies

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and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged--the weight of a citizen's vote cannot be made to depend on where he lives. * * *' '* * * (I)f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the StateIt could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multimplied by two, five or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. * * *'

The only case of which we are aware in which a constitutional limitation at all comparable to that here being discussed was involved is Holt v. Richardson [FN22], wherein a three-judge court considered a section of the constitution of Hawaii providing in effect that representation in the state senate could not be changed unless 'approved by a majority of the votes tallied upon the question in each of a majority of the counties.' The case is not very helpful because the court there noted that the senatorial apportionment in the Hawaii constitution was unquestionably invalid under Reynolds v. Sims, supra, and that the provisions concerning approval by more than one-half of those voting in each of a majority of the counties was likewise unconstitutional by virtue of its close ties to apportionment. On appeal, the United States Supreme Court merely noted that all parties conceded the unconstitutionality and accordingly did not discuss the provision. Burns v. Richardson[FN23].

FN22. 238 F.Supp. 468 (D.Hawaii, 1965).

FN23. 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

[3][4] We see no rational basis to distinguish between voting on representatives in the legislature, and voting on constitutional amendments. One is no more a necessary ingredient of our democratic ***690 **151** process than the other. Nor can it be said that an equal voice in selection of the legislature is of greater importance to a citizen than equality of weight in expression of views on changes in our basic charter, the constitution. As a matter of fact, it is amply evident that the constitutional provision here being considered was quite definitely placed in the constitution to preserve certain rights in a minority group. It has now been made clear that when this is done there is no political equality under the Fourteenth Amendment as that term applies to the Fifteenth, Seventeenth, and Nineteenth Amendments to our United States Constitution. Gray v. Sanders,supra. Neither can there be political equality under the Fourteenth Amendment to exercise the right of elective franchise provided for in Art. VII of the New Mexico Constitution, so long as Art. VII, Sec. 3, and Art. XIX, Sec. 1, contain the restriction here under attack.

The application of the rule of the reapportionment cases to constitutional conventions has been considered in West v. Carr[FN24] and in State ex rel. Smith v. Gore[FN25]. Although in West v. Carr, supra, it was held that the decision in Baker v. Carr, supra, had no application to apportionment of a constitutional convention authorized by a vote of the people, in the course of the opinion we find the following stated by the court in West v. Carr, supra:

FN24. 212 Tenn. 367, 370 S.W.2d 469 (1963), dismissed for lack of jurisdiction, 378 U.S. 557, 84 S.Ct. 1908, 12 L.Ed.2d 1034.

FN25. 150 W.Va. 71, 143 S.E.2d 791 (1965).

'As we have seen, the people of Tennessee, voting not by counties and districts, but voting in the State at large, in the November 6, 1962 election, voted for the convention, as provided and constituted by this Act. The legal effect of this vote was that the people made it their act, in all its terms, including the manner of choosing the delegates to the convention. Otherwise stated, this vote of the people of the State at large must be taken as an expression of their will and as their act and deed.
'In that election every qualified voter in the State was entitled to vote and every vote was given the

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same weight, whether the voter resided in the largest urban county or the smallest rural county. There is no claim that there was any malapportionment or any debasement of any vote; nor can it be said that this Act, as thus ratified by the people of the State, deprived complainant or any other person of any right under the Constitution of Tennessee or of the United States.
'This conclusion is reinforced when it is considered that neither the delegates nor the convention can take any final action, but are strictly limited to the subjects specified in the call, and as to them, can only make proposals which can have no effect unless and until they are ratified in another election by a vote of the people of the State at large, where every qualified voter will be entitled to vote and every vote given the same weight.' (Emphasis added.)

It is clear from this language that the court relied on the effect of the vote of the people at elections where the vote of every elector had equal weight to overcome the inequality of representation found in the constitutional convention.

In State v. Gore, supra, the court held equal representation in a constitutional convention a requisite of the state constitution and expressed disagreement with the conclusion of the Tennessee court in West v. Carr, supra, concerning the applicability of the decision in Baker v. Carr, supra.

Having disposed of the problem of the requirement of a two-thirds vote in every county we next note the question of whether there was compliance with the requirement of ratification by at least 'three-fourths of the electors voting in the whole state.' No serious attack is made on the constitutionality of this provision. However, ***691 **152** our attention is directed to the fact which appears in the record that whereas a total of 51,858 votes were case on Proposition 7, of which 42,101 or 81%, favored it, the total number who voted at the election was 56,152, and three-fourths of that number is 42,114. It has been suggested that the amendment thus failed by 13 votes to receive the vote of 'three-fourths of the electors voting in the whole state' if the words 'electors voting in the whole state' mean those voting on all propositions submitted at the election.

Quite obviously some ambiguity is present in the language used. Do the quoted words refer to the total number voting at the election so as to require approval by at least three-fourths of the largest number voting on any proposition submitted in the election, or do they merely refer to votes on the particular proposition? Some complication presents itself when it is noted that the three-fourths requirements appearing in Art. VII, Sec. 3; Art. XII, Sec. 10, and in Art. XIX Sec. 1, relates to 'electors voting in the whole state,' whereas Art. XIX, Sec. 1, requires only a majority of the 'electors voting thereon' to ratify amendments generally.

We are bound by long established principles of constitutional interpretation. In Todd v. Tierney[FN26], the court made the following pronouncements:

FN26. 38 N.M. 15, 27 P.2d 991 (1933).

'What the framers of the Constitution intended as disclosed by the language employed is, of course, the interpretation properly to be given the instrument. That intent must be arrived at by construing together its various pertinent provisions and giving to each the meaning which its language most naturally suggests when considered in proper relationship to the others. We should, as nearly as we may, endeavor to look at the instrument from the vantage point of the framers the better to understand their view of the matter and the meaning likely intended. * * *
'We have spoken often in this opinion of the viewpoint of the framers of the Constitution and of what they intended by the language employed. And whenever we refer to the framers that term is to be taken as embracing the people who adopted it. We are not unmindful of the rule of construction applicable to a Constitution that its language is to be taken in its common and ordinary sense and as likely understood by the people who adopted it. * * *'

In State ex rel. Ward v. Romero[FN27], the court had the following to say:

FN27. 17 N.M. 88 125 P. 617 (1912).

'It is the duty of this court to interpret the various provisions of the Constitution to carry out the spirit of that instrument. We should not permit legal technicalities, and subtle niceties to control and thereby destroy what the framers of the Constitution intended. Where the spirit and intent of the instrument can be clearly ascertained, effect should be given to it, and the strict letter should not control if the letter leads to incongruous results, clearly not intended. * * *'

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From the foregoing we recognize it as our responsibility to attempt to arrive at the meaning of the framers of the constitution and to give to their work an interpretation that is reasonable--not one that is illogical or incongruous.

[5] While aware, as already noted, that the use of different words within the same provision might lead to a conclusion that different meanings were thereby intended, we should not lose sight of the fact that to construe 'electors voting in the whole state' to in effect mean 'all electors voting at the election' as distinguished from those voting on the particular amendment, would have the effect of making the 'unamendable section' even more unamendable than would otherwise be true. To so hold would in effect attribute to the membership, of the convention, the Congress of the United States and the electorate who ***692 **153** ratified the constitution and the amendment to Art. XIX, the intention of incorporating provisions which ostensibly provide for amendment while in fact making it impossible. Notwithstanding that the restrictions were intended to make the particular provisions difficult of amendment, we cannot believe that it was the purpose to make it utterly impossible. As has been seen, the difficulties have been great, but we believe that to multiply the problems beyond those which naturally flow from the necessary meaning of language would amount to unreasonable interpretation and one not to be attributed to the drafters of the provision. Also, when it is remembered that Art. XIX, Sec. 1, was adopted as an amendment intended to generally make amendment less difficult, and that the three-fourths and two-thirds provisions were lifted bodily from Art. VII, Sec. 3, and Art. XII, Sec. 10, we do not believe that the argument favoring an interpretation which would make amendment more difficult is indicated or required. We find support for this approach in Board of County Comr's of Bernalillo County v. McCulloh [FN28].

