
An Assessment of New Jersey's Proposed Limited Initiative Process

by Craig B. Holman, Ph.D.

About the Brennan Center for Justice

The Brennan Center for Justice at New York University School of Law unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Our mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms.

About the Democracy Program

The Brennan Center's Democracy Program seeks to bring the ideal of representative self-government closer to reality. Our program collaborates with grassroots groups, advocacy organizations, and reform-minded government officials to eliminate barriers to full and equal political participation. We strive to ensure that public policy and institutions reflect the diverse voices and interests that make for a rich and energetic democracy.

About the Author

Craig Holman, Ph.D. is the Brennan Center's Senior Policy Analyst. Previously, he served as Project Director at the Center for Governmental Studies in Los Angeles. As Senior Policy Analyst, Dr. Holman conducts research on the campaign finance, judicial elections and direct democracy. He has assisted drafting state and local legislation and has authored and co-authored several works in each of these fields. His publications include: "Access Delayed Is Access Denied: Electronic Reporting of Campaign Finance Records," *Journal of Public Integrity* (2001); "Judicial Review of Ballot Initiatives," *Loyola Law Review* (1998); *THE PRICE OF JUSTICE: A CASE STUDY IN JUDICIAL CAMPAIGN FINANCING* (1995); and *DEMOCRACY BY INITIATIVE* (1992).

Acknowledgements

The Brennan Center would like to express its appreciation to the Fund for New Jersey for its support of the research and publication of this report.

Nancy Northup, Director of the Democracy Program, and Glenn Moramarco, Associate Counsel at the Brennan Center, provided useful insights and helpful comments in the course of the research. Respects to Dane Waters of the Initiative & Referendum Institute, whose tireless work in the field of direct democracy serves all who are interested. Many thanks to Amanda Cooper for managing the production of the report.

For more information, contact:

Brennan Center for Justice

at NYU School of Law

161 Avenue of the Americas, 12th Floor

New York, NY 10013

212.998.6730

FAX: 212.995.4550

Email: brennan.center@nyu.edu

www.brennancenter.org

Table of Contents

Summary of Findings	3
A. History of the Initiative and Referendum in the United States	5
B. Basic Features of the Initiative Among the States	8
1. Scope and Subject Matter	8
2. Drafting Procedures	10
3. Petition Circulation	12
4. Voting Requirements	14
5. Legislative Amendment	14
6. Judicial Review	16
C. Critical Issues Concerning the Initiative Process	17
1. Drafting of Initiative Legislation	17
2. Rising Costs of the Initiative	18
3. Voter Competence	19
4. Public Opinion on the Initiative	20
D. How the New Jersey Model Addresses the Critical Issues	21
1. Statutory Initiative and Referendum	21
2. Restricted Subject Matters	22
3. Ballot Qualification	22
4. Referendum Question	23
5. The Indirect Initiative and Proponent Amendability	23
6. Voter Information	24
7. Expedited Judicial Review	25
8. Post-Enactment Legislative Amendments	25
E. Conclusion: The New Jersey Model of the Initiative Empowers Citizens with an Important Means to Participate in the State's Policy Agenda, While Avoiding Many of the Problems Associated with Direct Democracy	26

An Assessment of New Jersey's Proposed Limited Initiative Process

by Craig B. Holman, Ph.D.



An Assessment of New Jersey's Proposed Limited Initiative Process

Summary of Findings

In the 2001-2002 legislative session, the New Jersey legislature will be considering two bills calling for a "limited initiative" process for the state of New Jersey -- Senate Concurrent Resolution No. 8 and Assembly Concurrent Resolution No. 82 ("SCR 8" and "ACR 82"). In this report, the Brennan Center for Justice analyzes these two bills by placing them in the context of initiative processes adopted in other states. We begin with a brief history of the initiative and referendum process in the United States, move on to a state-by-state comparison of the nation's various initiative features, discuss the critical issues concerning the initiative process in general, and finally address how SCR 8 and ACR 82 deal with these critical issues.

SCR 8 and ACR 82 propose a system of direct democracy that would, in some respects, be unique among the states. First, these bills propose an initiative process that is limited in terms of subject matter to issues of governmental reform, such as campaign finance, ethics, lobbying and electoral procedures. Second, the bills introduce a new concept of "proponent amendability" to the initiative process--that is, allowing the legislature, with the approval of the initiative proponents, to amend initiative proposals and correct potential problems that may have been unforeseen by the drafters. The proposals of SCR 8 and ACR 82, will be referred to throughout this paper as the "New Jersey model" of the initiative.

Some of the key findings of this report include:

- The subject area of governmental reform is one in which legislatures have traditionally been unwilling to act. Most of the governmental reform measures adopted in the last 20 years around the nation have come through the initiative process.
- The New Jersey model, because it contains stringent subject matter restrictions, should serve to keep the frequency of initiative drives relatively low. The subject matter restrictions will also focus initiative legislation away from such controversial issues as civil liberties and business regulation, thereby avoiding some of the high-financed campaigns and stratagems associated with initiative excesses in other states.
- The "proponent amendability" feature of the New Jersey model re-introduces deliberative lawmaking into direct democracy, and thereby has the potential to significantly improve the quality of initiative legislation.

It is the conclusion of this report that the New Jersey model of the initiative process offers an effective marriage between the legislative process and direct democracy. The New Jersey model would empower citizens with the right of direct legislation in policy arenas of great importance to the public, while keeping some of the perceived excesses of the initiative process in check.

“I believe in the Initiative and Referendum,
which should be used not to destroy representative government,
but to correct it whenever it becomes misrepresentative.”

Teddy Roosevelt

Direct democracy—as embodied in its contemporary forms of the initiative and referendum—has long provided voters in about half of the American states with a means to “check” unresponsive state and local governments. The initiative and referendum have never been offered as a replacement of representative democracy. Rather, these tools are designed to supplement democratic government by allowing voters an opportunity to participate in the policymaking arena when legislatures are unwilling or unable to address issues of great concern to the public.

Of course, the practice of direct democracy has not always lived up to its promise. In some states—such as California—the initiative process has become so pervasive in the policy arena that nearly as much money is spent on initiative campaigns in each election cycle as is spent on lobbying all levels of state government. In fact, more than twice as much is routinely spent on California’s initiative campaigns than is spent on electing the entire state legislature.¹

This is not the role originally intended for direct democracy. No other initiative state has experienced the same level of problems as has California—dubbed internationally as the “California nightmare.” As a convention of the states rather than a federal constitutional guarantee, state governments have significant leeway in designing the structure and operations of the initiative process, if they choose to allow initiatives at all. The initiative process may be structured in any number of ways to help ensure that direct democracy lives up to its promise.

Senate Concurrent Resolution No. 8 (SCR 8), sponsored by Senators William Schluter and John Adler, and Assembly Constitutional Resolution No. 82 (ACR 82), sponsored by Assemblymembers Leonard Lance and Richard Merkt, would establish a limited form of the initiative process for New Jersey that would avoid some of the problems associated with direct democracy. The New Jersey proposal is limited in several key ways. First and foremost, the subject matters of initiatives under the New Jersey model are restricted to issues of governmental reform. The high stakes areas of business regulation and taxes, which generate so much attention of lobbyists and special interest groups, may not be addressed by initiatives under the New Jersey model. Secondly, the limitation on subject matters for initiatives helps protect minority rights that can be threatened by the majoritarian rule offered by initiatives. Thirdly, and no less important, the institutional structures of the initiative offered by the New Jersey model—such as a high signature threshold for ballot qualification and pre-election judicial review of initiatives—guard against the possibility of frivolous abuse of the initiative process. Finally, the New Jersey model recognizes a special role for the legislature in the initiative process, requiring legislative hearings and action on initiative proposals before they are submitted to the voters (known as the “indirect initiative”).

¹ In 1997-1998, \$292 million was spent lobbying all levels of California state government. In the primary and general elections of 1998 combined, \$90 million was spent to elect the California legislature. Over the same time period, \$224 million was spent for and against state ballot initiatives, not including what was spent on other non-initiative state ballot measures.

The subject matter and structural limitations imposed upon the initiative process under the New Jersey model allow citizens to exercise their sovereignty in issue areas likely to create the greatest tension between citizens and their representatives: governmental reform and ethics. At the same time, the New Jersey model also places reasonable constraints on direct democracy so as to limit its frequency of use and costs to the public and to protect minority rights from simple majority rule.

In order to assess the likely impact of the initiative on New Jersey political life as provided in SCR 8 and ACR 82, this report will first briefly discuss the history of direct democracy and document the various institutional structures of the initiative in the states. The problems and benefits of each type of initiative will then be discussed, followed by an examination of how the New Jersey model would deal with these problems and affect public policy in the state.

A. History of the Initiative and Referendum in the United States

In the late 19th and early 20th centuries, America was deep in the throes of monopoly capitalism and its “robber barons,” who used their vast wealth to exert considerable influence over the nation’s economy as well as government. Nowhere was the power of wealthy special interest groups so evident as in the West. The western states depended on the resources of the robber barons—especially the railroads—for economic survival. Four businessmen in particular—Leland Stanford, Collis Huntington, Charles Crocker and Mark Hopkins—known as the “Big Four,” owned most of the nation’s railroads under the politically powerful Central Pacific Railroad. As the Central Pacific steam-rolled across the country, it acquired smaller railroad companies unable to compete effectively. When freight companies in California shifted their business from railroad to steamship to cut costs, Central Pacific simply bought out the steamship line and eliminated any further competition.

