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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?

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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*

INTRODUCTION

One method by which many state constitutions can be amended is the citizen initiative petition.[1] This method of amending a state constitution is authorized in eighteen states[2] and is a creature[3] of relatively recent vintage, with the first such provision enacted in 1898.[4]

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[5] to fifteen percent[6] of the statewide electorate.

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* 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.

1. *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).

2. 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.

3. 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 amended.

4. *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).

5. *See* MASS. CONST. art. XLVIII.

6. *See* OKLA. CONST. art. V, § 2.

The citizen initiative method of amending a state constitution has come under increasing—in both number and vociferousness—attacks by political observers[7] and legal scholars.[8] These attacks have labeled it a tool of bigots and economic special interests.[9]

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.[10] 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.

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.

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7. *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.

8. *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).

9. *See, e.g.*, Richard Fitch, *Initiative Mania*, SAN DIEGO UNION-TRIB., Sep. 16, 1990, at C2.

10. *See, e.g.*, Sneed v. Greensboro City Bd. of Educ., 264 S.E.2d 106, 122 (N.C. 1980).

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."[11] Chief Justice Warren Burger analogized the process to the venerable New England town meeting.[12] 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."[13] Justice Tom Clark, in his concurring opinion in *Baker v. Carr*,[14] 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.[15]

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.[16] Citizen initiatives also serve as a safety valve for voter frustration when a state government effectively ignores the wishes of the electorate.

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11. James v. Valtierra, 402 U.S. 137, 141 (1971).
12. *See* City of Eastlake v. Forest City Enters., 426 U.S. 668, 672-73 (1976).
13. *Id.* at 673.
14. 369 U.S. 186, 251 (1962) (Clark, J., concurring).
15. 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 referendum.

Id. at 258-59.
16. *See, e.g.*, Leonard, *supra* note 1, at 1211-19.

In 1898, South Dakota became the first state to permit the amendment of its constitution by this mechanism.[17] Between 1898 and 1918, fourteen additional states adopted provisions permitting citizen initiative petitions to propose constitutional amendments.[18] Of the states admitted to the Union during the first half of the twentieth century, only New Mexico failed to include an effective initiative and referendum provision in its state constitution.[19] Despite this failure, the topic was one of the most contested issues at the New Mexico Constitutional Convention of 1910.[20]

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.[21] At this period of time, these movements were at their most politically potent.

The citizen initiative petition is commonly labeled a "populist" device.[22] 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,[23] 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.[24] American populism has been described by one leading observer as the one constant political "ism" in American politics.[25]

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17. *See* S.D. CONST. art. XXIII, § 1.

18. *See* DAVID B. MAGLEBY, DIRECT LEGISLATURE: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES, 38-39 (1984).

19. *See* Leonard, *supra* note 1, at 1207, and sources cited therein.

20. *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).

21. *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).

22. See HICKS, *supra* note 21, at 406-07.

23. *See* GEORGE MCKENNA, AMERICAN POPULISM, xi-xii (1974).

24. *See id.* at xii.

25. *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.

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.[26]

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.[27] 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.[28]

> ....
> 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.

26. Letter from Thomas Jefferson to William Jarvis (Sept. 28, 1820), *reprinted in* MCKENNA, *supra* note 23, at 22.

27. *See* Leonard, *supra* note 1, at 1207 & n.23.

28. *See* Transcript of Proceedings of Oklahoma Constitutional Convention 89 (1906 - 1907)(on file with the author and available upon request)(hereinafter Oklahoma Convention Transcript).

> 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

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.[29] 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 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.[30]

"Alfalfa Bill" Murray's observation that the "fact that they have this power will make it unnecessary to use it"[31] 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.[32] 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.[33] 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 misrepresenta-

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> 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.

29. 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).

30. Oklahoma Convention Transcript, *supra* note 28, at 22-23 (emphasis added).

31. *Id.* at 23.

32. *See id.*

33. *See* DAVID D. SCHMIDT, CITIZEN LAW MAKERS-THE BALLOT INITIATIVE REVOLUTION, 9 (1989).

tive."[34] 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."[35]

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.[36] 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.[37]

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34. *Id.*

35. *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.

36. *See* Thomas C. Marks, *Constitutional Change Initiated by the People: One State's Unhappy Experience*, 68 TEMP. L. REV. 1241 (1995).