FN28. 52 N.M. 210, 195 P.2d 1005 (1948).

In this connection, we would take note that, the last two times prior to 1967 when amendments to Art. VII, Sec. 1, to permit absentee voting, were submitted were in 1958 and 1964 at general elections. Whereas in 1958, there were 69,567 votes cast in favor and 19,061 against, being over 78% of those voting on the proposition, only 43.2% of those voting for governor at the election voted on the proposed amendment. Similarly, in 1964, also a general election, over 81% of those voting on the amendment favored it, although only 41% of those voting for governor expressed an opinion on the amendment. [FN29] It is thus quite evident that to hold that three-fourths of those voting at any given election is required to amend Art. VII, Sec. 1, would give effect as having cast negative votes to those voters at the election who because of negligence, lack of interest, or some other unexplained reason failed to register their votes on the particular proposition. No logical reason for counting as opposed those who do not express their preference has been suggested. Nevertheless, this is the effect of requiring a three-fourths majority of those voting at an election whether or not they voted on the particular proposition. It would have been just as reasonable if a three- fourths vote of all registered voters had been required, whether voting or not. Such a provision, we submit, would be unsound in any view, but more reasonable only in degree than the present contention here held to be without merit. Compare Davy v. McNeill[FN30], where we find the following language quoted:

FN29. Id. Footnote 6.

FN30. 31 N.M. 7, 240 P. 482 (1925).

> 'Ordinarily, the vote of voters who do not choose to participate in an election are not to be taken into consideration in declaring the result. * * * And so, a constitutional provision requiring the assent of two-thirds of the qualified voters of the county of any election lawfully held for that (sic) purpose of a proposed issue of municipal bonds, means two-thirds of the vote of the qualified voters present and voting at such election favorably as determined by the final return of the result.'

See also Fabro v. Town of Gallup.[FN31]

FN31. 15 N.M. 108, 103 P. 271 (1909).

Taking this view of the provisions, can the language be read so as to support a conclusion that nothing more was required than a favorable vote of three-fourths of those voting on Proposition 7? Although the question is one of first impression in New Mexico, other courts have had occasion to consider it. Also, it should be noted that in Baca v. Ortiz, supra, the court in determining that na insufficient number of votes had been cast to adopt the proposed amendment, the number of votes used to establish

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this fact were those cast on the particular amendment, and no consideration was given to whether the number to which ***693 **154** the vote should be related was the total vote at the election.

While we have found no case involving a provision identical with our own, there are many which are similarly ambiguous and have accordingly required interpretation.[FN32] Generally speaking, the cases there cited pass upon the question of whether a constitutional provision or statute should be interpreted to require a majority of those voting on a proposition or a majority of those qualified to vote, whether voting or not, and support a conclusion that unless the constitution or law declares or clearly implies the contrary, qualified electors who do not present themselves to vote, or who do not vote on a proposition, are presumed to assent to the will of those who actually cast their ballots. Falls Church Taxpayers League v. City of Falls Church[FN33] is such a case. It held a bond issue to have been approved by 'a majority of the qualified voters who are freeholders voting in such election' even though not favored by sufficient voters to equal a majority of the votes cast on other propositions at the same election. Ladd v. Yett [FN34] also holds that only those votes cast on a given proposition shall be considered in determining if a 'majority of the qualified voters voting at said election' had voted in favor of each of several amendments to a city charter submitted at one election. See also, King v. City of McAlester[FN35]; Wilson v. Wasco County[FN36]; Harris v. Walker[FN37]. From Tinkel v. Griffin[FN38] we quote the following which we consider pertinent:

FN32. In 131 A.L.R. 1382 (1941) there is an annotation on the subject.

FN33. 203 Va. 604, 125 S.E.2d 817 (1962).

FN34. 273 S.W. 1006 (Tex.Civ.App.1925).

FN35. 273 P.2d 139 (Okl.1954).

FN36. 83 Or. 147, 163 P. 317 (1917).

FN37. 199 Ala. 51, 74 So. 40 (1917).

FN38. 26 Mont. 426, 68 P. 859 (1902).

'It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence. In a recent case the court of appeals of Kentucky, having under consideration a similar constitutional provision, said: 'It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed, and, to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted, the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.' (Montgomery County) Fiscal Court v. Trimble (104 Ky. 629,) 47 S.W. 773, 42 L.R.A. 738. * * *'

We are not unmindful that contrary conclusions have been reached by some courts. Of this character, to cite a few, are People v. Stevenson[FN39]; State ex rel. Cope v. Foraker[FN40]; State ex rel. Stevenson v. ***694 **155** Babcock[FN41]. There are others, but to cite them would add little to the opinion.

FN39. 281 Ill. 17, 117 N.E. 747 (1917).

FN40. 46 Ohio St. 677, 23 N.E. 491 (1890).

FN41. 17 Neb. 188, 22 N.W. 372 (1885).

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For the reasons stated, we conclude that the requirement of 'at least three- fourths of the electors voting in the whole state' was met when that percentage voting on the particular proposition favored it, notwithstanding the fact that this constituted less than three-fourths of all those voting at the election on some other propositions.

[6] The requirement of a two-thirds vote in each county being unconstitutional, and the demand of ratification by 'at least three-fourths of the electors voting in the whole state' having been met, the adoption of constitutional amendment submitted as Amendment No. 7 at the election held November 7, 1967 was accomplished. It follows that it should be certified by respondents as having been ratified, to accomplish which the alternative writ heretofore issued is made permanent. It is so ordered.

NOBLE, COMPTON and CARMODY, JJ., and LaFEL E. OMAN, J., Ct.App., concur.

437 P.2d 143, 78 N.M. 682

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Supreme Court of Florida.

ADVISORY OPINION TO the ATTORNEY GENERAL--LIMITED MARINE NET FISHING.

No. 81394.

June 17, 1993.

Attorney general petitioned for advisory opinion on validity of initiative petition, proposing constitutional amendment providing for limit on use of nets for catching saltwater finfish, shellfish, and other marine animals. The Supreme Court held that: (1) proposed amendment satisfied single-subject requirement of Florida Constitution, and (2) proposed amendment satisfied statutory ballot title and summary requirements.

So ordered.

McDonald, J. filed concurring opinion in which Barkett, C.J., Overton, and Kogan, JJ. concurred.

West Headnotes

[1] Constitutional Law ⚷9(1)
92k9(1) Most Cited Cases
Initiative petition proposing constitutional amendment providing for limit on use of nets for catching small water finfish, shellfish, or other marine animals satisfied single-subject requirement of Florida Constitution; sole purpose of amendment was to protect certain types of marine life from unnecessary killing, over-fishing and waste, and remaining provisions, providing definitions, exemptions, penalties, severability clause and effective date logically related to amendment's subject. West's F.S.A. Const. Art. 11, § 3.

[2] Constitutional Law ⚷9(1)
92k9(1) Most Cited Cases

Initiative petition proposing constitutional amendment providing for limit on use of nets for catching salt water finfish, shellfish, or other marine animals satisfied statutory ballot title and summary requirements. West's F.S.A. § 101.161(1).
***997** Robert A. Butterworth, Atty. Gen., Office of Atty. Gen., Tallahassee, for petitioner.

Michael L. Rosen and David Cardwell, Holland & Knight, on behalf of Save Our Sealife Committee, and David Guest, Sierra Club Legal Defense Fund, Tallahassee, on behalf of Conservation Coalition, Responding.

PER CURIAM.

In compliance with section 16.061, Florida Statutes (1991), the Attorney General has petitioned this Court for an advisory opinion on the validity of an initiative petition providing for a limit on the use of nets for catching saltwater finfish, shellfish, or other marine animals. We have jurisdiction pursuant to article IV, section 10 of the Florida Constitution. In response, we issued an order permitting interested parties to file briefs. [FN1]

FN1. No briefs were filed in opposition to the petition.