Hand-in-hand with this stranglehold over the economies of the western states came a stranglehold over their state governments. Renamed the Southern Pacific Railroad in the West, the railroad company controlled both economic fortunes and political fortunes. A leading newspaper reporter reflected upon the situation in 1896 as follows:

“In those days there was only one kind of politics and that was corrupt politics. It didn’t matter whether a man was a Republican or Democrat. The Southern Pacific Railroad controlled both parties, and he had to either stay out of the game altogether or play it with the railroad.”²

Squeezed both economically and politically, citizens throughout the West mounted a challenge to the monopolies, first in the form of the Populist movement (which emphasized economic deprivation) and later in the form of the Progressive movement (which emphasized political independence). Both movements shared at least one common objective: establishment of the *initiative* and *referendum* as tools for citizens to regain an element of control over legislatures otherwise dominated by wealthy special interest groups.

The “initiative” is a tool of direct democracy in which citizens petition to create a statute or constitutional amendment upon ratification by the voters. There are two types of the initiative. The first is an “indirect initiative” in which the proposal, upon gathering sufficient petition signatures, is first submitted to the legislature for approval. If the legislature declines to approve the measure, it is then presented to the voters for ratification or rejection. The second is the “direct initiative” in which the

² Quoted in Charles Bell and Charles Price, *California Government Today: Politics of Reform* (1980) at 55.

proposal, upon gathering sufficient petition signatures, is directly submitted to the voters for ratification or rejection.

The “referendum” is a tool of direct democracy in which citizens can petition to repeal a law approved by the legislature. There are three distinct types of referenda. The “petition” referendum discussed above is a direct democracy technique allowing citizens to challenge acts of the Legislature. Petition referenda are permitted in 24 states.

A second type of referenda is called “legislatively-referred referenda.” Some states allow legislatures the option of submitting a legislative proposal to the voters for approval. A third form of referenda is called “compulsory referenda.” Every state except Delaware mandates that some legislative acts, such as constitutional amendments, local charters and bond issues, must be approved by the voters through compulsory referenda. Neither “legislatively-referred referenda” nor “compulsory referenda” involve citizen-initiated legislation.

The intellectual precedent for the modern version of the initiative and referendum has roots as far back as 1309, when a few Swiss cantons first adopted the petition referendum. It expanded in use throughout Switzerland in the 19th century and eventually became the model for the American direct democracy movement, following press reports on Swiss initiatives and referenda. In 1885, Father Robert Haire, a priest from South Dakota, and Benjamin Urner, a newspaper publisher, became the first reformers to propose a similar system of direct democracy in the United States. James Sullivan became entranced with the idea and traveled to Switzerland to see how the initiative and referendum functioned firsthand. Sullivan’s published findings cemented the Swiss model of direct democracy for all future American reformers.

The idea of the initiative and referendum quickly transformed the state political landscape. In 1898, South Dakota became the first state to adopt the initiative and referendum. Oregon followed in 1902 when voters ratified the system by an 11-to-1 margin. Montana and Oklahoma came next. Between 1898 and 1918, 24 states in all adopted the initiative or petition referendum—mostly in the West.³ The overwhelming dominance of monopoly capitalism over the western states nurtured the direct democracy movement largely, but not exclusively, as a “western phenomenon.” Several eastern and southern states also incorporated the initiative and referendum into their state constitutions, the earliest of which was Maine in 1908. After 1918 the movement slowed, with no other state adopting the initiative until Alaska was admitted into the Union in 1959. Illinois and Florida adopted the process in the 1970s. Mississippi was the last state to provide the initiative power to citizens when it adopted the indirect initiative in 1992. No state has ever repealed the initiative and referendum.⁴

Today, as shown in Table One, 24 states and the District of Columbia provide for some use of the initiative process. Fifteen of these states provide initiatives for both constitutional amendments and statutes, while three allow initiatives only for constitutional amendments and seven allow it only for statutes. Three additional states allow only for petition referendum but no initiatives.

³ I & R Fact Sheet, “History of the Initiative and Referendum in the United States,” Initiative and Referendum Institute [www.iandrinstitute.org].

⁴ Mississippi is the only state that had the initiative process but lost it through judicial invalidation. In 1992, the Mississippi Supreme Court invalidated the state’s initiative process based on technical issues related to its enactment. *Power v. Robertson*, 130 Miss. 188 (1922). Mississippi re-established the initiative for only constitutional amendments 70 years later.

Table I

State-by-State Comparisons Of Direct Democracy

Twenty-four states and the District of Columbia provide for some use of the initiative process. Fifteen of these states authorize initiatives for both constitutional amendments (CA) and statutes (S), while three allow initiatives only for constitutional amendments and seven permit it only for enactment of statutes. Three additional states allow citizens to petition only against legislative acts through popular referenda.

State	Direct Initiative	Indirect Initiative	Both	Popular Referendum Only
Alaska		X(S)		
Arizona	X			
Arkansas	X			
California	X			
Colorado	X			
Dist. of Col.	X(S)			
Florida	X(CA)			
Idaho	X(S)			
Illinois	X(CA)			
Kentucky				X
Maine		X(S)		
Maryland				X
Massachusetts		X		
Michigan	X(CA)	X(S)		
Mississippi		X(CA)		
Missouri	X			
Montana	X			
Nebraska	X			
Nevada	X(CA)	X(S)		
New Mexico				X
North Dakota	X			
Ohio	X(CA)	X(S)		
Oklahoma	X			
Oregon	X			
South Dakota	X			
Utah			X(S)	
Washington			X(S)	
Wyoming		X(S)		

B. Basic Features of the Initiative Among the States

Although all state and local systems of the initiative and referendum are fashioned after the original Swiss model, there are significant differences in the structure and operations of direct democracy from jurisdiction to jurisdiction. All initiative systems share six structural components: scope and subject matter; drafting; petition circulation and ballot qualification; voting requirements and electoral restrictions; legislative amendment; and judicial review. But each state varies considerably in how they designed their systems within these six components.

1. Scope and Subject Matter

The scope of any particular initiative process involves several different levels. The first level is whether citizens may exercise their initiative power to affect statutes or constitutional amendments, or both. Most initiative states (15) allow citizens to enact both statutes and constitutional amendments through the initiative.⁵ Less than half that many states (7) permit citizens to propose only statutes through the initiative, and three states limit the initiative power to constitutional amendments only. Petition referenda always apply only to statutes, as opposed to referenda placed on the ballot by the legislature, which frequently concern constitutional amendments. Altogether, 24 states permit citizens to initiate referenda.⁶

Most states impose some form of subject restrictions on initiatives. Nearly all states place some restrictions on the subject matters of referenda. Usually, referenda cannot be invoked to challenge emergency legislation or laws designed to protect public peace. Frequently, budget bills and appropriations are exempted from the referendum. The most common subject limitation is the single-subject requirement. Twelve of the 22 states that permit initiatives to propose statutes impose a single-subject requirement on those initiatives, and 13 of the 18 states that permit initiative constitutional amendments also impose a single-subject requirement. The purpose of the single subject rule is to prevent log-rolling in legislation and to make legislation easier to understand and less deceptive.⁷

Initiative states often have other subject requirements beyond the single subject rule. As shown in Table Two, no fewer than 13 states impose substantive limitations on the initiative process. Many of these subject limitations are modest, such as Nevada's requirement that initiatives may not propose

⁵ California is the only state among these 15 that permits a single initiative to enact a statute and constitutional amendment simultaneously.

⁶ States that allow petition referenda are: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming.

⁷ The standard for defining single subject varies widely. In interpreting the single subject rule, state courts have considered two very different tests: the first, that the provisions must be "reasonably germane" to each other, has been adopted by the California Supreme Court; the other, that the provisions must be "functionally related" to each other, has been adopted by the Colorado Supreme Court and is a much tougher standard to meet. In essence, the "functionally related" standard means that all the provisions of the measure must be interdependent, interrelated or necessary to form an interlocking package. UCLA law professor Daniel Lowenstein has argued that a measure which called for the creation of parks in different parts of the state would not meet the functionally related standard even though most people would agree that such a measure met the normal understanding of what the single subject rule means. Daniel Lowenstein, "California Initiatives And The Single Subject Rule," 30 UCLA Law Rev. 936 (1983). These two different standards have played out in practice. For example, the courts in Colorado have routinely invalidated initiative legislation based on the functionally related standard of the single subject requirement, while the courts in California only rarely strike down initiative legislation based on the reasonably germane standard of single subject.