37. 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 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 trust and avoid conflicts between public duties and private interests.
>
> (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

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.[38] 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.[39] The initiative imposing such financial disclosure requirements ultimately passed with seventy-nine percent of the vote,[40] and was subsequently upheld by the courts—ironically in lawsuits filed by members of the state legislature.[41] 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.[42] 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.[43] In describing legislative attempts to limit the

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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.

38. 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.

39. *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.

40. *See* Cohen, *supra* note 38, at A23.

41. *See* Plante v. Gonzalez, 437 F. Supp. 536 (N.D. Fla. 1977); Plante v. Smathers, 372 So. 2d 933 (Fla. 1979).

42. 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).

43. 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.

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

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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, 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 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. 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.

> 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 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.[44]

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.[45] The voters corrected the inactivity of unresponsive representative government, and confidence in democracy, if not the legislature, was maintained.[46]

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.[47] In at

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44. *Lawmakers Launch Coastal Attack*, TAMPA TRIB., Mar. 23, 1995, at 14.

45. 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.

46. *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?

Id.

47. 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

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.[48] 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.[49] The fact that initiatives are "often unconstitutional,"[50] has been identified as one of the ten strongest objections to the creation or extension of the initiative.[51] While some popularly-supported initiatives have been declared unconstitutional,[52] 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

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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.

48. FLA. CONST. art. VII, § 1(e).

49. SCHMIDT, *supra* note 33, at 34.

50. *Id.*

51. *See id.*

52. *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).

initiatives were subsequently invalidated on any constitutional ground.[53] 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*,[54] the United States Supreme Court upheld executive and legislative actions that excluded persons from certain areas whose loyalty was not questioned based solely on their race.[55] In *Lochner v. New York*,[56] the federal courts temporarily elevated the capitalist economic system to constitutional protection.[57] The United States Supreme Court's decision in *Dred Scott v. Sanford*[58] 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*[59] 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.[60] 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.[61] The abolition

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53. SCHMIDT, *supra* note 33, at 34.
54. 323 U.S. 214 (1945).
55. *See id.* at 216.
56. 198 U.S. 45 (1905).
57. *See id.*
58. 60 U.S. (19 How.) 393 (1856).
59. 163 U.S. 537 (1896).
60. 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.

61. In Thomas Jefferson's view, leaving the protection of individuals rights to judges employed for life was a serious error:

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.[62]

> 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.

62. 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 politically powerless. Without offering a firm answer, 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

For example, many view the current federal judiciary as hostile to remedying past racial discrimination through the use of affirmative action programs.[63] 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.[64] 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."[65] 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.[66] 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.[67] 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."[68]

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.[69] This amendment, *inter alia*,

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> 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 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).

63. *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).

64. *See* Carl Rowan, *Houston Voters Embrace Racial Sanity*, DENVER POST, Nov. 10, 1997 at B-09.

65. Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295 (1981).

66. *See* Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1505 (1990).

67. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 79 (1980).

68. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 647 n.27 (2d ed. 1988).

69. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

purported to prohibit illegal aliens from receiving public services in the State of California.[70] Immediately following its enactment, five separate legal challenges were filed in federal court alleging the unconstitutionality of many of the provisions of the Proposition.[71] These separate actions were consolidated. A federal court, on November 16, 1994,[72] temporarily restrained the operation of Proposition 187. On December 14, 1994, the federal court granted the plaintiff's motion for a preliminary injunction.[73] On November 20, 1995, the federal court made the preliminary injunction permanent.[74] The permanent injunction remains in effect, while 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.[75] 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.[76] This injunction remained in effect until the Ninth Circuit Court of Appeals reversed,[77] finding the opponents of Proposition 209 possessed "no likelihood of success on the merits of their equal protection or pre-emption claims."[78] 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[79] 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,[80] while other courts have.[81] Recently, the Oklahoma Supreme Court

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70. *See id.*
71. *See id.*
72. *See id.*
73. *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.)
74. *See id.*
75. *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).
76. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996).
77. Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1448 (9th Cir. 1997).
78. *Id.*
79. *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).
80. *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").
81. *See, e.g.*, Gray v. Winthrop, 156 So. 270 (Fla. 1934).

invalidated an initiative petition and precluded it from being presented to the electorate.[82] It did so on the basis that the petition conflicted with federal constitutional law as interpreted by the United States Supreme Court.[83] 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.[84] Nonetheless, the ruling does evidence an avenue a particularly activist judiciary can travel in reviewing the federal constitutionality of an initiative petition.[85]

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."[86] 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

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82. *See In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1 (Okla. 1992).