The initiative petition, which would add section 16 to article X of the Florida Constitution, provides as follows:

Section 16. Limiting Marine Net Fishing
(a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and ***998** other marine animals from unnecessary killing, overfishing, and waste.
(b) For purposes of catching or taking any saltwater finfish, shellfish or other marine animals in Florida waters:
(1) No gill nets or other entangling nets shall be used in Florida waters; and
(2) In addition to the prohibition set forth in (1), no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters. Additionally, no more than two such nets, which shall not be connected, shall be used from any vessel, and no person not on a vessel shall use more than one such net in nearshore and inshore Florida waters.
(c) For purposes of this section:
(1) "gill net" means one or more walls of netting which captures saltwater finfish by ensnaring or entangling them in the meshes of the net by the gills, and "entangling net" means a drift net, trammell net, stab net, or any other net which captures saltwater finfish, shellfish, or other marine animals by causing all or part of heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net, but a hand thrown cast net is not a gill or an entangling net;
(2) "mesh area" of a net means the total area of netting with the meshes open to comprise the maximum square footage. The square footage shall be calculated using standard mathematical formulas for geometric shapes. Seines and other rectangular nets shall be calculated using the maximum length and maximum width of netting. Trawls and other bag type nets shall be calculated as a cone using the maximum circumference of the net mouth to derive the radius, and the maximum length from the net mouth to the tail end of the net to derive the slant height.

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Calculations for any other nets of combination type nets shall be based on the shape of the individual components;
(3) "coastline" means the territorial sea base line for the State of Florida established pursuant to the laws of the United States of America;
(4) "Florida waters" means the waters of the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida, and any other bodies of water under the jurisdiction of the State of Florida, whether coastal, intracoastal or inland, and any part thereof; and
(5) "nearshore and inshore Florida waters" means all Florida waters inside a line three miles seaward of the coastline along the Gulf of Mexico and inside a line one mile seaward of the coastline along the Atlantic Ocean.
(d) This section shall not apply to the use of nets for scientific research or governmental purposes.
(e) Persons violating this section shall be prosecuted and punished pursuant to the penalties in s. 370.021(2)(a), (b), (c)6. and 7., and (e), Florida Statutes (1991), unless and until the legislature enacts more stringent penalties for violations thereof. On and after the effective date of this section, law enforcement officers in the state are authorized to enforce the provisions of this section in the same manner and authority as if a violation of this section constituted a violation of Chapter 370, Florida Statutes (1991).
(f) It is the intent of this section that implementing legislation is not required for enforcing any violations hereof, but nothing in this section prohibits the establishment by law or pursuant to law of more restrictions on the use of nets for the purpose of catching or taking any saltwater finfish, shellfish, or other marine animals.
(g) If any portion of this section is held invalid for any reason, the remaining portion of this section, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.
(h) This section shall take effect on the July 1 next occurring after approval hereof by vote of the electors.

[1] The first issue we address is whether the proposed amendment meets the single-subject requirement. Article XI, section 3, Florida Constitution, provides that a proposed amendment "shall embrace but ***999** one subject and matter directly connected therewith." To satisfy the single-subject test, the proposed amendment must have a "natural relation and connection as component parts or aspects of a single dominant plan or scheme." *Advisory Opinion to the Attorney General--Limited Political Terms in Certain Elective Offices,* 592 So.2d 225, 227 (Fla.1991) (quoting *Fine v. Firestone,* 448 So.2d 984, 990 (Fla.1984)). The purpose of the single-subject restriction is to prevent the proposal of an amendment which contains two unrelated provisions, one which electors might wish to support and one which they might disfavor. *Advisory Opinion to the Attorney General--Limited Political Terms in Certain Elective Offices,* 592 So.2d 225.

We find that the proposed amendment is functionally and facially unified and therefore complies with the single-subject requirement. As stated in paragraph (a) of the proposed amendment, the sole purpose of the amendment is to protect certain types of marine life from unnecessary killing, overfishing and waste. The remaining provisions, which provide definitions, exemptions, penalties, a severability clause, and an effective date, are logically related to the subject of the amendment.

[2] The proposed amendment must also satisfy the ballot title and summary requirements of section 101.161(1), Florida Statutes (1991). The proposed ballot summary provides as follows:

LIMITING MARINE NET FISHING

Limits the use of nets for catching saltwater finfish, shellfish, or other marine animals by prohibiting the use of gill and other entangling nets in all Florida waters, and prohibiting the use of other nets larger than 500 square feet in mesh area in nearshore and inshore Florida waters. Provides definitions, administrative and criminal penalties, and exceptions for scientific and governmental purposes.

According to section 101.161(1), the substance of the amendment "shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of." Because the ballot summary and title do not exceed the permissible number of words, the only issue to be addressed is whether the substance of the amendment adheres to the standards we have previously set forth. The ballot summary and title requirements were designed to assure that the elector had fair notice of the proposed amendment's chief purpose. *In re Advisory Opinion to the Attorney General English--The Official Language of Florida,* 520 So.2d 11 (Fla.1988); *Askew v. Firestone,* 421 So.2d 151 (Fla.1982). We find that the ballot title and summary on the limited marine net fishing amendment provide electors with sufficient information to make an informed decision on how to cast their ballots.

We hold that the initiative petition and proposed ballot summary meet the legal requirements of article XI, section 3 of the Florida Constitution, and section 101.161(1), Florida Statutes (1991). No other issue is encompassed in this opinion and it should not be construed as favoring or opposing the passage of the proposed amendment.

It is so ordered.

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BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

McDONALD, J., concurs with an opinion, in which BARKETT, C.J., and OVERTON and KOGAN, JJ., concur.

McDONALD, Justice, concurring.

We are limited to reviewing only the issues of whether the proposed amendment complies with the single-subject requirement and the ballot summary and title requirements. *Advisory Opinion to the Attorney General--Limited Political Terms in Certain Elective Offices,* 592 So.2d 225 (Fla.1991). I concur with the majority that the proposed amendment complies with the constitutional and statutory requirements. The merit of the proposed amendment is to be decided by the voters of Florida and this ***1000** Court's opinion regarding the wisdom of any proposed amendment is irrelevant to its legal validity. I am concerned, however, that the net fishing amendment is more appropriate for inclusion in Florida's statute books than in the state constitution.

The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society.

The power to change both the constitution and statutory law is, theoretically, vested in the people. The power to amend the constitution is implicit in the declaration in article I, section 1, Florida Constitution, that "[a]ll political power is inherent in the people." Talbot D'Alemberte, *Commentary,* 25A Fla.Stat.Ann. 16 (1991). The 1968 revision of the state constitution adopted the Revision Commission's recommendation to include a section explicitly dealing with the initiative process. According to article XI, section 3, "[t]he power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people...." Recognizing the sovereignty of the people, I still feel compelled to express my view that the permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments. [FN2]

FN2. Florida's constitution is one of the most easily amended constitutions in the country. Michael G. Colantuono, Comment, *The Revisions of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change,* 75 Cal.L.Rev. 1473, 1509 n. 232 (1987). Between 1968 and 1984, Florida's constitution was amended forty- one times, at a rate of 2.4 amendments per year. *Id.* Since 1980, thirty-seven of the forty-four proposed amendments have been adopted. Six of the proposed amendments were by initiative, and four of them were adopted.

Undoubtedly, some of Florida's most crucial legal principles have evolved as a result of the initiative process. However, the legislative power of the state is vested in the Legislature, art. III, § 1, and on matters that are statutory in nature, a concerted effort should be made to have the Legislature address the subject. The technical requirements, such as the single-subject rule and the requirements of section 101.161(1), Florida Statutes (1991), appear insufficient to prevent abuse of the amendment process. [FN3] At this juncture, rather than espouse any particular solution as to how to prevent such abuse, I merely express my thought that some issues are better suited as legislatively enacted statutes than as constitutional amendments. It is my hope that the next Revision Commission will have the opportunity to establish some criteria regarding the subject matter of initiatives that will preserve the constitution as a document of fundamental laws, while still preserving the popular power of the people.

FN3. State constitutions generally do not restrict the subject matter that may be addressed by ballot propositions. James M. Fisher, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence,* 11 Hastings Const.L.Q. 43 (1984). However, there are exceptions. For example, Illinois constitution restricts initiatives to matters addressing the composition, duties, and powers of the legislature. Ill.Const., art. XIV, § 3.