Table 2
Subject Restrictions

State	Restrictions
Alaska	Single subject only. No revenue measures, appropriations, acts affecting the judiciary, or any local or special legislation. Also, no laws affecting peace, health or safety.
Arizona	Single subject only.
Arkansas	None.
California	Single subject only.
Colorado	Single subject only.
Florida	Single subject only.
Idaho	None.
Illinois	Must only deal with structural and procedural subjects of the legislature.
Maine	Any expenditure in excess of appropriations is void 45 days after legislature convenes.
Massachusetts	No measures involving religion, the judiciary, local or special legislation, or specific appropriations.
Michigan	None.
Mississippi	No modifications of bill of rights and no modifications of public employees' retirement system or labor-related items. Initiatives rejected by the voters cannot be placed on the ballot for two years after the election.
Missouri	Single subject only; no appropriations without new revenue, and nothing that is prohibited by the constitution.
Montana	Single subject only; no appropriations, and no special or local legislation.
Nebraska	Single subject only. The same subject can not appear on the ballot more than once in three years.
Nevada	No appropriations or expenditures of money, unless the measure includes a sufficient tax not prohibited by Nevada's constitution.
North Dakota	No emergency measures, or appropriations for support and maintenance of state departments and institutions.
Ohio	Single subject only. No measures involving property taxes.
Oklahoma	Single subject only. The same subject can not appear on the ballot more than once every three years.
Oregon	Single subject only.
South Dakota	Except laws as necessary for the immediate preservation of public peace, health or safety support of state government and existing public institutions.
Utah	None.
Washington	Single subject only.
Wyoming	No earmarking, making or repealing appropriations, creating courts, defining jurisdiction of courts or court rules, and no local or special legislation. No measure that is similar to a measure that has been defeated at the ballot within 5 years.

new appropriations unless the initiative also includes new taxes to finance the appropriations. Wyoming prohibits initiatives from creating courts and affecting the judicial process. Ohio does not permit initiatives to address property taxes. Alaska and Massachusetts prohibit initiatives outright from dedicating revenues or making or repealing appropriations. Illinois limits initiatives to those addressing the structure of the legislature. The District of Columbia allows its board of elections to refuse certification of any initiative that authorizes discrimination prohibited under the Human Rights Act of 1977.

Subject limitations in some instances have been beneficial, but in others have been harmful to public policy. For example, Alaska's prohibition against initiatives dedicating revenues has enabled that state to avoid potentially radical tax cutting proposals. But the same subject limitation in Massachusetts has tied the hands of citizens who want to create a comprehensive public financing campaign reform measure. Voters in Massachusetts overwhelmingly approved a full public financing campaign reform initiative in 1998, only to have the legislature and governor continue to debate whether to fund the program.

2. Drafting Procedures

Only one state—Washington—does not allow initiative proponents to write the actual text of their measures. The Washington Office of Code Reviser, staffed by 10 lawyers and 25 support personnel, drafts the text of any proposed initiative. All other states lay the responsibility of drafting initiatives upon the proponents, although most of these states will provide proponents with varying degrees of drafting assistance (see Table Three).

The level of drafting assistance ranges from none in Illinois to mandatory review by the state supreme court in Florida once 10% of the requisite qualification signatures are gathered. The Florida Supreme Court will then issue an “advisory opinion” on the constitutionality of the measure, which proponents may accept or reject at their own peril.

Most states lie somewhere in between. The legislative counsel in California will offer drafting advice to initiative proponents only if requested. As a result, nearly all initiatives in California receive no official review and drafting assistance. Colorado requires that all initiatives be subject to review in a public hearing before petition circulation. Colorado's Legislative Council takes public comment on each initiative proposal and provides its own legal and policy analysis of the measures. Proponents may accept or reject the suggestions, but the extensive level of public review often encourages proponents to take a close second look at the text of the proposal and make appropriate revisions.

Through the indirect initiative process, Massachusetts and Ohio provide drafting assistance near the end of the petition circulation process. Following a legislative hearing on the measure, Massachusetts permits proponents to make adjustments in the text of an initiative that are “perfecting in nature”; Ohio allows proponents to accept any amendments recommended by either house of the legislature. In Alaska, the legislature may adopt its own measure that is “substantially similar” to the initiative proposal (thus making amendments to the original proposal), and then have the original initiative removed from the ballot.⁸

⁸ In Alaska, the attorney general determines whether a legislative alternative to an initiative is “substantially similar” and, if so, removes the original initiative from the ballot.

Table 3

State Provisions Regarding Initiative Drafting Assistance

Alaska	Lieutenant Governor reviews form and legal restrictions on content.
Arizona	Secretary of State reviews form only.
Arkansas	Attorney General reviews and approves proposed title. Attorney General may reject confusing title and summary and instruct petitioners to redesign proposal.
California	Optional assistance from Legislative Counsel and optional review by the Secretary of State.
Colorado	Mandatory review by Legislative Council.
Florida	Supreme Court review for constitutionality and compliance to single subject after petitioners gather 10% of the signature requirement.
Idaho	Mandatory review by Attorney General.
Illinois	None
Maine	Secretary of State reviews form only.
Massachusetts	Petitioners may "perfect" draft after the indirect initiative legislative hearing.
Michigan	Optional public hearing on draft before the Board of State Canvassers.
Mississippi	Revisor of Statutes reviews form and substance.
Missouri	Attorney General reviews form only.
Montana	Mandatory review by Legislative Counsel.
Nebraska	Revisor of Statutes reviews form and substance.
Nevada	Secretary of State reviews form only.
North Dakota	Secretary of State reviews form only.
Ohio	Petitioners may revise draft after the indirect initiative legislative hearing.
Oklahoma	Ballot title certified by Superintendent of Instruction for readability.
Oregon	Mandatory review for single subject. May request draft assistance from the Legislative Counsel.
South Dakota	Secretary of State reviews form only.
Utah	Lieutenant Governor reviews form only.
Washington	Mandatory review by Code Reviser.
Wyoming	Secretary of State reviews form only.

3. Petition Circulation

Once an initiative is drafted and titled,⁹ proponents must circulate petitions to gather the requisite number of signatures for ballot qualification. The degree of difficulty of qualifying an initiative for the ballot rests on the length of time allowed for petition circulation, the number of signatures required for qualification, and whether the state mandates a geographical distribution of signatures. As with other structural components, these requirements vary from state to state. The amount of time in which proponents may circulate their petitions ranges from 90 days in Oklahoma to no time limit in Arkansas, Oregon and Utah (see Table Four).

The required number of signatures is set as a percentage of the last electoral vote or number of registered voters.¹⁰ Setting the signature qualification threshold for statutory initiatives at 5% of the last gubernatorial vote is fairly common. Wyoming has the highest signature threshold at 15% of total votes cast in the last election, which partly accounts for why only six initiatives have qualified for the state's ballot in over three decades. Signature qualification thresholds are usually higher for constitutional amendments. This is consistent with the principle that it should be more difficult to change the constitution than to change laws.

Twelve states require that signatures be gathered from areas distributed throughout the state. Typically, this involves requiring a specified percentage of signatures from a third or more of the state's counties. In Massachusetts, given that the state's population is heavily concentrated in the city of Boston, initiative proponents are not allowed to gather more than 25% of their signatures in any one county. The objective of a geographic requirement is to ensure that no single population center disproportionately dominates the state political agenda through the initiative process.

⁹ All states require that an initiative proposal receive a "title" briefly describing the intent of the proposal which is displayed prominently on the qualification petitions and the ballot. Usually the titles are written by an impartial governmental agency, such as the attorney general's office, but not always. In Arizona and Florida, the proponents write the explanatory title for the petitions and the ballot, though if a measure qualifies for the ballot, the attorney general's office then reviews the title for accuracy.

¹⁰ Requiring that a *percentage* of the state's voters, rather than a fixed number, sign initiative petitions for ballot qualification is one important area in which the American initiative diverges from the Swiss model. Switzerland requires that 100,000 persons sign an initiative petition for ballot qualification (recently raised from 50,000). By requiring a percentage of voters to sign an initiative petition in the United States, the requisite number of qualification signatures has steadily risen over the last century, reaching extremely high numbers in populous states. In California, for instance, 5% of the last gubernatorial vote translates into 419,260 valid signatures required to qualify an initiative statute in the year 2002. (Usually about 20% of the signatures are deemed invalid, and thus the actual number of signatures that need to be gathered is about 500,000.)

Such a large number of petition signatures required for ballot qualification has nurtured the development of an "initiative industry" in the United States. It is not possible for even well-organized volunteer groups to gather a half million signatures, and so proponents are pushed into paying an army of professional petition circulators to gather most, if not all, of the signatures. This has created a lucrative business, spawning many competing signature-gathering firms. Ballot qualification in California, for instance, costs an average \$1 million. Signature-gathering firms have become so professionalized that many will guarantee ballot qualification—at a price. California Commission on Campaign Financing, *Democracy by Initiative* (1992) at 157.

Switzerland, which has always required a manageable absolute number of signatures for ballot qualification, has not seen the development of professional signature-gathering firms or an initiative industry.