83. *Id.* at 2.

84. *Id.* at 8.

85. 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.

86. James J. Seeley, *The Public Referendum and Minority Group Legislature: Postscript to* Reitman v. Mullkey, 55 CORNELL L. REV. 881, 908 (1970).

provision raises political questions only Congress can address.[87] 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.[88]

Despite the clarity of law on this point, a number of innovative—but ultimately unsatisfying—law review 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*.[89] Similarly, a constitutional initiative amendment characterized as "aimed primarily against homosexuality," was rejected by the Oregon electorate in November 1992.[90] Rather than applauding the enlightened tolerance of the Oregon electorate, a post-election legal attack was launched upon the initiative process itself.[91] The attack viewed initiatives as arrogating to the electorate decisions that the attacker presumably felt more properly disposed of by federal judges.[92]

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*.[93]

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court cited both *Luther v. Borden* and *Pacific States*.[94] 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 . . . ."[95] In its most recent analysis of the guarantee clause, the United States Supreme Court stated that it approached "the issue with some trepidation,"[96] in that in most cases in which the clause was raised,

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87. *See* Luther v. Borden, 48 U.S. (7 HOW.) 1, 42 (1849).

88. *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.

89. 387 U.S. 369 (1967); *see* Seeley, *supra* note 86, at 881.

90. *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).

91. *See generally* Linde, *supra* note 8 (attacking the statewide initiative process).

92. *See, e.g., id.* at 40.

93. 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).

94. *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).

95. *Id.* at 223.

96. New York v. United States, 505 U.S. 144, 184 (1992).

the Court "found the claims presented to be nonjusticiable."[97] While recognizing that this traditional approach had recently been questioned by courts and legal academics, the Court declined to address this "difficult question."[98]

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.[99] The results were certain and the reasoning convincing. For example, in *In re Pfahler*,[100] 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.[101]

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[102] 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.[103] The Enabling Act required that the "constitution shall be republican in form."[104] 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."[105] The Oklahoma Constitution, which Congress required to be "republican" in form, and was so held by President Roosevelt in his Proclamation of Statehood,[106] contained provisions for citizen initiative amendments at Article V,

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97. *Id.*

98. *Id.* at 185.

99. *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).

100. 88 P. 270 (Cal. 1906).

101. *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.

102. Act of June 16, 1906, ch. 3335, (34 Stat. 267, Part I, page 2).

103. *See id.*

104. *Id.* § 3, at 269.

105. *Id.* § 4, at 271.

106. *See* Oklahoma Convention Transcript, *supra* note 28, at 462 (1907). President Theodore Roosevelt's

Section 1.[107] 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.[108] Almost all of the academics' articles rely heavily on the general writings of James Madison and his concerns expressed in the *Federalist Papers*.[109]

While Madison's observations on a republican form of government will be specifically addressed below, a 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."[110] 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."[111]

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."[112] 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.[113]

> 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

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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.

107. *See* OKLA. CONST., art. V, § 1 (1907).

108. *See id.* § 512.

109. *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).

110. 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).

111. 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).

112. Eule, *supra*, note 66, at 1541.

113. *See id.*

> 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.[114]

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.[115] 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."[116] 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."[117] Some observers have noted the irony of using Madison's democratic political beliefs as a mean of attacking citizen initiative petitions.[118]

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*

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114. 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."

115. *See* Eule, *supra* note 66, at 1541.

116. *See* Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

117. *See id.* at 30-31.

118.

> 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.

> *clause forbids the federal government from interfering with state governments in a way that would destroy their republican character.*"[119]

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:[120]

> 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.[121]

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 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,[122] 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."[123] The proponent of this statute argues that Congress should "assert its power under the

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119. Merritt, *supra* note 116, at 25 (emphasis added).

120. Professor Merritt's analysis does not directly discuss initiatives, but this conclusion is arguable using her analysis.