BARKETT, C.J., and OVERTON and KOGAN, JJ., concur.

620 So.2d 997, 18 Fla. L. Weekly S344

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C

Supreme Court of Florida.

ADVISORY OPINION TO the ATTORNEY GENERAL RE LIMITING CRUEL AND INHUMANE CONFINEMENT OF PIGS DURING PREGNANCY.

No. SC01-1367.

Jan. 17, 2002.

Robert A. Butterworth, Attorney General, and Louis F. Hubener III, Assistant Attorney General, Tallahassee, FL, for Petitioner.

Stephen H. Grimes and Susan L. Kelsey of Holland & Knight, Tallahassee, FL, for Floridians for Humane Farms.

PER CURIAM.

Pursuant to section 15.21, Florida Statutes (2001), the Secretary of State submitted to the Attorney General an initiative petition which sought to amend the Florida Constitution to limit the cruel and inhumane confinement of pigs during pregnancy. In turn, the Attorney General petitioned this Court for an advisory opinion relative to the validity of this initiative petition (hereinafter "proposed amendment") according to article IV, section 10 of the Florida Constitution, and section 16.061, Florida Statutes (2001). We have jurisdiction. *See* art. IV, § 10; art. V, § 3(b)(10), Fla. Const. In response, this Court issued an order permitting interested parties to file briefs on the proposed amendment. [FN1]

FN1. No briefs were filed in opposition to the proposed amendment.

The following are the ballot title and summary of the proposed amendment:

Ballot title: Animal Cruelty Amendment: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy.

Ballot summary: Inhumane treatment of animals is a concern of Florida citizens; to prevent cruelty to animals and as recommended by The Humane Society of the United States, no person shall confine a pig during pregnancy in a cage, crate or other enclosure, or tether a pregnant pig, on a farm so that the pig is prevented from turning around freely, except for veterinary purposes and during the prebirthing period; provides definitions, penalties, and an effective date.

The text of the proposed amendment, which would add section 20 to article X of the Florida Constitution, provided as follows:

Section 20. Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy.

Inhumane treatment of animals is a concern of Florida citizens. To prevent cruelty to certain animals and as recommended by The Humane Society of the United States, the people of the State of Florida hereby limit the cruel and inhumane confinement of pigs during pregnancy as provided herein.

(a) It shall be unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely.

(b) This section shall not apply:

(1) when a pig is undergoing an examination, test, treatment or operation carried out for veterinary purposes, provided that the period during which the animal is confined or tethered is not longer than reasonably necessary.

(2) during the prebirthing period.

(c) For purposes of this section:

***598** (1) "enclosure" means any cage, crate or other enclosure in which a pig is kept for all or the majority of any day, including what is commonly described as the "gestation crate."

(2) "farm" means the land, buildings, support facilities, and other appurtenances used in the production of animals for food or fiber.

(3) "person" means any natural person, corporation and/or business entity.

(4) "pig" means any animal of the porcine species.

(5) "turning around freely" means turning around without having to touch any side of the pig's enclosure.

(6) "prebirthing period" means the seven-day period prior to a pig's expected date of giving birth.

(d) A person who violates this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082(4)(a), Florida Statutes (1999), as amended, or by a fine of not more than $5000, or by both imprisonment and a fine, unless and until the legislature enacts more stringent penalties for violations hereof. On and after the effective date of this section, law enforcement officers in the state are authorized to enforce the provisions of this section in the same

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manner and authority as if a violation of this section constituted a violation of Section 828.13, Florida Statutes (1999). The confinement or tethering of each pig shall constitute a separate offense. The knowledge or acts of agents and employees of a person in regard to a pig owned, farmed, or in the custody of a person, shall be held to be the knowledge or act of such person.
(e) It is the intent of this section that implementing legislation is not required for enforcing any violations hereof.
(f) If any portion of this section is held invalid for any reason, the remaining portion of this section, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.
(g) The section shall take effect six years after approval by the electors.

The first issue we address is whether the proposed amendment meets the single- subject requirement. Article XI, section 3 of the Florida Constitution provides in pertinent part that proposed amendments based on citizen initiative petitions "shall embrace but one subject and matter directly connected therewith." The single-subject requirement applies to the citizen initiative method of amending the constitution because

> section 3 [citizen initiative] does not afford the same opportunity for public hearing and debate that accompanies the proposal and drafting processes of sections 1, 2, and 4. Accordingly, section 3 protects against multiple "precipitous" and "cataclysmic" changes in the constitution by limiting to a single subject what may be included in any one amendment proposal.

Advisory Opinion to the Atty. Gen. re Fish & Wildlife Conservation Comm'n, 705 So.2d 1351, 1353 (Fla.1998).

A proposed amendment must manifest a "logical and natural oneness of purpose" in order to satisfy the single-subject requirement. *Fine v. Firestone,* 448 So.2d 984, 990 (Fla.1984). This determination requires this Court to consider whether the proposed amendment affects separate functions of government, as well as how it affects other provisions of the constitution. *See In re Advisory Opinion to the Atty. Gen.--Restricts Laws Related to Discrimination,* 632 So.2d 1018, 1020 (Fla.1994). However, "the possibility that an amendment might interact with other parts of ***599** the Florida Constitution is not sufficient reason to invalidate the proposed amendment." *Advisory Opinion to the Atty. Gen.--Fee on the Everglades Sugar Prod.,* 681 So.2d 1124, 1128 (Fla.1996) (quoting *Advisory Opinion to the Atty. Gen. re Limited Casinos,* 644 So.2d 71, 74 (Fla.1994)). Likewise, "[a] proposal that affects several branches of government will not automatically fail." *Fish & Wildlife Conservation Comm'n,* 705 So.2d at 1353-54. Rather, "it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." *Id.* at 1354.

The only subject embraced in the proposed amendment is a prohibition against the inhumane confinement of pregnant pigs. Its provisions, which indicate the definitions, exemptions, penalties, and an effective date, are logically related to the subject of the proposed amendment. *See Advisory Opinion to the Atty. Gen.--Limited Marine Net Fishing,* 620 So.2d 997 (Fla.1993). Thus, we find that the proposed amendment is functionally and facially unified and therefore complies with the single-subject requirement.

Section 101.16(1), Florida Statutes (2001), governs the requirements for ballot titles and summaries and provides, in relevant part:

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment ... shall be printed in clear and unambiguous language on the ballot.... [T]he substance of the amendment ... shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

§ 101.161(1), Fla. Stat. (2001). Thus, the statute requires that the ballot title and summary "state in 'clear and unambiguous language the chief purpose of the measure.' " *Advisory Opinion to the Atty. Gen.--Limited Political Terms in Certain Elective Offices,* 592 So.2d 225, 228 (Fla.1991) (quoting *Askew v. Firestone,* 421 So.2d 151, 155 (Fla.1982)); *accord Advisory Opinion to the Atty. Gen. re Right of Citizens to Choose Health Care Providers,* 705 So.2d 563, 566 (Fla.1998). The title and summary must also be accurate and informative. *See Advisory Opinion to the Atty. Gen. re Term Limits Pledge,* 718 So.2d 798, 803 (Fla.1998). These requirements make certain that the "electorate is advised of the true meaning, and ramifications, of an amendment." *Advisory Opinion to the Atty. Gen. re Tax Limitation,* 644 So.2d 486, 490 (Fla.1994) (quoting *Askew,* 421 So.2d at 156). This Court concluded that the purpose of the statute was "to provide fair notice of the content of the proposed amendment so that the

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voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Term Limits Pledge*, 718 So.2d at 803. Nevertheless, "the title and summary need not explain every detail or ramification of the proposed amendment." *Advisory Opinion to the Atty. Gen. re Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So.2d 972, 975 (Fla.1997).

In this proposed amendment, the ballot title does not exceed fifteen words and the ballot summary does not exceed seventy-five words in length in accordance with section 101.161(1), Florida Statutes (2001). Because the substance of the proposed amendment complies with the abovementioned standards, we find that the ballot title and summary provide the citizens of Florida with sufficient information to make an informed decision at the ballot box.