Table 4

State-by-State Requirements for Qualification of Initiatives

State	Signature Requirement*	Circulation	Geographic Distribution
Alaska	10% LTV	1 Year	No
Arizona	10% LGV; 15% TV-LGE	20 Months	No
Arkansas	8% TV-LGE; 10% TV-LGE	unlimited	Yes
California	5% LGV; 8% LGV	150 days	No
Colorado	5% SV; 5% SV	180 days	No
Florida	8% LPV	4 Years	Yes
Idaho	6% RV	18 Months	No
Illinois	8% LGV; 10% Advisory	2 Years	No
Maine	10% LGV	1 Year	No
Massachusetts	3% + 1/2% LGV	90 days + 30 days	Yes
Michigan	8% LGV; 10% LGV	180 days	No
Mississippi	12% LGV	1 Year	Yes
Missouri	5% LGV; 8% LGV	18 Months	Yes
Montana	5% LGV; 10% LGV	1 Year	Yes
Nebraska	7% LGV; 10% LGV	1 Year	Yes
Nevada	10% LTV; 10% LTV	unlimited	Yes
North Dakota	2% VAP; 4% VAP	1 Year	No
Ohio	3% LGV + 3% LGV; 10% LGV	unlimited	Yes
Oklahoma	8% TV; 15% TV	90 days	No
Oregon	6% LGV; 8% LGV	unlimited	No
South Dakota	5% LGV; 10% LGV	1 Year	No
Utah	5% + 5% LGV (I)	unlimited	Yes
	10% LGV (D)	unlimited	Yes
Washington	8% LGV	6 Months-D	No
		10 Months-I	
Wyoming	15% LTV	18 Months	Yes

LTV % of total votes cast in last election
LGV % of votes cast in last gubernatorial election
TV-LGE % of total vote in the last election with gubernatorial candidates
SV % of votes cast for Secretary of State in last election
LPV % of votes cast for President in the previous presidential election
VAP % of the voting age population
RV % of registered voters
D Direct initiative process
I Indirect initiative process

* If two sets of numbers are presented for a signature requirement separated by a semi-colon, the first signature threshold applies to initiative statutes and the second applies to initiative constitutional amendments. Both signature thresholds in Utah apply to initiative statutes only.

4. Voting Requirements

States have experimented with a variety of ways to preserve the integrity of electoral institutions under the initiative process. One concern is to protect the sanctity of the state constitution among those states that allow the initiative process for constitutional amendments. State constitutions, unlike statutes, embody the fundamental precepts and institutions of governance, and thus should be more permanent and difficult to change.

The most common means of protecting constitutional law in the initiative process is to require a higher signature qualification threshold for initiative constitutional amendments than for initiative statutes. A few states impose additional hurdles for initiative constitutional amendments. For example, Illinois requires that constitutional amendments be approved by a three-fifths majority, or by majority of all those voting in the election. Nevada requires that all constitutional amendments be ratified by a majority of voters in two successive elections.

Opponents of a pending initiative proposal have on occasion sought to defeat a measure by placing their own contradictory measure on the same ballot. Usually, this “counter initiative” strategy is intended to confuse voters in the hope that voters will then reject both measures. In other cases, legislatures sometimes will place their own alternative measure to a more extreme initiative on the ballot, and thus expand the options available. Fifteen states and the District of Columbia have determined, either by law or court order, that if both conflicting measures are approved, the measure receiving the most affirmative votes prevails. The remaining states have not yet been confronted with this problem. In Washington, Maine and Massachusetts, voters are alerted on the ballot itself of conflicting ballot measures and are encouraged (or mandated in the case of Maine) to choose between them.

Although a few states limit the number of legislatively-referred measures that may be placed on a single ballot, only one state—Illinois—limits the number of initiatives. No ballot in Illinois may contain more than three public questions, including legislatively-referred measures. If more than the allotted measures qualify, the first measures certified will be placed on the ballot. While limits on the number of measures on a ballot holds some immediate appeal, such limits would favor those interest groups who are most capable of quick ballot qualification—those groups who have sufficient financial resources to employ an army of paid signature-gatherers or pay for a direct mail circulation drive.

Most states restrict initiatives to general election ballots, where voter turnout is traditionally highest. Alaska, California, North Dakota and Oklahoma permit initiatives on primary election ballots. In California, the regulation that opened up primary election ballots for initiatives appears to have been developed in error, but today there are so many initiatives on each of California’s ballots that there will be no reversing of this practice.¹¹

5. Legislative Amendment

Any type of law—initiative or legislative—periodically needs to be updated, amended and sometimes repealed as unintended consequences become apparent or conditions change. But at the same time, initiative legislation is often created as a last resort against an unresponsive or hostile legislature. To allow a legislature to freely amend or repeal initiative legislation could undermine the utility of the initiative process.

¹¹ For a full discussion of the accidental development of California’s regulation permitting initiatives on primary election ballots, despite the state’s constitutional provision which limits initiatives to “general election ballots,” see California Commission on Campaign Financing, *op.cit.* at 186-88.

Arizona is an interesting recent example. Prior to 1998, the Arizona legislature was free to tinker at will with initiative legislation, and it did so regularly. After voters overwhelmingly approved a medical marijuana initiative in 1996 (Proposition 200), the legislature promptly repealed the law. However, proponents then turned to the petition referendum process to check the legislative repeal, which placed the repeal law on the next general election ballot in 1998 (Proposition 300). Defenders of the initiative process went one step further: they also placed another initiative on the 1998 ballot that would prohibit the ability of the legislature to repeal an initiative and would restrict the body's authority to amend initiatives, only upon a three-quarters vote of the legislature and only if the amendment "furthers the purpose" of the initiative (Proposition 105). Proposition 300 was soundly rejected, thus upholding the medical marijuana initiative, and Proposition 105 was approved by a comparable vote margin.

About half the initiative states permit legislative repeal or amendment of initiative legislation at any time and the other half permit amendments or repeal with modest constraints. As shown in Table Five, usually these constraints involve a lapsing time period. For example, Alaska and Wyoming permit simple majority amendments of initiative legislation but prohibit the legislature from repealing initiatives for two years after passage. Some states require a super-majority vote of the legislature to repeal or amend initiative legislation. Only California expressly prohibits legislative action on initiative legislation—unless the initiative itself contains a provision allowing legislative amendments. Interestingly, most initiative proponents in California recognize the value of legislative amendments and so roughly 80% of California's initiatives contain a clause allowing amendment by a super-majority vote of the legislature that "furthers the purpose and intent" of the original initiative.¹²

6. Judicial Review

Initiatives can be challenged in court in different ways. In most states, they can be challenged prior to an election to keep them off the ballot. After voter approval, initiative legislation may be subject to court challenge in the same fashion as any other legislation.

Some patterns of challenging an initiative in court are fairly common. In most states, the courts are reluctant to remove an initiative from the ballot prior to an election. State and federal courts have shown some restraint when it comes to pre-election review of initiatives, based largely on the notion that the proposal is not within the purview of judicial review before it becomes an actual law. Generally, the courts have also shown an inclination to apply the same standards of review to initiatives as to other legislation.¹³

¹² The standard of a legislative amendment "furthering the purpose" of an initiative was tested in California's state courts. Under pressure from the insurance lobby, the California legislature amended an initiative law that regulated insurance rates. The legislative amendment exempted an entire class of insurers from the law. Challenged by the proponents of the initiative, the California Supreme Court ruled that the legislative action did not further the purpose of the initiative. *Amwest Surety Ins. v. Wilson*, 11 Cal. 4th 1243 (1995).

¹³ The appropriate standard for judicial review of initiative legislation continues to be hotly debated among legal scholars and the courts. Some scholars have argued that initiative legislation should be held to a stricter standard of judicial review due to the fact that initiatives tend to be written without the benefit of the deliberations associated with the normal legislative process. Others argue that the election itself provides the greatest safeguard against poorly drafted initiatives, and that many of the problems that plague the initiative process also plague the legislative process. As a general matter, most courts have concluded that both initiatives and legislation should be examined by similar standards of judicial review. See, for example, Julian Eule, "Judicial Review of Direct Democracy," 99 *Yale L.J.* 1503 (1990); and Craig Holman and Robert Stern, "Judicial Review of Ballot Initiatives," 31 *Loy. L.A. L. Rev.* 1239 (1998).

Table 5

State Procedures on Legislative Amendment of Initiative Legislation

Alaska	No repeal within 2 years; amendment anytime (Const. Art. XI, §6).
Arizona	Amendments and repeal allowed unless the measure was approved by majority of registered voters (Const. Art. 4, pt. 1, §1(6)).
Arkansas	By 2/3 vote of all members of each house (Const. Amendment Number 7).
California	No amendment unless otherwise permitted by the initiative. (Const. Art. 2, §10(c)).
Colorado	Both repeal and amendment (by court ruling).
D.C.	Both repeal and amendment probably permitted.*
Florida	Initiative applies only to Constitutional amendments, any changes of which must be approved by popular vote (Const. Art. XI, §3).
Idaho	Both repeal (by court ruling) and amendment (by common practice).
Illinois	Initiative applies only to Constitutional amendments, any changes of which must be approved by the voters, and advisory questions (Const. Art. 14, §3).
Maine	Both repeal and amendment (by common practice).
Massachusetts	Both repeal and amend (Const. Amend. Art. 48, General Prov. Pt. 6).
Michigan	Both repeal and amendment by 3/4 vote of each house or as otherwise provided by the initiative (Const. Art. 2, §9).
Mississippi	Constitutional amendments only; changes must be ratified by voters (Const. Ann. Art. 15, §273).
Missouri	Both repeal and amendment (by court ruling).
Montana	Both repeal and amendment (by common practice).
Nebraska	Both repeal and amendment probably permitted (by common practice).
Nevada	Not within 3 years of enactment (Const. Art. 19, §2).
North Dakota	By 2/3 vote of each house for seven years after passage, majority vote thereafter (Const. Art. III, §8).
Ohio	Both repeal and amendment (by court ruling).
Oklahoma	Both repeal and amendment (by court ruling).
Oregon	Both repeal and amendment (by court ruling).
South Dakota	Both repeal and amendment (by court ruling).
Utah	May amend only at subsequent sessions (§20-11-6) (Utah Code Ann. §20A-7-212).
Washington	Repeal or amend by 2/3 vote of each house during first 2 years of enactment, majority vote thereafter (Const. Art. II, §41).
Wyoming	No repeal for two years; amendment at any time (Const. Art. 3, §52(f)).