121. Merritt, *supra* note 116, at 41 (footnotes omitted).

122. 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.

123. Leong, *supra* note 8, at 707.

Guarantee Clause, and the Fourteenth Amendment."[124] 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,"[125]—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."[126] To identify these "wrongs," the author cites circuitously[127] 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,[128] and Congress needs to ban some, or all of them, by a statute akin to an electoral "book burning."[129]

In identifying the "wrongs so many have drawn attention to,"[130] 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.[131] 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.[132] Sweeping statements describing citizen proposal initiatives as

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124. *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.

125. 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 knees tremble with trepidation.

126. Leong, *supra* note 8, at 707.

127. *See id.* at nn.16 & 162.

128. Peter Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA LAW & POL'Y SYMP. 27, 46 (1996).

129. 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.

130. Leong, *supra* note 8, at 707.

131. *See id.*

132. 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

"Discrimination-Prone" Initiatives[133] 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.[134] 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

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> 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 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).

133. Debra Salz, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100, (1993).

134. 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.

by conservatives."[135] 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.[136]

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.[137] Previously, state legislatures had rejected similar proposals to grant women's suffrage.[138] 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.[139] 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 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.[140]

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.[141] Presumably an electorate so predisposed would find a congressional ban on initiatives to be prohibiting, anti-democratic, high-handed,

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135. CRONIN, *supra* note 21, at 200 (quoting David D. Schmidt, Editor of INITIATIVES NEWS REPORT).
136. *Id.* at 201.
137. *See id.*
138. *See id.* at 50-51.
139. *See id.* at 199.
140. *See id.* at 199.
141. *See, e.g.*, MAGLEBY, *supra* note 18, at 9 (citing a 1979 Field Institute Poll finding 85% of Californians supportive of citizen initiatives).

aristocratic, and elitist.[142] 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.[143]

The current congressional agenda does reflect at least one proposal—by Representative Jerry Solomon of New York—urging the adoption of a nationwide initiative.[144] 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[145] in honor of its sponsor, the late Congressman Sonny Bono of California.[146] This proposal attempts to

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142. 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.

143. *See, e.g.*, Laurie Kellman, *Defeat of Foley Shows Backers of Term Limits It Can Be Done*, WASH. TIMES, May 2, 1995, at A6.

144. H.R. Res. 21, 105th Cong. (1997).

145. *See* H.R. 1170, 104th Cong. (1995).

146. 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.

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.[147] 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 original state constitutions were short and were limited to the most fundamental matters.[148] 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.[149] 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?

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.

147. *See id.*

148. *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).

149. *See id.* at 420.

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*.[150] The Florida Supreme Court concluded that a proposed constitutional amendment banning gill-net fishing in Florida satisfied all requirements for inclusion on the ballot.[151] 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.[152]

Justice McDonald then suggested that the permanency of the Florida Constitution was threatened by the proliferation of amendments.[153] He observed that the Florida Constitution had been amended forty-one times between 1968-1984, at a rate of 2.4 amendments per year.[154] 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.[155]

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 . . . ."[156] This appeared to be a reference to the constitutional/statutory argument raised earlier by McDonald. While both McDonald and Grimes voted in support of

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150. *See* 620 So. 2d 997 (Fla. 1993).
151. *See id.* at 999.
152. *Id.* at 999-1000 (McDonald, J., concurring).
153. *See id.* at 1000.
154. *See id.* at 1000 n.2.
155. *See id.* at 1000.
156. Advisory Opinion to the Attorney General-Re: Stop Early Release of Prisoners, 642 So. 2d 724, 728 (Fla. 1994) (Grimes, C. J., dissenting).

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 overall conclusion that the Florida Constitution has been easy to amend. [157] However, the same study refuted the assertion that the ease of amendment is attributable to citizen initiative petitions.[158] According to the study, the Florida Constitution had at that time been amended thirty-nine times.[159] Only one of the successful amendments was by citizen initiative; the remaining thirty-eight were by legislative proposal.[160]

One author of the study updated its finding in 1995 when the pace of initiative petitions had increased.[161] This updated study concluded that there was no immediate need to place any limits on initiative petitions.[162] The vast majority of the proposed amendments clogging the Florida ballot had been attributable to legislative, not citizen, proposals.[163]

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."[164] The author of the rule readily conceded that the proposed rule would interfere with the electorate's right to discipline nonresponsive legislatures,[165] but presumably believed that concerns

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157. *See* Joseph W. Little & Julius Medenblik, *Restricting Legislative Amendments to the Constitution*, 80 FLA. B.J. 43 (1986).