***600** Accordingly, we hold that the initiative petition and proposed ballot title and summary meet the legal requirements of article XI, section 3 of the Florida Constitution, and section 101.161(1), Florida Statutes (2001). No other issue is encompassed in this opinion, and it should not be construed as favoring or opposing the passage of the proposed amendment.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, LEWIS, and QUINCE, JJ., concur.

PARIENTE, J., concurs with an opinion, in which ANSTEAD and LEWIS, JJ., concur.

PARIENTE, J., concurring.

I concur in the majority opinion but write separately to emphasize that this Court's approval of the proposed constitutional amendment for placement on the ballot is limited to whether the amendment meets the single subject and ballot summary requirements. In other words, the merits or wisdom of the proposal is irrelevant to whether the proposed amendment may be placed on the ballot. Thus, our approval of the amendment should not be construed as an expression on the merits or wisdom of the proposed constitutional amendment or whether the subject matter of the proposed amendment is one more appropriately addressed by the Legislature for inclusion in the statutory law of this State. *See Advisory Opinion to the Attorney Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.*, 769 So.2d 367, 368-69 (Fla.2000).

However, I cannot help but observe that the issue of whether pregnant pigs should be singled out for special protection is simply not a subject appropriate for inclusion in our State constitution; rather it is a subject more properly reserved for legislative enactment. I thus find that former Justice McDonald's observations made when this Court reviewed the net fishing amendment continue to ring true today:

> The merit of the proposed amendment is to be decided by the voters of Florida and this Court's opinion regarding the wisdom of any proposed amendment is irrelevant to its legal validity. I am concerned, however, that the net fishing amendment is more appropriate for inclusion in Florida's statute books than in the state constitution.
>
> *The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society.*
>
> The power to change both the constitution and statutory law is, theoretically, vested in the people. The power to amend the constitution is implicit in the declaration in article I, section 1, Florida Constitution, that "[a]ll political power is inherent in the people." The 1968 revision of the state constitution adopted the Revision Commission's recommendation to include a section explicitly dealing with the initiative process. According to article XI, section 3, "[t]he power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people ...." Recognizing the sovereignty of the people, I still feel compelled to express my view that the permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments.
>
> ***601** Undoubtedly, some of Florida's most crucial legal principles have evolved as a result of the initiative process. However, the legislative power of the state is vested in the Legislature, art. III, § 1, and on matters that are statutory in nature, a

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> concerted effort should be made to have the Legislature address the subject. The technical requirements, such as the single-subject rule and the requirements of section 101.161(1), Florida Statutes (1991), appear insufficient to prevent abuse of the amendment process. At this juncture, rather than espouse any particular solution as to how to prevent such abuse, I merely express my thought that some issues are better suited as legislatively enacted statutes than as constitutional amendments. It is my hope that the next Revision Commission will have the opportunity to establish some criteria regarding the subject matter of initiatives that will preserve the constitution as a document of fundamental laws, while still preserving the popular power of the people.

Advisory Opinion to the Attorney Gen.--Limited Marine Net Fishing, 620 So.2d 997, 999-1000 (Fla.1993) (McDonald, J., concurring) (footnote and citation omitted) (emphasis supplied). Unfortunately, as of this date, no changes to the citizen's initiative process have been made, and thus the number of initiatives continues to proliferate without restriction as to their subject matter. Unless changes are made to the citizen's initiative process, this Court has no choice but to restrict its review solely to whether the proposed constitutional amendment comports with the single subject and ballot summary requirements.

ANSTEAD and LEWIS, JJ., concur.

815 So.2d 597, 27 Fla. L. Weekly S71

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IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

COALITION TO REDUCE CLASS SIZE, and PRE-K COMMITTEE (PARENTS FOR READINESS EDUCATION FOR OUR KIDS) (PAC),

Plaintiffs,

vs.

KATHERINE HARRIS, in her capacity as SECRETARY OF STATE and as head of the DEPARTMENT OF STATE; and STATE OF FLORIDA, DEPARTMENT OF STATE,

Defendants.

CASE NO: 02-CA-1490

FILED
CIRCUIT CIVIL DIV.
02 JUL 17 PM 4:26
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

ORDER GRANTING PRELIMINARY INJUNCTION

This cause coming on for hearing, upon application of Plaintiffs, after notice to the Defendants, and after said parties have presented argument to the Court in connection therewith; and upon reading of the complaint, and upon consideration of the evidence presented and the provisions of Chapter 2002-390, Laws of Florida; the Court grants the Plaintiffs' Motion for Temporary Injunction, it appearing that the Plaintiffs are entitled to a temporary injunction pursuant to Fla.R.Civ.P. 1.610 for the following reasons:

The Plaintiffs have shown a substantial likelihood of success on the merits

1. The statutory requirements that the Department of State include on the November 2002 general election ballot "an analysis and fiscal impact of the estimated increase and decrease in any revenues or costs to the state resulting from the proposed initiative" prepared by the Revenue Estimating Conference established by Chapter 2002-

390, Laws of Florida, violate Article XI, Section 3, and Article XI, Section 5, Florida Constitution. Article XI, Section 3, Florida Constitution, is a self-executing method of amending the Constitution by citizen initiative. Legislation affecting this process is permissible only if necessary to ensure ballot integrity.

2. The statutory requirements that the Department of State include on the November 2002 general election ballot "an analysis and fiscal impact of the estimated increase and decrease in any revenues or costs to the state resulting from the proposed initiative" prepared by the Revenue Estimating Conference are not necessary to ensure ballot integrity of the initiative process.

3. An analysis and fiscal impact of the estimated increase and decrease in any revenues or costs to the state resulting from a proposed initiative prepared by governmental entity comments upon the "estimated impact" of a proposed initiative amendment and as such does not ensure the effectiveness of the "constitutionally provided initiative process." *State ex rel. Citizens for Tax Relief v. Firestone,* 386 So.2d 561 (Fla. 1980); *Miami Heat Limited Partnership v. Leahy,* 682 So.2d 198 (Fla. 3rd DCA 1996).

4. Moreover, the application of the fiscal impact statement in the challenged legislation to citizen initiatives, such as those proposed by the Plaintiffs, constitutes an abrogation of vested rights of the Plaintiffs. The Supreme Court of Florida has approved the Plaintiffs' amendments for placement on the ballot. The application of the challenged legislation of HB 65-E to the Plaintiffs' proposed amendments would not only violate the Due Process Clauses of the federal and state constitutions, but would also disrupt the constitutional process for judicial review of citizen initiatives to amend the constitution.

5. In consideration of the foregoing, this Court concludes there is a substantial likelihood that the Plaintiffs will prevail on the merits.

Likelihood that the Plaintiffs Will Suffer Irreparable Injury if the Injunction is not Granted

6. Both the Class Size amendment and the Pre-K amendment have been approved by the Florida Supreme Court for compliance with the single subject requirements of Article XI, Section 3, Florida Constitution, and the ballot title and summary requirements of Section 101.161, Florida Statutes. According to the sponsors, both amendments have collected the requisite number of signatures for placement on the general election ballot in November 2002. These signatures are in the process of being verified by supervisors of elections across the state. Unless the requisite number of signatures are verified, the amendments will not be on the general election ballot.

7. The Revenue Estimating Conference, in accordance with the requirements of Chapter 2002-390, Laws of Florida, on June 27, 2002, reviewed both amendments and prepared as fiscal impact statement, not exceeding 50 words in length, describing the fiscal impact of each amendment. If not enjoined, statements of fiscal impact will appear on the ballot, together with the language of the initiative proposals.

8. Because of the time constraints involved in printing ballots and preparing for the 2002 general election and because of the significant impact on the state and federal constitutional rights of the sponsors of the initiative petitions if the Defendants are not enjoined, this Court concludes that Plaintiffs will suffer irreparable injury if the injunction is not granted.

The Threatened Injury to the Plaintiffs Outweighs the Threatened Harm the Injunction May Do to the Defendants

9. The asserted state interest in having a fiscal impact statement appear on the ballot with an initiative proposal is that the public be made aware of the potential costs of a proposed change to the State Constitution. This interest does not outweigh the interests of sponsors of an initiative to present their amendments to the electorate without governmental interference. This is especially true where the constitutionally provided initiative process does not authorize or empower the government to add a fiscal impact comment to an amendment to the State Constitution proposed by initiative.