Arizona	Adams v. Bolin, 74 Ariz. 269, 247 P.2d 617 (1952)
Colorado	Zimmerman v. Herder, 122 Colo. 456, 223 P.2d 197 (1950)
Idaho	Luker v. Curtis, 64 Ida. 703, 136 P.2d 978 (1943)
Missouri	Halliburton v. Roach, 230 Mo. 408, 130 S.W. 689 (1910)
Ohio	Singer v. Cartledge, 129 Ohio St. 279, 195 N.E. 237 (1935)
Oklahoma	Experte Haley, 202 Okla. 101, 210 P.2d 653 (1949)
Oregon	Pierce v. Shisher, 119 Ore. 141, 249 P. 358 (1926)
South Dakota	Richards v. Whisman, 36 S.D. 260, 154 N.W. 707 (1915)

* No statutory indication or judicial ruling on the matter.

States can structure some of the factors involved in judicial review of initiatives. Some states provide for expedited court review at different stages of the initiative process in an effort to minimize the disruption of elections. For example, 15 states provide expedited review in a state court for any challenges to an initiative petition title or ballot title. States may define the appropriate standard of review for application of the single-subject rule by specifying whether it means “reasonably germane” versus “functionally related.” Florida’s requirement of an advisory opinion from the state supreme court on the constitutionality of a proposed initiative forces early judicial review. And states that impose subject limitations are likely to encourage greater court scrutiny of the substance of initiative legislation.

C. Critical Issues Concerning the Initiative Process

Defenders and detractors of direct democracy alike agree on many of the areas of concern about the performance of the initiative. Perhaps the most worrisome area is the dramatic rise of special interest group money in the process, both at the qualification stage and during the campaign. Other important areas of concern are: the drafting quality of initiatives and unintended policy consequences; the threat some initiatives have posed to civil liberties and minority rights; and the ability of voters to cast competent ballots on policy measures. Each of these concerns are closely inter-related. For example, a high-financed and professional campaign for an initiative proposal may be seen as tainting the judgment of voters.

1. Drafting of Initiative Legislation

Under the initiative process established in most states, once proponents have drafted and submitted their proposal to the state for an official petition circulation title, the initiative text is written in stone. Not one word of the text may be corrected or changed without invalidating the entire initiative, even if errors become obvious during the course of petition circulation.

Given that most initiative states only provide basic drafting assistance to initiative proponents, this rigidity of drafting initiatives can pose significant problems. If the review program of the initiative is inadequate in the drafting stage, an initiative may contain errors and oversights, which may doom it for rejection at the ballot box or, worse yet, produce serious unintended consequences in public policy if adopted.

Such rigidity in drafting initiative legislation need not be an inherent part of the process. Pre-circulation review of initiatives, if conducted seriously, can provide proponents with useful insights into what they may have overlooked in the initiative text. An effective review program must be mandatory, or else proponents will tend to avoid any outside advice, and the most comprehensive reviews involve public hearings, where leading experts and even opponents to the proposed policy offer their opinions. Proponents may then revise their proposal before getting too deep into the qualification process.

The indirect initiative can be structured to provide an ideal opportunity for proponents and the legislature to correct problems encountered later in the qualification process, though few states make use of this opportunity. A legislative hearing on the initiative after petition circulation but immediately before placing the measure on the ballot is when the proposal is taken most seriously by all affected persons. If there is room for negotiation and compromise between proponents and the legislature at this point, the initiative process would be given some of the qualities of deliberateness and flexibility so important in normal legislative channels. Only Alaska, Massachusetts, Ohio and Wyoming make use of this opportunity afforded by the indirect initiative process to improve the drafting quality of initiatives after a legislative hearing.

An ideal model of drafting assistance is called “proponent amendability.” Following a legislative hearing, proponents—and only the proponents—would be entitled to make amendments to the text of an initiative, consistent with the original intent and purpose of the measure, and then place the revised measure before the voters for approval. Proponent amendability preserves the integrity of the initiative process as a means for citizens to enact legislation independent of the legislature, while at the same time involve the legislature and the public in scrutinizing initiatives and suggesting improvements prior to enactment. No state utilizes this model, though it has been unsuccessfully proposed in Rhode Island.

2. Rising Costs of the Initiative

The costs of qualifying an initiative to the ballot, and the amount of money spent on campaigns for and against initiatives, has risen substantially in all initiative states over the last few decades. Costs have risen much more dramatically in some high-use initiative states, such as California, than in moderate-use initiative states. It is nevertheless clear that an increasing amount of money is flowing into direct democracy nationwide.

Without a doubt, California has the most alarming cost figures of any initiative state (or nation, for that matter). Since 1976, total spending on California ballot measure campaigns has jumped 2,400%, from \$9 million to \$224 million in 1998. The median cost of qualifying initiative measures for the ballot has increased 22-fold, from \$45,000 in 1976 to over \$1 million today.

A surprisingly small number of contributors making massively large contributions provide the bulk of financing for California ballot measures. In the June and November 1990 elections, for example, just 141 individuals and organizations making contributions of \$100,000 or more gave a total of \$74 million, or over two thirds (67%) of all the contributions received by the state’s initiative campaigns that year. Of these donors, 19 gave \$40 million in contributions of \$1 million or more—totaling 37% of all initiative dollars received. In November 1996, the gaming interests broke all global records for spending on a single initiative. California’s Proposition 5, which was to allow Las Vegas style slot machines in Indian gaming casinos, had a total of \$96 million spent for and against the measure, more than was spent on lobbying the entire state legislature on all legislation that year.¹⁴

¹⁴ Indian gambling interests in California, which had previously avoided extensive political involvement in lobbying and the initiative process, decided to finance their own measure to ensure that Indian casinos could use Nevada-style slot machines. Proposition 5 was the result. Gambling interests in Nevada decided to oppose the measure and spent some \$28 million in an opposition campaign. But polls showed that the measure was a sure-winner, and so the Nevada interests closed down the campaign early and went back home. Meanwhile, with no opposition and strong approval ratings in the polls, the Indian gaming interests continued to wage an expensive television ad war. By Election Day, the proponents had spent \$68 million on behalf of Proposition 5 and won handily.

Ironically, Proposition 5 was a statute that directly contradicted the state’s constitutional ban on Nevada-style gambling in California. There was little doubt that the measure was going to be invalidated by the courts, but codifying Proposition 5 was not the point. The Indian gaming interests decided that they wanted to become major players in the political arena and decided to demonstrate their clout. For two weeks following passage of the measure, the group continued to televise campaign ads—this time, thanking Californians for approving the measure. Proposition 5 was dismissed by the courts, and immediately thereafter the Governor and Legislature worked out a compromise agreement permitting Nevada-style gambling. The Indian gaming interests have since become the single largest source of candidate campaign contributions in California.

But the “California nightmare” is not typical. In the November 2000 elections in Massachusetts, for example, a total of \$15 million was spent for and against that state’s six ballot measures.¹⁵ The total spending reflected a fairly steady increase in spending on Massachusetts initiatives, but failed to reach the record total of \$16.1 million spent in 1992. The greatest financial activity on any single initiative on the Massachusetts 2000 general election ballot was \$5 million spent for and against a health care measure. The all-time record in Massachusetts spent on a single initiative was \$9 million on a power-plant regulatory measure in 1988.

Similarly, unlike California, the costs of qualifying initiatives to the ballot in Massachusetts and many other initiative states, while rising, still remains within the reach of well-organized volunteer groups. In California, the last truly volunteer qualification drive occurred in 1982 for a nuclear weapons freeze initiative. Throughout much of the rest of the nation, it is still common for initiatives to qualify for the state ballot via exclusively volunteer petition drives.¹⁶

While greater amounts of special interest money are flowing into the initiative process, the salvation of the initiative is that while money can guarantee a place on the ballot, money cannot guarantee success at the polls. In fact, economic interest groups usually lose when trying to promote passage of an initiative, regardless of the size of their campaign budgets. Indeed, Professor Elisabeth Gerber notes in her study on the initiative process, “the measure’s success as measured by its vote margin decreases as economic interests provide greater financial support for the measure.”¹⁷

3. Voter Competence

Voters have demonstrated caution in casting ballots on initiatives. Unlike voting for candidates who will later deliberate about policy proposals, voters realize that they are determining specific public policy when it comes to direct democracy, and are much more inquisitive and prudent in casting ballots on initiatives. In the 24 states that allow the initiative, only about 40% of measures placed on the ballot are ever approved by voters. Voters may sign any petition that is placed before them at the grocery store, thus enabling paid signature-gatherers to qualify any initiative for the ballot, but when it comes to deciding yes or no on concrete public policy, voters rely on more information than just the quantity of television advertising.