158. *See id.*

159. *See id.*

160. *See id.*

161. *See* Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393 (1995).

162. *See id.* at 413.

163. *See id.* at 408.

164. 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.

165. 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.

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.[166] 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.[167] 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.[168] Pursuant to this authorization, a citizen advisory committee examined the Oklahoma Constitution and issued a report in 1950.[169] 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."[170] This chapter is subdivided into three subsections, two of which are directly relevant to our inquiry.[171] 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

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166. 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.

167. *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).

168. *See* S. Res. 17, 1947 Okla. Sess. Law Serv. (West).

169. *See* H. V. THORNTON, OKLAHOMA CONSTITUTIONAL STUDIES OF THE OKLAHOMA CONSTITUTIONAL SURVEY AND CITIZEN ADVISORY COMMITTEE (1950).

170. *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.

171. *See id.*

legislature. "State constitutions have grown longer because legislatures have often failed to fulfill the reasonable expectations of the public."[172] 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."[173]

The second explanation given for lengthy, complex constitutions in the advisory committee's report is "Judicial Opposition to Social Policy."[174] 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,[175] prohibits women and children from working underground,[176] and requires the legislature to enact laws to protect the health and safety of industrial employees.[177] These "statutory" provisions were added to restrict the ability of an activist judiciary to invalidate progressive social legislature.[178] 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,

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172. *Id.* at 1.
173. *Id.* at 19.
174. *See id.* at 2.
175. OKLA. CONST. art. XXIII, § 1.
176. *See id.* at § 4.
177. *See id.* at § 5.
178. *See* THORNTON, *supra* note 169, at 2.

> 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.[179]

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.[180] Characterizing the proponents of the participatory democracy devices as "cranks,"[181] 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.[182] 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.[183]

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.[184] 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 representative government.[185] While it may qualify

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179. *See also* Speech of President Pro Tempre J.F. King to the Oklahoma Constitutional Convention, Oklahoma Convention Transcript, *supra* note 28, at 7-12.

180. *See* WILLIAM HOWARD TAFT, POPULAR GOVERNMENT (1913).

181. *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.

182. *See* TAFT, *supra* note 180, at 63-64.

183. HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 15-16 (1994).

184. *Id.*

185. *See* Leonard, *supra* note 1, at 1216-27.

as "Geek-Speak," at least one observer has touted the initiative process as contributing to the "alienation amelioration"[186] of our citizenry.[187]

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.[188] While not all observers find this process a totally commendable one,[189] and other observers have viewed these "benefits" as being substantially embellished,[190] *some*[191] deliberative process does exist in the drafting of legislative proposals that is not available for initiative petitions.

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186. Arrow, *supra* note 167, at 49.

187. *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.*

188. *See id.*

189. 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).

190. 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).

191. 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.

Analysts speak of the "filtering effects of the legislative process" available in the legislature, which is absent in the initiative process.[192] A recent controversial federal appellate court decision struck down an initiative approved by the California electorate almost a decade prior.[193] 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."[194] 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."[195]

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.[196] 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.[197] 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.[198] 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.[199]

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

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192. *See* CRONIN, *supra* note 21, at 92.

193. 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).

194. Henry Weinstein, *Novel Decision With Broad Impact*, L.A. TIMES, Oct. 8, 1997, (Metro Desk Section) at A16.

195. *Id.*

196. *See* Marks, *supra* note 36, at 1261.

197. *See id.*

198. Letters to the Editor, USA TODAY, Sept. 15, 1997 at 20A.

199. *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).

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 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.[200]

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.[201] Until the 1970s, the signatures for most California initiatives were obtained by unpaid volunteers.[202] 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.

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200. *See supra* notes 5 and 6 and accompanying text.

201. *See supra* note 39 and accompanying text.

202. *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).