10. Accordingly, this Court concludes that the threatened injury to the Plaintiffs outweighs the threatened harm the injunction may do to the asserted interests of the Defendants.

Granting the Injunction Will Not Disserve the Public Interest

11. The issuance of the injunction in this case serves the public interest. Under Article XI, Section 3, Florida Constitution, it is the people – the inherent source of all political power under our State Constitution (Article I, Section 1, Florida Constitution) – who are directly exercising their right to amend their constitution. By granting this injunction, the right of the people to amend their constitution within the prescribed constitutional process is preserved. By granting this injunction, the constitutionally provided initiative process is maintained, until the people decide whether to change that process at the general election of November 2002 when called upon to vote on Constitution Revision No. 2, which asks the people whether the Legislature should be

empowered to pass a law to provide for economic impact statements for proposed initiative amendments.

IT IS, THEREUPON, ORDERED, ADJUDGED, AND DECREED:

That a preliminary injunction be granted, enjoining Defendants, Katherine Harris, as the Secretary of State and as head of the Department of State, and the State of Florida, Department of State, and their deputies, agents, servants and employees, from placing on the ballot as directed by Chapter 2002-390, Laws of Florida, an analysis and fiscal impact statement for any initiative approved by the Florida Supreme Court for the general election ballot for November 2002.

This order shall become effective upon the filing in this Court of Plaintiffs' bond in the sum of one thousand dollars ($1,000.00), for attorneys fees and costs, to be approved by the Clerk of this Court, and conditioned that Plaintiffs will pay all costs and damages the State of Florida might sustain by the improper issuance of this temporary injunction.

Done and ordered at Tallahassee, Florida, this 17th day of July 2002.

P. Kevin Davey
Circuit Judge

Copies to Counsel for the Parties

H
Briefs and Other Related Documents

Supreme Court of Florida.

Jim SMITH, Secretary of State, etc., et al., Appellants,
v.
COALITION TO REDUCE CLASS SIZE and Pre-K Committee, etc., Appellees.

No. SC02-1624.

Sept. 13, 2002.

Sponsors of initiatives to amend the state constitution sought to enjoin the Secretary of State from placing fiscal impact statements on the ballot. The Circuit Court granted the injunction. Secretary of State appealed. The District Court of Appeal certified case for immediate resolution. The Supreme Court, Harding, Senior Justice, held that the statutory requirement of a fiscal impact statement on an initiative to amend the constitution was unnecessary to ensure ballot integrity and, therefore, was unconstitutional.

Affirmed.

Wells, J., dissented and filed opinion.

West Headnotes

[1] Appeal and Error 954(1)
30k954(1) Most Cited Cases

[1] Injunction 1
212k1 Most Cited Cases

To the extent that a permanent injunction rests on factual matters, it lies within the sound discretion of the trial court and will be affirmed absent a showing of abuse of discretion particularly where the order relies on live testimony or other evidence that the trial court is singularly well-suited to evaluate.

[2] Appeal and Error 893(1)
30k893(1) Most Cited Cases

To the extent an injunction rests on purely legal matters, an order imposing it is subject to full, or de novo, review.

[3] Constitutional Law 9(1)
92k9(1) Most Cited Cases

The statutory requirement of a fiscal impact statement on an initiative to amend the constitution was unnecessary to ensure ballot integrity and, therefore, violated the state constitutional requirements for an initiative to amend the constitution. West's F.S.A. Const. Art. 11, § § 3, 5; West's F.S.A. § § 100.371(6)(a), 101.161(1).

[4] Constitutional Law 9(.5)
92k9(.5) Most Cited Cases

To be constitutional, any legislative act or administrative rule which concerns the initiative process for amending the constitution must be necessary for ballot integrity. West's F.S.A. Const. Art. 11, § § 3, 5.

[5] Constitutional Law 9(.5)
92k9(.5) Most Cited Cases

If the constitutional requirements for an initiative to amend the constitution are met, then the sponsor has the right to place the initiative on the ballot. West's F.S.A. Const. Art. 11, § § 3, 5.

West Codenotes
Held Unconstitutional
West's F.S.A. § § 100.371(6), 101.161(1)

***960** L. Clayton Roberts, General Counsel, and Heidi Hughes, Assistant General Counsel, Florida Department of State, Tallahassee, FL, for Appellants.

Mark Herron and Thomas M. Findley of Messer, Caparello & Self, P.A., Tallahassee, FL; and Laurie Mathews of Hunton & Williams, Miami, FL, for Appellees.

Charles T. Canady, General Counsel, Carlos G. Muniz, Deputy General Counsel, and Simone Marstiller, Assistant General Counsel, Tallahassee, FL, for Jeb Bush, Governor of the State of Florida, Amicus Curiae.

Benjamin H. Hill, III, Lynn C. Hearn, and Mark J. Criser of Hill, Ward & Henderson, P.A., Tampa, FL, for The Florida House of Representatives, Amicus Curiae.

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HARDING, Senior Justice.

We have for review a trial court judgment certified by the district court of appeal to be of great public importance and to require immediate resolution by this Court. We have jurisdiction. *See* art. V, § 3(b)(5), Fla. Const. For the reasons expressed below, we affirm the trial court's judgment finding that the statutorily imposed fiscal impact statement is an unconstitutional imposition on the initiative process. [FN1]

FN1. We note that the Legislature has proposed a constitutional amendment which would require a fiscal impact statement to be placed on the ballot for all future proposed constitutional amendments by initiative. The citizens of this state will be given the opportunity to vote on this amendment in the November 2002 election.

This case concerns the constitutionality of chapter 2002-390, Laws of Florida, which requires the Department of State to include for all proposed revisions or amendments to the state constitution by initiative "an analysis and fiscal impact statement" prepared by the Revenue Estimating Conference, estimating the "increase or decrease in any revenues or costs to state or local governments resulting from [the adoption of] the proposed initiative." The law requires the statement to be "clear and unambiguous" and to not exceed fifty words. The fiscal impact statement would be separately contained and placed on the ballot after the ballot summary.

Two political committees that were formed to advocate the adoption of proposed amendments [FN2] sought a temporary ***961** injunction enjoining the Secretary of State from placing the fiscal impact statements on the November 2002 ballot. The committees pointed out to the circuit court that this Court has already approved the ballot titles and summaries for both **initiatives.** *See* *Advisory Opinion to the Attorney General re Voluntary Universal Pre-Kindergarten Education,* 824 So.2d 161 (Fla.2002); *Advisory Opinion to the Attorney General re Florida's Amendment to* ***Reduce Class Size,*** 816 So.2d 580 (Fla.2002). The circuit court below granted the injunction, finding the fiscal impact statement requirement facially unconstitutional because it violates article XI, sections 3 and 5 of the Florida Constitution. The circuit court also found the provision unconstitutional as applied to appellees and others who have already had their proposals approved by this Court for placement on the ballot, since it would abrogate vested rights in violation of the due process clauses of the state and federal constitutions. Therefore, the circuit court enjoined appellants from placing a fiscal impact statement for any **initiative** on the November ballot.

FN2. The two groups are the Coalition to Reduce Class Size and the Pre-K Committee.

On appeal, the First District Court of Appeal concluded that the case was one requiring immediate resolution by this Court, pursuant to Rule of Appellate Procedure 9.125. *See* *Harris v. Coalition to Reduce Class Size,* 824 So.2d 245 (Fla. 1st DCA 2002). The district court noted that the ballots for the November 2002 election must be printed and mailed no later than September 21.