This not to say that money does not have a significant impact on initiative campaigns. Money spent to *oppose* initiatives, rather than support initiatives, has a statistically significant effect on defeating initiative proposals. Money cannot buy passage of initiatives, but it can be very effective at defeating initiative proposals.¹⁸ In all likelihood, the impact of opposition money on initiative campaigns is the result of voter prudence when it comes to making public policy at the ballot box. A voter who is uncertain of the consequences of an initiative is likely to vote “no,” and a large opposition campaign can be effective at inducing doubts about a measure.

Public opinion polls show that voters are seldom fooled into voting for an initiative that they later regret. Whether or not one agrees with particularly policy outputs that some initiatives have generat-

¹⁵ Massachusetts Office of Campaign and Political Finance, “Statewide Ballot Question Spending Exceeds \$15 Million,” *Press Release* (Dec. 20, 2000).

¹⁶ California Commission on Campaign Financing, *op.cit.* at 144.

¹⁷ Elisabeth Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* (1998) at 107.

¹⁸ Gerber, *op.cit.* at 114.

ed, these policy outputs have more or less been the deliberate choice of the voters. California's 1970s tax revolt—Proposition 13—remains widely supported by the public. So, too, are initiatives that protected the environment, increased the minimum wage, and established crime victims' rights, campaign finance reform, term limits and "death with dignity" laws. Several studies have documented that voters use clear organizing principles to guide their vote patterns on initiatives.¹⁹

The initiative is frequently criticized for ushering in attacks on civil liberties and minority rights, an argument usually bolstered by reference to the same initiatives: California Propositions 187 (denying social benefits to illegal immigrants) and 209 (anti-affirmative action). This argument rests on the premise that the majoritarian nature of initiatives loses the moderating influence of representative government, and can thus overwhelm minority interests. While there certainly are valid examples of initiative legislation that have threatened civil liberties, no one can claim that this is solely, or even disproportionately, the purview of initiative legislation. The story of American governance in fraught with examples of legislation by representative bodies that have violated the civil liberties of minorities. The internment of Japanese-Americans during World War II, segregation and poll taxes, and New Jersey's Megan's Law are but a few examples. The principles of California Propositions 187 and 209 have been codified by Congress and state legislatures as well as by initiative. "Bad" laws and "good" laws can come from both the initiative and legislatures.

4. Public Opinion on the Initiative

Despite the problems associated with the initiative—the spiraling costs, the questions of adequate voter knowledge of the issues, drafting oversights and unintended consequences—the public in every state with the initiative strongly favors keeping this tool of direct democracy and the public in every state without the initiative, including New Jersey, wish they had it. Citizens do not want to replace representative government with direct democracy, but they do want the tools of direct democracy available to deal with issues that legislatures sometimes neglect.

A recent Rasmussen research survey, consistent with earlier polls, found strong nationwide support for the initiative and referendum. The following question was asked respondents: "Many states have laws which allow citizens to place initiatives on the ballot by collecting petition signatures. If the initiative is approved by voters on Election Day, it becomes a law. Is this a good idea?" A wide majority (64%) of American adults believed that this was a good idea. Only 17% responded that it was not. Support for the initiative crossed all demographic groups and all partisan affiliations. Majorities approved of the initiative in every state. About 66% of citizens surveyed in New Jersey want to see the initiative process in their own state.²⁰

Even in California, the state most beset by problems in the initiative, the public continues overwhelmingly to support the process, albeit with some structural reforms. Public opinion polls of Californians' views toward the initiative have remained consistent through the last twenty years. Recent polls show that well over 70% of Californians support the initiative process, but at the same time would like to see some significant changes in how it operates.²¹ Some of the more popular changes that Californians support include mandatory pre-circulation review and reducing the role of money in initiative campaigns.

¹⁹ Elisabeth Gerber and Arthur Lupia, *Voter Competence in Direct Legislation Elections, in Citizen Competence* (Steven Elkins ed. 1998).

²⁰ Rasmussen Research, "I&R Polls," Initiative and Referendum Institute (Mar. 16, 1998). [www.iandrinstitute.com].

²¹ John Jacobs, *Voters Like the Initiative Process, But Want It Fixed*, Sacramento Bee Dec. 9, 1997, at B7.

D. How the New Jersey Model Addresses the Critical Issues

The “New Jersey model” of the initiative, as represented by SCR 8 (sponsored by Senators Schluter and Adler) and ACR 82 (sponsored by Assemblymembers Lance and Merkt), provides for a limited form of direct democracy based on the experiences of other states.²² These proposals have been submitted for consideration in the 2000-2001 session of the New Jersey legislature.

New Jersey’s proposed initiative is more limited in scope and cautious in application than the initiative process in most other states. It appears to be designed to overcome many of the problems associated with direct democracy in other states. Its restrictions on subject matter as well as stringent qualification procedures are likely to contain the frequency of initiatives in New Jersey, while still providing citizens with a means to seek redress of grievances in some critical areas of state public policy. Most importantly, the New Jersey model proposes what most other states have thus far failed to achieve in direct democracy: a meaningful role for the legislature in deliberating and negotiating on the final product of initiative legislation.

Briefly, the New Jersey model contains the following key provisions:

- Establishes the initiative and referendum for state legislation.
- Provides for the indirect initiative process.
- Limits valid subjects for the initiative and referendum to matters of governmental reform.
- Sets the signature requirement for ballot qualification at 8% of the last gubernatorial vote for both initiatives and referenda.
- Affords a minimum one-year petition circulation period for ballot qualification.
- Permits the legislature to adopt “substantially similar” legislation, subject to approval by initiative proponents.
- Provides for dissemination of election information on the content of initiative proposal prior to the election.
- Requires a super-majority vote of the legislature to amend or repeal initiative legislation within five years of adoption.
- Prohibits repetitive subject matters of initiatives for a six-year period.
- Allows expedited court review of the constitutionality of initiatives.

The significance of these key provisions of the New Jersey model is examined in greater detail below.

1. Statutory Initiative and Referendum

The New Jersey model apply the tools of direct democracy only to state legislation, not constitutional amendments. Ratification of the initiative process would place New Jersey among the seven states that permit only statutory initiatives rather than among the bulk of initiative states that permit initiatives for both statutes and constitutional amendments. Several initiative states, such as

²² Assembly Concurrent Resolution No. 16, sponsored by Assemblymembers Rooney and Merkt, has also been introduced in the 2000-2001 session of the New Jersey legislature. This resolution closely follows the design of the initiative proposed by SCR 8 and ACR 82, but offers some significant differences. Most notably, ACR 16 would establish the initiative for constitutional amendments as well as statutes.

California, also extend the right of direct democracy to local levels of government, which the New Jersey model does not. The local initiative is beset with a whole unique set of benefits and problems, which consequently need not be addressed in New Jersey.²³ As such, the scope of the New Jersey model is fairly constrained.

2. Restricted Subject Matters

Perhaps the most defining feature of the New Jersey model is that initiatives and referenda must be limited to specific subject matters of governmental reform: campaign finance, lobbying, governmental ethics, and the electoral process. This places the New Jersey model among the most restrictive in the nation, with the exception of Illinois, and warrants describing this form of direct democracy as the “limited initiative.”

Such a stringent subject limitation will have a profound affect on its use. As a general rule, states with the strictest subject limitations are low-use states of the initiative. Illinois, which limits initiatives to addressing the organization and operation of the legislature, has the lowest frequency of initiatives of any state. Initiative usage in other states with restrictive subject matters also tends to be low, for example, Alaska, Massachusetts, Nevada, South Dakota and Wyoming all see fewer than one initiative per year on average. The limitation on subject matters under the New Jersey model would undoubtedly keep the frequency of initiative usage in check.

This is not to say, however, that the subject limitations under the New Jersey model would render the initiative irrelevant to popular concerns, as may be the case in Illinois. The subject of governmental reform encompasses some critical issues that concern the public—most notably, campaign finance reform and ethics. Although such issues as taxes and education tend to preoccupy initiative politics, campaign finance, ethics and electoral reform are issues that arise on a fairly regular basis via initiative and touch the sentiments of many citizens. Furthermore, recent history shows that however limited may be the field of governmental reform, this is precisely the field of issues that legislatures are least inclined to address on their own. Over the last two decades, most state and local campaign finance reforms have been implemented through the initiative rather than by legislatures.²⁴ Granting citizens the right to influence the governmental reform policy agenda would provide citizens with meaningful input in preserving the integrity of their government.

Another subject limitation in the New Jersey model—that no substantively similar initiative may be repeated for six years—is comparable to restrictions imposed in Nebraska, Oklahoma and Wyoming. Low-use initiative states rarely see recurring initiatives on the same subject year after year. (Such is not necessarily the case in high-use states. California, for example, has seen four campaign finance ballot measures between 1996 and 2000.)

3. Ballot Qualification

The New Jersey model proposes ballot qualification procedures for the initiative that are difficult but not inconsistent with many other states. Petition circulators must gather valid signatures amounting to 8% of the number of persons who voted in the last gubernatorial election and must do so within

²³ For a full discussion of the structure and practice of the initiative at the local level, see California Commission on Campaign Financing, *To Govern Ourselves: Ballot Initiatives in the Los Angeles Area* (1992); and Craig Holman, “La democrazia diretta locale in California,” 29 *Amministrare* 259 (1999).