Colorado enacted a statute making it a felony to pay individuals to circulate initiative petitions.[203] 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.[204] 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."[205]

The Court's use of the First Amendment to protect paid petition circulators has not gone uncriticized,[206] 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."[207] Although not all initiative states had similar bans at the time of the *Meyers* decision, and the "initiative industry"[208] had grown to different levels of maturity in the various states, the *Meyers* decision had a tremendous negative impact on initiative reform attempts.[209] 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."[210]

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.[211]

Not all initiative observers believe that the initiative process has been totally captured by the economic special interests that it was originally created to

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203. COL. REV. STAT. § 1-40-110 (1980).
204. Meyer v. Grant, 486 U.S. 414 (1988).
205. *Id.* at 426.
206. *See* Lowenstein & Stern, *supra* note 202.
207. *Id.* at 176.
208. 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.
209. 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.
210. Lowenstein & Stern, *supra* note 202, at 175 n.1(quoting Mike Arno of American Petition Consultants on May 8, 1989).
211. Leo C. Wolensky, *Are Citizens Losing the Initiative?*, L.A. TIMES, Oct. 7, 1988, § 1 at 1, col 5.

control.[212] 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.[213] The same source estimated that, in 1992, over $17,000,000 was spent on initiative measures in twenty-one states.[214] 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.[215]

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.[216]

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.[217]

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212. *See, e.g.*, SCHMIDT, *supra* note 33, at 35-36 (presenting empirical evidence to dispute this conclusion).

213. *See* MAGLEBY, *supra* note 18, at 30.

214. *Id.*

215. 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.

216. Briffault, *supra* note 62, at 1361-62 (citation omitted).

217. In preparation for the 1997 Constitutional Revision Commission, a number of potential reforms have been identified for the Commission. The citation in this Article should not be construed as agreement with all, or

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.[218] 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

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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).

218. Meyer, 486 U.S. at 414.

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.[219] 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.[220] 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.[221] If this proposal 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.[222] 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.[223] 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.[224]

This has proven a difficult problem to remedy. Although the problem has been frequently identified and many solutions proposed,[225] 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.[226] Although the original proposal being referenced was directed at amendments proposed by a legislature, the same concept might be adopted and workable in an

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219. *But see* Lowenstein & Stern, *supra* note 202, at 220.
220. *See id.* at 221.
221. *See id.*
222. *See id.*
223. *See* Vlae Kershner, *Big Changes Urged in Law on Initiatives*, S.F. CHRON., April 15, 1992 at A13.
224. *See supra* note 188 and accompanying text.
225. *See supra* note 217 and accompanying text.
226. *See* Little, *supra* note 161, at 408.

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.[227] Illinois has essentially adopted this approach by imposing a quota of three initiatives per election, on a first come, first served basis.[228] 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.[229]

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.[230] 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

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227. *Id.*

228. *See* 10 ILL. COMP. STAT. ANN. 5/28-1 (West 1993).

229. *See* Little, *supra* note 161, at 408.

230. *See, e.g.*, FLA. STAT. ANN. § 101.161 (West 1995). This statute provides:

> (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).

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.[231] 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.

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.[232] 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,[233] the legislature was presumably motivated by a desire to improve the quality of the communication of the content of initiative petitions.[234]

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.[235] The Attorney General either approves the proposal or prepares a more

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231. *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.

232. *See* OKLA. STAT. ANN. tit. 34, § 9D2 (West 1994).

233. *See* OKLA. STAT. ANN. tit. 34, § 9 (West 1994).

234. *See id.*

235. *See* ARK. CODE ANN. § 7-9-107 (Michie 1987).

suitable one if he finds the proposed rule defective.[236] 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,[237] and upon certification, copies of the initiative measure the petition[238] 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.[239] 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.[240]

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

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236. *See id.*

237. *See* CAL. ELEC. CODE § 9007 (West 1997). This statute states:

> 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.

238. *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.

239. *Id.*

240. *See* CAL. ELEC. CODE §§ 9060-9096 (West 1997).

Office of Legislative Legal Services for review and comment.[241] All executive agencies are authorized to assist in reviewing and preparing comments on a proposed petition.[242] 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.[243] 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 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."[244]

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,

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241. *See* COL. REV. STAT. ANN. § 1-40-105 (West 1988).
242. *See id.*
243. *See id.*
244. *Quoted in* Mark Petracca, *Initiative and Referendum Process is too Important to Lose*, DALLAS MORNING NEWS, May 17, 1993 at 15A.

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.