[1][2] We begin our analysis by addressing the appropriate standard of review. In *Operation Rescue v. Women's Health Center,* 626 So.2d 664 (Fla.1993), this Court stated the following regarding an appellate court's standard of review of a trial court's grant of an injunction:

> Where an injunction is issued and challenged, Florida's appellate courts possess express authority to review the order. Fla. R.App. P. 9.130(a)(3)(B). The scope of review, however, is limited. As a general rule, trial court orders are clothed with a presumption of correctness and will remain undisturbed unless the petitioning party can show reversible error. To the extent it rests on factual matters, an order imposing a permanent injunction lies within the sound discretion of the trial court and will be affirmed absent a showing of abuse of discretion. This is particularly true where the order relies on live testimony or other evidence that the trial court is singularly well-suited to evaluate. Abuse of discretion, of course, is judged by the general "reasonableness" standard:
> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not

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unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness. *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla.1980). To the extent it rests on purely legal matters, an order imposing an injunction is subject to full, or de novo, review on appeal.

Id. at 670 (citations omitted).

The issue in this case is whether chapter 2002-390 violates the Florida Constitution. Article XI, section 3 of the Florida Constitution, entitled "Initiative," provides:

The power to propose the revision or amendment of any portion or portions of ***962** this constitution by initiative is reserved to the people, provided that any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

Article XI, section 5, entitled "Amendment or Revision Election," provides:

(a) A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution, initiative petition or report of revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the secretary of state, unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature and limited to a single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.

(b) Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published.

(c) If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

In *State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So.2d 561 (Fla.1980), this Court found that article XI, section 3 was a self-executing constitutional provision. Accordingly, this Court recognized that the Legislature only has limited authority to adopt regulations that affect the initiative process:

This is a self-executing constitutional provision. It clearly establishes a right to propose by initiative petition a constitutional amendment which may be implemented without the aid of any legislative enactment. *Gray v. Bryant*, 125 So.2d 846 (Fla.1960). In this regard, this initiative process has already produced a constitutional amendment which was adopted without the benefit of the subject statute or rule. Art. II, § 8 (Ethics in Government).

The four methods of amending our constitution must be considered as a whole to effect their overall purpose. *Smathers v. Smith*, 338 So.2d 825 (Fla.1976). They are delicately balanced to reflect the power of the people to propose amendments through the initiative process and the power of the legislature to propose amendments by its legislative action without executive check. Only these two methods can produce constitutional amendment proposals at each general election. The power to propose amendments to the electorate by the constitution revision commission or a constitutional convention procedure is substantially restricted by their ability to exist. In considering any legislative act or administrative rule which concerns the initiative amending process, ***963** we must be careful that the legislative statute or implementing rule is necessary for ballot integrity since any restriction on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process. The delicate symmetric balance of this constitutional scheme must be maintained, and any legislative act regulating the process should be allowed only when necessary to ensure ballot integrity. We do, however, recognize that the legislature, in its legislative capacity, and the secretary of state, in his executive capacity, have the duty and obligation to ensure ballot integrity and a valid election process. Ballot integrity is necessary to ensure the effectiveness of the constitutionally provided initiative process.

Id. at 566-67. In *Tax Relief*, the appellant citizens group was attempting to place a constitutional

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amendment on the ballot by initiative pursuant to article XI, section 3. An existing statute and administrative rule imposed certain requirements on an initiative's sponsor before the proposal would be placed on the ballot. Among these were verification procedures for the signatures found on the petition and a requirement that initiative petitions be filed with the secretary of state 122 days preceding the next general election rather than the ninety days required in article XI, section 5. This Court determined that procedures for signature verification were constitutional as they were necessary for ballot integrity. However, this Court rejected the 122-day cutoff date, finding that there was no constitutional authority for the limitation.

[3][4] Pursuant to the standard announced in this Court's opinion in *Tax Relief,* "[i]n considering any legislative act or administrative rule which concerns the initiative amending process, we must be careful that the legislative statute or implementing rule is necessary for ballot integrity." 386 So.2d at 566. Therefore, in the instant case, the Court must decide whether chapter 2002-390 is necessary to ensure ballot integrity. The circuit court below concluded that it was not. [FN3] We agree.

FN3. We review the circuit court's legal finding de novo. *See Operation Rescue,* 626 So.2d at 670.

[5] Article XI does not contain any language, either explicit or implicit, regarding the fiscal impact of initiatives. [FN4] Article XI, section 3 grants Floridians the power to amend the constitution by initiative. The requirements for exercising this power are set forth in article XI, section 3. If these requirements are met, then the sponsor of an initiative has the right to place the initiative on the ballot. However, with the passage of chapter 2002-390, an initiative's appearance on the ballot will be substantially altered, due to the addition of the fiscal impact statement. The effect of chapter 2002-390 would be to "weaken the power of the initiative process." *Tax Relief,* 386 So.2d at 566. Hence, we are unable to conclude that chapter 2002-390 is necessary to ensure ballot integrity.

FN4. In its amicus brief, the House of Representatives asserts that ten states have statutory fiscal impact requirements for initiatives even though the right of initiative is provided for in the state constitutions of the respective states. The House adds that these fiscal impact requirements have not been challenged in any of these states. However, we note that there are differences between our state constitution and some of the other state constitutions. For instance, article 19, section 5 of the Nevada Constitution provides that "[t]he provisions of [the initiative] article are self-executing *but the legislature may provide by law for procedures to facilitate the operation thereof.*" There is no such grant of legislative authority in article XI of the Florida Constitution.

***964** The appellants and the House of Representatives, as amicus, argue that the fiscal impact statement is necessary for the electorate to be informed. While we do not in any way diminish the importance of an informed electorate, we find that the fiscal impact statement does not go to the ballot integrity which is a prerequisite for any legislative involvement in the initiative process.

In *Miami Heat Ltd. Partnership v. Leahy,* 682 So.2d 198 (Fla. 3d DCA 1996), the Third District Court of Appeal considered an analogous case. In *Leahy,* the appellants argued that an initiative petition violated section 12-12 of the Dade County Code, which provided that "Initiative petitions proposed pursuant to Sections 7.01 or 8.07 of the Dade County Home Rule Charter shall embrace but one subject and matter directly connected therewith." The intervenor responded that the Home Rule Charter provided the sole procedure and qualifications an initiative petition must meet for submittal to the electorate and therefore section 12-12 was invalid and no single-subject requirement was applicable. The district court agreed:

> We agree with the intervenor that the Home Rule Charter provides the only method for initiating referenda on ordinances and does not impose a single subject requirement. Article VIII, section 11(1)(i) of the 1885 Florida Constitution, carried forward by Article VIII, section 6(e) of the 1968 Florida Constitution, states that the Home Rule Charter "[s]hall provide a method for ... initiative and referendum, including the initiation of and referendum on ordinances ...." Section 7.01 of the Charter carries out the constitutional directive and lays out a "procedure" for Dade County electors to initiate passage of or referenda on ordinances. Nowhere in that procedure is there a requirement

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that initiative petitions embrace only a single subject.

Id. at 202. Citing to this Court's decision in *Tax Relief,* the district court concluded that section 12-12 of the Code was not "necessary to ensure ballot integrity" and that such a restriction on the initiative process would strengthen the authority and power of the County Commission but weaken the power of the initiative process. *Id.* The district court stated that the charter was supreme and if the Board of County Commissioners wished to impose a single subject requirement on initiative petitions, it must do so by amendment to the charter itself. *See id.* at 203.

Similarly, in the instant case, the proper way to impose a fiscal impact requirement would be to amend article XI as the 2001 Legislature proposed by passage of House Joint Resolution 571. [FN5] House Joint Resolution 571 will appear on the November 2002 ballot. If Floridians wish to have a ***965** fiscal impact statement included with all initiatives to amend the constitution, then they can vote to adopt House Joint Resolution 571. We emphasize that our opinion should not be interpreted as a comment on the wisdom of having or not having a fiscal impact statement included with initiatives to amend the constitution or the wisdom of adopting or not adopting House Joint Resolution 571. We only conclude that the fiscal impact statement requirement cannot be imposed on the initiative process by statute or administrative rule.

FN5. House Joint Resolution 571 provides in relevant part: A joint resolution proposing a revision of Article XI, Section 5 of the State Constitution requiring the Legislature to provide by general law for the provision of an economic impact statement of each amendment proposed by initiative to the State Constitution prior to its adoption by the voters of the state. Be It Resolved by the Legislature of the State of Florida:
That the amendment to Section 5 of Article XI of the State Constitution set forth below is agreed to and shall be submitted to the electors of Florida for approval or rejection at the general election to be held in November 2002:
SECTION 5. Amendment or revision election.--
....
(b) The legislature shall provide by general law, prior to the holding of an election pursuant to this section, for the provision of a statement to the public regarding the probable financial impact of any amendment proposed by initiative pursuant to Section 3.