²⁴ Herbert Alexander and Lori Cox NyBlom, *Campaign Reform on the Ballot: 1972-1994* (1996).

a time period of at least one year.²⁵ Roughly half of the initiative states have qualification signature thresholds as high or higher, and most states have a petition circulation period of one year or longer. Four states—Arkansas, Ohio, Oregon and Utah—have no time limits on petition circulation.

Petition circulators in New Jersey would have to gather about 184,000 valid signatures in order to qualify an initiative to the ballot. Given that about 20% of signatures are routinely invalidated by elections officials during the verification process, that means about 221,000 signatures would need to be gathered by initiative proponents for ballot qualification. This is a difficult task, but judging from the experience of other states, a task that is still within the reach of well-organized civic groups dedicated to a cause and, as always, to anyone who can afford to finance a paid circulation drive. A petition circulation period of at least one year is certainly reasonable. Even in states with unlimited time periods for petition circulation, it is usually the case that if initiative proponents are not able to gather the requisite signatures within one year, the petition drive is likely to fail. The proposed ballot qualification procedures for New Jersey are stringent enough to discourage frivolous initiatives, yet still achievable by disciplined citizen groups.

4. Referendum Question

While not detracting from the benefits of the initiative process as offered by SCR 8 and ACR 82, it is worth noting that the requirements for a referendum in these bills are the same as the requirements for an initiative. This renders the referendum in the New Jersey model essentially superfluous.

The primary objective of the referendum process is to prevent a legislative action from becoming law. Consequently, all states that allow petition referendum require that proponents give notice to the state that a particular law is being challenged within 90 days of the close of the legislative session. This notice serves to suspend enactment of the law until such time as either the referendum petition drive fails to gather the requisite number of signatures or the voters decide upon the measure at the next election. Traditionally, the time period allowed for the petition circulation drive for referenda is very brief—usually 90 days or less—after which the legislative action either becomes law because the petition drive failed or the law is suspended until the decision of the voters on Election Day.

The referendum under the New Jersey model neither suspends a legislative action pending voter ratification nor subjects it to an abbreviated qualification procedure. As such, the referendum is little more than a “negative initiative”—an initiative that cancels an existing law. This poses no special problems for the initiative, but it does not constitute a referendum process in the traditional sense.

5. The Indirect Initiative and Proponent Amendability

One of the most interesting elements of the New Jersey model is the concept of “proponent amendability” inherent in the structure of its indirect initiative. The proposal in New Jersey starts off by following the route of eight other states by requiring that, once sufficient qualification signatures have been gathered, the initiative is first submitted to the legislature for hearings and a vote. But the New Jersey model departs from the practices in nearly all other indirect initiative states because of the range of legislative responses. Not only may the legislature vote a submitted initiative up or down (rejection of an initiative then places it on the ballot for voter approval), the legislature may also devise its own “substantially similar” substitute legislation. If agreed upon by the official proponents of the initiative, the legislative measure becomes law and the initiative is removed from the ballot.

²⁵ The legislature has the authority to set the time period for petition circulation at one year or greater. For purposes of this analysis, it will be assumed that the circulation period will be set at one year.

This unique procedure integrates the legislature into the initiative process, while keeping citizens and initiative proponents primarily responsible for the final product of initiative legislation. In terms of drafting assistance, it is the best of both worlds: the deliberateness and flexibility of legislative action is combined with the right of citizens to take charge of the policy agenda through initiative action. Drafting errors or oversights in an initiative would be brought to light in the course of the legislative hearing, and the legislature may negotiate better legislation with initiative proponents. Since the proponents are the final arbiters of whether a legislative alternative is “substantially similar,” citizens are given a great deal of leeway in re-writing their original proposal without sacrificing sovereignty over the initiative to the legislature. In essence, the New Jersey model offers “proponent amendability” to improve the quality of initiative legislation—a dynamic feature that no other state offers.

6. Voter Information

Although voters tend to receive substantial election information about initiatives from news reports, campaign advertisements and discussions among friends and colleagues, it is always useful to increase the amount of neutral election information available to the public. The New Jersey model requires that the state distribute the full text of all initiatives well before Election day through publication in major newspapers in every county.

Half the initiative states disseminate election information about initiatives through major newspapers;²⁶ the other half distribute a ballot pamphlet to voters.²⁷ A few states use both methods.²⁸

Although it is very useful to disseminate the text of initiatives through the major newspapers, New Jersey may want to consider expanding this election information by publishing and distributing ballot pamphlets. States that distribute election information about initiatives through ballot pamphlets reach more voters than states that rely on newspapers. Newspaper distribution reaches only as far as the newspapers’ paid circulation. By contrast, a pamphlet mailed to every voter’s home not only reaches more people, it is also less often discarded and thus available for study on Election Day. Of course, the drawback to ballot pamphlets is that they are more costly than newspaper inserts.

Whichever method is used to distribute election information on initiatives, it is recommended that the information include more than the text of the initiative. Newspaper inserts as well as ballot pamphlets should include an impartial description of each initiative by a reasonably neutral authority, usually the Secretary of State’s office, and a fiscal impact analysis by the state. In order to encourage robust discussion of initiatives, it is also useful to include pro and con arguments by the official proponents of the initiative and credible opponents selected by the Secretary of State.

In states with the initiative process, it is these and other similar sources of neutral election information that are valued most by voters. Surveys indicate that somewhere between 30% and 60% of voters rely on such state-sponsored sources of information on some or all ballot measures. Surveys in Seattle and Massachusetts have shown that state-sponsored ballot pamphlets are the primary source

²⁶ States that disseminate election information about initiatives through major newspapers include: Arkansas, Colorado, District of Columbia, Florida, Idaho, Michigan, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Utah and Wyoming.

²⁷ States that distribute election information on initiatives through ballot pamphlets include: Alaska, Arizona, California, Idaho, Illinois, Maine, Massachusetts, Montana, Nevada, Ohio, Oregon, Utah, Washington and Wyoming.

²⁸ States that distribute election information through both newspapers and voter’s pamphlets are: Idaho, Montana, Ohio, Utah and Wyoming.

of election information on initiatives for voters, even ahead of television advertising. Other surveys in Utah and California found that while television is the primary source of election information on ballot measures in those states, newspapers and ballot pamphlets are nevertheless important sources of information and generally more trusted.²⁹

In establishing the specific procedures for implementation of the New Jersey model of the initiative, the Secretary of State's office should also be assigned the responsibility of drafting a title and brief summary that accurately describes the key provisions of each initiative. This official title and summary should headline the initiative petition as well as form the ballot label. This comprises another important source of neutral election information for voters.

State-sponsored election information, through newspaper inserts, ballot pamphlets, and the official title and summary of an initiative, can go a long way toward offsetting biased campaign advertising through paid media. It is also the kind of election information most desired by voters.

7. Expedited Judicial Review

More often than ever before, initiatives are entangled in litigation. Some of this increase in the number of lawsuits over initiative legislation is due to changes in opposition campaign strategy. While court challenges to initiative legislation have not been uncommon throughout history, litigation over initiatives is more frequent today. Modern opposition campaigns seem more willing to wage a battle against an initiative on two fronts: attempting to convince voters to vote "no" and, failing that, filing a lawsuit against the voter-approved measure.³⁰

This increasing use of litigation has had a profound impact on both the initiative process and the courts. Citizens tend to feel more involved and concerned with legislation that emerges from the initiative process than with remote legislation produced by legislatures. When a judge strikes down popular initiative legislation, voters frequently question the personal motives of the judge, casting aspersions on the impartiality of the judiciary.³¹ Just as significantly, voters can lose confidence in the efficacy of the initiative process itself.³² Especially in states with extensive litigation over the initiative, such as California, it is not uncommon to hear citizens exclaim: "Why bother voting on the initiative when a judge will just throw it out, anyway?"

The New Jersey model attempts to address the problems associated with litigation by providing expedited court review of initiatives by a full court prior to vote of the people, if possible. The majoritarian nature of initiative legislation makes it imperative that the courts have the opportunity to scrutinize initiatives for constitutionality. But the tension between judicial review and popular

²⁹ California Commission on Campaign Financing, *op.cit.* at 244.

³⁰ Craig Holman and Robert Stern, *op.cit.* at 1256-58.

³¹ In a classic example of the judicial system being cast in a negative public light because of a ruling striking down initiative legislation, Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit invalidated a California term limits initiative (Proposition 140) in 1997, claiming that voters did not understand the true meaning of the initiative. Following Judge Reinhardt's determination that the voters had been ignorant about a provision in the measure calling for a lifetime ban on officials holding the same office after a given term, an 11-judge en banc panel of the same court reversed the decision by a 9-to-2 vote. *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), cert. denied, 522 U.S. 804 (1997). Judge David Thompson, who wrote the majority opinion for the en banc panel, noted that extensive media coverage, opposition campaign literature warning of the lifetime ban, and voter rejection of an alternative measure on the same ballot not calling for a lifetime ban, made it clear voters knew what they were doing.

³² Charles Price, "Shadow Government," *California Journal* (Oct. 1997) at 38.

legislation can be reduced by: (i) providing expedited court review prior to a popular vote on the measure; and (ii) involving more than a single judge in the ruling on constitutionality. Determinations by a panel of judges tend to be more deliberative and balanced, and are likely to be seen as such by the public. The New Jersey model offers expedited review by the full State Supreme Court as the test of an initiative's constitutionality.

8. Post-Enactment Legislative Amendments

No legislation—initiative or otherwise—is immune to changing conditions over time. Legislation must be updated and sometimes even repealed to adapt to new situations or correct earlier oversights. Even in California, the one state that does not allow legislative amendments of initiative legislation, initiative proponents usually place a clause in the measure itself permitting amendments by a super-majority vote of the legislature that are consistent with the purpose and intent of the original measure.

The New Jersey model offers a system of post-enactment legislative amendments that is cautious and compatible with the practices in most other initiative states. Any effort by the legislature to amend or repeal initiative legislation must first be introduced as a bill in print for at least 20 days, after which public hearings must be held on the bill. The “20-day rule” and public hearing requirement for amending legislation is an important safeguard against “sneak attacks” on initiative legislation by a hostile legislature. It gives initiative proponents time to familiarize themselves with the nature of the amending legislation and to participate in the reconsideration, as well as to mobilize public support if the amending legislation is seen as an attack on the initiative rather than an improvement. This safeguard of the initiative is fairly unique among the states.

A second safeguard to ensure reasonable legislative action on initiative legislation—which is quite common among the states—is the super-majority vote requirement for all amending legislation within five years of passage of the original initiative. A super-majority vote requirement helps to guarantee that there is substantial consensus among legislators on the need for the amending legislation. If distrust of legislative amendments should continue, New Jersey could supplement the super-majority vote requirement with a constraining clause similar to that recently approved by voters in Arizona—that any legislative amendment must also be consistent with the purpose and intent of the original initiative.

E. Conclusion: The New Jersey Model of the Initiative Empowers Citizens with an Important Means to Participate in the State’s Policy Agenda, While Avoiding Many of the Problems Associated with Direct Democracy

The model of direct democracy offered in SCR 8 and ACR 82—referred to as the “New Jersey model”—establishes a framework for an initiative process that is attuned to the problems and benefits experienced by other states. Nearly half of the states have granted their citizens the tools of direct democracy, some for as long as a century. Over the course of recent history, many of the weaknesses and strengths of the initiative have become apparent. These lessons have been taken into consideration in forming the New Jersey model of direct democracy.

Two key features of the New Jersey model will produce an effective yet tempered initiative process. The first key feature is restricting initiatives and referenda to addressing only issues of governmental reform: campaign finance, ethics, lobbying and electoral procedures. Restricting the subject matters of direct legislation creates what is appropriately called a “limited initiative” process.

New Jersey's limited initiative affords citizens the right to seek redress on a subject matter that legislatures have historically been unwilling to address, and one for which legislatures have a self-interest that may diverge from the public's interest. At the same time, the limited initiative will dramatically restrict the scope of direct democracy so that the state would not be inundated with initiatives, as is the case in some initiative states. This structure would result in New Jersey becoming a low-use initiative state.

As a low-use state of the initiative, the problems of spiraling qualification and campaign costs and the development of a booming "initiative industry" will be minimized. It is inevitable that the initiative will involve substantial costs for ballot qualification and campaign expenditures, but without a steady wave of initiative drives sweeping through the state, the lack of profitability in this sector will discourage professionalized and expensive business practices surrounding the initiative process. The subject matters to which initiatives are limited will also help keep wealthy special interest groups out of the process. Unlike such lucrative issues as gambling, business regulation and taxes, initiatives proposing governmental reform issues are not likely to attract big spending campaigns.

The second key feature of the New Jersey model is the integration of the legislature into the initiative process, conducting public hearings and negotiating improvements in initiative proposals. Since initiative proponents are the final arbiters of whether a legislative alternative is "substantially similar" to the original initiative, this process of deliberation in re-writing initiatives is referred to as "proponent amendability." All too often, initiatives are drafted without appropriate review and a full understanding of the initiatives consequences. Proponent amendability allows initiative proponents, after a comprehensive public hearing on the various impacts of the proposal, to negotiate an improved version of the measure with the legislature—or to reject the legislature's advice and submit the original initiative to the voters. Proponent amendability is a feature that no other state currently has structured into their initiative systems, and it is a feature that is sorely needed.

Other notable aspects of the New Jersey model include expedited review of initiatives before the New Jersey Supreme Court when initiatives are contested for constitutionality; publication and distribution of the text of initiatives in major newspapers; and reasonable constraints on post-enactment legislative amendments and repeal of initiative legislation. It is recommended that the legislature adopt some additional procedures for the initiative process in its implementing legislation, such as pre-circulation review of initiatives by a governmental agency and distribution of a ballot pamphlet that provides a full discussion of the fiscal impact and pros and cons of each initiative.

The New Jersey model of the initiative process is a unique hybrid of institutional structures designed in light of the experiences of other states. For those concerned with excessive initiative activity, the "limited initiative" will reduce the frequency and costs of the initiative process seen in other states. "Proponent amendability" helps address the common problem of poorly drafted initiatives and unintended consequences. The New Jersey model provides citizens with the major benefits of the initiative—a means for seeking redress for pressing governmental problems when the legislature declines to act—while avoiding some of the major problems associated with the initiative process.

Campaign Finance Reform Resources from the Brennan Center

Books & Other Publications:

WRITING REFORM: A GUIDE TO DRAFTING STATE AND LOCAL CAMPAIGN FINANCE LAWS, (Deborah Goldberg, ed., Brennan Center 2000).

BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS, (Jonathan S. Krasno and Daniel E. Seltz, Brennan Center 2000).

IF BUCKLEY FELL, (E. Joshua Rosenkranz, ed., Century Foundation 1999).

BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM, (E. Joshua Rosenkranz, Twentieth Century Fund 1998).

Five New Ideas: To Deal With the Problems Posed by Campaign Appeals Masquerading as Issue Advocacy (Brennan Center for Justice Policy Committee on Political Advertising, Brennan Center 2000).

CAMPAIGN FINANCE REFORM SERIES

- *Subsidizing Political Campaigns: The Varieties and Values of Public Financing* (Elizabeth Daniel, 2000).
- *Gauging the Impact of Independent Expenditures in Issue Advocacy Campaigns* (Jonathan S. Krasno, 1999).
- *Regulating Electioneering: Distinguishing Between “Express Advocacy” & “Issue Advocacy”* (Glenn J. Moramarco, 1998).
- *Campaign Finance Reform & the Constitution: A Critical Look at Buckley v. Valeo* (Burt Neuborne, 1996).
- *A Survey of Efforts to Reform the Campaign Finance System* (Burt Neuborne, 1996).
- *The Values of Campaign Finance Reform* (Burt Neuborne, 1996).
- *The Flow of Money in Congressional Elections* (Kenneth N. Weine, 1997).

Other resources are available at:

www.brennancenter.org and www.buyingtime.org

For more information, or to order a Brennan Center publication, contact:

Brennan Center for Justice

161 Avenue of the Americas, 12th Floor

New York, NY 10013

Tel: 212.998.6730

Fax: 212.995.4550

Email: brennan.center@nyu.edu

www.brennancenter.org

Brennan Center for Justice

Board of Directors

William J. Brennan, III, Chair
Smith, Stratton, Wise, Heher & Brennan

Nancy Brennan
Executive Director
Plimoth Plantation

David W. Carpenter
Sidley & Austin

Professor Peggy C. Davis
NYU School of Law

Professor John Ferejohn
NYU School of Law

Peter M. Fishbein
Kaye, Scholer, Fierman, Hays & Handler

Professor Thomas M. Jorde
University of California,
Berkeley School of Law

Edward J. Kelly, III
Mercantile Bank Shares Corporation

Professor Larry Kramer
NYU School of Law

Anthony Lewis
The New York Times

Professor Gerald P. Lopez
Academic Director
Brennan Center for Justice

Professor Nancy Morawetz
NYU School of Law

Ronald L. Olson
Munger, Tolles & Olson

Dwight D. Opperman
Chair
Key Investment, Inc.

Lawrence B. Pedowitz
Wachtell, Lipton, Rosen & Katz

Daniel A. Reznick
General Counsel
District of Columbia Financial
Responsibility & Management
Assistance Authority

Dean John E. Sexton
NYU School of Law

Robert Shrum
Chair
Shrum, Devine & Donilon

Walter J. Smith, S.J.
President & CEO
The HealthCare Chaplaincy, Inc.

Clyde A. Szuch
Pitney, Hardin, Kipp & Szuch

Professor Kim Taylor-Thompson
Academic Director
Brennan Center for Justice

Adam Winkler
University of California, Los Angeles

E. Joshua Rosenkranz*
President & CEO

Professor Burt Neuborne*
Legal Director
John Norton Pomeroy Professor of Law,
NYU School of Law

Democracy Program

Nancy Northup
Director

Deborah Goldberg
Deputy Director

Officers

Jeannemarie E. Smith
Treasurer
CFO, NYU School of Law

Steven A. Reiss
General Counsel
Weil, Gotshal & Manges

* Also on Board of Directors



161 Avenue of the Americas, 12th Floor
New York, NY 10013
212.998.6730
Fax: 212.995.4550
www.brennancenter.org