Accordingly, for the reasons expressed in this opinion, we affirm the circuit court's judgment. No motion for rehearing will be permitted.

It is so ordered.

ANSTEAD, C.J., and SHAW, PARIENTE, LEWIS, and QUINCE, JJ., concur.

WELLS, J., dissents with an opinion.

WELLS, J., dissenting.

I dissent.

I do not join the majority because I do not find that the legislative act of requiring a "fiscal impact statement" positively and certainly is opposed to the Constitution. It is on that basis that this Court's historical precedent has stated that the courts must rely in interfering with the decision of the Legislature to act. In *Greater Loretta Improvement Ass'n v. State,* 234 So.2d 665, 670 (Fla.1970), this Court expressly stated:

> When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another of power committed to the latter. The courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. I believe this is sound precedent and evidences proper respect for the Florida Constitution's mandate as to separation of powers as set forth in article II, section 3, and for the powers of the Legislature granted by article III, section 1.

The majority relies upon this Court's decision in *State ex rel. Citizens Proposition for Tax Relief v. Firestone,* 386 So.2d 561 (Fla.1980). I find the issue in that case to be totally different than the one here under consideration. In that case what was held by

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the Court to be unconstitutional was a time limit, which this Court's majority found to be in conflict with the time period in the express language of the Constitution. However, this Court later made clear in Krivanek v. Take Back Tampa Political Committee, 625 So.2d 840 (Fla.1993), that the Legislature had the power to reasonably regulate the initiative election process.

> Given its constitutional underpinnings, the right to petition is inherent and absolute. *This does not mean, however, that such a right is not subject to reasonable regulation. Quite to the contrary, reasonable regulations on the right to vote and on the petition process are necessary to ensure ballot integrity and a valid election process. See, e.g., State ex rel. Citizens Proposition for Tax Relief v. Firestone,* 386 So.2d 561 (Fla.1980) (legislature and secretary of state may impose reasonable regulations on process of petition validation to ensure expeditious and proper verification of petition signatures).

Krivanek, 625 So.2d at 843 (emphasis added). Indeed, the Legislature has regulated the process by the requirements of sections 99.097, 100.371, and ***966**101.161, Florida Statutes. This Court has on various occasions stricken initiatives from the ballot for failure to adhere to the requirements of section 101.161. *See, e.g., Advisory Opinion to the Attorney Gen. re Fish & Wildlife Conservation Comm'n,* 705 So.2d 1351, 1355 (Fla.1998). Moreover, this Court has even stricken an adopted initiative from the Constitution based upon this statutory requirement. *Armstrong v. Harris,* 773 So.2d 7, 16 (Fla.2000).

Nor can I agree with the majority's statement that because article XI, section 3, is self-executing, "the Legislature only has limited authority to adopt regulations that affect the initiative process." Majority op. at 962. The fact that a constitutional provision is self-executing and can be implemented without the aid of legislative enactments should in no way restrict the Legislature's power to enact those reasonable regulations that are not positively and certainly opposed to the Constitution. *See Greater Loretta,* 234 So.2d at 670. A self-executing constitutional provision does not preempt the regulatory field so as to inhibit legislative power. *Cf. Gray v. Bryant,* 125 So.2d 846, 851 (Fla.1960) ("The fact that the right granted by the provision may be supplemented by legislation ... does not of itself prevent the provision from being self-executing.").

Likewise, I cannot agree with the majority that the fact that the requirement for a fiscal impact statement in respect to initiatives has been placed on this November's ballot by the Legislature so that voters can make a fiscal impact statement a constitutional requirement is relevant to the present issue. The fact that the Legislature decided to have on the November ballot an amendment which would make fiscal impact statements a constitutional requirement in no way diminishes the Legislature's power to adopt such a requirement by statute. Such an amendment is not necessary for the Legislature to possess such authority. Its inclusion in the Constitution would, however, assure that the requirement of a fiscal impact statement could not be stricken from the statutes in the future without an amendment adopted by the people.

Respondents have argued that the fiscal impact statement requirement can be the subject of government abuse by giving the government the opportunity to predict a high number or low number depending on whether the government favors or disfavors the initiative. I believe this contention misses the real issue for this Court to decide at this time. This is a facial attack upon the constitutionality of the statute. In this facial attack, the issue is neither the content of a particular fiscal impact statement nor the process by which the numbers in a fiscal impact statement were deduced. Rather, the sole question here is whether the Constitution bars the Legislature from legislating the requirement for a fiscal impact statement.

A challenge to the specific fiscal impact statements in this case would be an as-applied challenge to the statute, which is not before this Court. Therefore, I do not believe that the specter of manipulation or any kind of specter of bad faith on the part of the Legislature in respect to these fiscal impact statements has any role in respect to the present issue to be decided. To the contrary, here, as in every facial constitutional attack, the judicial branch has an obligation to afford the legislative branch the presumption that the legislative branch adopted a statute in good faith. *Smathers v. Smith,* 338 So.2d 825, 826-27 (Fla.1976).

As to the facial constitutionality of the fiscal impact statement requirement, the majority concludes that the effect of this requirement would be to "weaken the power of the initiative process." Majority op. at 963 (quoting *Tax Relief,* 386 So.2d at 566). In support of its conclusion, the majority analogizes this case to ***967***Miami Heat Ltd. Partnership v. Leahy,* 682 So.2d 198, 202 (Fla. 3d DCA 1996), in which the Third District Court of Appeal held that a county code section that imposed a single-subject rule on the

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initiative petition process in Dade County was invalid under the Dade County Home Rule Charter, which did not have a single-subject requirement for citizens initiatives. The *Leahy* court reasoned that the charter provision addressing that process was self-executing, and therefore a county code section that weakened the power of the initiative process was invalid if not "necessary to ensure ballot integrity." *Id. Leahy* is inapplicable to the case at hand because a single subject rule clearly changes the requirements for what the people can propose in an initiative. The fiscal impact statement requirement of chapter 2002-390 just as plainly does not change the requirements as to what the people can provide. Thus, I agree with the Third District's conclusion in *Leahy,* but I do not agree that the fiscal impact is analogous to the *Leahy* situation or that fiscal impact information per se "weakens the power of the initiative process." Knowledge is strength, not weakness.

Finally, I note the information in the Florida House of Representatives' amicus brief, which was not contested by respondents, that twenty-four states provide for constitutional or statutory amendments by citizen initiatives. Of those states, over forty percent have a *statutory* requirement for fiscal impact statements. Obviously, it is sound policy to have informed voters. I do not find anything in the Florida Constitution which prohibits the Florida Legislature from enacting a statute which would join these other states in having a statutorily required fiscal impact statement so that, as in those other states, Florida's voters have this information with the ballot summaries.

I do not agree with the majority's attempt in footnote 4 to minimize the fact that this substantial number of other states have this statutory requirement. What the Nevada Constitution, to which the majority's footnote refers, provides is the same power this Court has recognized the Florida Legislature has in section 101.161, Florida Statutes. As noted earlier in this opinion, if the Florida Legislature does not have the power to enact section 101.161 without the Nevada provision being expressed in the Constitution, then this Court has repeatedly erred in prohibiting initiatives from being on the ballot on the basis of noncompliance with that section.

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Briefs and Other Related Documents (Back to top)

- 2002 WL 32131499 (Appellate Brief) Brief of Amicus Curiae Jeb Bush, Governor of the State of Florida (Aug. 05, 2002)
- 2002 WL 32131612 (Appellate Brief) Brief of Amicus Curiae Jeb Bush, Governor of the State of Florida (Aug. 05, 2002)
- 2002 WL 32131500 (Appellate Brief) Respondents' Answer Brief (Aug. 2002)
- 2002 WL 32131613 (Appellate Brief) Respondents' Answer Brief (Aug. 2002)

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